SUPREME COURT OF THE STATE OF CALIFORNIA

	Case No. S147999
Coordination Proceeding Special Title (Rule 1550 (b))	Judicial Council Coordination Proceeding No. 4365
IN RE MARRIAGE CASES	First Appellate District No. A110449 (Consolidated on appeal with case nos. A110540, A110451, A110463, A110651, A110652)
	San Francisco Superior Court Case No. 429539 (Consolidated for trial with San Francisco Superior Court Case No. 429548)

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR SECULAR HUMANISM AND THE CENTER FOR INQUIRY IN SUPPORT OF THE CITY AND COUNTY OF SAN FRANCISCO, URGING REVERSAL OF THE DECISION OF THE COURT OF APPEALS

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STATEMENT OF INTEREST AND PURPOSE OF *AMICI CURIAE*

May It Please This Honorable California Supreme Court:

The Council for Secular Humanism, hereinafter, Council, is a nonprofit educational organization headquartered in Amherst, New York. The Council engages in numerous activities, designed to promote a worldview that embodies secular social and legal values and institutions. The Council is deeply involved in defending the rights of nonreligious people and in promoting the separation of church and state. The Council's flagship publication is *Free Inquiry* Magazine, which is published bi monthly and has an average total readership of 36,000 per issue. There are about 5,000 readers of each issue in California.

The Center for Inquiry, hereinafter, Center, is an umbrella organization that includes the Council. Also headquartered in Amherst, New York, the Center is a nonprofit educational organization devoted to the application of reason and evidenced-based inquiry into every area of human endeavor. In addition to the Council, the Center's umbrella also includes the Committee for Skeptical Inquiry, which publishes the most prestigious scientific/skeptical publication in the world, *Skeptical Inquirer*.

The Center, with outposts throughout the United States and in many countries around the world, seeks to educate the general public about the importance of discarding supernatural claims of every sort and substituting, instead, an empirical approach to all major questions facing the world. The Center has its own headquarters for the Los Angeles area in Hollywood, California, with a mailing list of over 8,000 people in Southern California. The Center is particularly concerned, along with the Council, that no laws restricting the liberties of people be grounded in religious belief systems, but rather be rooted in direct human experience or the best information

currently offered by modern science, in the event that any prohibitory laws are deemed necessary in the first place.

In this brief, *Amicus Curiae*, the Council and the Center seek to support the **City and County of San Francisco**, in **San Francisco's** effort to have the same-sex marriage prohibition set forth in *California Family Code,* hereinafter, *Fam. Code, §§§ 300, 301,* and *308.5*, declared unconstitutional. *Amici* also support **San Francisco** in requesting that this Court order the State of California to grant marriage licenses to same-sex couples on the same terms as those provided to opposite-sex couples.

INTRODUCTION

In the Court of Appeals decision, from which this Court granted review, *In Re Marriage Cases,* hereinafter, *Decision Below*, 143 Cal. App. 4th 873 (1st Dist., Div. 3, 2006), both the concurring Justice and the dissenting Justice recognized the grave dangers inherent in the state's attempting to legislate or take sides regarding an issue that is religiously divisive. Concurring Justice Parrilli, acknowledged that a "danger" has emerged in the same-sex marriage debate, because the state has involved itself in "a venture that combines civic process with religious symbolism." 143 Cal. App. 4th, at 941. Justice Parrilli states that: "The often unspoken, but underlying, assumption about the current definition of marriage is that it comes from religious tradition." Id. Justice Parrilli also says: "...the opposition to same-sex partnerships comes from biblical language and religious doctrine." Id.

Dissenting Justice Klein points out that some of the amici in the *Decision Below* argued that "the ban on same-sex marriage" has "no secular legislative purpose" and that the state's "reliance on the 'common

understanding of marriage'" is "a pretext for naked religious preference." 143 Cal. App. 4th, at 963-964, footnote 7.

Amici, herein, will address how the ban on same-sex marriage violates the federal and state constitutional provisions against any law "that respects an establishment of religion."

SUMMARY OF ARGUMENT

Amici argue that the ban on same-sex marriage violates the *Establishment Clause* of the *First Amendment* to the United States Constitution and also violates *Article I, § 4,* and *Article XVI, § 5,* of the California Constitution.

No branch of government can favor believers over nonbelievers. No branch of government can favor one religion over any other. All government actions must have a secular purpose. The principal or primary effect of government action must be to neither advance nor inhibit religion. No government action is permitted to foster an excessive government entanglement with religion. Courts must examine whether a claimed secular purpose is a mere sham. All government actions that claim a secular purpose, but are actually based upon religious doctrine, must be held unconstitutional.

Ultimately, the ban on same sex-marriage is not grounded in any foundation, other than religious belief. The ban is therefore unconstitutional under the United States and California Constitutions. *Amici* seek to amplify and further develop the *Establishment Clause* concerns, and those of the corresponding California constitutional provisions, that were implicated by other amici in the Court of Appeals, and addressed by both the concurring and dissenting Justices in that Court.

Amici also argue that the ban's preference for some religious views, over others, violates the *Free Exercise Clauses* of the federal and state Constitutions.

ARGUMENT

I. ALL BRANCHES OF GOVERNMENT MUST REMAIN STRICTLY NEUTRAL IN MATTERS OF RELIGION.

For the past 60 years, the United States Supreme Court has held, without exception, that all branches of government, whether federal or state, must be strictly neutral in matters of religion. This means that no branch of government is permitted to favor believers over nonbelievers. That is, no branch of government is permitted to side with any or all religions against nonbelievers, *Torcaso v. Watkins,* 367 U.S. 488, 495 (1961). No branch of government is permitted to in any way favor one religion over another, *Everson v. Board of Education of Ewing Tp.,* 330 U.S. 1, 15 (1947). Thus, the United States Supreme Court has properly interpreted the *Establishment Clause* of the *First Amendment* as requiring government neutrality in matters of religion.

A. The History Of The Establishment Clause Demonstrates The Framers' Commitment To Strict Government Neutrality In Matters Of Religion.

Some have claimed that the *Establishment Clause* only prevents branches of government from favoring one or more religions over others, but permits the favoring of religion, generally, over nonbelief. This is an incorrect interpretation of the *First Amendment.*

When the Senate, of the very first Congress, was considering the wording of the religion clauses of what was to become the *First Amendment,* it rejected, on September 3, 1789, two proposed phrases that, if adopted, could have arguably only prevented government from favoring one

religion over another. The first proposed wording, rejected by the Senate, read: "Congress shall make no law establishing one religious sect or society in preference to any other."[1] The Senate additionally rejected wording that read: "Congress shall make no law establishing any particular denomination or religion in preference to any other."[2] The Senate finally chose wording that read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[3]

As Justice Souter points out, concurring in *Lee v. Weisman,* 505 U.S. 577, 614 (1992), though the House of Representatives accepted much of the Senate's wording of the Bill of Rights, the House rejected the Senate's wording of the *Establishment Clause* and called for a joint conference committee, to which the Senate agreed.

B. History Shows That The Framers Wanted To Preserve Equal Rights Of Conscience For Both Believers And Nonbelievers.

James Madison and Daniel Carroll were part of the House delegation to this joint conference committee. When the House was debating the text of the future *Establishment Clause*, before it was sent to the Senate, Carroll articulated the unmistakable objective of a society in which government could not betray any favoritism for any point of view on matters of religion. Carroll, who was also one of the actual signatories of the original Constitution in 1787, firmly believed that, in all cases, religious views must

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[1] *The Establishment Clause: Religion and the First Amendment,* Levy, Leonard W., Macmillan Publishing Co., New York, N.Y., 1986, page 82

[2] Id.

[3] Id.

be left to individuals to decide for themselves without any government display of preference for belief versus nonbelief. On August 15, 1789, during the House debates on what was to become the *Establishment Clause*, he said: "...the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand..."[4] This was in keeping with a pervasive Enlightenment view of that era, in which the government should get out of the theology business entirely and not in any way tip its hand, while each individual undertook a personal quest that would lead to either some form of belief or nonbelief for that individual.

