No. S147999

IN THE SUPREME COURT OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

IN RE MARRIAGE CASES
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE
NOS. A110449, A110450, A110451, A110463, A110651, A110652
SAN FRANCISCO SUPERIOR COURT NOS. JCCP4365, 429539, 429548, 504038

LOS ANGELES SUPERIOR COURT NO. BC088506
HONORABLE RICHARD A. KRAMER, JUDGE

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION AND [PROPOSED] AMICI CURIAE BRIEF OF AMICI CONCERNED WITH WOMEN'S RIGHTS

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 8.520(f) of the California Rules of Court, California Women's Law Center, Equal Rights Advocates, and Legal Momentum (collectively, "*amici*") respectfully request leave to file the attached brief, in support of Respondents, to be considered in the above-captioned cases. This application is timely made within thirty days of the filing of the last-filed reply brief.

A. California Women's Law Center

Founded in 1989, the California Women's Law Center ("CWLC") is the first law center in California dedicated solely to addressing the comprehensive and unique legal needs of women and girls. Using the vehicle of systemic change, CWLC seeks to ensure that life opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC's Issue Priorities are sex discrimination, violence against women, women's health, race and gender, exploitation of women, and women's economic security. CWLC is firmly committed to eradicating invidious discrimination in all forms, including eliminating laws that reinforce traditional gender roles.

B. Equal Rights Advocates

Equal Rights Advocates ("ERA") is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and

advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases in both state and federal courts for the past thirty-three years. ERA has been dedicated to the empowerment of women through the establishment of their economic, social, and political equality. Promoting equal rights for lesbians and gay men, as well as the broader LGBTQ community, have been of great importance to the organization since its early years. ERA countered discrimination specifically directed at lesbians by creating the Lesbian Rights Project which later became the National Center for Lesbian Rights. ERA views sexual orientation discrimination as a pernicious and legally impermissible form of sex discrimination which is harmful to society at large.

C. Legal Momentum

Legal Momentum is the oldest legal advocacy organization in the United States dedicated to advancing the rights of women and girls. Since its founding in 1970, Legal Momentum has been a leader in establishing legal, legislative and educational strategies to secure equality and justice for women across the country. Its public policy and litigation agenda focuses on four areas that are of greatest concern to women in the United States: freedom from violence against women; equal work and equal pay; securing the health of women and girls; and strong families and strong communities. Legal Momentum views discrimination on the basis of sexual orientation as a form of sex discrimination. Legal Momentum is dedicated to the right of

all women and men to live and work free of government-enforced gender stereotypes, and strongly supports the right of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

D. Interests of Amici Curiae

These proceedings raise important issues regarding improper sex stereotyping. *Amici* are dedicated to ending sex discrimination and achieving full equality for women and girls. Each *amicus* has extensive knowledge concerning issues of discrimination based on sex stereotypes. They have a particular interest in protecting women and men, including lesbians and gay men, from gender discrimination and gender-based stereotypes. *Amici* are uniquely situated to address the ways in which restricting marriage to different-sex couples relies on outmoded, stereotypical, and constitutionally impermissible conceptions of gender, and to demonstrating how legislation based on gender stereotypes violates the California Constitution.

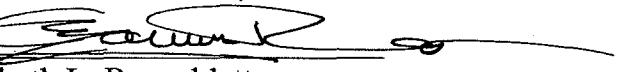
For these reasons, *amici* have a substantial interest in the present cases.

E. Need For Further Briefing

Amici are familiar with the issues before the Court and the scope of their presentation. *Amici* believe that further briefing is necessary to provide detailed discussion of certain authorities and arguments that the parties did not have the opportunity to fully address. Specifically, *amici*

will demonstrate that California's marriage statute not only facially discriminates based on sex, but represents a particularly invidious form of gender discrimination because it relies on and enforces sex stereotypes. *Amici* will explain how the recognition of the right to marry for lesbian and gay Californians is compelled by California constitutional jurisprudence mandating the eradication of legislation enforcing sex stereotypes and recognizing the validity of families and familial relationships formed by same-sex couples.

DATED this 26th day of September, 2007.

