No. A110451

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

LANCY WOO, et al.,
Respondents,
v.
STATE OF CALIFORNIA, et al.,
Appellants.

San Francisco Superior Court Case No. 504038
Judicial Council Coordination Proceeding No. 4365
Honorable Richard A. Kramer, Judge

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INTRODUCTION

Respondents include twenty-four Californians, each of whom wishes to marry the person he or she finds irreplaceable. These couples have waited years and, in one case, more than five decades, for the chance to wed. Respondents do not seek to alter the institution of marriage. Rather, they wish to participate in it equally, instead of being consigned to the separate, lesser, and stigmatizing institution of domestic partnership. The California Constitution guarantees all Californians the right to choose the person with whom they wish to join in marriage. The State is violating this fundamental right, as well as the constitutional guarantee of equal protection, by excluding Respondents (along with thousands of other lesbian and gay couples in every corner of our state) from marriage because of their sex and sexual orientation.

The trial court properly ruled that this exclusion denies Respondents the same "basic human right to marry a person of one's choice" recognized by the California Supreme Court in *Perez v. Sharp* (1948) 32 Cal.2d 711. (Appellants' Appendix ("AA") at p. 127 [Final Decision on Applications for Writ of Mandate, Motions for Summary Judgment, and Motion for Judgment on the Pleadings, Dated April 13, 2005 ("Final Decision")].)

Marriage is far more than a bundle of tangible benefits. It is a status of profound personal, social, and often spiritual affirmation, expressing the commitment of two individuals to one another "for better or for worse." Stated most simply, marriage is valued and protected as an "esteemed institution" that is "at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality,

companionship, intimacy, fidelity and family." (*Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941, 954.)

The State concedes that the current marriage statutes do not provide equality to individuals in same-sex relationships, but argues that it should be permitted to provide "*comparable* rights and benefits to same-sex couples" through a separate domestic partnership scheme. (Appellant's Opening Brief ("AOB") at p. 6 [emphasis added]; see also *id.* at p. 7 [California "extends *virtually* the same rights and benefits to same-sex couples"] [emphasis added].) In essence, the State argues that, for same-sex couples, a status less than full equality, in the form of domestic partnership, is good enough.

Respondents appreciate that, by enacting the domestic partnership law, the California Legislature has taken steps to narrow the gap between the tangible protections that exist for same-sex and different-sex couples. Respondents also agree with the State that many purported justifications for excluding same-sex couples from marriage, including some that have been relied on by courts in other states, are spurious and contrary to the public policy of this state. Yet, the justifications the State *does* attempt to offer are just as unpersuasive and unavailing.

The State has failed to identify any legitimate, much less compelling, interest to support its exclusion of same-sex couples from marriage and its maintenance of an inferior legal status for these families. It offers but two: (1) deference to the "common understanding of marriage"; and (2) deference to the "legislative process." (AOB at pp. 32-37.) Neither of these interests can support a legal scheme that relegates same-sex couples to a separate, second-class status.

Deference to the "common understanding of marriage" is not a legitimate state interest. Rather, it is merely a restatement of the discriminatory restriction at issue. As the trial court held, the State may not maintain an arbitrary and discriminatory statute simply because it has done so in the past and perceives popular support to continue doing so. (AA at p. 113 [Final Decision]; see also, e.g., *Perez*, *supra*, 32 Cal.2d at p. 727.) Similarly, deference to the legislative (*i.e.*, majoritarian) process is neither appropriate nor permissible when a law serves no other purpose than to maintain a distinction between the majority and a disfavored group.

The State's invocation of deference to the "legislative process" is especially inapposite in light of the Legislature's recent passage of Assembly Bill 849 (2005) ("AB 849"), which would have eliminated the sex-based restrictions on marriage and permitted same-sex couples to marry under state law, on an equal basis with others. Although vetoed by the Governor,[1] that bill was passed by both houses of the California legislature.

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[1] The Governor explained that while "lesbian and gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationships," he was "returning Assembly Bill 849 without [his] signature," because "[t]he ultimate issue regarding the constitutionality of section 308.5 [Proposition 22] and its prohibition against same-sex marriage is currently before the Court of Appeal in San Francisco and likely will be decided by the Supreme Court." (Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-2006 Reg. Sess.) p. 3737, at <http://www.leginfo.ca.gov/pub/bill/asm/ab_0801-0850/ab_849_vt_20050929.html>.) As discussed in the Statement of the Case, *infra*, Respondents disagree with the Governor's interpretation of Proposition 22. Nevertheless, even if the Governor's view were correct, a

(footnote continued)

By passing AB 849, the Legislature has acknowledged that providing a separate status for lesbian and gay couples is neither equal nor sufficient and that the current marriage law violates our state constitution.

California once stood alone in acknowledging the patent unconstitutionality of anti-miscegenation statutes, notwithstanding their popularity. Our State's integrity and leadership on that point of basic fairness have been a source of pride and benefit to California for the past fifty years. This Court should continue that noble tradition by affirming the Superior Court's judgment that excluding same-sex couples from the right to marry and relegating them to a separate and inferior status violates the California Constitution.

STATEMENT OF FACTS

I. The Respondent Couples And Their Families.

This action was brought by twelve same-sex couples who wish to marry and are eligible to do so, but for the fact that they are of the same sex.[2]

Notwithstanding the important palliative role of our State's comprehensive domestic partnership law, these couples and their families

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statute passed by initiative, like Proposition 22, cannot override the guarantees of the California Constitution.

[2] Declarations of one member of each couple and of several extended family members were submitted in support of Petitioners' Writ Petition below, and are found in Respondents' Appendix ("RA") as Exhibit 2. (RA at pp. 62-179.) The discussion in this brief provides representative excerpts of the matters set forth in greater detail in those declarations.

remain second-class citizens and suffer unjustifiable financial, practical, emotional, and dignitary burdens as a consequence.

Lancy Woo and Cristy Chung have been committed partners for seventeen years. They have a six-year-old daughter, Olivia, who brings them immense joy. (RA at p. 77 ¶ 1.) Lancy runs a small business, and Cristy is a stay-at-home mom. (RA at p. 77 ¶ 1.)

Cristy's mother, Karen Danese, describes their relationship as "one of the most beautiful" she has known. (RA at p. 160 ¶ 7.) Unlike Cristy's mother, however, Lancy's mother does not fully understand or support the couple's relationship. (RA at p. 78 ¶ 5.) While Lancy's mother loves Cristy as a person, she does not see Cristy as Lancy's spouse. One barrier to her understanding is that there is no traditional Chinese ritual or language for acknowledging a domestic partnership; there is only marriage. (RA at p. 78 ¶ 5.)

Lancy and Cristy want to marry, in part, because they do not want Olivia to worry that her family is less permanent than those of her classmates. They also do not want her to receive a message from the State that her parents are not "good enough" to be married. (RA at pp. 82-83 ¶ 18.) Cristy grew up knowing the bitter taste of exclusion and social rejection because her parents married across racial lines when the laws against interracial marriage only recently had been voided.

Lancy and Christy also want to honor each other by making the ultimate pledge of commitment before their community and with the acknowledgement of their government, just as other couples do. (RA at p. 77 ¶ 1.) From her own experience of discrimination based on her interracial marriage, Cristy's mother supports them in their pursuit of

respect under the law, insisting: "My daughter should ... have [the] opportunity to marry the person that she loves.... They have created a family together.... They should not be prevented from marrying just because of other people's prejudices." (RA at p. 161 ¶ 13.)

Corey Davis and Andre LeJeune are thirty-six and thirty-eight years old, respectively. (RA at p. 133 ¶ 2.) Corey was the first in his family to attend a four-year college and became a teacher. (RA at p. 133-134 ¶¶ 2, 6.) Andre is a pharmacist. (RA at p. 133 ¶ 2.) They have been together for seven years. (RA at p. 133 ¶ 2.)

Corey learned about strong, healthy relationships from his parents, who were best friends for years before they married. (RA at p. 134 ¶ 7.) His dream growing up was to find a close, loving relationship like his parents'. (RA at p. 134 ¶ 7.) Forging his bond with Andre has made him "one of the happiest people in the world." (RA at p. 134 ¶ 7.) Corey and Andre share similar values. They are devoted to their parents, siblings and extended families. They attend church together. They support each other's careers and are building common financial security. (RA at pp. 134-135 ¶¶ 9, 10.)

Corey and Andre have pooled their financial resources, and also share the burden of each other's debt. (RA at p. 135 ¶ 10.) Yet, absent a recognized marriage, they understand how vulnerable they are to the misperceptions, mistakes and ungenerous motives of others. For example, some years ago they were turned down for a joint home loan because the loan officer considered them unrelated and mistakenly said they were ineligible for that reason. (RA at p. 136 ¶ 14.)

Corey and Andre both feel that they are demeaned, and that their

commitment to one another is made invisible, every time they have to fill out paperwork requiring them to identify themselves as "single." (RA at p. 137 ¶ 21.) In addition, despite being only in their thirties, they worry about being able to take care of each other should one of them fall ill. Andre experienced heart troubles three years ago, and Corey is HIV-positive. (RA at p. 135 ¶¶ 11, 12.) When Corey was hospitalized with internal bleeding, he feared that the hospital staff might not allow Andre even to visit him. (RA at p. 135 ¶ 11.)

When Corey and Andre married in San Francisco, they saw how their announcement helped others finally to understand the seriousness of their commitment to one another, despite all they had been saying for years to make that point. (RA at p. 136 ¶¶ 15, 16.) There was a noticeable change in how coworkers and friends treated them. Corey realized, "Without being married, no matter how long we have been together, people assume that our relationship is tenuous." (RA at p. 136 ¶ 15.)

Corey's mother wants her son to be able to marry Andre. She says, "[P]eople can be so mean and disrespectful to gay people.... I think it will get better when gay couples are able to get married because that will help others see them as serious, loving couples just like other couples who make solemn commitments. It will bring an important validation they deserve." (RA at p. 172 ¶ 12.)

Jeanne Rizzo and Pali Cooper have been together sixteen years. Jeanne is the executive director of the Breast Cancer Fund. Pali is a chiropractor.

They first met and fell in love in 1989. Jeanne's son, Christopher Bradshaw, was nine at the time. (RA at pp. 112 ¶ 4.) Because marriage

was unavailable and the term "domestic partnership" was new and unfamiliar, Jeanne and Pali found it hard to reassure Christopher about their commitment to one another and the stability of their relationship. (RA at p. 112 ¶ 4.) When he faced the peer pressures of junior high school a few years later, Christopher found it awkward to be open about his family to his friends and their parents. Looking back now as an adult, he recalls that: "Like most kids, I wanted to fit in at school and worried about everything from having the 'right' lunch to having the 'right' parents." (RA at p. 164 ¶ 4.) Especially at that difficult age, he notes that it would have been far easier for him simply "to refer to Pali as [his] step-mother, which is what she was, if she had been able to be married to [his] mother." (RA at p. 164 ¶ 4.)

Over the years, Pali has contributed greatly to Christopher's emotional and spiritual growth, while also providing financial support. (RA at p. 112 ¶ 4.)

Condemning the injustice of a rule that permits him, at twenty-four, to obtain a marriage license simply because he is heterosexual, while his mothers who have been together for much of his life cannot, Christopher describes the situation as "pathetic." (RA at p. 114 ¶ 12.) "My mother and Pali are mature and legitimate parents, proven partners, and contributing members of society. There is no justification for denying them – or me – the equal respect for our family that is denied to us because committed same-sex partners are denied the opportunity to marry." (RA at p. 165 ¶ 7.)

Karen Shain and Jody Sokolower, both of whom are fifty-five years old, have been together thirty-two years. (RA at p. 120 ¶ 2.) When Karen first met Jody in 1972, she knew that she "had met the love of [her]

life." (RA at p. 120 ¶ 3.) From the beginning, the two planned to build a life together, including raising children. (RA at p. 120 ¶ 3.)

In 1989, Karen became pregnant and then gave birth to the couple's daughter Ericka. (RA at p. 121 ¶ 5.) Ericka now is a teenager who describes her relationships with both of her parents as "very close." (RA at p. 167 ¶ 5.)

In September 1996, Karen and Jody had a party to celebrate their twenty-fifth anniversary. Friends and relatives came from as far away as England. During the party, Karen and Jody exchanged vows of love and commitment before their assembled guests. (RA at p. 122 ¶ 9.) Though they spoke from the heart, both felt the lack of the official sanction that gives greater weight and consequence to such rituals. (RA at p. 123 ¶ 14.)

Ericka believes that her parents should be allowed this basic choice. She says, "[My parents] have been together for over 30 years. They are very loving, caring, and supportive of each other. They have been together for so long that they can read each other's minds. You can tell that they are never going to break up.... They should be able to get married, just like everyone else." (RA at pp. 167-168 ¶ 11.)