James Madison, the author of the initial draft of the *Establishment Clause*, had, along with Thomas Jefferson, his closest ally in separating government and religion, always demonstrated a commitment to a government that was totally neutral in matters of religion, and not just a government that could favor religion, generally, over nonbelief. Four years before initially introducing the concept of the *Establishment Clause* into Congress, Madison opposed a general assessment in Virginia, that would have used taxpayer money for the benefit of all clergy.

In his *Memorial and Remonstrance Against Religious Assessments,* written in 1785, Madison wrote that the religion of every person must be left to the conviction and conscience of each individual.[5]

The following year, in 1786, Madison, the future fourth president of the United States, collaborated with Thomas Jefferson, the future third

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[4] *Church and State in the United States,* Stokes, Anton Phelps, and Pfeifer, Leo, Harper & Row, New York, Evanston, London, 1964, page 94.

[5] *James Madison on Religious Liberty*, Alley, Robert S., ed., Prometheus Books, Buffalo, New York, 1985, page 56.

president of the United States, in introducing into the Virginia Legislature, the first statutory scheme, up to that point in recorded history, providing protection for all freedom of conscience, including that of nonbelievers. Jefferson and Madison persuaded the Virginia Legislature to enact the *Virginia Statute for Religious Freedom* which provided that no one's civil rights should depend in any way upon that individual's opinions on religion. Further language stated that everyone should be free to profess and to argue for any view on matters of religion, and that no one's legal rights should depend in any way on those views, whatever they may be.[6]

Though Jefferson was in France during the nation's consideration of the Constitution and the Bill of Rights, he and Madison were in constant communication. Dumas Malone, the famed historian who wrote the multi volume series, *Jefferson and His Time,*[7] has said that Jefferson and Madison held identical views with respect to religion and government.[8] In 1787, Jefferson published his *Notes on the State of Virginia*, in which he wrote:

> "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say that there are twenty gods or no god. It neither picks my pocket nor breaks my leg."[9]

This sentiment, this view that government should treat believer and nonbeliever as equal, so as to leave matters concerning religion entirely up

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[6] http://usinfo.state.gov/usa/infousa/facts/democrac/42.htm (viewed on June 20, 2007).

[7] Little Brown & Company, Boston, Massachusetts, 1948.

[8] Op. cit., Alley (footnote 5, above), pages 304 and 338.

[9] *Jefferson, Writings,* Library of America, Literary Classics of the United States, Inc., New York, N.Y., 1984, *Notes, Query XVII,* page 285.

to the conscience of the individual, without even the slightest nudging from government either in favor of belief or nonbelief, was as central to the thinking of Madison as it was to Jefferson. Madison was so devoted to keeping religion and government separate, he even had misgiving about the holding of property by religious entities. He wrote:

> "But besides the danger of a direct mixture of religion and civil government, there is an evil that ought to be guarded against in indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations.[10]

C. The Final Wording Of The Establishment Clause Was Intentionally Chosen To Prevent Government From Favoring Belief Over Nonbelief.

Justice Souter points out that it is "remarkable" that unlike earlier drafts from both Houses of Congress, the final language adopted by the joint conference committee did not merely prevent government from making any law that would respect an establishment of "a religion," "a national religion," "one religious sect," "or specific articles of faith." *Lee,* 505 U.S., at 614. Justice Souter writes that the adoption of the final wording of the *Establishment Clause*, "no law respecting an establishment of religion," by its very phrasing and by the history of all the proposed and ultimately rejected language of the *Clause*, by both Houses of Congress, demonstrates that the Framers did not just intend to prevent government from favoring one religion over another, while still allowing "nonpreferential" aid for all religions, as against nonbelief, 505 U.S., at

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[10] Op. cit., Alley (footnote 5, above), page 91 (directly quoting from Madison's *Detached Memoranda*, estimated to have been written by him at some point after 1817).

615-616. The Framers intended government to be neutral and allowed no preference for religion generally, over nonbelief. Id.

Justice Souter further quotes from Madison's *Detached Memoranda*, to show how Madison feared that any venture into any religious themes by government could ultimately lead to domination by one sect. The quote is from Madison's opposition to any presidential proclamations touching upon religion at all. Madison fears that such practices will tend, over time, "to narrow the recommendation to the standard of the predominant sect." 505 U.S., at 617.[11]

Thus, Madison favored government neutrality, over allowing government to provide generic, nonpreferential aid to religion, generally. Madison also believed that nonpreferential support for religion, even generally, would ultimately lead to the most powerful or predominant sect's domination of government. In a letter to Jefferson, dated, October 17, 1788, about eight months before introducing into Congress the first draft of what was to become the *First Amendment*, Madison expressed his fear of allowing popular majorities to use government to impose their views on minorities, particularly in the realm of religion. In this letter, Madison wrote that he is concerned that the "rights of conscience" would be substantially narrowed "if submitted to public definition."[12] This is not the position of someone who would allow majorities to harness the mechanisms of government for even a generic religious point of view.

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[11] Justice Souter cites the *Detached Memoranda* from 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946)

[12] http://www.founding.com/library/lbody.cfm?id=181&parent=58 (viewed on June 29, 2007).

As shown, above, Madison and Jefferson held indistinguishable views on separating government and religion. As Justice Souter points out, the above-described 1786 *Virginia Statute for Religious Liberty* was written by Jefferson, but was sponsored in the Virginia Legislature by Madison. 505 U.S., at 615. Jefferson was in Paris at the time as U.S. Ambassador to France.

Accordingly, Jefferson's reflections on the *Virginia Statute*, and his description of what happened when Madison introduced the measure into the Legislature provide powerful evidence of the type of opposition Madison had to beat back in order to secure its passage. In his *Autobiography,* dated January 6, 1821,[13] Jefferson describes how Madison had to secure the defeat of proposals that were designed to alter the *Virginia Statute* so that it only protected Christians. Jefferson exults in the ultimate victory Madison and he enjoyed in the passage of the measure that included full protection for nonbelievers. Jefferson writes about the defeated proposed amendments:

> "The insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew, the Gentile, the Christian and Mahometan (Muslim), the Hindoo, and infidel of every denomination."[14]

After such a battle in the Virginia Legislature, it is understandable how Madison asserted his influence in the joint House and Senate conference committee, in September of 1789, in order to secure the final wording of the *Establishment Clause* in broader terms than any of the

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[13] Op. cit., *Jefferson, Writings,* (footnote 9, above), page 3

[14] Ibid., page 40.

previously proposed texts that had been considered by either or both Houses of Congress.

There is thus a clear history that Madison and Jefferson continually demonstrated their intent to secure a government that is neutral in matters of religion. The legislation they sponsored and their writings throughout their lives, show an unmistakable commitment to achieving a government that does not favor religion in any way but gives free reign to each individual to make a personal choice in such matters. In addition to Jefferson and Madison, we have the type of remarks as exemplified by Representative Carroll, described above, during the House debate on the then future *Establishment Clause*, urging that the delicate rights of conscience be immune from even the slightest "touch" of the hand of government. Such a perspective embodied the widespread intent that government be thwarted from asserting any authority to either aid or inhibit any religious view or views.

We also have the Senate's rejection of two would-be wordings of the *Establishment Clause*, described above, that may have opened the door to a possible interpretation of only prohibiting government from favoring one religion over another. Finally, we have the joint House and Senate conference committee's choosing more comprehensive language, than any previous proposal, to ensure government neutrality in matters of religion, as Justice Souter points out, above.

There is, accordingly, powerful evidence, from diverse sources, showing that the overall scheme of the crafting of the *Establishment Clause* was a clear trajectory toward government neutrality in matters of religion, rather than allowing government to favor all religions, collectively, over nonbelief.