Respectfully submitted,
IRELL & MANELLA, LLP
By: 
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SUMMARY OF ARGUMENT

The Court of Appeal erred in holding that section 300 of the California Family Code does not impermissibly discriminate on the basis of sex in violation of the California Constitution.

California Family Code section 300 defines marriage as "a personal relation . . . between a man and a woman."[1] This is an expressly sex-based classification, which denies a fundamental right to individuals on the basis of their sex. Each female plaintiff in this case is excluded from the joys, commitments, rights, privileges, and obligations of marriage to her beloved life partner because she is a woman. A man in her place would be allowed to marry. Each male plaintiff is likewise deprived of enjoying the same celebrated commitments and connections with his beloved life partner because he is a man. A woman in his place would be allowed to marry. The express sex-based restrictions in the statute relegate each plaintiff to the second-tier construct of domestic partnership. Although California's domestic partnership legislation has helped to address some of the most egregious deprivations of prior law, domestic partners lack many of the

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[1] *Amici* here focus their argument on section 300. Both sections 301 and 308.5 also make a gender distinction in marriage, but, properly construed, do not limit marriages entered in California. If, however, the Court were to construe either section 301 or 308.5 to affect who may marry in California, the restrictions in those sections would be unconstitutional for the same reasons that section 300 is constitutionally defective, as the Superior Court held in invalidating section 308.5. (*See* Respondents' Brief in *Woo v. California*, A110451, at pp. 17-19.)

protections provided to married couples. Moreover, the state stigmatizes domestic partners and their families by refusing to confer upon them the status of marriage.

Because section 300 facially discriminates based on sex, it is presumed invalid under the California Constitution. The statute can survive constitutional scrutiny only if it is justified by a "compelling state interest" and "represent[s] the narrowest and least restrictive means by which the objective can be achieved." (*Arp v. Worker's Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 400, 406 [563 P.2d 849, 138 Cal.Rptr. 293].) This standard cannot be met here, where the rationales advanced in support of the law are themselves gender stereotypes regarding, for example, the roles of men and women in society and the household as husbands, wives, and parents.

The Court of Appeal erred in exempting the marriage statute from strict scrutiny based on its purported "equal application" to men and women. This holding directly conflicts with the long-standing California doctrine that equal protection applies to *individuals* and must be evaluated from the standpoint of the individual. This doctrine was articulated in *Perez v. Sharp*, in which this Court struck down California's anti-miscegenation statute. (*Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17].) Here, as in that closely analogous case, individuals are deprived of the fundamental right to marry the spouse of their choice based on a suspect

classification. And here, as in *Perez*, the exclusion should be overturned.

Nor can the sex-based classification in the statute be exempted from strict scrutiny based on what the Court of Appeal described as a lack of "evidence [that] California's opposite-sex definition of marriage was intended to discriminate against males or females." (*In re Marriage Cases* (Cal. Ct. App. 2006) 49 Cal.Rptr.3d 675, 708.) The law does not require a statute to be built on conscious antipathy toward particular groups to be unconstitutional on equal protection grounds; the drawing of a sex-based line is sufficient to trigger strict scrutiny. In any event, the legislative history of the statute demonstrates that the statute is discriminatory in that it relies upon, and perpetuates, sex stereotypes about the roles of men and women in family and society. This is confirmed by supporters of the law, who have advanced numerous arguments based on sex stereotypes in briefing for this case, including arguments that it is necessary to have a man in a marriage to protect a financially-dependent woman, and that male and female parents have fundamentally different child-rearing skills that are necessary for child development. (See *infra*, at pp. 30-32.) Legislation based on such stereotyping is impermissible under California law, which has long held that enactments that perpetuate stereotypes about "appropriate" gender roles are unconstitutional, regardless of whether the discrimination is "benign" or based on hostility toward a particular class.

The gender stereotypes perpetuated by the current marriage statute's

denial of marriage to same-sex couples harm all Californians, not just those individuals who are denied the right to marry based on their sex. By excluding same-sex couples from the institution of marriage, the state gives legal support to the belief that a marriage and a family are not proper if they allow a man to act "like a wife" or "like a mother" or permit a woman to act "like a husband" or "like a father." That message undermines the ability of all Californians to achieve their full potential, both within marriage and outside, without regard for gender stereotypes.

