Case No. S147999

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re: MARRIAGE CASES [Six Consolidated Appeals*]

* *City and County of San Francisco v. State of California*, A110449; *Tyler v. State of California*, A110450; *Woo v. Lockyer*, A110451; *Clinton v. State of California*, A110463; *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, A110651; *Campaign for California Families v. Newsom*, A110652

AMICUS CURIAE BRIEF BY THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PETITIONERS

Appeal Following Decision By California Court of Appeal,
First Appellate District, Division Three
In Six Consolidated Appeals

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INTRODUCTION

This is not a case about "gay marriage." It is a case about **marriage**. It is a case about whether the State of California should be in the business of enforcing laws where the undisputed Legislative intent shows that the laws were based on intentional discrimination. It is a case about whether the State may infringe on the fundamental right to marry the person of one's choice based on historical discrimination under the guise of tradition. It is about whether it is permissible to attempt to inject religion and subjective notions of morality into state-sponsored action. It is, in sum, the most recent battlefront in the timeless struggle for basic civil rights and equality.

Approximately one half of a century ago, these same basic issues arose in the context of anti-miscegenation laws when Judge Leon Bazile sentenced an interracial couple to jail for marrying outside of their race, stating:

> "***Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.***" (See *Loving v. Virginia* (1967) 388 U.S. 1, 3.)

The sentence was overturned by the United States Supreme Court in the landmark decision of *Loving v. Virginia* which abolished all anti-miscegenation laws in the United States.

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. [¶] Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious discriminations." (*Loving v. Virginia, supra*, 388 U.S. at p. 12.)

The rationale of *Loving* was not new to California, however. This Court was at the forefront of the debate when, nearly twenty years earlier, it became the first state in the Union to recognize that anti-miscegenation

statutes violated the Equal Protection Clause. (*Perez v. Sharp* (1948) 32 Cal.2d 711; *Loving v. Virginia, supra*, 388 U.S. at 7, fn. 5.)

California now stands at another such threshold.

Once again we are being asked to decide whether the fundamental right to marry the person of one's choice can be infringed by the State. How this Court defines the constitutional issue before it is the most critical step. There are those who will urge the court to define the constitutional right as marriage based on concepts of "tradition" or normative, personal, religious or subjective senses of morality -- many of the same arguments advanced and rejected in *Loving* and *Perez*, rejected in the integration cases, rejected in voting right's cases, and rejected following the abolition of slavery.

Today, denial of a fundamental right on the basis of past perceptions of race or gender seem like a strange remnant of a shameful past when majorities enacted legislation with a goal of maintaining group superiority and castigating minorities into separate and less than equal status. We look back and cannot fathom how individuals could have opposed commonplace notions of equality. And yet, here we are at another such juncture.

Now is not the time for us as a society to buckle to pressure from those who wish to strip citizens of a "basic civil right of man" based on assertions of a historical tradition of exclusion or a subjective sense of morality.

History will judge us by our decision today. Will future generations look back and wonder how we could continue to deny fundamental civil rights to citizens under "tradition" or subjective notions of morality? Will they question how we could continue a culture of intolerance? Or, will they be rightly proud of our foresightedness?

Amicus curiae THE SOUTHERN POVERTY LAW CENTER is internationally known for its tolerance education programs, its legal victories against white supremacist groups and its tracking of hate groups. Founded by Morris Dees and Joe Levin, two attorneys who shared a commitment to racial equality, the SPLC has worked to make the nation's Constitutional ideals a reality by fighting all forms of discrimination.

As a long-standing leader in the civil rights movement, *amicus curiae* submits that just as the Equal Protection Clause and right of privacy mandate the freedom to marry a person of one's own choice cannot be infringed by the State based on race, neither can the State seek to infringe this important constitutional right based on one's gender or sexual orientation.

SUMMARY OF LEGAL DISCUSSION

1. California laws prohibiting same-sex couples from marrying infringe on the following fundamental constitutional rights: (1) the fundamental right to marry the person of one's choice as grounded in the right to privacy as set forth in *Perez v. Sharp*, *Loving v. Virginia*, and *Lawrence v. Texas*; and (2) the fundamental right to equal protection as guaranteed by the Due Process Clause as articulated in *Brown v. Board of Education*.

2. "Strict Scrutiny" should apply where a State prohibition has an undeniable disparate impact on fundamental constitutional rights based on gender and/or sexual orientation.