Noted *Establishment Clause* Scholar, Leonard Levy, revealed an additional flaw in nonpreferentialist arguments that claim that the *Clause* allows government favoritism for religion, generally, over "irreligion."[15]

Professor Levy writes that the whole purpose of a bill of rights was not to expand the power of government, but to limit it. Thus, he argues, prohibiting government from making any law respecting an establishment of religion cannot be read as still providing government with some extended power to favor religion generally.[16] Levy quotes Madison from the above described October 17, 1788, letter to Jefferson (footnote 12, above) in contending that a bill of rights would not be intended "to imply powers not meant to be included in the enumeration."[17] Thus, it is clear that Madison, as the main individual architect of the *Establishment Clause,* did not intend to empower government to actively support any or all religions, even generically, against nonbelievers.

In 1947, the United States Supreme Court explicitly recognized that the *Establishment Clause* is as binding on all branches of state government as it is on all branches of the federal government, *Everson, supra.,* 330 U.S., at 15.

It should be clear, then, that for any branch of government, federal, state, or local, there cannot be even the slightest betrayal of any favoritism for religious belief over nonbelief:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice.

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[15] Op. cit., Levy (footnote 1, above), page 94.

[16] Ibid., page 84

[17] Ibid.

> It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas,* 393 U.S. 97, 103-104 (1968).

Accordingly, once it can be shown that California's ban on same sex marriage is not rooted in any nonreligious concept, severable from religious beliefs, the ban must be struck down as a violation of the *Establishment Clause*.

II. THE RELIGION CLAUSES OF THE CALIFORNIA CONSTITUTION MANDATE GOVERNMENT NEUTRALITY IN ALL MATTERS OF RELIGION.

The Ninth Circuit used to assert that the religion clauses of the California Constitution are actually more protective of the notion of church/state separation and more sweeping in this regard than the *Establishment Clause.* That Court has stated that the "no preference" Clause of the California Constitution, *Article I, § 4,* has been interpreted by California courts to be "broader" than the *Establishment Clause* of the *First Amendment. Vernon v. City of Los Angeles*, 27 F.3d 1385, 1395 (9th Cir. 1994). That Court has further stated that the religion clauses of our state Constitution are "read more broadly than their counterparts in the federal Constitution." *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 629 (9th Cir. 1996). However, the last pronouncement on this question by this California Supreme Court, declared by a 4 to 3 majority, that the religion clauses of the California Constitution will not be interpreted to be any more "protective of the doctrine of the separation of church and state"

than the *Establishment Clause* of the *First Amendment*, *East Bay Asian Local Development Corp. v. State of California,* 24 Cal. 4th 693, 719 (2000).

The *East Bay* majority then went on to write that this California Supreme Court will construe our state *Establishment Clause*, *Article I, § 4,* guided by the decisions of the United States Supreme Court, regarding the *Establishment Clause* of the *First Amendment,* Id.

A. This Court Has Every Right To Interpret The State Establishment Clause As More Expansive Than The National Supreme Court's Interpretation Of The Federal *Establishment Clause.*

In a powerful dissent in *East Bay*, Justice Mosk asserted that the California religion clauses are "more protective of the principle of church/state separation" than the *First Amendment.* 24 Cal. 4th, at 723. He also reminded us that *Article I, § 24* of the California Constitution explicitly decrees that rights provided under the state Constitution are not dependent upon those guaranteed by the federal Constitution, Id.

In *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 325-326 (1997), the majority opinion of Chief Justice George further reminds us that California may always choose to provide greater protection under our Constitution than is provided under the national Constitution, even if the two Constitutions were to have identical wording in a given area. Thus, this Court's decision in *East Bay* to tailor it's interpretation of our state's religion clauses to be in conformity with the national Supreme Court's interpretation of the federal *Establishment Clause,* was voluntary on the part of the *East Bay* majority. This Court, at any time that it chooses, can take back the power to provide greater protection under our state *Establishment Clause* than is recognized by the U.S. Supreme Court. In fact, that Court has clearly concluded that a state is permitted to provide, in

its own constitution, "individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Centers v. Robbins,* 447 U.S. 74, 81 (1980).

While this Court's most recent majority opinion, comparing the federal and state *Establishment Clauses* in *East Bay*, put this Court on record as deeming the state *Establishment Clause* to be interpreted in line with the U.S. Supreme Court's interpretation of the federal counterpart, the opposite is apparently the case with respect to the state *Free Exercise Clause.*

In *Catholic Charities of Sacramento, Inc., v. Superior Court (Department of Managed Health Care, Real Party in Interest),* 32 Cal. 4th 527, 560-561 (2004), this Court's majority opinion, by Justice Werdegar, held that with respect to the *Free Exercise Clause,* contained in the very same *Article I, Section 4* that contains our state *Establishment Clause,* this Court is not bound by the national Supreme Court's interpretation of the *Free Exercise Clause* of the *First Amendment.* The majority opinion in *Catholic Charities*, though it is addressing the state *Free Exercise Clause*, declares that under *Article I, § 24,* the meaning of *Article I, § 4,* "is not dependent on the meaning of any provision of the federal Constitution." Id.

Amici urge this Court to allow itself the same scope of providing a broader interpretation of the state *Establishment Clause*, than the national Supreme Court provides under the federal Constitution, just as this Court permits itself a broader interpretation of the state *Free Exercise Clause* than the U.S. Supreme Court recognizes under the national Constitution.

Though the *Catholic Charities* majority opinion did not expressly overrule the *East Bay* majority opinion, on the question of this Court's refraining from giving a more expansive reading to our state *Establishment*

Clause than occurs at the federal level, the *Catholic Charities* majority's generalized language regarding *Article I, § 4,* gives a clear indication that this Court could, at any time it chooses, allow itself the same broader scope in interpreting the state *Establishment Clause*, as it has asserted for itself with respect to the state *Free Exercise Clause*.

Amici included the history of the federal Establishment Clause, above, in order to demonstrate how strongly the Framers truly intended government neutrality in matters of religion. This historical intent is thus a very persuasive argument for this Court's asserting the same right to provide more church/state separation, under the California Constitution, than may be currently recognized by the national Supreme Court's interpretation of the federal Constitution. The history of the framing of the federal *Establishment Clause* is compelling enough to justify this Court's giving our state counterpart as expansive a reading as this Court has reserved for itself with respect to our state's *Free Exercise Clause*.

B. This Court Has Every Right To Invoke Independent State Grounds To Hold The Ban On Same-Sex Marriage Unconstitutional Under the California Constitution.

Amici respectfully request that this Court strike down the ban on same-sex marriage under the state Constitution's religion clauses, if this Court is not prepared to do so under the federal *First Amendment,* and if this Court is not willing to do so under both the state and federal religion clauses. *Amici* request that this Court strike down the ban under both the federal and state religion clauses, but recommends invoking the state Constitution, if this Court is otherwise unwilling to nullify the ban under any federal Constitutional grounds.

The Massachusetts Supreme Judicial Court has already broken ground for state supreme courts to strike down the ban on same-sex marriage on state constitutional grounds, independently of the federal Constitution. *Goodridge v. Department of Public Health,* 798 N.E. 2d 941, 969 (2003).

C. California Has Three Distinct Constitutional Provisions That Clearly Show An Intent To Preserve Government Neutrality In Matters Of Religion.

California actually has three distinct constitutional provisions, all devoted to barring any government aid or assistance, in any manner, to the promotion of any religious concept or belief. *Article I, § 4*, requires no preference for religion of any kind and also requires that there be no law respecting an establishment of religion. *Article IX, § 8*, is a stand-alone provision devoted exclusively to barring any public money from ever being appropriated for the benefit of any religious school, whatsoever. This provision also prohibits the teaching of any religious doctrine, of any kind, even indirectly, in any public school in the state. There is no corresponding provision in the federal Constitution to *Article IX, § 8*, beyond the *Establishment* and *Free Exercise Clauses*.

Article XVI, § 5 prohibits any branch of government from doing "anything to or in aid of" any religion, whatsoever. No branch of government can do anything that would "help to support or sustain" any entity that is controlled by any religion. This provision has been interpreted to not only prohibit any government-provided monetary aid to religion, but also to prohibit any government activity that promotes religion, financial or otherwise. *Lucas Valley Homeowner's Association v. County of Marin (Chabad of North Bay Inc., Real Party in Interest),* 233 Cal. App.3d 130,

146 (1st Dist., Div. 4, 1991). Just as with *Article IX, § 8*, there is no corresponding provision in the federal Constitution to *Article XVI, § 5*, beyond the *Establishment* and *Free Exercise Clauses*.