Myra Beals and Ida Matson reside in Mendocino, California and have been in a mutually committed relationship for twenty-eight years, since 1977. (RA at p. 99 ¶ 2.) They were among the first couples to enroll when the California domestic partner registry opened in 2000. (RA at p. 99 ¶ 2.) They are sixty-two and sixty-nine years old, respectively. (RA at p. 99 ¶ 2.) Before undergoing treatment for cancer and retiring in 1997, Myra directed human resources for a hospital. (RA at p. 99 ¶ 3.) That same year, Ida retired from her position as a manager with the Santa Clara County

Transportation Agency. (RA at p. 99 ¶ 4.) During their nearly three decades together, Ida and Myra have had to endure discriminatory pension systems, exclusionary health insurance plans, expensive legal fees for estate planning, more complex home loan applications, and higher car insurance premiums. (RA at pp. 100 ¶¶ 14, 15.) In addition to the financial and paperwork burdens imposed by businesses that refuse to treat them as a family has come the more painful insult of their own relatives doing the same. (RA at p. 102 ¶ 23.) As Myra says it, "Over time, this wears away at a person." (RA at p. 102 ¶ 23.)

During the time that San Francisco was allowing same-sex couples to marry, Ida and Myra made an appointment to wed . (RA at p. 99 ¶ 5.) Myra's 92-year-old mother – who always has been supportive of the couple – was planning to attend, along with other friends and family members. (RA at p. 99 ¶ 5.) Although their appointment was cancelled, they still long to marry legally, even if the delay makes it far less likely that Myra's mother will be able to share the experience with them.

Phyllis Lyon and Del Martin have been in a committed relationship for more than fifty-two years. (RA at p. 68 ¶ 1.) They were the first couple to be married in San Francisco on February 12, 2004. (RA at p. 68 ¶ 2.) The ceremony was "very moving and emotional" for both of them. (RA at p. 68 ¶ 3.) They had not anticipated being able to marry legally in their lifetimes, and "it meant a great deal" to be respected under the law after all those years of exclusion. (RA at pp. 68 ¶ 3.) If this litigation proceeds quickly enough to make it possible despite their advanced ages, they very much wish to marry again, in a marriage that will be recognized as legally valid. (RA at p. 74 ¶ 25.)

Phyllis and Del fell in love in the mid-fifties, a time when many lesbians and gay men scarcely dared to acknowledge each other for fear of being discovered, losing their jobs and worse. (RA at pp. 68-70 ¶¶ 7-9.) They promised to "love . . . honor ... and be faithful" to one another for the rest of their lives. (RA at p. 68 ¶ 4.) They also dedicated themselves jointly to increasing public understanding of lesbians, and of sexual orientation issues generally. (RA at p. 69 ¶ 8.) Today, they look back on a shared legacy of education and activism and see that attitudes have changed "enormously." (RA at p. 69 ¶ 9.)

Del and Phyllis witnessed the creation of the earliest domestic partner registries and laws. They have seen the steady evolution of the domestic partnership laws, but are emphatic that "none of us could confuse those domestic partnerships with marriage. They did not have the same social meaning as a marriage, nor the comprehensive legal protections of marriage." (RA at p. 71 ¶ 11.)

Phyllis and Del have worried over the years about their legal vulnerability. As they experience increased health problems and physical limitations due to aging, they worry even more about whether they will be able to speak for each other and remain together should either or both of them become incapacitated. (RA at p. 71 ¶ 12.) They also are anxious about how they would manage financially should either or both of them incur significant medical bills, and about whether they may be at risk of losing their home. (RA at p. 71 ¶ 14.) While they were eager to see California's expanded domestic partnership laws take effect, they remained concerned that they may encounter legal problems not covered by these laws, and find themselves at the mercy of others who do not understand or

care about the laws. (RA at pp. 71-72 ¶ 15.) Moreover, Phyllis believes that the domestic partner laws "always will convey that message of being second class," because the concept was developed specifically to offer same-sex couples something else instead of marriage. (RA at p. 72 ¶ 16.) Phyllis explains: "We are citizens. We simply want the same rights as other citizens." (RA at p. 73 ¶ 22.)

Stuart Gaffney and John Lewis have celebrated eighteen anniversaries together. (RA at p. 148 ¶ 5.) They are forty-two and forty-seven years old, respectively. (RA at p. 148 ¶¶ 2, 3.) Stuart is a health policy specialist at the University of California at San Francisco. (RA at p. 148 ¶ 2.) John pursues religious studies and maintains the couple's home. (RA at pp. 148, 151-152, ¶ 3, 18.)

John is Stuart's "closest companion, confidant, and friend." (RA at p. 150 ¶ 9.) After so many years together, their "lives and human spirits are now intimately intertwined." (RA at p. 150 ¶ 9.) Both men are family oriented. They have provided care to each other's aging parents. They are devoted uncles to the children on both sides of their family. They organize Stuart's family's annual Chinese New Year celebration, for which John cooks the traditional dishes. (RA at p. 151 ¶ 17.)

The couple registered with the State as domestic partners as a practical step, but it holds "very little symbolic meaning" for them. (RA at p. 152 ¶ 19.) When San Francisco began issuing marriage licenses to gay couples, on the other hand, they presented themselves immediately. They married the first day it was possible, and both describe the day as "the happiest and most moving" of their lives. (RA at p. 152 ¶ 20.) They recall feeling that the City had lifted "a badge of inferiority" from them by

treating them as "fully equal citizens." (RA 152 ¶ 22.) It made them "deeply happy in a way [they] had not fully anticipated." (RA at p. 152 ¶ 22.)

Both sets of parents were supportive of their marriage, using terms like "son-in-law" and "husband," sharing the wedding news among friends and colleagues, and speaking out publicly in favor of marriage equality for same-sex couples. (RA at pp. 153-154 ¶ 26.) After the San Francisco Chronicle reported on the couple's wedding, many friends sent enthusiastic congratulations. (RA at p. 154 ¶ 27.) Stuart and John both came to realize how much public recognition and support they had been lacking before. (RA at p. 154 ¶ 28.)

For Stuart and his family, the couple's current exclusion from marriage also creates a harsh and poignant echo. His mother is Chinese-American and his father is white. (RA at p. 149 ¶ 6.) They married in California in 1952, just four years after the California Supreme Court led the country by striking the State's law against Asian and white pairings. (RA at p. 149 ¶ 6.) Stuart always has credited our state's Supreme Court, at least in part, for the fact that he exists at all. (RA at p. 149 ¶ 7.)

What Stuart and John "seek in this lawsuit is exactly what [Stuart's] parents obtained by virtue of the California Supreme Court's decision in 1948: the right to become a married couple with equal status in the eyes of the law." (RA at p. 156 ¶ 34.)

II. The Organizational Respondents – Our Family Coalition And Equality California.

Organizational Respondents Our Family Coalition and Equality California together represent more than 92,000 same-sex couples across our

state, all of whom are denied the freedom to marry simply because of who they are.[3] According to the U.S. Census, these couples comprise the largest such population in the country, constituting 1.4% of all couples in this state, and reflecting the full racial and ethnic diversity of California.[4] Thirty-two percent of these couples are raising children, who number more than 70,000.[5] These children are more likely than children of different-sex couples to be under five years old, adopted, and to have disabilities.[6] The

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[3] The most recent federal census data, which provides only a partial count, shows that there are more than 92,000 same-sex couples living in California, and that they reside in every county of our state. (Smith & Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households - A Preliminary Analysis of 2000 United States Census Data* (2001) at p. 2.) Many of these couples are members of the Respondent organizations.

[4] UCLA Williams Project, *Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000* (May 2004), page 7, available at http://www.law.ucla.edu/williamsproj/publications/CaliforniaCouplesReport.pdf. Roughly one quarter of these same-sex couples are Hispanic, 6% are Asian or Pacific Islander, 5% are African American, and 24% are interracial. (*Id.*) Twenty one (21) percent include at least one person with a disability. (*Id.*)

[5] (*Id.* at p. 2.) More than half of these are children of color, including 31,000 children of Hispanic origin, over 4,400 Asian-American children, 3,600 African-American children, 4,500 mixed-race children, 17,600 identified as "other" race, and 27,600 identified as white. (*Id.*)

[6] (*Id.*) Their parents also are more likely than married parents to be racial minorities, to speak Spanish, and to be disabled. (*Id.*) These factors all correlate to economic challenges for the family, which the Census confirms: the median household income for same-sex parents is $10,000 lower than the median household income for heterosexual married couples with children. (*Id.*)

organizational respondents participate here, on behalf of their members, because the State's withholding of marriage causes pervasive harms to those they represent.

STATEMENT OF THE CASE

I. Relevant Procedural History.

On February 12, 2004, the City of San Francisco began issuing marriage licenses on an equal basis to same-sex and different-sex couples, based on its determination that failure to do so would violate the state constitutional guarantees of equal protection and due process. (*Lockyer*, *supra*, 33 Cal.4th at pp. 1069-1070.) The following day, two different groups filed lawsuits in San Francisco Superior Court seeking to stop the City from issuing licenses to same-sex couples.[7] Those requests were denied. (*Id.* at p. 1071 & fn. 6.) On March 11, 2004, in response to a writ filed by the Attorney General, the California Supreme Court stayed the City from issuing any further licenses to same-sex couples. The Court noted, however, that its ruling did "not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes." (*Id.* at pp. 1073-1074.)

On August 15, 2004, the California Supreme Court invalidated the marriage licenses issued to same-sex couples but expressly declined to

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[7] See *Thomasson v. Newsom*, San Francisco Superior Court Case No. CGC-04-028794 ["Thomasson action"]; and *Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco*, San Francisco Superior Court Case No. CGC-04-503943 ["Fund action"].

reach the constitutionality of excluding those couples from marriage. "To avoid any misunderstanding," the Court stated, "we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue." (*Id.* at p. 1069.)

On March 12, 2004, the Respondents filed a writ of mandate and complaint for declaratory and injunctive relief, contending that the exclusion of same-sex couples from marriage violates their rights under the California Constitution to privacy, equal protection based on sex and sexual orientation, and free expression.[8] The City and County of San Francisco

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[8] Respondents rely exclusively on the California Constitution as the basis for their challenge to the violation of lesbian and gay couples' fundamental right to marry in California. The "California Constitution 'is and always has been, a document of independent force.'" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325 [citing *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550]; see also Cal. Const., art. I, § 24 [providing that the rights "guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"].) The California Supreme Court has "construed the California Constitution as providing greater protection than that afforded by parallel provisions of the United States Constitution." (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 261.)

Respondents cite federal case law where appropriate only as persuasive authority. (See, e.g., *People v. Smith* (1983) 34 Cal.3d 251, 265 ["decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less

(footnote continued)

also filed a lawsuit challenging the constitutionality of the marriages statutes, as did two other sets of same-sex couples.[9] All four of these actions, together with the *Thomasson* and *Fund* actions, were coordinated in San Francisco Superior Court and assigned to the Honorable Richard A. Kramer.

II. Statutes Challenged By Respondents.

Respondents focus in this action, as they did in the Superior Court below, on Family Code section 300, which explicitly restricts marriage to male-female couples. Two other Family Code provisions concerning marriage also refer to gender, but neither, if properly construed, limits the ability of same-sex couples to marry in California. Section 301 provides: "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage." (Cal. Fam. Code § 301.) The purpose of this provision is to establish the same age of consent for men and women. It does not state that a male may marry only a female, nor vice-versa.

Section 308.5 modifies section 308, pertaining to "foreign

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individual protection than is guaranteed by California law."] [internal citations omitted].)

[9] *City and County of San Francisco v. State of California, et al.*, San Francisco Superior Court case number CGC 04-429-539; *Tyler, et al. v. County of Los Angeles, et al.*, Los Angeles Superior Court case number BS 088 506; *Clinton et al. v. State of California et al.*, San Francisco Superior Court case number CGC-04-429-548.

marriages." Section 308 provides: "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state." (Cal. Fam. Code § 308.) Section 308.5 provides: "Only marriage between a man and a woman is valid or recognized in California." (Cal. Fam. Code § 308.5.) This provision codified Proposition 22, which was enacted by the voters in 2000 only for the purpose of ensuring that California would not be required to respect the validity or otherwise to recognize marriages contracted by same-sex couples in other jurisdictions. (See, e.g., Official Voter Information Guide for Proposition 22, dated March 7, 2000 ["The truth is, unless we pass Proposition 22, legal loopholes could force California to recognize 'same-sex marriages' performed in other states."].) For this reason, section 308.5 is irrelevant to marriages performed in California. (See *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424 [explaining that § 308.5 "was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming, in reliance on Family Code section 308, that their marriages must be recognized as valid marriages."]; AA at p. 117 ["the background materials to Proposition 22 indicate that its purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state"]; but see *Knight v. Superior Court* (2005) 128 Cal.App.4th 14 [stating that Proposition 22 applies to both in-state and out-of-state marriages].)

Even if this Court were to construe either section 301 or section 308.5 more broadly to bar lesbian and gay couples from marrying in California, such a construction simply would render these provisions

redundant of the restriction in section 300, and unconstitutional for exactly the same reasons that section 300 is.

III. Judge Kramer's Decision.

After a two-day hearing on Respondents' writ petition in December 2004, San Francisco Superior Court Judge Richard A. Kramer issued his final opinion and order in this and the other coordinated marriage cases on April 13, 2005. In his order, Judge Kramer held that:

- Excluding same-sex couples from the right to marry requires strict scrutiny because it discriminates based on gender (AA at pp. 122-125), and also because it abridges the fundamental right to marry the person of one's choice (AA at pp. 125-127);
- Even under the most deferential level of scrutiny – rational basis review – Family Code sections 300 and 308.5[10] "fail to meet constitutional muster" (AA at p. 111);
- Because the State's purported justifications fail even under the rational basis test, "[i]t is axiomatic that such rationales could not therefore constitute a compelling state interest." (AA at p. 127.)