The state further reinforces gender stereotypes by creating a two-tier system that distinguishes between marriage – the celebrated institution that has been referred to as a lynchpin of society – and domestic partnership. Though an admirable effort, in practice the California Domestic Partner Rights and Responsibilities Act of 2003 (Fam. Code §§ 297-299.6) (the "Domestic Partnership Act") creates a second-class union that lacks both the universal recognition and the powerful symbolism of marriage. This is not just a matter of differing legal formalities (although, as the parties' supplemental briefs have amply demonstrated, such distinctions exist, and are important), but also one of unequal status conferred by the state. When parents dream of their children's future happiness in marriage, they are not thinking of prison visitation rights, community property law, and tax deductions. They are dreaming of their children's ability to experience the joys of loving and being loved in a lifelong relationship. The state affirms

this dream for the majority by allowing marriage to a different-sex partner. At the same time, the state denies this life goal to those who defy gender stereotypes by forming an intimate, loving bond with a member of the same sex, by creating a second-class institution for them. Maintaining a revered institution for some and a devalued institution for others on the basis of sex and sex stereotypes does not afford equal protection.

Moreover, even if the marriage exclusion is seen as intended to discriminate based on sexual orientation rather than to discriminate against a particular sex, the strict scrutiny that applies to sex-based classifications must still apply. This is so because the exclusion relies on a sex-based classification and gender stereotypes to achieve its sexual orientation discrimination, and because sexual orientation discrimination is a form of sex discrimination, particularly when based on an express sex-based classification and rationales of gender nonconformity.

For these reasons, and as set forth in more detail below and in the Petitioners' Briefs, the Court should reverse the decision of the Court of Appeal, hold the marriage exclusion in section 300 of the California Family Code to be unconstitutional under the state Constitution, and permit lesbian and gay Californians to exercise their fundamental right to marry.

ARGUMENT

I. The California Marriage Statute Impermissibly Discriminates Based On Sex

A. Sex-Based Classifications Are Presumed Invalid Under California Law

A classification based on sex is a suspect classification under the California equal protection clause and is therefore subject to strict scrutiny. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 [707 P.2d 195, 219 Cal.Rptr. 133] ["classifications based on sex are considered 'suspect' for purposes of equal protection analysis under the California Constitution"]; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 [485 P.2d 529, 95 Cal.Rptr. 329] ["The instant case compels the application of the strict scrutiny standard of review . . . because classifications based upon sex should be treated as suspect."].) This Court has recognized that classifications based on sex harm both women and men and thus cannot survive constitutional scrutiny based on "subjective value judgments about which types of sex-based distinctions are important or harmful." (*Koire v. Metro Car Wash, supra*, at p. 39.) Rather, a sex-based classification can survive constitutional scrutiny only if it is justified by "a compelling state interest" and "represent[s] the narrowest and least restrictive means by which the objective can be achieved." (*Arp v. Worker's Compensation Appeals Bd., supra*, 19 Cal.3d at pp. 400, 406.)

Moreover, "where a statutory scheme, on its face, employs a suspect

classification, the scheme is, on its face, in conflict with the core prohibition of the Equal Protection Clause. It is . . . presumed invalid."[2] (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 44 [112 Cal.Rptr.2d 5].)

In applying strict scrutiny to sex-based classifications, California affords greater protection against discrimination than the federal Constitution does. (See *Connerly v. State Personnel Bd., supra*, 92 Cal.App.4th at pp. 31-32 [noting distinction between federal and California standards]; see also *Serrano v. Priest* (1976) 18 Cal. 3d 728, 764 [557 P.2d 929, 135 Cal.Rptr. 345]; *People v. Longwell* (1975) 14 Cal. 3d 943, 953 fn. 4 [538 P.2d 753, 123 Cal.Rptr. 297] [decisions of the U.S. Supreme Court regarding protections guaranteed in the California Declaration of Rights "are to be followed by California courts only when they provide no less protection than is guaranteed by California law."] disapproved on another ground in *People v. Laiwa* (1983) 34 Cal.3d 711 [669 P.2d 1278, 195