In California, we thus have three separate and distinct state constitutional provisions all designed to prevent any kind of government support for any religious belief. As argued in this brief, these three provisions justify this Court's applying a greater standard of church/state separation than what has been forthcoming from the U.S. Supreme Court under the federal Constitution. Surely, if it can be shown that the ban on same-sex marriage is grounded in religious doctrines, and cannot be defended with any severable secular argument, the ban would be unconstitutional under the religion clauses of the California Constitution.

In her majority opinion in *Sands v. Morongo Unified School District,* 53 Cal.3d 863, 870 (1991), Justice Kennard pointed out that government neutrality in matters of religion enhances the liberties of everyone and that government must therefore remain secular and avoid affiliating with any religious beliefs or institutions. Justice Kennard's majority opinion then cites the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), requiring that all actions of any branch of government: 1) must have a secular purpose; 2) must not have a primary effect that either advances or inhibits religion; and 3) must not result in excessive government entanglement with religion., 53 Cal.3d, at 871. The current ban, in this state, on same-sex marriage does not have a secular purpose. Since the ban is rooted in religious belief, it has a primary effect of advancing religion. Since the ban entails a legislative prohibition, giving the force of law to what is essentially a religious view, it results in excessive state government entanglement with religion.

The majority opinion in *Sands* also recognizes that violations of the separation of church and state can independently violate the California Constitution, 53 Cal. 3d, at 883. Justice Mosk, as he did in dissent in *East Bay*, concurring in *Sands*, reminded us of California's right to provide greater church/state separation under our state Constitution than may be provided by the national Supreme Court under the federal Constitution. Justice Mosk quoted United States Supreme Court Justice William Brennan's law review article, *State Constitutions and Protections of Individual Rights*, 90 Harvard Law Review 489, 491 (1977):

> "...state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." 53 Cal. 3d, at 906.

In *Fox v. City of Los Angeles,* 22 Cal. 3d 792, 796 (1978), this Court stated:

> "The California Constitution, like the United States Constitution, does not merely proscribe an establishment of religion. Rather, all laws 'respecting an establishment of religion' are forbidden."

In *Fox,* this Court held that even thought he display of a Latin cross on Los Angeles City Hall, during the holiday season, was not a religious service, the display still violated government neutrality in matters of religion, 22 Cal. 3d, at 798. This Court then declared: "To be neutral surely means to honor the beliefs of the silent as well as the vocal minorities." 22 Cal. 3d, at 799. This government neutrality is violated if California can continue to bar same-sex marriage, because it places the state in support of one religious view against other religious views and because it enacts a religious point of view, generally, as against a secular perspective.

In *California Educational Authorities v. Priest,* 12 Cal. 3d 593, 599-600 (1974) this Court explicitly stated: "...a law may violate the [Establishment] clause by aiding all religions, not only be preferring one sect or religion over another." Accordingly, whether the ban on same-sex marriage is based upon one set of religious beliefs versus others, or even upon all religious beliefs, it is unconstitutional. This Court, in *California Educational Authorities*, also held: "To be valid, the statute (any statute) must first have a clearly secular legislative purpose;" 12 Cal. 3d, at 600.

The heart of the matter is therefore that unless California's statutory scheme restricting legal marriage to persons of the opposite sex can be shown to have a purpose, not a subterfuge, that is legitimately severable from any and all religious doctrines, the ban on same-sex marriage is unconstitutional under a proper interpretation of both the *Establishment Clause* of the *First Amendment*, and under *Article I, § 4, and Article XVI, § 5*, of the California Constitution. "...the First Amendment requires that a statute must be invalidated if is entirely motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

D. Not Only Is It Appropriate For This Court To Assert Its Right To Interpret The State *Establishment Clause* More Broadly Than The U.S. Supreme Court Interprets The Federal *Establishment Clause*, California's Ban On Respecting An Establishment Of Religion Can Be Seen As Allowing A More Encompassing Interpretation Than The National Constitution.

So far, *Amici* have urged this Court to exercise its obvious power to interpret the state *Establishment Clause* more broadly than the U.S. Supreme Court has seen fit to do with the federal counterpart. A reason for this is that the national Supreme Court is more and more not fully recognizing the amazingly precise history of the *First Amendment*'s

enactment and the enormous evidence that the Framers specifically intended strict government neutrality in matters of religion, in which government cannot in any way favor belief over nonbelief. Thus *Amici* would like to see this Court interpret the state *Establishment Clause* as *Amici* would hope the federal Supreme Court would interpret the *First Amendment.*

Another reason is that taken together, the three distinct provisions in the California Constitution, all designed to keep religion and government separate, do present a comprehensive argument for a very strong legal claim that government, in this state, cannot enact or enforce in any way, whatsoever, any religion-favoring laws or policies. The collective strength of these three provisions in our state Constitution can be argued to more definitively prevent government from showing any kind of obeisance to religion than the wording of the national *Establishment Clause*, even though the latter, as shown, above, through the history of its inception, was meant to require strict government neutrality in matters of religion.

Justice Mosk, as shown above in his dissent in *East Bay* and in his concurrence in *Sands*, insisted that our state Constitution can be used to provide even more church/state separation than the federal Constitution. In his concurrence in *Sands*, he points out how the delegates to the 1849 California Constitutional Convention specifically avoided continuing the previous entanglement between church and state that characterized Spanish California, 53 Cal. 3d, at 907. Justice Mosk further reminds us that when those delegates were searching for a model of church/state separation they chose from the New York State Constitution of 1777, from which they derived the "no preference" language of what is still *Article I, §4*. Id. These delegates chose this model in preference to the Virginia Constitution which

spoke of a duty owed to the "Creator" and the duty of "Christian forbearance, love, and charity. Id.

Justice Mosk then shows that strict adherence to the separation of church and state was an integral part of California's jurisprudence from the very beginning. He cites *Ex Parte Newman*, 9 Cal. 502, 506-507 (1858), in which then Chief Justice Terry wrote that California has "a complete separation of church and state" and further wrote that "all religious despotism" comes about without that separation, 53 Cal. 3d, at 908.

Amici urge upon this Court that the legacy of Justice Mosk is the correct interpretation of the law and urge this Court to provide more church/state separation under our state Constitution than is currently provided by the U.S. Supreme Court under the *First Amendment*.

III. THE BAN ON SAME-SEX MARRIAGE, CURRENTLY IN FORCE IN CALIFORNIA, IS INDEED GROUNDED IN RELIGIOUS BELIEF. THERE IS NO SEVERABLE ELEMENT THAT COULD PROVIDE ANY SECULAR, INDEPENDENT, STAND-ALONE BASIS FOR THE BAN, OTHER THAN ULTIMATE RECOURSE TO RELIGIOUS DOCTRINE.

A. The Concurring And Dissenting Justices In The *Decision Below* Acknowledge That The Ban Is Based On Religion.

In the Introduction to this brief, above, *Amici* cited the opinion of the concurring Justice, in the *Decision Below*, in which she actually acknowledges the religious basis of the ban on same sex marriage. Justice Parrilli acknowledged the "danger" involved in this issue, because the ban on same sex marriage involves the state in "a venture that combines civic process with religious symbolism." 143 Cal. App. 4th, at 941.

Justice Parrilli further wrote, in her concurrence: "The often unspoken, but underlying , assumption about the current definition of

marriage is that it comes from religious tradition." Id. Justice Parrilli also says: "...the opposition to same-sex partnerships comes from biblical language and religious doctrine." Id. The last statement is a truly remarkable admission from a Justice who nevertheless voted to uphold the ban. Justice Parrilli thus admits that the current definition of marriage comes from religious tradition. This concurring Justice further admits that this issue makes the state "enmesh itself with religious tradition, terminology, and teaching." 143 Cal. App. 4th, at 942. For the state to so "enmesh" itself surely violates the third prong of the *Lemon* test, requiring all branches of government to avoid activity which results in excessive government entanglement with religion. *Lemon,* supra, 403 U.S., at 613.