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[10] As discussed above, Respondents contend that section 308.5 of the Family Code applies only to marriages contracted by same-sex couples in other jurisdictions. Judge Kramer concurred with this position and further held that, regardless of the geographic scope of section 308.5, it violates the fundamental right to marry and the equal protection clause of the state constitution. (AA at pp. 117-118.)

After entry of judgment in favor of the *Woo* petitioners, the State appealed.

ARGUMENT

I. Family Code Section 300 Violates Each Respondent's Fundamental Right To Marry The Person Of His Or Her Choice.

This case proceeds from a point of basic agreement. Marriage is among society's "most rewarding and cherished institutions." (*Goodridge v. Dep't. of Public Health* (Mass. 2003) 798 N.E.2d 941, 949.) For many, marriage "is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275.) The State departs from this basic agreement, however, when it argues that it may reserve this cherished institution exclusively for heterosexual couples, simply because it has done so in the past. As Judge Kramer correctly concluded, lesbians and gay men have an equal stake in this fundamental right, and their exclusion from marriage is not justified even by a rational basis, much less under the applicable strict scrutiny test. (AA at p. 111.)

Marriage is a "basic civil right." (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) In 1948, almost twenty years before the United States Supreme Court ultimately reached the same conclusion, the California Supreme Court held that laws restricting the right to marry based on race violate the fundamental right to marry. (*Perez, supra,* 32 Cal.2d at p. 715 ["The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring."].) Since *Perez*, California courts have continued to recognize marriage as a fundamental right under

both the Due Process and Privacy Clauses of the California Constitution. (See, e.g., *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 ["The right to marriage [is] . . . now recognized as [a] fundamental, constitutionally protected interest[ ]."]; *In re Carrafa* (1978) 77 Cal.App.3d 788, 791 ["The right to marry is a fundamental constitutional right."]; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275 [Individuals have a "right of privacy or liberty in matters related to marriage."] [citations omitted].) Where a statute "involves an obvious invasion of" this right, "a compelling interest must be present to overcome the vital privacy interest." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34.)[11]

The State concedes that the right to marry is fundamental but argues

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[11] The State erroneously argues that infringements on the right to marry are subject only to rational basis review, citing *Ortiz v. Los Angeles Police Relief Ass'n* (2002) 98 Cal.App.4th 1288. (AOB at p. 43 n. 24.) In fact, *Ortiz* held that "beyond question," the right to privacy includes "the right to join in marriage with the person of one's choice." (*Ortiz*, *supra*, 98 Cal.App.4th at p. 1303.) *Ortiz* also affirmed that where, as here, "a law interferes directly and substantially with the fundamental right to marriage, [it must be] subject to strict scrutiny." (*Id.* at p. 1311.) The plaintiff in *Ortiz* challenged a policy prohibiting employees of the Los Angeles Policy Relief Association from marrying convicted felons. The court concluded that the challenged policy was not subject to strict scrutiny because it imposed only an incidental burden on the plaintiff's right to marry. "The rule is not a flat prohibition on marriage that affects entire classes of individuals statewide. [The employer] did not and could not prohibit Ortiz and [her chosen male partner] from getting married." (*Id.* at p. 1312.) In contrast, the statutory restriction in this case affects an entire class of individuals and completely bars them from marriage. Accordingly, it is subject to strict scrutiny.

that same-sex couples do not enjoy this right. According to the State, Respondents do not have a constitutionally protected right to marry unless they can show that a separate right to "same-sex marriage" is deeply rooted in the traditions of California or this country. (AOB at p. 39.) This is incorrect.

Respondents do not seek a right to "same-sex marriage" anymore than the plaintiffs in *Perez* sought a right to "interracial marriage." Rather, they seek to exercise the same fundamental right to marry that is available to those in heterosexual relationships. The liberty at stake in both cases – the right of every adult person to choose whom to marry – is deeply rooted in history and tradition. It is based on a recognition that some decisions involve matters so intimate and personal and so central to human dignity and individual identity that they must be sheltered from governmental interference. As the Massachusetts Supreme Judicial Court held in *Goodridge*: "Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family . . . these are among the most basic of every individual's liberty and due process rights." (*Goodridge, supra*, 798 N.E.2d at p. 959.) Similarly, in *Lawrence v. Texas*, the United States Supreme Court reiterated that decisions about relationships such as marriage "involv[e] the most intimate and personal choices a person may make in a lifetime." (*Lawrence v. Texas* (2003) 539 U.S. 558, 574.) Such choices are "central to the liberty protected by the Fourteenth Amendment [and] [p]ersons in a homosexual relationship may seek autonomy for these

purposes, just as heterosexual persons do." (*Ibid.*)[12]

In *Perez*, the California Supreme Court likewise held that "the essence of the right to marry is freedom to join in marriage with the person of one's choice." (*Perez*, *supra*, 32 Cal.2d at p. 717.) As the Court explained, a law prohibiting interracial marriage violates this fundamental right because, under such a law, a person "may find himself barred . . . from marrying the person of his choice and that person to him may be irreplaceable." (*Id.* at p. 725.) It is of course true that *Perez* addressed restrictions based on the respective races of the participants, rather than on their gender or sexual orientation. Nonetheless, as Judge Kramer properly held, the underlying right identified in *Perez* remains the same, and the reasoning in *Perez* applies equally to a restriction that denies the right to marry based on the respective sexes of the participants. (AA at p. 126.)

The State concedes that, in other cases involving laws that restrict the right to marry, courts have not defined the right in a circular manner, using the specific restriction being challenged. For example, when *Perez* was decided, there was no shared American understanding of marriage as encompassing interracial couples. To the contrary, anti-miscegenation laws had been in place since colonial days. They remained common through the early decades of the twentieth century, were overwhelmingly supported by

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[12] *Lawrence* did not present or determine whether excluding same-sex couples from marriage violates the United States Constitution. Yet the import of *Lawrence* in defining the relevant right at stake is unmistakable: fundamental liberties are guaranteed to all and may not be "defined" in group-based terms to exclude a particular class of people.

public opinion, and had been upheld by many other courts. (See, e.g., *Perez*, *supra*, 32 Cal.2d at p. 752 [Shenk, J., dissenting].) Nonetheless, in *Perez*, the question was not whether "interracial marriage is deeply-rooted in our culture." (AOB at p. 39.) Similarly, in *Turner v. Safley* (1987) 482 U.S. 78, there was no longstanding tradition of permitting prisoners to marry. Yet the question was not whether "inmate marriage is deeply-rooted in our culture."[13]

The same analysis applies here. Individuals in same-sex intimate relationships have the same liberty interest in exercising the right to marry as heterosexual couples. Once a fundamental right is recognized, the scope of that right is defined by the attributes of the right itself, *not* by the people who seek to exercise it or who have been excluded from doing so in the past. (See AA at p. 126 [the right to marry is not "defined in terms of who one may marry"].) Thus, it is no more appropriate to speak of a right to "gay marriage" than to talk about a right to "women's vote," "Negro citizenship" or, closer to the issue in this case, "interracial marriage."

Justice Greaney succinctly explained this error in his concurring

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[13] Some have tried to argue that the holdings in *Perez* and *Loving* are limited to discrimination based on race. But both decisions expressly declared that their holdings were independently based on due process, not just equal protection, because the statutes at issue violated the fundamental right to marry, "a right shared by *all* the state's citizens." (*Loving*, *supra*, 388 U.S. at p. 12 [emphasis added]; see also *Zablocki v. Redhail* (1978) 434 U.S. 374, 383-84 ["Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."].)

opinion in *Goodridge*:

> To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question. . . .

(*GOODRIDGE*, *SUPRA*, 798 N.E.2D AT PP. 972-973 AND N. 5.)

Justice Blackmun made the same point in his dissent from the now-repudiated majority decision in *Bowers v. Hardwick* (1986) 478 U.S. 186. In his words:

> This case is no more about 'a fundamental right to engage in homosexual sodomy' . . . , than *Stanley v. Georgia*, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"

(*ID.* AT P. 199 [BLACKMUN, J., DISSENTING].)

In *Lawrence*, the United States Supreme Court acknowledged that Justice Blackmun had been correct. Concluding that "*Bowers* was not correct when it was decided, and it is not correct today," (*Lawrence*, *supra*, 539 U.S. at p. 578), the Court held that its prior framing of the question in *Bowers* – as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" – "disclose[d] the Court's failure to appreciate the extent of the liberty at stake." (*Id.* at p. 567.)

The State now urges this Court to repeat exactly the same error – to frame the right in question based on the identity of those who seek to exercise it. The State must do more than simply urge this Court to define the fundamental right to marry using the very restriction that is being

challenged. Rather, as Judge Kramer underscored, our Constitution requires that the State must explain why, beyond the simple fact of historical exclusion, the right to marry must be defined to exclude same-sex couples. (AA at p. 113 ["The state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional."].)

This the State cannot and, tellingly, has made no effort to do. The State does not dispute that same-sex couples form attachments as strong and enduring as those formed by different-sex couples. It does not dispute that same-sex couples have the same need for the tangible and intangible benefits of marriage. It does not dispute that same-sex couples have the same wish to marry as others, and the same yearning for the public validation and social stature that marriage conveys.[14] Having conceded that

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[14] Indeed, had the State been inclined to dispute these points, California's established public policy would have precluded it from doing so. When enacting AB 205, the Legislature found that "many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex" and that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution." (2003 Cal. Legis. Serv. Ch. 421 (A.B. 205) § 1(b) (West). As Judge Kramer correctly held below, "California's enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage...[T]he State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well." (AA at p. 115).

same-sex couples are similarly situated with regard to the purposes of marriage, and have an equal need and desire for its protections, the State must justify their exclusion from a "vital personal right[] essential to the orderly pursuit of happiness." (*Loving v. Virginia* (1967) 388 U.S. 1, 12.)

As Judge Kramer correctly held, the State's obligation to justify this exclusion is especially clear where, in addition to infringing a fundamental right, the restriction also targets a vulnerable minority. (See AA at p. 122 [Strict scrutiny "applies where a legislative classification creates a 'suspect' class or impinges on a fundamental human right. Both circumstances exist here."]); see also, e.g., *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 19 (1979) [same]; *Lawrence v. Texas* (2003) 539 U.S. 558, 575 ["Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."]; *Goodridge*, *supra*, 798 N.E.2d at p. 953 ["In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of equal protection and due process --] frequently overlap, as they do here."] [citations omitted.]; *State v. Limon* (Kan. 2005) --- P.3d ---, 2005 WL 2675039, at *14 [noting that the substantive due process and equal protection analyses often are necessarily linked].)

II. Abridging Respondents' Freedom To Marry Based On Their Sex And Sexual Orientation Violates Their Right To Equal Protection.

A. Denying Respondents The Right To Marry Discriminates On The Basis Of Sex In Violation Of The California Constitution's Equal Protection Guarantee.

Statutory classifications based on sex are subject to strict scrutiny

under our state's constitution. (*Catholic Charities of Sacramento, Inc., v. Superior Court* (2004) 32 Cal.4th 527, 564 ["We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution ... and triggers the highest level of scrutiny"].) Family Code section 300 is unconstitutional under this standard because it creates a sex-based classification that serves no legitimate, much less compelling, purpose. The requirement that marriage must consist of a man and a woman is a vestige of a prior era in which the law allocated rights, duties, and obligations in marriage based on gender. Now that the law has eliminated these sex-based classifications *within* marriage, it no longer makes sense, if it ever did, to rely on gender as a basis to restrict who may enter into marriage. As California and other courts have done many times in the past when confronted with challenges to other sex-based classifications relating to marriage, this Court must strike this outmoded restriction. (See, e.g., *Follansbee v. Benzenberg* (1954) 122 Cal.App.2d 466 [striking common law rule prohibiting women from recovering necessary medical expenses when their spouses were negligently injured]; *Self v. Self* (1962) 58 Cal.2d 683 [striking common law rule that a wife could not sue her husband for a negligent or intentional tort]; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 643 [noting that statute imposing child support obligations on men but not women "appears to state a sex-based distinction that violates the state and federal constitutions"]; *Orr v. Orr* (1979) 440 U.S. 268, 279 [holding unconstitutional state statute that authorized the imposition of alimony obligations on men but not women].)

To conclude that California's marriage statutes unconstitutionally

discriminate on the basis of sex, this Court need look no further than the existence of a facial classification based on sex and the absence of any current justification for that restriction. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 44 ["Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the Equal Protection Clause. It is . . . presumed invalid."] [citations omitted].) The importance of the right to marry and the impact of the challenged restriction on a vulnerable minority only more strongly confirm this conclusion.