3. The State has no compelling interest in any of the following: (1) advancing a law where the legislative intent was intentional discrimination against a suspect class; (2) preserving traditional prohibitions against marriage for same-sex couples; or (3) injecting subjective notions of religion and/or morality into state-sponsored action.

4. California courts are obliged to strike down laws which do not pass constitutional muster -- whether enacted by the Legislature or the populace -- and so doing does not violate the proper constitutionally mandated separation of powers, as set forth in *Marbury v. Madison*.

LEGAL DISCUSSION

I.

CALIFORNIA LAWS PROHIBITING SAME-SEX COUPLES FROM MARRYING INFRINGE FUNDAMENTAL CONSTITUTIONAL RIGHTS

> "*We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.*" (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486.)

A. THE RIGHT TO MARRY THE PERSON OF ONE'S CHOICE IS GROUNDED IN THE FUNDAMENTAL RIGHT TO PRIVACY

In 1948, nearly 20 years before the United States Supreme Court struck down all anti-miscegenation laws, this Court struck down a similar ban in

California, concluding "marriage is thus something more than a civil contract subject to regulation by the state; it is a *fundamental right of free men . . . a right of individuals* . . . ." (*Perez v. Sharp, supra*, 32 Cal.2d at pp. 714, 716 [emphasis added].)

In 1967, the United States Supreme Court issued a concise 13-page opinion in *Loving v. Virginia, supra,* 380 U.S. 1, which struck down **all** anti-miscegenation laws in the Union. The Court reasoned:

> "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. [Footnote]. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. (*Id.*, 380 U.S. at pp. 11-12.)

Thereafter, in 1972, Californians placed the right of privacy among the existing inalienable rights of life, liberty, and pursuit of happiness guaranteed

by our state's Constitution. (Cal. Const. art 1, §1.) By extension, marriage falls within the inalienable rights protected by the California Constitution. (*White v. Davis* (1975) 13 Cal.3d 757, 773-775, fn. 10 [right of privacy includes marriage]; cf. *Lawrence v. Texas* (2003) 539 U.S. 558, 566-567 [right to privacy in intimate relationships].)[1]

Following the constitutionalization of the right to privacy and with the increased visibility of the gay rights movements, many Californians began to fear that marriages for same-sex couples were inevitable. Accordingly, a 1977 legislative change was made to limit marriage to opposite sex couples.[2] This change led some legal commentators to conclude, "Chapter 339 is an apparent

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[1] It has been argued that the United States Supreme Court's dismissal of *Baker v. Nelson* (1972) 409 U.S. 810 establishes that prohibitions against same-sex marriage do not violate the federal constitution. This rule, however, would appear extremely suspect in light of the Court's ruling in *Lawrence v. Texas*. Moreover, even if *Baker* does constitute the federal law on this issue, *Baker* is not dispositive in that the California Constitution can provide additional protections above and beyond those provided for in the federal constitution. (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764; *Pipkin v. Board of Supervisors of Shasta County* (1978) 82 Cal.App.3d 652, 660.)

[2] Contrary to Respondents' suggestion that bans prohibiting same-sex couples from marrying constitute recognized "tradition," the fact is that for over 100 years of our state's history, California's marriage statute was gender neutral, describing marriage as a "personal relation arising out of a civil contract." (See former Civ. Code, §§55, 4100.) And, while Californians at the state's founding may not have envisioned marriage between same-sex individuals, it cannot be said that Californians envisioned precluding marriage between same-sex individuals prior to 1977 either.

attempt to prevent same-sex marriages in California." (9 Pacific Law Journal, at p. 496.)

This fear was abundant in March of 2000 when California's electorate approved Proposition 22, which declared in full that: "Only marriage between a man and a woman is valid or recognized in California." (Ballot Pamp., Primary Elec. (Mar. 7, 2000), pp. 52 [argument in favor], 132 [text].) The arguments in favor expressed a concern other states might recognize same-sex marriages which would then be recognized by California. (Id., at p. 52.)

In this case, the central question before the Court is whether the State "may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same-sex who wish to marry." (See *Goodridge v. Dept. of Public Health* (Mass. 2003) 440 Mass. 309, 312 [798 N.E.2d 941].) Alternatively stated, does California's statutory ban precluding same-sex couples from marrying – which was not enacted until 1977 – infringe on the fundamental right to marry on the basis of gender and/or sexual orientation?[3]

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[3] In *Baehr v. Lewin* (1993) 74 Haw. 530, 575-564, 852 P.2d 44, reconsideration granted in part in 74 Haw. 645, 875 P.2d 225, the Supreme Court of Hawaii analyzed this question on the basis of discrimination based on gender rather than sexual orientation. As discussed in Section II *infra*, *Amicus Curiae* submits that this issue should be resolved on the basis of both gender and sexual orientation, both of which employ utilize the "compelling state interest" test.