B. The Will Of Popular Majorities Is Irrelevant In Enforcing The Prohibition Against Religious-Based Laws.

However, Justice Parrilli then says that the religious component of this same-sex marriage controversy is "better suited to legislative consideration and public debate." 143 Cal. App. 4th, at 942. This view, unfortunately, is grievously mistaken. It is not up to popular majorities and legislative bodies to determine the extent to which society will base its laws on religion. Given the authority, already cited in this brief, alone, any law that is based on religion, and that cannot offer up an independent nonreligious foundation, is a violation of the *Establishment Clauses* of both the federal and state Constitutions. As the United States Supreme Court has held, regarding the protections of the *First Amendment*:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 628 (1943).

The national Supreme Court went on to declare that First Amendment rights "may not be submitted to vote" and "depend on the outcome of no elections." Id. Thus, the will or opinion of even an overwhelming majority of Californians is irrelevant when it comes to preventing religious-based laws from officially discriminating against same-sex couples. "...we do not count heads before enforcing the First Amendment." *McCreary County v. ACLU*, 545 U.S. 844, 884 (O'Connor, J., concurring, 2005).

C. The Ban Is Not Only Based On Religious Doctrines, It Also Unconstitutionally Favors Some Religions Over Others.

Justice Parrilli and dissenting Justice Klein, in the *Decision Below*, both acknowledge that there were amici, at the Court of Appeals stage of this case, who demonstrated how some religions favor same sex marriage and how some do not, 143 Cal. App. 4th, at 942 (Justice Parrilli) and at 963-964, footnote 7 (Justice Klein). Justice Klein also writes that these amici made the point upon which this present brief of the Council and Center now seeks to amplify: that the ban on same sex marriage serves "no secular legislative purpose" and is a "pretext for naked religious preference which impermissibly prefers certain religious beliefs over others." Id.

Justice Klein further points to the decision in *Adams v. Howerton,* 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) to show how courts have deemed heterosexual marriage to be grounded in religious beliefs that are ultimately traceable to "canon law, which, in earlier times, was administered in the ecclesiastical courts." 143 Cal. App. 4th, at 963. Justice Klein then correctly declares that religious doctrine should not be permitted to influence civil law. Id.

A recent law review article capably elaborates on how the ban on same-sex marriage violates the *Establishment Clause*. In *Preservationism, or The Elephant in The Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion,* Wilson, Justin T., 14 Duke Journal of Gender Law & Policy 561, 580 (2007), the author shows that, even though there is a diversity of religious viewpoints on same-sex marriage, the majority of religiously observant people in the United States oppose it.[18] Again, allowing majoritarian religious beliefs to shape the legal system is unconstitutional.

In this law review article, the author further analogizes to how, every time the courts would strike down laws requiring the teaching of Biblical creationism or laws barring the teaching of evolution, the religious opponents of evolution would just alter their nomenclature, and introduce new wording–such as "balanced treatment" and "intelligent design"–in an attempt to camouflage the underlying religious purpose of their efforts. The claim of defending "traditional marriage" can be seen as an attempt to avoid the direct admission that the effort is being made to preserve a purely religious-based prohibition in the law, 14 Duke Journal, at 602-603. This law review article asks if "the proponents of banning same-sex civil marriage have articulated a non-pretextual, genuinely secular interest for

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[18] The author, in his footnote 89, cites to the Marriage Law Project, World Religions and Same-Sex Marriage 1 (2002). This study shows that in the United States, at the time of the study, of 163,916,650 religious adherents, to denominations of Christianity, Judaism, Islam, Hinduism, and Buddhism, 97.6 percent belong to religions that affirm the heterosexual definition of marriage. The author provides for this study the website of: http://marriagelaw.cua.edu/publications/wrr.pdf (viewed on September 4, 2007). Counsel for *Amici* downloaded and has the pdf of this study.

doing so." 14 Duke Journal, at 615. As shown throughout this present brief, no genuinely secular purpose has been shown to underlie the effort to preserve legal marriage for only heterosexual couples.

D. The Congressional Debates On The Defense Of Marriage Act Show How Legislation Banning Same-Sex Marriage Is Based On Religious Doctrines.

The debate in the United States Congress, in 1996, in its passage of the Defense Of Marriage Act, hereinafter, DOMA, is a powerful further demonstration of how the legislative motive to ban same-sex marriage is, in the final analysis, a religious one. DOMA mandates that marriage is to be recognized only between a man and a woman for purposes of all federal laws and declares that states do not have to recognize any marriage performed in another state if that marriage is between persons of the same gender.

In the House, Republican Representative and future United States Senator from Missouri, James Talent, said that heterosexual marriage "is rooted in and sanctioned by the precepts of the great monotheistic religions and in particular the Judeo-Christian religion." 142 *Cong. Rec.*, Part 13, H18702 (July 23, 1996). Then Representative Talent also said that the preservation of only heterosexual marriage was required by "the teachings of all the monotheistic religions, and in particular the teachings of the Judeo-Christian religion on which our culture is based." Id.

In the Senate, Republican Phil Gramm of Texas said that our society must preserve only heterosexual marriage because it has been required by "every major religion in history, from the early Iliad and the Odyssey, to the oldest writings of the Bible." 142 *Cong. Rec.*, Part 16, S22443 (September 10, 1996). All references to the Senate debate herein shall be to 142 *Cong.*

Rec., Part 16, September 10, 1996. Democrat Robert Byrd of West Virginia said that same-sex marriage must be banned because "one has only to turn to the Old Testament and read the Word of God to understand how eternal is the true defense of marriage." 142 *Cong. Rec.*, at S22447. Republican Dan Coats of Indiana said that the issue of same-sex marriage touches upon the "deepest moral and religious convictions." 142 *Cong. Rec.*, at S22451.

Republican Nancy Kassebaum of Kansas stated that failure to preserve marriage exclusively for heterosexual couples would undermine the imparting of religious values. 142 *Cong. Rec.*, at S22457. Democrat Charles Robb of Virginia said that the whole debate on same-sex marriage raises "difficult questions of religion." 142 *Cong. Rec.*, at S22459.

Democrat Bill Bradley of New Jersey said that "opponents of gay rights have rooted their approach to religion. Many opposed assert that God has not ordained homosexuality." 142 *Cong. Rec.*, at S22462. Most revealingly, in justifying his vote for DOMA, Senator Bradley also said:

> "...in trying to balance the religious and the historical idea of marriage with the need to extend rights, I say that rights should extend up to but not including recognition of same-sex marriage." 142 *Cong. Rec.*, at S22463.

As shown throughout this brief, the federal and state Constitutions do not allow legislators to "balance" a religious idea of marriage, or a religious idea of anything else, when passing a law that affects the rights of people. Laws must have a secular purpose and not be contrived to "balance" the views of religious prohibitionists against the yearning for freedom on the part of the victims of any given ban on a would-be liberty.

These references to the *Congressional Record* are from members of the House and Senate of both parties. These references are all part of the formal Congressional debate on DOMA. It is quite revealing of how,

irrespective of party, there was such a widespread conviction on the part of both Congressional opponents and supporters of DOMA that confining marriage to only heterosexual couples was essentially a religious issue, or at the very least, that the religious component could not be isolated from the legislative debate Congress was having.

E. The Efforts On The Part Of Many Religious Parties And Amici, In The Instant Case, To Preserve The Ban, Shows The Religious Motivation Underlying The Effort To Deny Same-Sex Couples Equal Marriage Rights.

In the instant case, at various levels of this now consolidated litigation, many of the parties and amici, involved in the effort to preserve the ban on same-sex marriage, are openly religious entities or legal centers devoted to assisting various religious denominations in infusing religious beliefs into the civil law. Religious people have a right to present their views. However, the law of the land must not in any way become the enforcement mechanism for religious beliefs.