As both the California courts and U.S. Supreme Court have noted, laws that use sex-based classifications to target same-sex conduct or relationships discriminate against lesbian and gay people. This is so because sexual orientation is a relational concept based on gender. By definition, heterosexuality is attraction to individuals of a different sex, and homosexuality is attraction to individuals of the same sex. Thus, when a law differentiates between same-sex and different-sex couples, it necessarily also is distinguishing between those who are gay and those who are heterosexual.[15]

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[15] See, e.g., *Lockyer*, *supra*, 33 Cal.4th at p. 1076 n.11 [noting that the purpose of the gender restriction in marriage was to prevent same-sex couples from marrying]; *id.* at p. 1128 n.2 [Kennard, J., concurring and dissenting] [stating that "California has expressly restricted matrimony to heterosexual couples"]; see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155, 1161 [describing the refusal of a business to treat a same-sex couple in the same manner as a different-sex couple as a form of discrimination based on "homosexuality"]; *Lawrence*, *supra*, 539

(footnote continued)

By restricting marriage to different-sex couples, the current law erects a bar that categorically excludes all lesbian and gay couples from the right to marry. Because of that restriction, an entire class of persons is injured and demeaned, and their ability to participate in one of our most cherished institutions is not just burdened, but completely barred. Under these circumstances, the need for heightened scrutiny of the sex-based classification in section 300 is particularly clear. (See, e.g., *Sail'er Inn v. Kirby*, 5 Cal.3d at pp. 19-20 [holding that strict scrutiny is especially warranted when one's sex is used to bar access to an important right, such as the right to pursue an otherwise lawful occupation].)

1. Family Code section 300 establishes a sex-based classification.

The sex-based classification in California Family Code section 300 is apparent on its face. It provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman . . ." (Fam. Code § 300.) Under this statute, Respondent Del Martin is prohibited from marrying her partner of more than 50 years, Phyllis Lyon, solely because Del is female. If Del were male, she and Phyllis would have married decades ago. By any measure, this is a sex-based classification. As Judge

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U.S. 558 [holding that a law that proscribes conduct between persons of the same sex targets "homosexual persons"]; *id.* at p. 581 [O'Connor, J., concurring] [recognizing that adverse treatment of those with same-sex partners is discrimination based on "sexual orientation"]; see also Section II.B, *infra*, for further discussion of the sexual orientation-based equal protection violation.

Kramer correctly held below, "If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor." (AA at p. 123; see also *Goodridge*, *supra*, 798 N.E.2d at p. 971 [Greaney, J., concurring] ["[O]ur marriage statutes . . . create a statutory classification based on the sex of the two people who wish to marry. As a factual matter, an individual's choice of marital partner is constrained because of his or her own sex."].)[16]

Despite the statute's express imposition of a sex-based restriction, the State argues that it does not *discriminate* on the basis of sex because "[m]en and women are treated exactly the same under the law." (AOB at p. 27.) Both the California Supreme Court and the United States Supreme Court have rejected the argument that a law may classify on a suspect basis, so long as it subjects different groups "equally" to the same restriction. In *Perez*, the State argued that the then-existing marriage statute did not discriminate based on race, because it "equally" prohibited non-whites from marrying whites and whites from marrying non-whites. The California

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[16] See also *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, 64 [holding that "[the Hawaii marriage statute], on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex."]; *Baker*, *supra*, 744 A.2d at p. 905 [Johnson, J., concurring in part and dissenting in part] ["A woman is denied the right to marry another woman because her would-be partner is a woman . . . Similarly, a man is denied the right to marry another man because his would-be partner is a man . . . Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex...."].

Supreme Court rejected this fallacy, explaining: "The decisive question ... is not whether different races, each considered as a group, are equally treated. The right to marry is the right of *individuals*, not of racial groups." (*Perez*, *supra*, 32 Cal.2d at p. 716 [emphasis added]; see also *Baehr*, *supra*, 852 P.2d at p. 68 [holding that "mere equal application" of the statute to both sexes does not immunize it from the heavy burden of justification required by the Constitution].)[17]

Likewise, in *McLaughlin v. Florida* (1964) 379 U.S. 184, the United States Supreme Court determined that a penalty on interracial cohabitation constituted race discrimination, even though the statute applied "equally" to different races. (*Id.* at p. 188 ["all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple [was] subject to the same penalty."].) As the Court pointed out, "[i]t is readily apparent that [the statute] treats the interracial couple made up of a white person and a Negro differently than it does any other couple." (*Ibid.*) The Court held that even when a race-based restriction applies "equally" to different affected groups, courts still must inquire "whether the classifications drawn in a statute are reasonable in light of its purpose [or] whether there is an arbitrary or invidious

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[17] The State does not succeed in distinguishing *Baehr* with its claim that that the Hawaii Supreme Court's decision was based on Hawaii's "unique equal protection clause" (AOB at p. 21). Like Hawaii, California applies the highest level of scrutiny to classifications based on gender. (See, e.g., *Catholic Charities, supra,* 32 Cal.4th at p. 564.) The two constitutions are identical in this regard.

discrimination between those classes covered by [the statute]." (*Id.* at p. 191; see also *Loving v. Virginia* (1967) 388 U.S. 1 [holding that the law prohibiting interracial marriage constituted impermissible discrimination based on race, notwithstanding that it imposed the same restriction "equally" on whites and non-whites].)

Precisely the same principle applies here. Here, as in *Perez*, "[t]he right to marry is the right of *individuals*, not of . . . groups." (*Perez*, *supra*, 32 Cal.2d at p. 716.) When considered from this individual perspective, as it must be, the discriminatory impact of the current marriage law is unmistakable. Lancy Woo is prohibited from marrying the person of her choice, Cristy Chung, because of her sex, just as the statute challenged in *Perez* prevented Andrea Perez from marrying the person of her choice – Sylvester Davis – because of her race.[18] Although the statute "equally" prohibits men and women from marrying a person of the same sex, mere equal application to different groups does not negate the injury to individuals nor immunize a discriminatory statute from heightened

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[18] As Justice Johnson noted in *Baker v. State*, were the court to accept the State's logic that a statute cannot be held to discriminate on the basis of sex if it restricts men and women equally, then "a statute that required courts to give custody of male children to fathers and female children to mothers would not be sex discrimination." (*Baker*, *supra*, 744 A.2d at p. 906 n.10 [Johnson, J., concurring in part and dissenting in part].) Similarly, a statute that permitted employers to advertise for "male" jobs and "female" jobs would not be sex discrimination as long as the terms and conditions of employment were comparable. But, of course it is. (See, e.g., *Pittsburgh Press Co. v. Human Rel. Comm'n.* (1973) 413 U.S. 376, 391; 42 U.S.C. § 2000e-3(b).)

scrutiny. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 35 ["The strict scrutiny standard of review applies . . . regardless of whether the law may be said to benefit and burden the races [or sexes] equally."]; see also *Catholic Charities, supra,* 32 Cal.4th 527 [rejecting argument that Catholic Charities did not discriminate on the basis of sex because it sought to withhold contraception-related coverage "equally" for both men and women]. Indeed, the Court of Appeal expressly has recognized that California's statutory prohibition of marriage by same-sex couples is a gender-based classification. (*Holguin v. Flores* (2004) 122 Cal.App.4th 428, 439 [holding that California's sex-based restriction on marriage creates an "inequity" for "members of the class of couples who, *because of their gender . . . were barred from marrying.*"] [emphasis added].)[19]

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[19] The State erroneously contends that *Holguin* supports its view that the marriage law does not discriminate based on sex. In *Holguin*, the court upheld the constitutionality of the Legislature's decision to grant the right to sue for wrongful death to registered domestic partners but not to unmarried heterosexual cohabitants. As the court explained, the California Legislature did so to remedy, in small part, the inequity caused by the exclusion of same-sex couples from marriage. By contrast, the unmarried male plaintiff and his deceased female partner had the right to marry and thus could have brought themselves within the class of people entitled to sue for wrongful death. The *Holguin* court observed, "No case we know of has held the plaintiff was denied equal protection because he was a member of a class granted *more* advantages than the comparison class." (*Holguin, supra*, 122 Cal.App.4th at p. 439 [emphasis in original].) In addition, as noted above, the court in *Holguin* expressly noted that the marriage statues discriminate based on gender. Thus, notwithstanding the State's misplaced reliance on it, *Holguin* actually supports Respondents' argument that excluding same-sex couples from the right to marry discriminates based on sex.

Likewise, when the Legislature enacted California's expanded domestic partnership law, the California Domestic Partner Rights and Responsibilities Act of 2003 (Assembly Bill 205 (2003) ("AB 205")),[20] the Legislature expressly found that the current marriage law discriminates on the basis of sex. In the findings supporting AB 205, the Legislature stated: "Expanding the rights and creating responsibilities of registered domestic partners would . . . *reduce discrimination on the bas[i]s of sex* ... in a manner consistent with the requirements of the California Constitution." (See 2003 Cal. Legis. Serv. Ch. 421 (A.B. 205) § 1(b) (West) [emphasis added].)[21]

The California Supreme Court has instructed that courts must give legislative findings of sex discrimination considerable deference. (See *Catholic Charities*, *supra*, 32 Cal.4th at p. 564 ["To identify subtle forms of

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[20] Under AB 205, registered domestic partners are provided with most of the state-conferred rights and responsibilities of married spouses. As discussed in more detail in section IV.C, *infra*, registered domestic partners do not have all of the rights and benefits of marriage even under state law, nor are they able to seek access to any of the federal rights or benefits given only to legal spouses.

[21] Of course, as the California Supreme Court has noted, the Legislature did not find that AB 205 would eliminate the sex-based discrimination inherent in California's marriage statutes, only that it would "*reduce* discrimination" and "help California *move closer* to fulfilling the promises of inalienable rights, liberty, and equality contained in section 1 and 7 of Article I of the California Constitution." (See 2003 Cal. Legis. Serv. Ch. 421 (A.B. 205) § 1(b), 1(a) [emphases added], *as cited in Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839 [discussing the "goal" of AB 205 to reduce discrimination – not to achieve full equality].)

gender discrimination . . . is within the Legislature's competence"].) In contending that the marriage statute does *not* discriminate on the basis of sex, the State does precisely what the California Supreme Court criticized in *Catholic Charities*; it "merely restates its disagreement with the Legislature's determination" that a particular situation "constitutes a form of gender discrimination." (*Id.* at p. 566.) But as the California Supreme Court has made clear, the State's mere disagreement cannot negate the deference owed to such a determination. (*Id.*)[22]

The Legislature reiterated this determination when considering and passing AB 849, the marriage equality bill in 2005. In the findings supporting AB 849, the Legislature stated: "California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantees of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians." (Assem. Bill No. 849, vetoed by Governor, Sept. 29, 2005 (2005-2006 Reg. Sess.), § 3(f); see also *id.* at §

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[22] Although the Legislature is uniquely competent to identify and address problems of discrimination, the Legislature has no constitutional authority to enact laws that violate fundamental rights or deny equal protection. It follows that while courts generally must defer to legislative findings concerning a problem of inequality, they owe no deference to laws that discriminate against vulnerable minorities, which are "not entitled to a presumption of validity and [are] instead presumed invalid." (*Connerly*, *supra*, 92 Cal.App.4th at p. 44.) Accordingly, while this Court must give some deference to the Legislature's finding that the marriage statutes discriminate on the basis of gender, it owes none to the discriminatory classifications in those statutes.

3(d) ["The gender-specific definition of marriage that the Legislature adopted specifically discriminated in favor of different-sex couples and, consequently, discriminated and continues to discriminate against same-sex couples."].)

Although the Governor ultimately vetoed AB 849, "[t]he Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute." (*Freedom Newspapers v. Orange County Employees Ret. Sys.* (1993) 6 Cal.4th 821, 832 [citing *Eu v. Chacon* (1976) 16 Cal.3d 465, 470; *Irvine v. California Emp. Com.* (1946) 27 Cal.2d 570, 578].) Thus, despite the Governor's veto, AB 849 makes clear the Legislature's determination that the section 300 discriminates on the basis of sex and sexual orientation and, by so doing, violates our State Constitution.

2. Particularly because California's marriage laws no longer differentiate between the rights and duties of husbands and wives, continuing to restrict marriage based on gender serves no legitimate purpose.

The restriction of marriage to different-sex couples is a vestige of an era in which the rights and duties of spouses were defined by gender; it has no contemporary justification. Prior to the nineteenth century, marriage laws were influenced heavily by the coverture doctrine, which provided that a woman lost her separate legal existence when she married:

> By marriage, the husband and wife are one person in law: . . . the very being or legal existence of the woman . . . is incorporated . . . into that of the husband . . .

(1 W. BLACKSTONE, COMMENTARIES, BOOK 1, CH. 15, AT PP. 442-43.) AS

OUR COURT OF APPEAL HAS EXPLAINED, "THE OLD COMMON LAW RULE . . . [WAS BASED] ON THE THEORY THAT THE WIFE'S PERSONALITY MERGED IN THAT OF THE HUSBAND'S, THAT SHE HAD NO RIGHT TO HOLD PROPERTY SEPARATE AND APART FROM HER HUSBAND, AND HAD NO RIGHT TO SUE IN HER OWN NAME." (*FOLLANSBEE, SUPRA,* 122 CAL.APP.2D AT P. 476.) IN SHORT, "AT COMMON LAW THE HUSBAND AND WIFE WERE CONSIDERED AS ONE, AND HE WAS THE ONE." (*RODRIGUEZ V. BETHLEHEM STEEL CORP.* (1974) 12 CAL.3D 382, 388 N. 2 [CITATIONS OMITTED].)