The Court of Appeal improperly concluded that because same-sex couples have historically not been allowed to exercise the right of marriage, no such fundamental right exists. This approach, however, has been soundly shown as circular and lacking logical integrity. "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 we are asked to decide." (*Goodridge, supra*, 798 N.E.2d at pp. 972-973 (conc. opn. Greaney, J.); and see dissenting opinion of Kline, J., below at *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 966 ["[T]he fact that same-sex couples have traditionally been prohibited from marrying is the reason this lawsuit was commenced; it cannot be converted into the dispositive reason it cannot succeed'"].)

The Court of Appeal also attempted to minimize the fundamental nature of the right asserted, stating, "California law does not literally prohibit gays and lesbians from marrying; however, it requires those who do to marry someone of the opposite sex." (*In Re Marriage Cases, supra*, 143 Cal.App.4th at p. 918.) This statement is overly facile. The assertion is no less ludicrous than it was for those who argued anti-miscegenation laws did not violate the constitutional right of African-Americans to marry because they could marry

someone from the same race. Such a callously insensitive statement does not warrant serious consideration by this Court.

B. DOMESTIC PARTNERSHIPS, WHICH ARE NOT EQUAL, RUN AFOUL OF *BROWN V. BOARD OF EDUCATION*

> "***The doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. . . . We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.***" (*Brown v. Board of Education* (1954) 347 U.S. 483, 490-491, 495.)

At its core, the argument of those in favor of maintaining the exclusion of same-sex couples from marriage is that California provides a separate system of domestic partnership protections. Thus, they conclude the statutory

prohibitions excluding same-sex couples from the right of marriage passes constitutional muster under equal protection. Not so.

Just as the *Brown* Court rejected the notion that separate is equal, this Court, in addition to rejecting that notion, must dismiss the assertion that equality must be obtained at the ballot box. Due process does not require the consent of a majority of the electorate before equal rights under the Constitution are allowed to vest.

Indeed, the danger to the liberty of same-sex couples in California rises to the level of that warned by philosopher John Stuart Mill, who opined that in a representative democracy, safeguards are required against unfettered control by the "tyranny of the majority." (John Stuart Mill, *On Liberty,* The Library of Liberal Arts Edition, p.7.) Nowhere is this tyranny of the majority more evident than when the electorate of California approved Proposition 22 or the Governor vetoed contrary legislation "out of respect for the will of the People."

Moreover, although the California Legislature has gradually increased the numbers of rights afforded to couples who register as domestic partners, **a domestic partnership does not equal marriage**. The Legislature itself is mindful of the fact that domestic partners are denied many of the rights enjoyed by married people. (Stats. 2003, ch. 421, §1, subd. (a) (A.B. 205)

["[T]his act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article I of the California Constitution..."].)

This case presents, therefore, a more egregious situation than was presented in *Brown*. The inequities which exist between marriage and domestic partnerships are flagrant and relegate same-sex couples to the status of second-class citizens by providing a "second tier" which is inferior to marriage (*i.e.*, no rights under federal law, no joint tax returns, no community property tax treatment, no right to comity from other states). (See *In re: Marriage Cases, supra*, 143 Cal.App.4th at pp. 901-902.)

However, separate and apart from these tangible differences, the simple fact remains that the concept of marriage does have an inherent worth. By passing and enforcing legislation which prohibits state-sponsored recognition of this inherently worthy institution, the State is denying a fundamental right to an entire class of citizens. Such action is antithetical to the precepts upon which this country was founded.

II.

STRICT SCRUTINY SHOULD APPLY WHERE LEGISLATION CREATES AN UNDENIABLY DISPARATE IMPACT ON SAME-SEX COUPLES

"Our Supreme Court has also recognized the centrality of sexual orientation to individual identity, viewing it, for purposes of the Unruh Civil Rights Act (Civ. Code § 51), as akin to sex, race, color, religion, ancestry, national origin, disability and medical condition." (*In Re: Marriage Cases, supra*, 143 Cal.App.4th at p. 972 (Dis. Opn. J. Kline).)