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[2] While strict scrutiny applies to statutes that contain express sex-based distinctions, it does not apply to statutes that neither classify on the basis of sex nor implicate a fundamental right. This is the case with respect to two cases relied upon by several appellants. (See *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7 [576 P.2d 1342, 145 Cal.Rptr. 176] [concerning a gender-neutral police department physical agility test.]; *Reece v. Alcoholic Beverage Control Appeals Bd.* (1976) 64 Cal. App. 3d 675 [134 Cal.Rptr. 698][concerning a challenge to a gender-neutral liquor license disqualification provision].) In contrast, section 300 denies a fundamental right to individuals based on an expressly sex-based classification.

Cal.Rptr. 503].)[3]

B. The California Marriage Statue Includes A Presumptively Invalid Sex-Based Classification

Section 300 defines marriage as the union "between a man and a woman." By providing that a woman can marry only someone who is male and that a man can marry only someone who is female, the statute facially discriminates on the basis of sex. As the trial court explained, "If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor." (Final Decision on Applications for Writ of Mandate, Motions for Summary Judgment, and Motion for Judgment on the Pleadings, dated April 13, 2005 ("Final Decision"), Appellant's Appendix, Case No. A110450, at p. 123.) Because the marriage exclusion in section 300 facially classifies on the basis of sex, it must be presumed invalid.

The facial sex-based classification contained in the marriage statute

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[3] This greater level of protection is one of several reasons that this court cannot rely (as suggested by Appellant Proposition 22 Legal Defense and Education Fund) on the U.S. Supreme Court's summary dismissal of *Baker v. Nelson* for guidance regarding the constitutionality of California's marriage statute. (*Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185], *appeal dismissed* (1972) 409 U.S. 810 [93 S.Ct.37, 34 L.Ed.2d 65].) In fact, the U.S. Supreme Court dismissed the *Baker* appeal several years *before* the U.S. Supreme Court established that the federal Constitution required anything more than a rational basis for sex-based classifications. (See *Craig v. Boren* (1976) 429 U.S. 190, 197 [97 S.Ct. 451, 50 L.Ed.2d 397].)

bears much resemblance to the race-based classifications rejected by this court and the U.S. Supreme Court, respectively, in *Perez* and *Loving v. Virginia*. (*Perez, supra,* 32 Cal.2d 711; *Loving v. Virginia* (1967) 388 U.S. 1, 10-11 [87 S.Ct. 1817, 18 L.Ed.2d 1010].) The anti-miscegenation statutes at issue in *Perez* and *Loving* each denied individuals equal protection under the law by denying individuals the right to marry the spouse of their choice purely on the basis of race. Here, the same standard applies (i.e., strict scrutiny) and the statute at issue is likewise unconstitutional: it denies individuals the right to marry the spouse of their choice purely on the basis of sex. (*Koire v. Metro Car Wash, supra*, 40 Cal.3d 24 at p. 36 ["Public policy in California strongly supports eradication of discrimination based on sex."].)

C. The Sex-Based Classification In The California Marriage Statute Cannot Be Justified By Its Purported "Equal" Application To Men And Women

Appellants attempt to justify the sex-based classification of the current marriage statute on the basis that it discriminates against men and women equally. But to each woman who is deprived of the right to marry the person she loves purely on the ground that she is a woman, and to each man who is deprived of the right to marry the person he loves purely on the ground that he is a man, the statute's treatment is hardly "equal." It is discrimination on the basis of sex. Long-standing California jurisprudence confirms this reality.

1. Equal Protection Applies To Individuals

The Court of Appeal erred in adopting Appellants' argument that the purported "equal application" of the marriage statute to women and men exempts the statute from the presumption that sex-based classifications are invalid. (See *In re Marriage Cases* (Cal. Ct. App. 2006) 49 Cal.Rptr.3d 675, 706.) This holding is in direct conflict with the California doctrine that equal protection of the law is a right afforded to individuals, and must be evaluated on an individual level. This Court articulated this principle when it rejected the "equal application" argument in the closely analogous context of anti-miscegenation laws. In *Perez v. Sharp*, *supra*, 32 Cal.2d 711, the Court struck down California's anti-miscegenation law, explaining that "[t]he decisive question . . . is not whether different races, each considered as a group, are equally treated." (*Id.* at p. 716.) This was so because "[t]he right to marry is the right of individuals, not racial groups." (*Ibid.*) Each individual in *Perez* was "barred by law from marrying the person of [his or her] choice and that person to [him or her] may be irreplaceable." (*Id.* at p. 725.)