For centuries, this arrangement was believed to reflect the "natural" order of things.[23] Over time, however, both legislatures and courts recognized that such restrictions were unjust, and both took steps to eliminate gender as a relevant legal factor within the marital relationship. Formerly, the law contemplated that the husband was the legal head of the household, responsible for its support and its links to the external society, while the wife was responsible for the day-to-day management of the home and the care and nurturance of the children. Today, the law is no longer grounded in these stereotypes. (See, e.g., *Follansbee*, *supra*, 122 Cal.App.2d at p. 476 ["This hollow, debasing, and degrading philosophy, which has pervaded judicial thinking for years, has spent its course. These

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[23] See, e.g., *Bradwell v. Illinois* (1872) 83 U.S. (16 Wall) 130, 141 [Bradley, J., concurring] ["The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."]; see also *In re Carey* (1922) 57 Cal.App. 297, 303 [opining that the law may "discriminate with reference to women; though, happily, it is believed that these discriminations are enacted mainly in their own interest."].

archaic notions no longer obtain."].) Rather, "a husband and wife have, in the marriage relation, equal rights which should receive equal protection of the law." (*Rodriguez, supra*, 2 Cal.3d at p. 388; see also *Byrd v. Blanton* (1983) 149 Cal.App.3d 987, 992 ["Throughout the evolution of our present day family law statutes, the trend has been toward achieving greater equality between spouses."].)

Married women now may own and sell property,[24] enter into contracts,[25] and sue their husbands for sexual assault and other torts.[26] Married women now equally are obliged to provide financial support for a spouse, to pay alimony or child support upon divorce, and to assume all of

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[24] See, e.g., *Peck v. Vandenberg* (1866) 30 Cal. 11, 58 ["A woman, whether married or single, is capable of taking and holding a title in her own right and upon a money consideration."]; *Hand v. Hand* (1885) 68 Cal. 135, 139-40 [McKee, J., dissenting] ["A married woman . . . can convey her separate real property without the consent of her husband."].

The Legislature has given men and women equal rights with regard to community property as well. (See *Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 35 [noting that "the 1975 reform legislation marked a significant dividing line between the husband-dominated community property law of the past and the equal managerial rights of the present day."].)

[25] See, e.g., *Wilson v. Wilson* (1868) 36 Cal. 447, 454 ["The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property[.]"].

[26] *People v. Hillard* (1989) 212 Cal.App.3d 780, 784 ["[T]he Legislature added Penal Code § 262 [in 1979] for the sole purpose of eliminating the marital exemption for forcible spousal rape . . ."]; *see also Self v. Self* (1962) 58 Cal.2d 683, 689 ["[T]he fundamental basis of the interspousal disability doctrine – legal identity of husband and wife – no longer exists."].

the other obligations entailed by marriage, according to gender-neutral standards. Neither women nor men have an automatic advantage in child custody cases.[27] In short, in every respect, California law has eliminated sex-based classifications relating to marriage – with the glaring, and constitutionally unacceptable, exception of the requirement that the spouses must be of different genders.[28] As Justice Carter noted in his concurring opinion in *Perez*, "A change in conditions may invalidate a statute which was reasonable and valid when enacted." (*Perez, supra*, 32 Cal.2d at p. 737 [Carter, J., concurring] [citations omitted]; see also *ibid.* ["Even if I concede, which I do not, that the statutes here involved were at any time reasonable, they are not longer reasonable and therefore no longer valid today."].) In this case, retaining the requirement that only different-sex couples may marry, long after the societal and legal context that made sense

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[27] See, e.g., *In re Marriage of Carney* (1979) 24 Cal.3d 725, 736 [holding that courts may not base family law determinations on sex-based stereotypes about parenting]; *In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 645 ["The Legislature clearly has articulated the policy that irrational, sex-based differences in marital and parental rights should end and that parental disputes about children should be resolved in accordance with each child's best interest."]; Cal. Fam. Code § 3040(a)(1) [" the court . . . shall not prefer a parent as custodian because of that parent's sex."].

[28] See *Baker, supra*, 744 A.2d at p. 912 ["[T]he [sex-based] classification is a vestige of the historical unequal marriage relationship that more recent legislative enactments and our own jurisprudence have unequivocally rejected."'] [Johnson, J., concurring in part and dissenting in part]; *see also Goodridge, supra*, 798 N.E.2d at p. 973 [Greaney, J., concurring] ["[T]he case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage[.]"].

of such a requirement has ceased to exist, violates the requirement of equal protection for all Californians. Now that all other sex-based distinctions within marriage have been abolished, retaining this requirement is inexplicable on any rational, much less compelling, ground.

B. The Restriction of Marriage To Different-Sex Couples Also Violates Equal Protection Because It Discriminates Against Respondents Based On Their Sexual Orientation.

The exclusion of same-sex couples from marriage also violates the equal protection clause of the California Constitution because it discriminates on the basis of sexual orientation by completely barring lesbian and gay couples from the right to marry.[29] Moreover, contrary to the State's argument (see AOB at 15), there can be no serious dispute that this discrimination is intentional. The current marriage law was last amended to add an express, sex-based limitation in 1977. As the California Supreme Court has noted, the avowed purpose of that bill was "to prevent persons of the same sex from entering lawful marriage." (*Lockyer*, *supra*, 33 Cal.4th at p. 1076 n. 11; see also AA at pp. 116-117 [noting that the purpose of the 1977 amendment was to eliminate any ambiguity as to whether the law excluded same-sex couples].) Contrary to the State's argument, Respondents do not argue that the Legislature therefore intended to permit same-sex couples to marry prior to 1977. Rather, the point is that, even if California's earlier marriage law did not intentionally discriminate against same-sex couples, the current law does now. At least since the

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[29] See footnote 15, *supra*, and accompanying text.

marriage statute was amended in 1977, the Legislature has been cognizant of the discriminatory exclusion of same-sex couples and deliberately has chosen not only to permit that discriminatory provision to remain in effect, but to make the discrimination even more explicit.[30] As the Alaska Supreme Court recently noted, "allowing a discriminatory classification to remain in force is no different than giving it the force of law in the first place." (See *Alaska Civil Liberties Union v. State* (Alaska 2005) -- P.2d --, 2005 Alas. LEXIS 148 [holding that the State of Alaska unconstitutionally discriminated against lesbians and gay men by providing benefits only to married couples while simultaneously restricting marriage to heterosexual couples]; see also *Perez*, *supra*, 32 Cal.2d at p. 737 [Carter, J., concurring] [noting that a law that was reasonable when enacted may become unconstitutional due to changes in the underlying legal and social context].)

The United States Supreme Court recently struck down laws that discriminate on the basis of sexual orientation in *Romer v. Evans* and *Lawrence v. Texas.* In both instances, the Court found that the laws in question could not survive even rational basis review; the Court therefore had no need in either case to address whether laws discriminating based on sexual orientation should be subjected to heightened scrutiny. Those cases powerfully underscore the need to be suspicious that laws classifying based on sexual orientation reflect irrational prejudice, rather than a legitimate

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[30] Indeed, the Legislature itself recognized this in the findings supporting AB 849, which expressly noted that the current law discriminates against same-sex couples. (See Section II.A.1, *supra.*)

public purpose, and thus warrant heightened scrutiny. In both cases, the Court found that the states in question had enacted irrational laws that had no legitimate purpose and served only to discriminate against gays and lesbians. (See *Romer v. Evans* (1996) 517 U.S. 620, 632 [holding that Amendment Two was "inexplicable by anything but animus towards the class it affects" and thus lacked "a rational relationship to legitimate state interests."]; see also *Lawrence*, *supra*, 539 U.S. at p. 580 [O'Connor, J., concurring] [holding that the Texas statute was based "on a desire to harm a politically unpopular group"].) That within the space of ten years the Supreme Court twice has found it necessary to invalidate anti-gay laws as completely irrational speaks powerfully to the prevalence of anti-gay animus and the corresponding need for courts to scrutinize with care laws that classify on the basis of sexual orientation.

The Supreme Court's holding in *Bowers v. Hardwick*, (1986) 478 U.S. 186, and its reversal of that decision seventeen years later, also make plain the need for heightened scrutiny of laws that discriminate against lesbians and gay men. In *Lawrence*, the Supreme Court acknowledged that, for seventeen years, the nation's highest court erroneously had held that lesbians and gay men had no constitutionally protected interest in sexual intimacy and that the states could go so far as to criminalize expressions of sexual intimacy by lesbians and gay men. In *Lawrence*, the Court explained that *Bowers* was wrong the day it was decided. (*Lawrence*, *supra*, 539 U.S. at p. 578.) Nevertheless, for the intervening seventeen years, state legislatures in this country and the electorates of the states believed they could rely on *Bowers* as the supreme law of the land in considering whether to adopt laws that discriminate based on sexual

orientation. Much ensuing state action used *Bowers* as a justification. (See, e.g., Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws* (2000) 25 Harv. C.R.-C.L. L. Rev. 103 [describing the myriad forms of state-sponsored discrimination against lesbians and gay men spawned, and considered justified, by the Supreme Court's holding in *Bowers v. Hardwick*].) Nothing illustrates the need for heightened scrutiny of laws that discriminate based on sexual orientation as strikingly as the Supreme Court's own reconsideration, and overruling, of its opinion in *Bowers*. If even the Supreme Court has been required to consider the impact of anti-gay prejudice on its own jurisprudence and to reverse its decision in *Bowers* in order to stop state-sponsored discrimination that followed in its wake, surely laws that classify on this basis warrant close scrutiny.

In fact, although the California Supreme Court has not ruled *expressly* on what level of scrutiny applies to laws that classify on the basis of sexual orientation, the Court rightly has viewed such laws with suspicion for more than twenty-five years. (*Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458 [holding that government policies that discriminate against lesbians and gay employees violate the state constitutional guarantee of equal protection].) In addition, the California Court of Appeal has suggested that such discrimination warrants heightened scrutiny. (See *Children's Hosp. and Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 769 [identifying race and sexual orientation as examples of suspect classifications under the California Constitution]; see also *Holmes v. California National Guard* (2001) 90 Cal.App.4th 297 [affirming trial court decision holding that sexual orientation classifications

are subject to heightened scrutiny].)[31]

As these decisions reflect, lesbians and gay men clearly meet the criteria generally considered by the California Supreme Court in determining whether classifications that discriminate on a particular basis are suspect and therefore must be subjected to heightened judicial scrutiny. These factors include: 1) whether the group affected has been saddled with legal disabilities or suffered a history of purposeful discrimination; 2) whether the trait used to define the class (*e.g.*, sexual orientation) is unrelated to the ability to perform and contribute to society; and 3) whether the group cannot protect itself sufficiently through the political process. (See *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42; *Sail'er Inn, supra,* 5 Cal.3d at pp. 18-19.)[32] These factors are alternative rather than

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[31] Leading constitutional scholars also long have agreed that sexual orientation classifications should be subject to strict scrutiny. (See, e.g., Laurence H. Tribe, *American Constitutional Law* 1616 (2d ed. 1988); John Hart Ely, *Democracy and Distrust* (1980) pp. 162-164.)

[32] Although some federal courts also have mentioned "immutability" in some of their equal protection decisions, neither the United States Supreme Court nor California courts have held that only classifications based on immutable traits can be deemed suspect. Even if it were necessary, however, immutability does not mean "genetic." Rather, it refers to a characteristic that is "beyond the individual's control." (*City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 441 [explaining why illegitimacy is a suspect classification].) It does not mean an absolute inability to change the class trait. Illegitimate children can be adopted; aliens can become naturalized; people can change their sex; and members of certain races and ethnic groups can "pass" as white or hide their national origin. Rather, immutable means a characteristic that an individual "either cannot change, or should not be required to change because it is fundamental to . . . individual identities or consciences." (footnote continued)

cumulative; a group need not meet all of these criteria in order for laws affecting that group to warrant some form of heightened review. (See, e.g., *Bay Area Women's Coalition v. City and County of San Francisco* (1978) 78 Cal.App.3d 961, 966 [noting that, to be considered "suspect" for equal protection purposes, the group "must be one which has been 'saddled with such disabilities, *or* subjected to such a history of purposeful unequal treatment.'"] [emphasis added]; accord, *Tain v. State Bd. of Chiropractic Examiners* (2005) 130 Cal.App.4th 609, 630 [quoting *Bowens*, *supra*, 1 Cal.4th at p. 42].)[33]

Although it need not do so to trigger heightened scrutiny,

(*Hernandez-Montiel v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084, 1092.) Based on this definition, sexual orientation clearly is immutable. (See *id.* at 1093 ["Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."]; *Karouni v. Gonzalez* (9th Cir. 2005) 399 F.3d 1163, 1173 [same].)