California's Constitution compels review of California's marriage statute setting forth who may enter into marriage under the strict scrutiny test. Moreover, *Perez* further supports the conclusion that strict scrutiny review applies in reviewing statutory limitations on who may enter into a marital relationship. (*Perez, supra*, 32 Cal.2d at p. 727.) Finally, application of strict scrutiny over legislation regulating who may enter into marriage is also supported by United States Supreme Court precedent. The United States Supreme Court applied strict scrutiny review to a Wisconsin statute requiring

that a person under court-ordered child support obtain a court order granting permission to marry. (*Zablocki v. Redhail* (1977) 434 U.S. 374, 386-388.)[4]

The Massachusetts Supreme Court in *Goodridge* noted strict scrutiny applied to statutes implicating a fundamental right or using a suspect classification, but concluded it need not decide if strict scrutiny applied because the limitation of marriage to opposite sex couples did not survive rational basis review on due process and equal protection grounds. (*Goodridge, supra,* 798 N.E.2d at p. 961.) Justice Greany's concurring opinion favored resolution under "traditional equal protection analysis" and indicated application of strict scrutiny. (*Id.*, at pp. 970-971 (conc. opn. Greany, J.) [Massachusetts' marriage statute creates "a statutory classification based on the sex of the two people who wish to marry"].)

The California Legislature has acknowledged a history of discrimination against same-sex couples in its findings regarding the California Domestic Partner Rights and Responsibilities Act of 2003 (Fam. Code, §297 *et seq.*). (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 849.)

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[4] *Zablocki* noted rational basis review is proper for review of "regulations that do not significantly interfere with decisions to enter into the marital relationship." (*Zablocki, supra,* 434 U.S. at pp. 386-387, fn. 12, citing to *Califano v. Jobst* (1977) 434 U.S. 47, 54 [termination of Social Security benefits upon marriage reviewed under rational basis test].)

Indeed, the reported cases are replete with instances of documented discrimination. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 488 ["The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities."]; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276 ["Lesbians and gay men . . . share a history of persecution comparable to that of Blacks and women."]; *Rowland v. Mad River Local Sch. Dist.* (1985) 470 U.S. 1009, 1014 ["Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility."].

Notwithstanding, the majority opinion in this case goes far astray from this precedent. Specifically, in finding there is no fundamental right to "marriage between same-sex partners," the court erroneously concludes that sexual orientation is not a suspect class for equal protection analysis. (*In re: Marriage Cases, supra*, 143 Cal.App.4th at p. 923.) This finding, however, is not only contrary to the Unruh Civil Rights Acts, recent statutory enactments, and countless reported cases, it is also belied by common sense. As Justice Kline poignantly stated, "To say that the factors which determine whether a classification is suspect do not all apply to homosexuals requires us to deny as judges what we know as people." (*Id.*, at p. 975 (Dis. Opn. J. Kline).)

III.

THE STATE HAS NO COMPELLING STATE INTEREST IN ENFORCING STATE STATUTES WHICH FAIL TO PASS CONSTITUTIONAL MUSTER

A. THERE IS NO COMPELLING STATE INTEREST IN ADVANCING STATE LAWS WHERE THE LEGISLATIVE INTENT WAS INTENTIONAL DISCRIMINATION

"***UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES***" (Ballot Pamp., Primary Elec. (Mar. 7, 2000), rebuttal to arg. against Prop. 22, at p. 53 (emphasis in original).)

For over 100 years of our state's history, California's marriage statute was gender neutral, describing marriage as a "personal relation arising out of a civil contract." (See former Civil Code, §§55, 4100.) "The Civil Code of this state, which went into effect on the first day of January, 1873, provided, in section 55: 'Marriage is a personal relation arising out of a civil contract, to

which the consent of parties capable of making it is necessary....'" (*In re Estate of Richards* (1901) 133 Cal. 524, 526-527; see also Stats. 1895, ch. 129 § 1.)

The gender neutral language survived in the Family Law Act which moved Civil Code, section 55 to Civil Code, section 4100. (Stats. 1969 ch. 1608, §8.)[5] The gender neutral language was also in place in 1972 when Californians added the right of privacy to our state's Constitution. (*White, supra*, 13 Cal.3d at p.773.) That changed in 1977. The 1977 legislative change to restrict marriage to opposite sex couples led some legal commentators to conclude, "Chapter 339 is an apparent attempt to prevent same-sex marriages in California." (9 Pacific Law Journal, *supra*, at p. 496.)