The Court of Appeal reiterated this principle in 2001, stating, "[T]he rights created by the Equal Protection Clause are not group rights; they are personal rights guaranteed to the individual. Thus, where an individual is denied an opportunity or benefit or otherwise suffers a detriment as a result of a . . . governmental scheme, it is no answer that others of her [group]

secured the benefit or avoided the detriment." (*Connerly v. State Personnel Bd., supra*, 92 Cal.App.4th at p. 35 [internal citations omitted][invalidating as unconstitutional several state affirmative action provisions including some that were found to distinguish between individuals on the basis of gender].)

Even the U.S. Supreme Court – which offers less substantive protection in interpreting the federal Constitution than this Court does in interpreting California's – rejects the "equal application" argument, and has done so since 1948. In *Shelley v. Kraemer* (1948) 334 U.S. 1 [68 S.Ct. 836, 3 A.L.R.2d 441, 92 L.Ed. 1161], a case involving private agreements to restrict property access by race, the Court explained, "[t]he rights established [by the Equal Protection Clause] are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (*Id.* at p. 22.) The U.S. Supreme Court similarly rejected the "equal application" argument in holding that Virginia's anti-miscegenation law unconstitutionally impinged on individuals' right to marry the spouse of their choice and worked an "invidious discrimination," despite the law's purported "equal" application to different races. (*Loving v. Virginia, supra*, 388 U.S. at pp. 10-11.)

Shelley and *Loving* are part of a long line of federal cases that reject

the "equal application" justification for a denial of equal protection. (See also *McLaughlin v. Florida* (1964) 379 U.S. 184 [85 S.Ct. 283, 13 L.Ed.2d 222] [striking down a law prohibiting unmarried interracial couples from cohabitating and specifically disapproving of the theory that a discriminatory law can be saved merely because it "applie[s] equally to those to whom it [is] applicable"]; *Anderson v. Martin* (1964) 375 U.S. 399, 404 [84 S.Ct. 454, 11 L.Ed.2d 430] [invalidating a provision that identified candidates for office by race, rejecting argument that the "Act is nondiscriminatory because the labeling provision applies equally to Negro and white"]; *Shaw v. Reno* (1993) 509 U.S. 630, 650 [113 S.Ct. 2816, 125 L.Ed.2d 511, 61 USLW 4818] ["racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally"]; *Johnson v. California* (2005) 543 U.S. 499, 505-506 [125 S.Ct. 1141, 160 L.Ed.2d 949] [reaffirming that "equal application" does not justify classification based on suspect class and stating, "[w]e rejected the notion that separate can ever be equal – or neutral – 50 years ago in *Brown v. Board of Education* . . . and we refuse to resurrect it today"]; *Parents Involved in Community Schools* (2007)___ U.S. ___, [127 S.Ct. 2738, 2747] [rejecting "equal application" theory with respect to school admission "tiebreaker" quotas because "at the heart of the [U.S.] Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply

components of a racial, religious, sexual or national class"].) California's constitution must provide substantive protection equal to or greater than that of the federal Constitution.

Like *Perez*, *Connerly*, *Loving*, and the many federal cases cited above, this is a case about individuals – in this case, individuals who are legally barred from marrying the intended spouse of their choice, purely on the basis of their sex. The current marriage statute harms each such individual, as outlined in the Third Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Complaint"). (Respondent's Appendix, Case No. A110451, at pp. 179-206.) From its first page, the Complaint focuses on the harm to individual Respondents who are denied equal protection of the law by the sex-based restriction in California's marriage statute. (See, e.g., *Id.* at p. 181, ¶ 2 ["Excluding same-sex couples from marriage deprives the individuals who are members of those couples of the opportunity to enter into the one legally-recognized, government-sanctioned relationship that is most widely recognized as a symbol of love and commitment and that automatically is afforded great societal respect."]; see also, e.g., *id.* at pp. 182-183, ¶¶ 3, 4, 195-196, ¶ 25, 198-200, ¶ 39, 202, ¶ 45 [outlining the harm to individual plaintiffs from the marriage ban].)