[33] Although California's and the federal analysis are similar, they are not co-extensive. As the Court in *Tain* pointed out, "To date, the United States Supreme Court has refused to extend the highest level of scrutiny under the Fourteenth Amendment beyond race and alienage to such classes as gender [and] sexual orientation ...." (*Tain*, *supra*, 130 Cal.App.4th at p. 630.) In our state, by contrast, gender classifications have received the most rigorous scrutiny for decades. (See, e.g., *Sail'er Inn*, *supra*, 5 Cal.3d 1; see also *Catholic Charities, supra,* 32 Cal.4th 527.) Federal law also has lagged behind California's with regard to discriminatory classifications based on sexual orientation. Where the California Supreme Court applied meaningful equal protection review to such an exclusion in 1979, the United States Supreme Court did not do so until seventeen years later. (Compare *Gay Law Students*, *supra*, 24 Cal.3d 458, with *Romer, supra,* 517 U.S. 620.)

discrimination based on sexual orientation clearly meets all of the indicia for concluding that a classification warrants strict scrutiny. Lesbians and gay men historically have been, and still are, targets of irrational and invidious discrimination. As the Court of Appeal observed in *People v. Garcia* (2000) 77 Cal.App.4th 1269, "Lesbians and gay men ... share a history of persecution comparable to that of Blacks and women." (*Id.* at p. 1276 [holding that excluding jurors on the basis of their sexual orientation violates the California Constitution].) The *Garcia* court added, "Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' ... and such 'immediate and severe opprobrium' as homosexuals." (*Id.* at p. 1279 [citing *Rowland v. Mad River Local Sch. Dist.* (1985) 470 U.S. 1009, 1014] [Brennan, J., dissenting from denial of cert.]; see also *Lawrence*, *supra*, 539 U.S. at p. 559 [noting that "for centuries there have been powerful voices to condemn homosexual conduct as immoral"].)

Indeed, California case law documents the longstanding and pervasive nature of anti-gay discrimination in this state. (See, e.g., *Stouman v. Reilly* (1951) 37 Cal.2d 713 [describing standard practice on the part of bars and restaurants of refusing service to patrons suspected of being gay]; *In re Joshua H.* (1993) 13 Cal.App.4th 1718 [discussing hate violence against gay people]; *Gay Law Students Ass'n*, *supra*, 24 Cal.3d at p. 458 [addressing policy of major public employer of categorically excluding all gay people from employment]; *Murray v. Oceanside School District* (2000)

79 Cal.App.4th 1338 [describing anti-gay workplace harassment].)[34]

The California Legislature explicitly recognized the continuing history of discrimination against lesbian and gay people, as well as the constitutional mandate to end that discrimination, in its passage two years ago of AB 205, finding that: "Expanding the rights and creating responsibilities of registered domestic partners would ... reduce *discrimination on the bas[i]s of ... sexual orientation* in a manner consistent with the requirements of the California Constitution." (2003 Cal. Legis. Serv. Ch. 421 (A.B. 205) § 1(b) [emphasis added].)[35] The California Supreme Court recently echoed the legislative findings in AB 205 concerning the longstanding history of discrimination against lesbians and gay men. In *Koebke*, the California Supreme Court expressly stated that "discrimination based on marital status implicates discrimination against

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[34] Despite the enactment in California of many anti-discrimination laws, social prejudice, including bias crimes against gay people, persists at alarming levels. According to statistics compiled by the California Department of Justice and by Los Angeles County, hate crimes based on sexual orientation consistently rank as the second largest category of such crimes, trailing only those based on race, despite the disproportionately small size of the lesbian and gay population. California's most recent hate crimes report is available at <http://ag.ca.gov/cjsc/publications/hatecrimes/hc04/preface.pdf>, and the most recent Los Angeles County report is available at <http://www.lahumanrelations.org/publications/docs/HRC2003Final3.pdf>.

[35] As previously noted, the Legislature reiterated this finding in passing AB 849, which although vetoed by the Governor, is relevant to the Legislature's understanding of the existing, unamended law. (See *Freedom Newspapers v. Orange County Employees Ret. Sys.*, *supra*, 6 Cal.4th at p. 832.)

homosexuals who, as the Legislature recognized in the Domestic Partner Act, have been subject to widespread discrimination." (*Koebke*, *supra*, 36 Cal.4th at p. 849.)

In addition, being lesbian or gay has no bearing on a person's ability to perform or contribute to society. All three branches of California government have adopted policies prohibiting discrimination against lesbian and gay people in a wide variety of contexts.[36] Through these policies, the state resoundingly has rejected the view that sexual orientation has any correlation with an individual's ability to perform in society or is, in itself, a proper basis for differential treatment.

Finally, as noted above, lesbians and gay men have been the target of repeated efforts to use the majoritarian political process to deny them basic legal protections and to relegate them to second-class citizenship, including initiative campaigns such as those that resulted in the enactment of Amendment 2 in Colorado,[37] the adoption of sweeping constitutional

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[36] See, e.g., Gov't Code § 12940 [prohibiting employment discrimination on the basis of sexual orientation]; Cal. Executive Order No. B-54-79 [barring sexual orientation discrimination in agencies of the state government under the jurisdiction of the Governor]; 10 Cal. Code of Regs. 2695.7 [prohibiting sexual orientation discrimination in insurance claims settlement practices]; *Gay Law Students*, *supra*, 24 Cal.3d 458 [holding that California Constitution prohibits the state or governmental entity from arbitrarily discriminating on the basis of sexual orientation]; Cal. Code of Judicial Ethics, Canon 3 [prohibiting judicial bias or prejudice on the basis of sexual orientation].

[37] Amendment 2, which the U.S. Supreme Court struck down as a violation of the federal equal protection clause in *Romer,* , was an initiative enacted by Colorado voters to amend that state's constitution to prohibit

(footnote continued)

amendments prohibiting provision of any rights to those in same-sex relationships,[38] and Proposition 22 in this state.[39] Indeed, the treatment of lesbian and gay Americans throughout our country's history provides ample examples of prejudice enacted into exclusionary laws. Consequently, laws that single out gay people for disfavored treatment should receive searching review because they are so likely to have been fueled by prejudice. (See, e.g., *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1029, 1031 [describing local initiative measure that would repeal city's anti-discrimination ordinances and ban any future measures protecting gay persons or persons with AIDS from discrimination as so "plainly designed to encourage ... discrimination" that "[a]ll that is lacking is a sack of stones for throwing"].)[40]

"all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons." (*Romer*, *supra*, 517 U.S. at p. 624.)

[38] See, e.g., *Citizens for Equal Protection, Inc. v. Bruning* (D. Neb. 2005) 368 F. Supp. 2d 980.

[39] As noted in the Statement of the Case above, Proposition 22 is an initiative statute enacted by California voters in 2000, in order to prevent California from having to honor marriages of same-sex couples from other jurisdictions. Similarly, in recent weeks, two different groups have submitted numerous proposals to amend the California Constitution to maintain the "no gays allowed" marriage rule, and also to repeal the state's domestic partnership laws. (See http://ag.ca.gov/initiatives/activeindex.htm [listing active initiative measures].)

[40] The enactment of laws prohibiting discrimination on the basis of sexual orientation does not mean that heightened scrutiny of laws that discriminate against lesbians and gay men is not needed. Women and most racial, ethnic and religious minority groups are protected from

(footnote continued)

III. Denying Those In Same-Sex Relationships The Right To Solemnize A Lawful Marriage Unconstitutionally Abridges Their Right to Free Expression.

By prohibiting those in same-sex relationships from expressing their mutual love and commitment through marriage, the California marriage statutes also impermissibly infringe the free expression rights of lesbian and gay people.[41] As the United States Supreme Court aptly observed in *Turner v. Safley* (1987) 482 U.S. 78, marriage is a unique form of personal and public expression that enables those in committed relationships to convey to one another and the rest of the world the depth of their devotion to and love for each other. (*Id.* at pp. 95-96 [explaining that the marriages of prison inmates, "like others, are expressions of emotional support and public commitment"].) Because the current law prohibits lesbian and gay couples from communicating their commitment through marriage, it

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discrimination by an array of state and federal laws that far exceed the limited protections afforded lesbians and gay men. Yet the existence of such laws does not change the fact that classifications affecting those minority groups nevertheless are subject to heightened scrutiny. In fact, laws that discriminate on the basis of race and sex have been found to deserve strict scrutiny after passage of state and federal laws that prohibit discrimination on these bases. In *Frontiero v. Richardson* (1973) 411 U.S. 677, 687-88, for example, the Court noted that such protections constitute strong evidence that the legislature has acknowledged a history of purposeful unequal treatment. Thus, the limited protections for lesbians and gay men that exist today, which are far narrower than those protecting women when gender was first determined to be a suspect class, do not preclude strict scrutiny of classifications on the basis of sexual orientation.

[41] The rights of free expression and association are protected in Article I, sections 1 through 3 of the California Constitution.

burdens their right to free expression under the state constitution. (See David Cruz, "*Just Don't Call it Marriage*": *The First Amendment and Marriage as an Expressive Resource* (May 2001) 74 S. Cal. L. Rev. 925.)

The California Supreme Court repeatedly has emphasized that our state constitution's protection of expression is "broader" and "greater" than that contained in the First Amendment of the United States Constitution because Article I, section 2 of the California Constitution expressly embraces people's right to express themselves on "all subjects." (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 15 [quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 482]; *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366-67 [collecting cases].)

As a result, California's constitutional protection of expression extends quite broadly to conduct as diverse as fortune-telling (*Spiritual Psychic Science Church v. City of Asuza* (1985) 39 Cal.3d 501, 512); solicitation on privately-owned property (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910); and even growing a beard as a symbol of masculinity or nonconformity. (*Finot v. Pasadena City Bd. of Education* (1967) 250 Cal.App.2d 189, 201-02.)

The California Supreme Court recognized many years ago that the freedom to engage in protected expression is particularly important to the civil rights struggles of gay people. The high court emphasized that, when lesbians and gay men "come out of the closet" and otherwise engage in "the struggle ... for equal rights," this "must be recognized as ... political activity" that "bears a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities." (*Gay Law Students*

Ass'n, *supra*, 24 Cal.3d at p. 488; see also *Rowland v. Mad River Sch. Dist* (1985) 470 U.S. 1009 [Brennan, J., dissenting from a denial of cert.].)

Marriage also involves profoundly personal and symbolic communication between the spouses, and with the public. It thus is entitled to "free expression" protection. Accordingly, like attempts to ban flag-burning because of "the flag's status as a symbol of our nation and certain national ideals" (*United States v. Eichman* (1990) 496 U.S 310, 316), the fact that some people would like marriage to symbolize a preferred status exclusively for different-sex unions cannot justify the restriction. (See *Texas v. Johnson* (1989) 491 U.S. 397, 413 [rejecting notion that "government may permit designated symbols to communicate only a limited set of messages"].)[42]

Restrictions on speech – or on who may speak – because of the message that will be conveyed are presumed to be unconstitutional because of the specter of government suppression of disfavored ideas or views. (*In re M.S.* (1995) 10 Cal.4th 698, 720.) Thus, for example, the government could not reserve the oath of new citizenship only for those of European descent, while requiring all others to submit a notarized form. Likewise, the State could not permit only male students to recite the Pledge of Allegiance, while requiring female students who wish to express their

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[42] While Respondents seek to marry to celebrate and participate in the institution, not to criticize it, participation in civil marriage, like flag-burning, is conduct 'sufficiently imbued with elements of communication to implicate" the freedom of expression. (See *Texas v. Johnson*, *supra*, 491 U.S. at 414.)

loyalty and patriotism to stand silently at attention in the back of the room. Yet this is essentially what the State proposes with its argument that gay couples should be excluded from marriage in order to preserve a message that the State believes a majority of heterosexuals want to maintain. (See, e.g., AOB at p. 2 ["Today, millions of California citizens contend that the word 'marriage' has a particular meaning to them, . . . and that that common meaning of marriage should not change."].)

Contrary to the State's argument, same-sex couples also are entitled to use the same language -- language that is best understood by others as connoting family -- to convey to others their level of love and commitment.

Because the State is seeking to prevent a certain class – same-sex couples – from access to this expression, the State bears the burden to show that this restriction is narrowly tailored to achieve state interests that are not only legitimate, but compelling. (*Keenan v. Superior Court* (2002) 27 Cal. 4th 413, 429, 436.) Indeed, the official muzzle on this expression must be necessary – that is, the least restrictive way – of meeting those interests. (*Id.* at p. 429.)

The State cannot meet this heavy burden. Because of the unique messages marriage conveys, neither domestic partnerships nor private commitment ceremonies provide an adequate expressive alternative. The act of marriage declares a couple's intentions and love in a manner that is universally understood. When a couple says, "we're married," everyone knows what that means – even across barriers of language and culture. In contrast, the terms "domestic partnership" and "commitment ceremony" are unfamiliar.

Although most of the Respondents have registered as domestic

partners and many have had commitment ceremonies, they have not received the same respect and understanding from family, friends, and society that automatically is accorded to couples who have married. For example, although Myra and Ida have been together for over twenty-nine years, they still have constant reminders that their "relationship is not respected the way a married couple's relationship is respected. Over time, this wears away at a person." (RA at p. 102.)

Many of the Respondents' parents also recognize the connection between this exclusion and the second-class status imposed upon their children. Judy Baker explained that she would like "to see an end to the messages of exclusion" which she knows causes her son and his life partner to "endure a sense of second-class citizenship." (RA at p. 176.) Similarly, Mary Davis believes that discrimination against lesbian and gay people like her son Corey will be reduced "when gay couples are able to get married because that will help others see them as serious, loving couples just like other couples who make solemn commitments. It will bring an important validation they deserve." (RA at p. 172.)

In sum, there is no adequate alternative for Respondents to express to one another and to society at large the importance of their relationships, and their shared love and commitment. Because there is no legitimate, let alone compelling, reason selectively to keep Respondents' relationships in the closet of an institution other than marriage, the State unconstitutionally is infringing Respondents' rights to freedom of expression and expressive association under the California Constitution.