As an example, the Roman Catholic fraternal order, the Knights of Columbus, filed an amicus brief in this case. While their brief does not contain overtly religious arguments, *Amici* are of the opinion that if last year, for instance, the Vatican had announced official support for same-sex marriage, we would not now be seeing the Knights of Columbus appearing as amicus, in the instant case, in support of only heterosexual marriage. Thus, the Knights' motive for supporting the ban can be argued to derive from their religious views, irrespective of what they say in their brief.

In a Knights' publication entitled *Same Sex Attraction: Catholic*

Teaching and Practice,[19] It says on page 14:

> "Holy Scripture does not concern itself with the *condition* of homosexuality but only with the immorality of homosexual *actions*. This can be seen from the fact that Holy Scripture in both the Old and the New Testaments teaches (1) that the proper place for the expression of sexual intimacy is within the context of marriage and (2) that there are at least five clear condemnations of male homosexual actions and one of female."

If an organization believes that there is a divine decree that confines sexual conduct to only marriage and that this same divine source condemns homosexual actions, it should be clear that such an organization's motive for seeking to perpetuate the ban on same-sex marriage is an outgrowth of religious convictions.

The Alliance Defense Fund's efforts to keep the ban on same-sex marriage in force, can also be seen as religiously motivated. On this organization's website, they say:

> "God created marriage as the unity of one man and one woman. This has been both the legal and traditional understanding of a marriage–literally–for millennia, since Eden." [20]

If the Alliance is truly persuaded that God has ordained marriage to be only between one man and one woman, it should be obvious that the Alliance's

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[19] Published by the Catholic Information Service, Knights of Columbus Supreme Council, P.O. Box 1971, New Haven, CT. 06521-1971 (2006) http://www.kofc.org/un/rc/en/publications/cis/publications/veritas/Veritas_CIS385.pdf (viewed on July 13, 2007). Counsel for *Amici* downloaded and has the pdf of this actual publication.

[20] http://www.alliancedefensefund.org/issues/TraditionalFamily/Default.aspx (viewed on July 9, 2007). Counsel for *Amici* printed out and has this very page with these words.

involvement in efforts to perpetuate the ban on same-sex marriage is derived from religious beliefs.

The same would apply to the Advocates for Faith and Freedom. Like the Alliance, this organization appeared in the *Decision Below* in support of the ban. On their website, they say: "It is our intent to encourage Christians to engage the culture and fulfill the Great Commission by spreading the Gospel of Jesus Christ".[21]

Certainly, the Knights of Columbus, the Alliance Defense Fund, the Advocates for Faith and Freedom, and others, have a right to proclaim that same-sex marriage should not be permitted. However, the same *First Amendment*, and corresponding provisions of the California Constitution, that protect their right to say this, also protect the rights of gays and lesbians to live unencumbered by prohibitory laws that are based upon religious beliefs.

Again, these organizations have every right to make their views known to this Court. While these religious organizations and religious oriented law centers have a right to express their views, opponents of the ban are entitled to characterize such views as part of a comprehensive cumulative case to demonstrate that the overall tenor of the ban is religious. *Amici* urge this Court to recognize the overwhelming religious impulse that underlies the effort to preserve the ban on same-sex marriage.

F. The Overwhelming Religious Support For *Proposition 22*, Which Is Now Embodied In *Family Code § 308.5*, And For Attempted Prior Such Enactments In The Legislature, Clearly Demonstrates The Pervasive Religious Nature Of Support For The Ban.

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[21] http://www.faith-freedom.com/purpose.asp (viewed on July 9, 2007). Counsel for *Amici* printed out and has this very page with these words.

Amici are supporting the effort of **San Francisco** to have the ban on same-sex marriage declared unconstitutional by, among other claims, *Amici's* assertion that *Fam. Code § 308.5,* which declares that only marriage between a man and woman is valid or recognized in California, violates the separation of church and state. The enactment of this statute, by ballot initiative in March of 2000, resulted from a campaign that was rife with religious support for this measure.

A few weeks before the actual voting, the *San Francisco Chronicle* reported how *Proposition 22*, now embodied in *Fam. Code § 308.5*, was "heavily supported by the Mormon Church in Utah" and also by the "California Catholic Conference" and "evangelical and other Christian churches.[22] The day after it passed, the *Sacramento Bee* stated that the measure had "pitted conservative religious groups against supporters of gay rights" and that "most religious denominations" supported it.[23] The nonpartisan *California Journal* reported that supporters of *Proposition 22* included the "Committee for Moral Concerns, Church of Jesus Christ of Latter-Day Saints, California Catholic Conference of Bishops" and also "150 other churches and religious organizations."[24]

The fact that this measure was passed by the voters rather than by members of the Legislature is irrelevant to the religious motivation for its appearance on the ballot in the first place. Moreover, as shown, above, in footnote 18 of the present brief, an enormous percentage of the American people belong to religions that affirm the heterosexual definition of

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[22] *San Francisco Chronicle, Sunday Chronicle,* February 20, 2000, page 6.

[23] *Sacramento Bee, Main News Section,* March 8, 2000, page P1.

[24] *California Journal*, February 2000, page 65.

marriage. As further shown, above, popular majorities are constitutionally prohibited from enacting their religious views into law.

In 1996, then Assemblymember William "Pete" Knight unsuccessfully attempted to pass through the Legislature a measure that would have held invalid in California any marriage between persons of the same gender, entered into outside of this state.[25] In a letter dated June 6, 1996, then California Attorney General, Daniel E. Lungren, now a member of Congress, sent Assemblymember Knight a letter of support for this bill. On page 2 of this letter, Attorney General Lungren declared that "Beginning with the Torah, the obligation to marry was seen as one of the first callings of men and women.[26] Mr. Lungren goes on to state that Christianity designated matrimony as a sacrament in the 12th Century, with the church defining marriage as "the natural estate of two people of different sexes."[27]

In footnote 1 of this letter, then Attorney General Lungren cites numerous Biblical passages, including the 5th and 7th Commandments, and quotes from Deuteronomy, Exodus, Genesis, Malachi, Proverbs, and Psalms.[28]

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[25] *Assembly Bill, AB, 1982.* Counsel for *Amici* is in possession of a true and correct copy of the language of this proposed legislation, provided to counsel, under penalty of perjury, by California attorney, Jan Raymond, who runs a full time California legislative history research operation in Davis, California, http://naj.net.

[26] Counsel for *Amici* is in possession of a true and correct copy of this letter by and through the identical method as described immediately above in footnote 25.

[27] Id.

[28] Id.

In footnote 2 of the letter, he refers to Martin Luther's manifesto, "The Babylonian Captivity of the Church," published in 1520.[29]

It should now be obvious that whenever any effort in California is made to establish or to perpetuate the ban on same-sex marriage, the overwhelming effort to do so is always primarily religiously motivated.

Based on the foregoing, *Amici* now respectfully urge on this California Supreme Court that the fundamentally religious nature of the ban on same-sex marriage has been sufficiently demonstrated in order to justify this Court's striking it down as an unconstitutional prohibition that cements religious beliefs into law.

IV. NO BRANCH OF GOVERNMENT CAN CAMOUFLAGE A RELIGIOUS PURPOSE BY CLAIMING SOME KIND OF INDEPENDENT SECULAR MOTIVATION, WHEN THE GOVERNMENT ACTION IN QUESTION IS DISCERNIBLY GROUNDED IN RELIGIOUS BELIEF.

Now that *Amici* maintain that they have demonstrated how the ban on same-sex marriage is really an enactment of religious doctrines, this Court may very well find itself beset with claims from the opposing side that the desire to perpetuate the ban is not grounded in religious beliefs. Even if attempts are made to make nonreligious arguments, this Court has the authority to pierce through any claimed secular purpose and see such claims as a sham that is propped up in order to dodge the proper application of the *Establishment Clauses* of the federal and state Constitutions.