Based on this history, as well as the history of expressed discriminatory intent surrounding Proposition 22, it is manifestly obvious that the gender specific titles contained in the current legislation were enacted for the express purpose of denying equal protection to same-sex couples. Given the overt invidious discrimination underpinning the 1977 legislation and Proposition 22, there is simply no rational basis to conclude the State has any compelling interest in maintaining the status quo.

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[5] It is no surprise that the California Supreme Court, deciding *Perez*, discussed marriage in gender neutral terms of an inalienable right of the individual. (*Perez, supra*, 32 Cal.2d at p. 715.) After all, the basic marriage statute of Civil Code, section 55 described marriage as a "personal relation" without any group qualifiers.

Indeed, given society's common notions of equal protection and a level playing field, the State's interest is to the contrary. Such overt, state-sponsored discrimination against a minority group by a majority should not be legislated, should not be ratified, and should never be tolerated.

Moreover, the California Legislature made an express finding that same-sex couples are being denied basic rights and that domestic partnership will bring them closer to the rights they are lacking. (Stats. 2003, ch. 421, §1, subd. (a) (A.B. 205) ["[T]his act is intended to help California ***move closer to fulfilling the promises of inalienable rights***, liberty and equality . . . ."] (emphasis added).) Since an inalienable right is "that which may not be taken away," how is that the state can say they have a compelling interest in attempting to "move closer" and, thereby, admittedly continue to deny basic rights to which same-sex couples are undeniably entitled and have not been receiving?

Such an admitted justification by the California Legislature that same-sex couples are knowingly and intentionally being deprived of their basic constitutional rights is antithetical to the fundamental notions of due process and equal protection that are presented in this case.

B. THERE IS NO COMPELLING STATE INTEREST IN PRESERVING STATE-SPONSORED PROHIBITIONS PRECLUDING SAME-SEX COUPLES FROM MARRYING

> "***Respondents do not seek the establishment of a 'new' constitutional right to serve their special interest, but rather the application of an established right to marry a person of one's choice; a right available to all that government cannot significantly restrict in the absence of compelling need.***" (*In re: Marriage Cases, supra*, 143 Cal.App.4th at p. 943 (Dis. Opn. J. Kline).)

Since 1977, the State has foreclosed individuals from enjoying the freedom to marry the person of one's choice based on gender and/or sexual orientation. This Court is tasked with the responsibility of determining whether the fundamental right to marry the person of one's choice can be so infringed upon by the State.

At its most basic level, this case presents a situation in which a number of individuals are being precluded from entering into a private civil contract by the State. This prohibition does not exist because the parties intend to

engage in some unlawful purpose. (*See Lawrence v. Texas, supra*, 539 U.S. at pp. 566-567.) Rather, the prohibition exists based on historical discrimination and subjective notions of morality.

There is, however, no compelling reason for justifying state-sponsored exclusion of same-sex couples from a right enjoyed by every other adult member of the citizenry. Stated another way, *there is no compelling reason for the State to interfere with the right of two private citizens to enter into a civil contract of marriage* merely because they happen to be of the same gender and/or sexual orientation.

Given that there is no compelling reason to support the exclusion of same-sex couples from the fundamental right to marry the person of one's choice, California's prohibition against same-sex marriages cannot pass constitutional muster.

C. THERE IS NO COMPELLING STATE INTEREST IN INJECTING RELIGION OR SUBJECTIVE NOTIONS OF MORALITY INTO STATE-SPONSORED ACTION

> "[F]***anaticism and ignorance is forever busy, and needs feeding. And soon, your Honor, with banners flying and with drums beating we'll be marching backward, BACKWARD, through the glorious ages of that Sixteenth Century when bigots burned the man who dared bring enlightenment and intelligence to the human mind.***" Spencer Tracy as Henry Drummond, Inherit the Wind (1960).

One final point warrants comment -- the issue that the respondents have attempted to both explicitly and implicitly draw subjective notions of morality and highly personal issues of religion under the guise of "tradition" into an analysis on the propriety of state sponsored action. While it is beyond dispute that many individuals have deep personal feelings on the institution of marriage, these feelings should not -- and cannot -- be allowed to cloud the constitutional issue. Preclusion of a state-sponsored fundamental right from a class of individuals because certain members of society deem their

relationship morally and religiously offensive, is wholly improper and violative of the Establishment Clause. "Marriage, from the perspective of the state, is a civil institution." (*Reference re Same-Sex Marriage* (Can. 2004) 3 S.C.R. 698, 710-713 [concluding that definition of marriage as between one man and one woman based in "Christendom" no longer had a role in a pluralistic society].)