IV. The State Has Failed To Identify Any Legitimate, Much Less Compelling, Reason To Bar Same-Sex Couples From Marriage.

The statutory exclusion of same-sex couples from marriage is subject to strict scrutiny because it abridges Respondents' fundamental right to marry, discriminates on the suspect bases of sex and of sexual orientation, and infringes their right to freedom of expression and association. To justify this exclusion, the State must show that barring same-sex couples from marriage is necessary to serve a compelling state interest, which it cannot do. (See, e.g., *Warden v. State Bar* (1999) 21 Cal.4th 628, 640-641 [holding that in cases involving suspect classifications or fundamental rights, "*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."] [emphases in original].)

The State asserts only two interests in excluding same-sex couples from marriage: (1) deference to "the common understanding of marriage;" and (2) deference to the "legislative process." (AOB at pp. 32-37.) As Judge Kramer determined below, neither of these interests is sufficient even under the lowest level of scrutiny, and certainly neither is sufficient under the heightened scrutiny that must be applied in this case. (AA at p. 111 [holding that even under the rational basis test, "Family Code sections 300 and 308.5 fail to meet constitutional muster"].)

The State also erroneously asserts that, by providing same-sex couples with a separate legal status that offers an approximation of equality, the State has met its constitutional burden and need not justify itself any further. But domestic partnership is not a constitutionally acceptable

substitute for marriage because our Constitution does not guarantee lesbians and gay men "approximately equal protection," but rather *equal* protection. Domestic partnership under California law is not equal to marriage either in its specifics, or in the status it creates. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 30-31 [detailing differences between California domestic partnership status and marriage, as discussed in Section III(C) hereof, below].)

In a footnote, the State also erroneously suggests that, under the rational basis standard, the marriage statutes should be upheld if there is "*any conceivable* legitimate interest" to support them. (AOB at p. 34 n. 22.) But even under the rational basis test, a challenged classification must be "*reasonably* conceivable" and must at least rationally advance a government interest that is both legitimate and independent of the classification. (See, e.g., *People v. Wilkinson* (2004) 33 Cal.4th 831, 836; see also *Romer*, *supra*, 517 U.S. at p. 631; *Lawrence*, *supra*, 539 U.S. at p. 583 [O'Connor, J., concurring].)

Of particular relevance here, "[w]hen one class is treated differently from another, there must be some rationality in the nature of the class singled out." (*Quackenbush v. Superior Court* (1997) 60 Cal.App.4th 454, 466 [citing *Brown v. Merlo* (1973) 8 Cal.3d 855, 861].) The classification "must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situation related to the subject-matter of the legislation." (*Young v. Haines* (1986) 41 Cal.3d 883, 900; see also *Merlo*, *supra*, 8 Cal.3d 855 at p. 861.)

Here, the State effectively concedes that the exclusion of same-sex couples from marriage fails this test. As the State admits, the current

restriction is not based on any "inherent differences" between gay and heterosexual people in relation to their need for, or interests in securing, the tangible and intangible benefits provided by marriage. Rather, the only justification proffered by the State is deference to the majority's desire to maintain marriage as a status available only to heterosexual couples. (See, e.g., AOB at p. 33 ["The word 'marriage' has a particular meaning for millions of Californians, and that common understanding of marriage is important to them."].) The State concedes, that is, that its only justification is the desire to maintain a distinction between the majority and a disfavored group, which even the most deferential level of constitutional review does not permit. (See *Young v. Haines*, *supra*, 41 Cal.3d at p. 900 [legislation "must involve something more than mere characteristics which will serve to divide or identify the class"]; *Romer*, 517 U.S. at p. 633 [The goal of rational basis review is to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."].) As explained further below, the State's reliance on "tradition" fails for the same reason, because it serves no interest independent of the classification. (*Romer*, *supra*, 517 U.S. at p. 633.) The State's asserted interest in tradition does not explain the classification, it merely repeats it, rendering it "a classification undertaken for its own sake, something the Equal Protection Clause does not permit." (*Id.* at p. 634.)

A. Tradition Is An Insufficient Basis For Barring Lesbians And Gay Men From An Important Right.

Contrary to the State's argument, deference to tradition, without more, is not a legitimate, much less a compelling, state interest. The State may not maintain an arbitrary and discriminatory statute, simply because it

has done so in the past. As Judge Kramer held, "The State's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional." (AA at p. 113; see also *Lawrence*, *supra*, 539 U.S. at pp. 557-558 ["neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."].)

When *Perez* was decided, there was a nearly "unbroken line of judicial support, both state and federal, for the validity of [anti-miscegenation laws]." (*Perez, supra,* 32 Cal.2d at p. 752 [Shenk, J., dissenting].) Even the United States Supreme Court had approved such laws, affirming a conviction under a statute authorizing up to seven years of hard labor as punishment for entering into an interracial relationship. (*Pace v. Alabama* (1883) 106 U.S. 583.) The *Perez* majority was not deterred, however, by the dissent's citation of decisions upholding anti-miscegenation laws (*Perez*, 32 Cal.2d at p. 752), nor by its complaints that "such laws have been in effect in this country since before our national independence and in this state since our first legislative session." (*Id.* at p. 742.) The majority understood that the long-standing duration of a wrong cannot justify its perpetuation. (See *id.* at pp. 724-26; see also AA at p. 113 [Final Decision] ["Even under the rational basis standard, a statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time"].)

Likewise, this Court should not be deterred by the State's recitation of decisions upholding the validity of similarly discriminatory marriage laws in other states. Many of those decisions date from the 1970s and 80s, at a time when public, legislative, and judicial recognition of the serious harms caused by discrimination against same-sex couples and their children

was substantially less developed than it is now.[43] Others rely on arguments that simply are not tenable under controlling California policy and jurisprudence. Moreover, because same-sex couples can now marry in several jurisdictions, the State's assertion of a "common" definition of marriage that universally excludes lesbian and gay couples is palpably untrue. Already courts and legislatures elsewhere in the country and around the world, fulfilling their constitutional duties, have come to see the injustice of perpetuating the exclusion of same-sex couples from civil marriage.[44]

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[43] In addition, although the State cites *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, *cert. denied* (1972) 409 U.S. 810, that case presents no obstacle to the instant action. In addition to its early date and paucity of analysis, *Baker* was based exclusively on the federal constitution, whereas Respondents rely on the California Constitution.

[44] See, e.g., *Goodridge*, *supra*, 798 N.E.2d 941 [holding that excluding same-sex couples from the right to marry violates the Massachusetts Constitution]; *Hernandez v. Robles* (N.Y. Supr. Ct. 2004) 794 N.Y.S.2d 579, appeal docketed [holding that excluding same-sex couples from the right to marry violates the New York Constitution]; *Castle v. Washington* (Wash. Supr. Ct. 2004), Case No. 04-2-00614-4, 2004 WL 1985215, appeal docketed [same with regard to the Washington Constitution]; *Andersen v. King County* (Wash. Supr. Ct. 2004), Case No. 04-2-04964-4-SEA, 2004 WL 1738447, appeal docketed [same]; *Halpern v. Toronto* (Ont. Ct. App. 2003) 172 O.A.C. 276 [same with regard to the Canadian Constitution]; *Hendricks v. Quebec* (Quebec Ct. App. 2004) [2004] R.J.Q. 851 [same]; *EGALE Canada, Inc. v. Attorney General of Canada* (B.C. Ct. App. 2003) 13 B.C.L.R.4th 1 [same]; *Dunbar v. Yukon* (Yukon S.Ct. 2004) [2004] Y.K.S.C. 54; *Fourie v. Minister of Home Affairs* (South Africa Ct. App. 2004) Case No, 232, 2003 [same with regard to the South African Constitution]; see also *Baehr*, *supra*, 875 P.2d 225 [holding that excluding same-sex couples from the right to marry discriminated on

(footnote continued)

The *Perez* court also was not dissuaded by the widespread popular support for excluding interracial couples from marriage that existed in 1948.[45] Instead, the Court took seriously its sworn obligation to ensure that, no matter how strongly "tradition" or public sentiment might support such laws, legislation infringing a right as fundamental as the right to marry "must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." (*Perez, supra,* 32 Cal.2d at p. 715.)

The Massachusetts Supreme Judicial Court recently reached the same conclusion. After the Court held in *Goodridge* that same-sex couples have an equal right to marry, the Massachusetts Senate asked the Court

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the basis of sex, and remanding for a determination of whether such discrimination was justified by a compelling state interest].

In addition to these judicial decisions, the Netherlands, Belgium, Canada, and Spain have enacted legislation allowing same-sex couples to marry. (AP, *Gay Marriage Approved*, N.Y. Times (July 21, 2005) p. 6 [describing Canada]; Renwick McLean, *Spain Legalizes Gay Marriage; Law Is Among the Most Liberal*, N.Y. Times (July 1, 2005) p. 9.)

[45] Nearly twenty years later, in 1967, 72% of Americans still were opposed to interracial relationships and 48% thought they should be illegal. (E.J. Graff, *What is Marriage For? The Strange History of Our Most Intimate Institution* (1999) 79, 156.) In fact, just five years ago, when the voters of Alabama considered repealing the state's unenforceable ban on interracial marriage, more than 300,000 voters, comprising approximately 40% of that state's voting public, sought to maintain that ban on the books. (*Alabama Repeals Ban Against Interracial Marriage* (Nov. 8, 2000) CHATTANOOGA TIMES, B2.)

whether, rather than permitting same-sex couples to marry, the Legislature permissibly could assign those couples to a separate legal status in order to "preserv[e] the traditional historic nature and meaning of the institution of civil marriage" without violating the Massachusetts Constitution. (Mass. Senate Bill 2175, § 1(g).) The Court held that such a separate institution would compound, rather than remedy, the constitutional infirmity identified in *Goodridge*. (*Opinions of the Justices to the Senate* (2004) 802 N.E.2d 565, 569 ["The same defects of rationality evident in the marriage ban . . . are evident in, if not exaggerated by, Senate No. 2175."].) The Court explained that the government may not, "under the guise of protecting 'traditional' values, even if they be the traditional values of the majority, enshrine in the law an invidious discrimination that our Constitution ... forbids." (*Id.* at p. 570 [quoting *Goodridge*, *supra*, 798 N.E.2d at p. 948]; see also *Lawrence*, *supra*, 539 U.S. at p. 577 ["[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."].)

That some people disapprove of permitting same-sex couples to marry does not justify denying same-sex couples that right or relegating them to a separate status of "domestic partnerships."[46] To the contrary, it is

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[46] Respondents seek the right to *civil* marriage sanctioned by the State, not religious marriage. Religious groups can, of course, refuse any couple's request to be married or otherwise decline to recognize, for religious purposes, a civil marriage permitted by law. That is true currently with regard to different-sex couples who marry legally, such as with the Catholic Church's refusal to recognize second marriages of Catholics who divorce, or Orthodox Judaism's refusal to perform religious marriages
(footnote continued)

well-settled that governmental discrimination is especially pernicious when it is designed to accommodate societal prejudice. (*Palmore v. Sidoti* (1984) 466 U.S. 429, 433 ["The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."]; see also *City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 448 ["[T]he [government] may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic"].)

The same principle applies equally here. The right to marry is fundamental, and thus must be secured equally to all, even if some portion of the public disapproves.

B. Deference To the Legislative Process Does Not Justify Excluding All Lesbian and Gay Couples From Marriage.

The State also argues that this Court should uphold the discriminatory marriage statutes based on the State's unsupported contention that the "People" have created an "appropriate . . . balance" of

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between Jews and non-Jews. Ending governmental discrimination against same-sex couples will not change the rights of religious groups. To the contrary, as the Ontario Court of Appeal explained, "Freedom of religion . . . ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views." (*Halpern*, *supra*, 172 O.A.C. 276, at ¶ 139.) Any other result would threaten the California Constitution's ban on religious preferences. (Cal. Const., art. I, sec. 4.)

"legitimate interests." (AOB at p. 34.) The State does not even attempt to give a novel framing to this argument, which it advanced more than fifty years ago – with similar lack of persuasiveness – in defense of the miscegenation laws.

Contrary to the State's position, it *is* the role of the judiciary, not the people or even the Legislature, to decide whether statutes comport with the requirements of the Constitution. (*Parr v. Municipal Court* (1971) 3 Cal.3d 861, 870 ["Constitutional questions are not determined by a consensus of current public opinion."].) Thus, when the State argued in *Perez* that the issue was best left to the legislature, not the courts, the Supreme Court rejected the contention out of hand. (See *Perez*, *supra*, 32 Cal.2d at p. 738 ["[I]t is said that it is not the policy of the court but that of the Legislature which should control."] [Carter, J., concurring]; accord *Baehr v. Lewin* (1993) 74 Haw. 530, 582 [rejecting dissent's contention that the matter is best left for the legislature, explaining: "The only legitimate inquiry we can make is whether it is constitutional."].)