A. Sham Claims Of A Secular Purpose In Order To Mask A Religious Motive Must Not Be Permitted To Prevail.

Two years ago, the United States Supreme Court declared that a "secular purpose has to be genuine, not a sham, and not merely secondary to

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[29] Id.

a religious objective." *McCreary County,* supra., 545 U.S., at 864. In *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987), the State of Louisiana claimed that its mandating that if evolution is taught in the public schools, creation science must also be taught, was not about imposing a religious view, but about shoring up academic freedom. The Supreme Court, in rejecting Louisiana's assertion, said that when a state claims it acted with a secular purpose, the claim must be sincere and not a sham, 482 U.S., at 586-587. The Court saw through the state's claim of a secular purpose and recognized the law at issue as the product of the "upsurge of fundamentalist religious fervor" that deems evolution to be a contradiction of "the literal interpretation of the Bible." 482 U.S., at 590. The Court also noted that during the Louisiana Legislature's deliberations over this statute, reference was made to a supernatural creator, 482 U.S., at 591. This, of course, is analogous to the members of Congress referring to religious doctrine during the above described DOMA debate.

The *Edwards* Court, by a 7 to 2 majority, declared the Louisiana statute to be unconstitutional even though in dissent, Justice Scalia sought to bolster the state's claim of a nonreligious purpose by referring to creation science as merely a scientific alternative to evolution that postulates that "the physical universe and life within it appeared suddenly and have not changed substantially since appearing." 482 U.S., at 612 (Scalia, J., dissenting). Surely to claim a nonreligious motive for preserving "traditional marriage" by banning same-sex marriage is as much of a subterfuge, to hide an underlying theological motive, as is the bogus claim that there are valid secular scientific theories that can empirically challenge the claims of evolution, by somehow showing that living beings appeared suddenly in their current form.

The United States Supreme Court has seen through the sham arguments designed to conceal how creation science is really a Trojan horse for religious beliefs. It is respectfully urged that this California Supreme Court do the same regarding the equally disingenuous attempts to claim that the ban on same-sex marriage is not ultimately based on religious doctrines. "...government must pursue a course of complete neutrality toward religion." *Wallace*, supra., 472 U.S., at 60.

V. THIS COURT MAY DECLARE THE BAN ON SAME-SEX MARRIAGE UNCONSTITUTIONAL UNDER THE *ESTABLISHMENT CLAUSE* OF THE *FIRST AMENDMENT*; UNDER *ARTICLE I, § 4,* AND *ARTICLE XVI, § 5,* OF THE CALIFORNIA CONSTITUTION; OR UNDER ALL FEDERAL AND STATE CONSTITUTIONAL PROVISIONS.

Amici maintain that the arguments and precedents presented in this brief strongly justify this Court in holding that the ban on same-sex marriage violates the *Establishment Clause* of the *First Amendment.* However, because the United States Supreme Court has not yet gone that far, even though this Court may now do so, this Court must determine if it will "lead the way" for the rest of the nation and the federal courts in providing what should be an obvious application of the *First Amendment* to this issue.

Most interestingly, when the national Supreme Court declared unconstitutional laws criminalizing private homosexual intimate acts, in *Lawrence v. Texas*, 539 U.S. 558, 573-574 (2003), a dissenting Justice argued that the majority's decision calls into question all state laws against same sex marriage, 539 U.S., at 590 (Scalia, J., dissenting).

Amici believe Justice Scalia is correct in viewing the language of the majority opinion in *Lawrence* as casting grave doubt on all laws banning

same-sex marriage. However, while *Amici* respectfully urge upon this Court that California's ban on same-sex marriage is a clear violation of the federal *Establishment Clause*, we recognize how state supreme courts may be reluctant to anchor certain groundbreaking decisions, even if technically correct, in the national Constitution, when the United States Supreme Court has not yet revealed its willingness to confer federal constitutional protection on the particular sought-after freedom at issue.

Amici have argued in this brief that the ban on same sex marriage violates *Article I, § 4*, and *Article XVI, § 5,* of the California Constitution. *Amici* have also urged this Court to reassert its right to give the state's *Establishment Clause* a more expansive reading than even the current interpretation of the federal constitutional counterpart by the U.S. Supreme Court. *Amici* have argued that this Court's reservation unto itself of the right to grant a broader interpretation of the state *Free Exercise Clause*, than is provided by the federal counterpart, should be extended to encompass the state *Establishment Clause*. Should this Court decide to invoke state constitutional provisions, in finding that the ban constitutes a law respecting an establishment of religion, grounding such a ruling in the state Constitution would immunize this Court's decision from possible reversal by the United States Supreme Court.

Accordingly, though *Amici* argue that the ban violates the religion clauses of both the national and state Constitutions, *Amici* recognize that this Court will determine for itself under which Constitution or Constitutions the ban would be declared unconstitutional, after the Court would first determine that *Amici*'s arguments are correct and that the ban is indeed a law grounded in religious doctrines.

VI. IF THIS COURT IS NOT YET PREPARED TO RULE THAT THE BAN ON SAME-SEX MARRIAGE IS UNCONSTITUTIONAL, *AMICI* URGE REMANDING THIS CASE TO THE TRIAL COURT, DIRECTING IT TO TAKE EVIDENCE ON THE QUESTION OF THE RELIGIOUS NATURE OF THE BAN.

This Court in *Fox*, supra., approved of the trial court's taking judicial notice that the cross displayed over Los Angeles City Hall was a religious symbol and therefore an unconstitutional display, 22 Cal. 3d, at 794. The trial court in *Fox*, whose decision was upheld by this Court, described its judicial notice of the religious nature of the display as stemming from evidence which included "matters of common knowledge." Id. *Amici* believe they have shown sufficiently that the ban on same-sex marriage is a religious-based prohibition, to the degree necessary to justify this Court's striking down the ban.

A. There Is Enough Evidence That The Ban Is Based On Religious Beliefs In Order To Justify The Taking Of Judicial Notice That Religious Beliefs Undergird The Prohibition Against Same-Sex Marriage.

In *20th Century Insurance Company v. Garamendi,* 8 Cal. 4th 216, 269-270, footnote 8 (1994), this Court recognized its right to take judicial notice, at the request of any party, even amici, of:

> "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (This is also the text of *California Evidence Code § 452 (h)*).

Evidence Code § 452 (g) also allows judicial notice to be taken of any "facts and propositions that are of such common knowledge" within the territorial jurisdiction of a court that "they cannot reasonably be the subject of dispute."

Amici argue that they have met this standard in this brief and that this Court can determine, either by formal judicial notice or otherwise, that the ban on same sex marriage is primarily a law respecting an establishment of religion, that is, a religious-based law. *Amici* argue that they have shown, beyond reasonable dispute, that the grounding of the ban against same-sex marriage is so inextricably bound up with religious beliefs that there does not exist a detectable, severable secular motive for the ban.

However, if, after considering the arguments of **San Francisco** and all amici who oppose the ban on same-sex marriage, this Court is still currently unwilling to strike it down, the Council and the Center then urge the Court to remand the matter to the trial court with instructions to take evidence on the question of whether or not the ban is grounded primarily in religious beliefs. *Amici* maintain that such a course of action would be preferable to this Court's outright upholding of the ban.

VII. IN ADDITION TO VIOLATING THE *ESTABLISHMENT CLAUSES* OF BOTH THE FEDERAL AND STATE CONSTITUTIONS, THE BAN ALSO VIOLATES THE *FREE EXERCISE CLAUSES* OF BOTH THE *FIRST AMENDMENT* AND THE CORRESPONDING PROVISIONS OF THE CALIFORNIA CONSTITUTION.

Amici have focused this brief, thus far, on the *Establishment Clauses* of both the federal and state Constitutions. However, as described above, this Court's most recent pronouncement on the question of free exercise of religion declares that this Court will construe the *Free Exercise Clause* of the state Constitution more broadly than the U.S. Supreme Court may construe the corresponding clause in the federal Constitution, *Catholic Charities*, supra., 32 Cal. 4th, at 560-561.

Amici have shown, above, that both the concurring and dissenting Justices, in the *Decision Below*, recognized that some religions favor same-sex marriage, while others oppose it, 143 Cal. App. 4th, at 942 (Justice Parrilli, concurring) and at 963-964, footnote 7 (Justice Klein, dissenting).