The proper resolution of this matter turns on the question of whether a state may properly infringe on one's right to marry the person of one's own choice. And just as there may have been those who felt that allowing inter-racial marriages was somehow morally wrong or offensive to then prevailing normative ideals against interracial marriage, such feelings or beliefs that marriage exclude same-sex couples have no place in the proper determination of whether the State may restrict constitutional rights and conduct of its citizenry.

Indeed, as Justice Saxe noted in the dissenting opinion in *Hernandez v. Robles* (N.Y. App. Div. 2005) 26 A.D.3d 98, 805 N.Y.S.2d 354, 383, "[N]*o person or group has the right deliberately to impose personal ethical values -- the values that fix what counts as a successful and fulfilled life -- on anyone else.*"

IV.

COURTS ARE OBLIGED TO STRIKE DOWN LAWS WHICH FAIL TO PASS CONSTITUTIONAL MUSTER AND DOING SO NEITHER USURPS PROPER LEGISLATIVE FUNCTION NOR VIOLATES SEPARATION OF POWERS

> "***One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.***" (*Board of Education v. Barnette* (1943) 319 US. 624, 638.)

As Justice Kline aptly noted in his dissent, the majority's opinion is erroneously premised on the notion that the courts should not be allowed to invade the rights of the Legislature. (*In re: Marriage Cases, supra,* 143 Cal.App.4th at p. 966 (Dis. Opn. J. Kline).) However, it is axiomatic that "The doctrine of separation of powers is thus modified by the principle of checks and balances, which appropriately comes into play in this case." (*Id.*, at p. 967.)

California's Constitution should never be read in a manner that permits the Legislature to re-define fundamental rights to prohibit a discernable group's participation in that fundamental right in the absence of a compelling state interest narrowly tailored to meet the compelling interest. Exclusion of marital benefits to same-sex couples with the express intent of precluding same-sex couples from marrying violates both the fundamental right of marriage and a founding hallmark of our justice system – equal protection.

> "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'" (*Romer v. Evans* (1996) 517 U.S. 620, 633.)

Nor should California law be read in a way that allows the majority to define the fundamental rights of a minority. We have that here where the limitation of marriage to a man and a woman was enacted for an expressly discriminatory purpose of denying a discernable class of Californians from the ability to exercise their fundamental right to marry the person of their choice.

In fact, what right is more vital than marriage, the core bond of the unitary family?

Simply stated, a legislative definition which is repugnant to the Constitution is void, and it is the special duty of the judicial branch to say so when this is the case. (*In re: Marriage Cases, supra,* 143 Cal.App.4th at p. 970 (Dis. Opn. J. Kline); see also *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176-177.) This Court should so act.

CONCLUSION

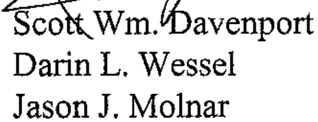
Contrary to the assertions of respondents, this case does **not** present a call for judicial activism. It presents a simple (albeit politically-charged) issue about the most basic and fundamental of human rights -- the right of all individuals to marry a person of one's choice. That fundamental right which cannot be infringed by the State on the basis of age, race, or nationality. That same right which the State should not be allowed to infringe upon on the basis of gender and/or sexual orientation.

While the prospect of such change may seem scary to some, one thing remains certain: from the integration of schools to the abolition of the anti-miscegenation laws, the struggle for civil rights has weathered tougher storms. And we will weather this one, too.

Accordingly, for all these reasons, *Amicus Curiae* urges this Court to hold that the freedom to marry a person of one's own choice cannot be infringed by the State based on one's gender or sexual orientation.

Dated: August 22, 2007

MANNING & MARDER,
KASS, ELLROD, RAMIREZ LLP



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CERTIFICATION OF BRIEF FORMAT

Appellate counsel hereby certifies that this brief does not exceed 14,000 words in length. According to the Word Perfect software program, the actual word count (including the Table of Contents and the Table of Authorities) is 5,957 words.

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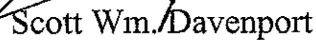
By: 
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1 **In re Marriage Cases, Case No. S147999**

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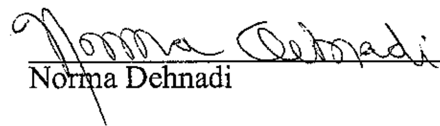

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