As the courts have recognized, the judiciary has a weighty duty to safeguard the rights of individuals and vulnerable minorities, especially where issues of great public controversy and public importance are concerned:

> The separation of powers doctrine ... establishes ... checks and balances to protect any one branch against the overreaching of any other branch. [citations.] Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and *in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.*

(*Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 964 n. 3 [emphasis added]; see also *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1215 ["[A] challenge to the constitutionality of an act is inherently a judicial rather than political question[.]"].) The judiciary is entrusted with this weighty role precisely because it is most insulated from popular prejudice and opinion. "Because of its independence and long tenure, the judiciary ... can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.)

The *Perez* Court also rejected the argument that courts necessarily must defer to the Legislature with regard to marriage. (See, e.g., *Perez*, *supra*, 32 Cal.2d at p. 745 [Shenk, J. dissenting] [arguing that "the right of the state to exercise extensive control over the marriage contract has always been recognized"].) Although acknowledging that "[t]he regulation of marriage is ... a proper function of the state," the Court recognized that the State must exercise its power to regulate marriage within constitutional limits. (*Id.* at p. 713 ["No law within the broad areas of state interest may be unreasonably arbitrary and discriminatory."]; see also *Beeler v. Beeler* (1954) 124 Cal.App.2d 679, 682 ["The regulation of marriage ... is solely within the province of the Legislature, *except as the same may be restricted by the Constitution*." [emphasis added].)

As Justice Carter explained in *Perez*, the usual deference owed to legislation does not apply in "cases involving discrimination." (*Perez*, *supra*, 32 Cal.2d at p. 738 [Carter, J., concurring].) Rather, a law that curtails the rights of a single group must be viewed with suspicion, and that

"suspicion . . . is sufficient to overcome the presumption of validity and constitutionality normally present when a statute is attacked as unconstitutional." (*Id.*; see also *Connerly, supra,* 92 Cal.App.4th at p. 44 [a law that facially discriminates "is not entitled to a presumption of validity and is instead presumed invalid."].)

The State's argument that the Court should defer to the Legislature on this issue is particularly inappropriate in light of the Legislature's express finding, when it passed AB 849, that the current marriage law violates the California Constitution. As the Legislature now has made clear, it does *not* consider the current exclusion of same-sex couples from marriage to strike an "appropriate ... balance," nor does it believe that the discriminatory exclusion of same-sex couples from marriage is based on "legitimate interests." (AOB at p. 34.) Rather, as Respondents also agree, the Legislature has determined that the current legislative scheme is unconstitutional and must give way to the true equality that our state's Constitution demands.

C. Domestic Partnership Is Not A Constitutionally Adequate Substitute For Marriage.

Respondents seek marriage, not simply a bundle of specific rights and benefits. The State's argument that Respondents should be satisfied with such a bundle, under the rubric of "domestic partnership," offends not only same-sex couples, such as Respondents, who yearn for the right to wed, but should offend every person who values marriage as a "cherished" institution. (*Goodridge*, *supra*, 798 N.E.2d at p. 949; see also *Lockyer*, *supra*, 33 Cal.4th at p. 1132 [Kennard, J., dissenting in part and concurring in part] ["For many, marriage is the most significant and most highly

treasured experience in a lifetime."].)

In contrast to marriage, domestic partnership is a lesser status, and a lesser experience. Even with regard to tangible benefits, it is patently inferior. Recently, the Third District held that, even with AB 205 now fully operative, domestic partners still do *not* enjoy the legal status of marriage. (*Knight v. Superior Court, supra,* 128 Cal.App.4th at p. 30 ["[T]he Legislature has not created a 'marriage' by another name or granted domestic partners a status equivalent to married spouses."]. As the Court in Knight explained:

> In fact, domestic partners do not receive a number of marital rights and benefits. For example, they may not file joint tax returns and their earned income is not treated as community property for state income tax purposes (§ 297.5, subd. (g)), and they are not entitled to numerous benefits provided to married couples by the federal government (§ 297.5, subd. (k)), such as marital benefits relating to social security, Medicare, federal housing, food stamps, veterans' benefits, military benefits, and federal employment benefit laws. And prerequisites for the formation of domestic partnerships differ from marriage. Persons under the age of 18 who wish to marry may do so with parental consent (§ 302); however, there is no similar provision for minors to register as domestic partners. In addition, homosexuals must share a common residence before they can register as domestic partners (§ 297, subd. (b)(1)), but there is no similar limitation for persons who wish to marry....
>
> In addition, the mechanisms for forming and terminating the relationships are different. Domestic partners simply file with the Secretary of State a Declaration of Domestic Partnership to form their legal union (§ 298.5); but couples who want to marry must obtain a license and participate in some form of ceremony solemnizing their marriage. (§§ 300; 420.) Another difference is the method for terminating a domestic partnership. If there are no children of the union, if the partnership is not more than five years in

> duration, and if the partners meet certain conditions relating to property and debts, they may terminate the relationship simply by filing with the Secretary of State a Notice of Termination of Domestic Partnership (§ 299.) The dissolution of a marriage under similar circumstances requires judicial intervention. (§§ 2400-2403.) These factors indicate marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership. More than the mere filing of documents with the Secretary of State is required to form or dissolve a marriage.

(*ID.* AT P. 31.)

The Respondents are directly harmed by this tangible inequality. For example, although Ida Matson devoted her working years to the Santa Clara County Transportation Agency, her registered domestic partnership does not entitle her to obtain long-term care insurance for her partner of 28 years, Myra Beals, as married retirees are entitled to do for their spouses. (RA at p. 99; Cal. Fam. Code § 297.5(h).) Likewise, because they cannot file their state income taxes jointly and earned income is not treated as community property for state income tax purposes, every year wage-earner Lancy Woo and stay-at-home parent Cristy Chung suffer unfair tax treatment that lets them know to the dollar the extent of their family's inequality. (RA at p. 77; Cal. Fam. Code § 297.5(g).)

California's continued distinction between the legal statuses of marriage and domestic partnership also prevents same-sex couples from having standing to challenge the federal government's limitation to different-sex couples of 1,138 federal rights and protections extended to

married couples.[47] Domestic partnership also lacks the transportability of legal recognition that the status of marriage would confer for purposes of travel to other jurisdictions that recognize (or might recognize) the marriages of same-sex couples.[48] These include the state of Massachusetts and other states that have not definitively limited marriage to different-sex couples, as well as our nation's nearest neighbor to the north – Canada – and the nations of the Netherlands, Belgium, and Spain.

But even if domestic partnership provided fully equal benefits, which it does not, the separate status would remain demeaning and constitutionally insufficient. As the Ontario Court of Appeal held in *Halpern v. Canada* (2003) 172 O.A.C. 276, "The societal significance of marriage ... cannot be overlooked.... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex

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[47] Assoc. Gen. Counsel, GAO, letter to Sen. Maj. Leader Bill Frist, Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Jan. 23, 2004), at <http://www.gao.gov/new.items/d04353r.pdf>; see also Assoc. Gen. Counsel, GAO, letter to Chairman of the House Judiciary Comm., Henry Hyde, Defense of Marriage Act, OGC 97-16 (Jan. 31, 1997), at: <http://www.gao.gov/archive/1997/og97016.pdf>.

[48] See *Knight*, *supra*, 128 Cal.App.4th at p. 31 ["[U]nlike a marriage, a domestic partnership will not automatically be recognized by other states. Therefore, if the domestic partners move out of California, the rights bestowed by our state's domestic partnership law may well become illusory.... And many of the rights bestowed upon domestic partners, such as the right to visit their hospitalized partner and to make medical decisions for him or her, may not be acknowledged by other states. Consequently, domestic partners do not have the same freedom to travel and retain the benefits associated with their union as do married persons."].

relationships." By purposefully excluding lesbian and gay couples from the legal and social validation provided only by marriage, the law cuts to the core of their dignity and full citizenship. Indeed, as the Supreme Court of Appeals of South Africa recently held, when striking that country's ban on marriage by same-sex couples, it cuts to the core of their very humanity: "marriage and the capacity to get married remain central to our self-definition as humans." (*Fourie v. Minister of Home Affairs* (South Africa Ct. App. 2004) Case No, 232, 2003; see also *Goodridge*, *supra*, 798 N.E.2d at p. 957 ["Without the right to marry – or more properly, the right to choose to marry – one is excluded from the full range of human experience[.]"].)

As with the history of anti-miscegenation laws, this country's effort to respond to racial discrimination through facilities or opportunities that were labeled "separate but equal" is highly instructive. The problem with that approach, as history so devastatingly reveals, is not simply that providing tangible equality through a separate system is difficult but that, at a far more profound level, the exercise itself is demeaning — labeling one disempowered group not merely as different, but as unworthy of equal dignity and equal regard as human beings. (See *Opinions of the Justices*, *supra*, 802 N.E.2d at p. 570 ["[t]he dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual-couples to second-class status."]; see also *Barbeau v. Attorney General* (B.C. Ct. App. 2003) 2003 BCCA 251 at Para. 156 ["Any other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality.

This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal' or to leave it to government to choose amongst less-than-equal solutions.")[49]

The constitutional guarantee of equality is not only about equal access to tangible things such as goods and services, education, and employment. It is also about the right to be free from government discrimination. "[T]he right to equal treatment ... is not coextensive with any substantive rights to the benefits denied the party discriminated against." (*Heckler v. Matthews* (1984) 465 U.S. 728, 739.) Rather, official discrimination is harmful in itself, because, "by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, [it] can cause serious noneconomic injuries[.]" (*Id.* at pp. 739-40; see also *Allen v. Wright* (1984) 468 U.S. 737, 755 ["[T]he stigmatizing

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[49] The State incorrectly asserts that the Vermont Supreme Court "expressly held that Vermont was not required to afford such rights by redefining marriage," in *Baker v. State* (Vt. 1999) 744 A.2d 864. To the contrary, because the parties' "claims and arguments [in *Baker*] focused primarily on the consequences of official exclusion from the statutory benefits, protections, and security incident to marry under Vermont law," the Court limited its holding to the conclusion that the denial of these benefits, protections and securities violated the Vermont Constitution. (*Id.* at p. 886.) The Vermont Supreme Court *never has ruled on* whether a separate status only for lesbian and gay couples is constitutionally adequate. (*Ibid.* ["While some future case may attempt to establish that -- notwithstanding equal benefits and protections under Vermont law -- the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today."].)

injury often caused by ... discrimination ... is one of the most serious consequences of discriminatory government action."].)

It is no more acceptable for the State of California to assign a lesser family status to gay people than it would be for the State to do so for any other minority group. For example, if the State were to determine that Muslims or those of Iraqi descent, or left-handed people, were eligible only for domestic partnership, while everyone else remained eligible to marry, the constitutional defect would be unmistakable. It is no less obvious here.[50]

CONCLUSION

This Court should resist the State's invitation to resurrect the "separate but equal" fallacy that was repudiated 50 years ago. As the California Supreme Court has recognized, "there is no more effective

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[50] Contrary to the State's argument, *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, did not present or address the question of whether same-sex couples must be accorded the right to marry, or whether providing same-sex couples with the separate status of domestic partnerships was constitutionally sufficient. In fact, *Koebke* did not present any constitutional claims at all, but considered only whether a golf club violated the Unruh Civil Rights Act by providing greater benefits to heterosexual spouses than to same-sex domestic partners. In concluding that the club's refusal to provide equal benefits to registered domestic partners violated the Unruh Act, the Court did not hold that domestic partnerships are equivalent to marriage. Rather, the Court acknowledged that the Domestic Partnership Act does not, in fact, provide "actual" equality (id. at p. 845), but rather was intended to "*reduce* discrimination on the basis of sex and sexual orientation." (*Id.* at p. 838 [citing Stats. 2003, ch. 421, § 1] [emphasis added].)

practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally....Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (*Hays v. Wood* (1979) 25 Cal.3d 772, 786 [internal citations omitted].) Here, there can be little doubt that heterosexual couples in California would not be satisfied were civil marriage to be reserved exclusively for same-sex couples and heterosexual couples were offered only the option of domestic partnerships. Indeed, such an arrangement would be patently unequal and unfair. It is not less so simply because it is lesbians and gay men, not heterosexuals, who are disadvantaged.

By relegating same-sex couples to a lesser legal status with a different name, California has made a deliberate choice to withhold the intangible benefits of marriage from same-sex couples and to reserve those benefits for heterosexual couples only. This is the very opposite of the equality that Respondents seek, and to which they are entitled under the California Constitution.

For the foregoing reasons, Respondents urge this Court to affirm the Superior Court's judgment in full.

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), counsel for the Woo Respondents hereby certifies that the number of words contained in Respondents' Brief in Opposition, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 20,932 words, as calculated using the word count feature of the computer program used to prepare the brief.

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LANCY WOO AND CRISTY CHUNG, JOSHUA RYMER AND TIM FRAZER, JEWELLE GOMEZ AND DIANE SABIN, MYRA BEALS AND IDA MATSON, ARTHUR FREDERICK ADAMS AND DEVIN WAYNE BAKER, JEANNE RIZZO AND PALI COOPER, KAREN SHAIN AND JODY SOKOLOWER, JANET WALLACE AND DEBORAH HART, COREY DAVIS AND ANDRE LEJEUNE, RACHEL LEDERMAN AND ALEXSIS BEACH, STUART GAFFNEY AND JOHN LEWIS, PHYLLIS LYON AND DEL MARTIN, OUR FAMILY COALITION AND EQUALITY CALIFORNIA