Since no branch of government is permitted to favor one religion over another, *Abington School District v. Schempp,* 374 U.S. 203, 216 (1963), and *Amici* argue that they have already shown that the ban on same-sex marriage is based on religious beliefs, the ban not only violates the *Establishment Clauses* of both the federal and state Constitutions. It also violates the *Free Exercise Clauses* of each of these Constitutions. *Amici* thus respectfully urge this Court to also strike down the ban under the *Free Exercise Clauses* of both Constitutions. Again, if this Court is not comfortable in issuing a ruling grounded in any way in the federal *Free Exercise Clause*, *Amici* urge this Court to do so under the California *Free Exercise Clause* (or *No Preference Clause* of *Article I, § 4*), particularly since this Court has already asserted its right to independently provide greater protection under the state such *Clause* than the national Supreme Court has decreed to exist under the federal counterpart.

A. The Religious Freedom Of Believers Is Not Violated By Laws That Allow People The Freedom To Live Differently From The Dictates Of Any Or All Religious Doctrines.

There seems to now exist a dangerous argument that, if it were ever adopted by any court, would totally undermine both the *Establishment Clause* and the *Free Exercise Clause*. It is an argument that this Court should entirely reject if any party or other amicus raises it. Some religious proponents of the ban argue either directly or by implication that *their* religious freedom is contingent upon perpetuating the ban.

For instance, among the number of problems that the Advocates of Faith and Freedom see resulting from the legalization of same-sex marriage, as set forth in their January 2007 newsletter, is the claim that "...schools will be required to include same-sex couples in their references to marriage, which would lead to the brainwashing of our children."[30] This does not constitute a violation of the religious freedom of any believers. If schools teach evolution, family planning, the reality of divorce, and that gays and lesbians are just as decent as anyone else, this is not the government's respecting an establishment of religion. Nor is it violating the free exercise rights of religious believers.

When the public schools teach evolution, they are doing so because empirical science has deemed evolution to be the best explanation of our origins to date. The fact that some religions may disagree with evolution should not require that government-run schools delete evolution from the curriculum, when evolution is shown to be true by virtue of the best teachings of modern science. Evolution is not taught to contravene religion. Evolution is taught because it is valid science. If some religions happen to disagree with evolution, parents who practice such faiths can provide their children with opposing views at home. If we allow religious doctrines to dictate the permissible scope of what can be taught in public schools, then government is not enforcing the *Free Exercise Clause*. Rather, government would then be violating the *Establishment Clause*.

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[30] http://www.faith-freedom.com/uploads/materials/Voices%20for%20Freedom_1-07.pdf (viewed on July 17, 2007). Counsel for *Amici* printed out and has this very page with these words. As of September 4, 2007, the last time counsel checked, the Advocates no longer displayed newsletter texts on their website. However, the Advocates did graciously mail a hard copy thereof, received by counsel on September 6, 2007.

If public schools teach that legal marriage now includes couples who are of the same gender, the free exercise rights of religious families are not violated. The schools would just be teaching the new legal reality that persons of the same gender can now lawfully marry each other. The schools will not teach that persons of the same gender must marry each other, only that they are now permitted to do so. We don't ban abortion just because schools might teach the factually true statement that it is currently a legally obtainable procedure in our society. No public school would ever teach that women must have abortions. They would only teach the reality that it is legal for women to have abortions, if they so choose.

Religious people have no constitutional right to be free from having to hear about the legal freedom of others to live in a way that some or even all religions might condemn. As the United States Supreme Court has decreed: "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine..." *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952). Thus, if religious people were permitted to harness the machinery of government so that no law allowing people to conduct themselves contrary to religious sentiment would ever pass–just so that religious school children never have to learn, in public schools, that other people have the legal freedom to live differently–we would then be living under a religious tyranny.

B. The *Free Exercise Clause* Is Meant To Be A Shield, Not A Sword.

The purpose of the *Free Exercise Clause* is to prevent government from singling out certain religious practices for special invidious discrimination, not to allow religious believers to commandeer the police power of the state to ban conduct that is offensive to these believers. A

person's religious liberty can never be defined as entailing the right to legally interfere with someone else's personal freedom.

Rather than empowering religious adherents to control government so that others cannot conduct themselves in a manner different from the dictates of religious doctrine, the *Free Exercise Clause* is designed to shield religious practitioners from being targeted by government bodies with the special intent of discriminating against those practitioners.

The best example of the *Free Exercise Clause*, properly implemented, can be seen in a United States Supreme Court case that arose when the city of Hialeah, Florida, passed an ordinance banning the ritual killing of animals, but in a way that prevented only followers of the Santeria religion from killing animals in their ceremonies, while for instance, still allowing the kosher process of slaughter. *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 536-537 (1993). In this case, members of the Santeria faith were not attempting to pass or perpetuate a law designed to deny nonadherents of their religion the right to conduct themselves in a manner contrary to Santeria beliefs. Followers of this religion were only trying to defend themselves against a city ordinance that was intentionally designed to single them out for special invidiously discriminatory treatment, 508 U.S., at 540-541.

Conclusion

Amici respectfully request that this Court grant the relief sought by the **City and County of San Francisco**, holding *Family Code §§§ 300, 301,* and *308.5* unconstitutional and further ordering the State of California to grant marriage licenses to same-sex couples on the same terms as those provided to opposite-sex couples.

Amici urge this Court to so act under either or both of the *Establishment Clauses* of the federal and state Constitutions, and under either or both of the *Free Exercise Clauses* of the federal and state Constitutions. *Amici* recognize that this Court will determine for itself under which Constitution, federal, state, or both, in which to ground its decision, if the Court agrees with *Amici*'s argument herein that the ban on same-sex marriage is based on religious beliefs.

At some point in the future, in a more enlightened and improved era, hopefully society will look back on the current religious-based prejudices against gay and lesbian people as a time of sorrowful barbarism.

Amici can think of no better way to end this brief than with a quote from a sitting Justice on this Court:

> "...government must remain neutral among religious groups and adherents, and between religious and nonreligious members of society–that legislation may not have the purpose or effect of advancing, promoting, or endorsing religion or any particular religion." *East Bay,* supra., 24 Cal. 4th, at 727 (Werdegar, J., dissenting.)

Respectfully submitted,

Dated: **September 14, 2007**

By 

Edward Tabash,
Attorney for *Amici Curiae*,
THE COUNCIL FOR SECULAR HUMANISM and THE CENTER FOR INQUIRY

CERTIFICATE OF COMPLIANCE

California Rules of Court § 8.520 (c) (1)

I, Edward Tabash, do hereby Declare that I am the attorney for *Amici*, the Council for Secular Humanism and the Center for Inquiry. I personally typed this Brief, *Amicus Curiae*, by way of a Corel Word Perfect X3 program. I used New Times Roman, Size 13 Point Type. The word count that I have just taken, using the word counting feature of this word processing program, has just informed me that the total number of words of the brief, excluding from the count the Table of Contents, the Table of Authorities, and this present Certificate of Compliance, is **11,970** words, thus falling within the 14,000 word limit. The count includes all words up to and including the very end of page 43, above.

I declare under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct of my personal knowledge and that this Declaration was executed on **September 14, 2007**, at Beverly Hills, California.

Edward Tabash

In Re Marriage Cases, Case No. S147999

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. My business address is 8484 Wilshire Boulevard, Suite 850, Beverly Hills, California 90211.

On **September 14, 2007,** I served the document described as: **Brief Amicus Curiae of the Council for Secular Humanism and the Center For Inquiry In Support of the City and County of San Francisco, Urging Reversal of the Decision of the Court of Appeals** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I caused each such envelope to be deposited in the United States mail, at Beverly Hills, California. Each such envelope was mailed with first class postage, thereon, fully prepaid.

I am readily familiar with my office's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with first class postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business. I am aware that upon motion of any party served, service is presumed invalid if the postal cancellation date or the postal meter date is more than one day after the date of deposit for mailing as set forth in this Declaration.

I declare under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct of my personal knowledge, and that this Declaration was executed on **September 14, 2007**, at Beverly Hills, California.

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