The trial court in this case recognized these individual harms and appropriately rejected the "equal application" argument: "*Perez* makes it

crystal clear that equal protection of the law applies to individuals and not to the groups into which such individuals might be classified and that the question to be answered is whether such individual is being denied equal protection because of his/her characteristics." (Appellant's Appendix Case No. A110450, at p. 124.) Thus, the trial court explained, "[t]o say that all men and all women are treated the same in that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications." (*Id.* at p. 123.) Here, each Respondent, and every person who is likewise denied the fundamental right to marry based on his or her sex, is denied equal protection based on an impermissible sex-based classification.

2. The Court Of Appeal Erred In Limiting The Holdings Of *Perez* And *Loving* To The Context Of Race

The Court of Appeal discounted the anti-miscegenation cases' rejection of the "equal application" argument in part because the courts in *Perez* and *Loving* were "especially troubled by the challenged laws' reliance on express *racial* classifications." (*In re Marriage Cases*, *supra*, 49 Cal.Rptr. at p. 708 [emphasis in original].) But the "equal application" argument is no more valid in gender cases than it is in race cases, and the Court of Appeal erred in making such a distinction. As a threshold matter, sex-based classifications and race-based classifications are equally subject

to strict scrutiny under California law. (See, e.g., *Connerly v. State Personnel Bd., supra*, 92 Cal.App.4th at pp. 31-32 [citing *Koire* and *Sail'er Inn*], 39 ["under the equal protection guarantee of California's Constitution, gender is a suspect classification subject to strict scrutiny"].)

Moreover, the precept that California's equal protection rights must be evaluated with respect to individuals – and California's corresponding rejection of the "equal application" concept – has not been limited to race cases. Nor could it be, as equal protection rights belong to all individuals, not only individuals of a particular race. Thus, the Court of Appeal has rejected the "equal application" concept in the context of sex discrimination in statutory schemes concerning the state lottery, government bonds, state civil service, community colleges, and state contracting. (See *Connerly v. State Personnel Bd., supra*, 92 Cal.App.4th at pp. 35, 45, 51 [repeating doctrine that in a gender discrimination case, "[f]or purposes of equal protection analysis, we must view the law from the standpoint of the individual."].) Likewise, the U.S. Supreme Court has recognized that the equal application argument is inappropriate in the sex discrimination context just as it is in the race discrimination context. In *J.E.B. v. Alabama ex rel T.B.* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89], the Supreme Court struck down sex-based peremptory challenges made in jury *voir dire* notwithstanding that sex-based peremptory challenges could be applied equally against men and women. (*Id.* at 146; see also *id.* at 152-53

(conc. opn. of Kennedy, J.) ["The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . an individual denied jury service because of a peremptory challenge exercised against her on account of her sex is no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors."].)

D. The Court Of Appeal Erred In Holding That The Marriage Exclusion Lacked Discriminatory Purpose And Therefore Did Not Discriminate On The Basis Of Sex

The Court of Appeal's final basis for rejecting the equal protection reasoning of *Perez* and *Loving* was that "[n]o evidence indicates California's opposite-sex definition of marriage was intended to discriminate against males or females, and [Respondents] do not argue that the purpose of the definition is to discriminate against either gender." (*In re Marriage Cases*, *supra*, 49 Cal.Rptr. at p. 708 [emphasis in original].) The Court of Appeal's reasoning is flawed in many respects.

1. The Marriage Statute's Legislative History Reflects A Discriminatory Purpose

Contrary to the Court of Appeal's assessment, the "opposite-sex definition of marriage" was enacted with a discriminatory purpose: to reinforce sex-based stereotypes regarding the roles of men and women in marriage and parenting. This discriminatory purpose rises beyond codification of a sex-based classification (which the statute also does, and

which subjects the statute to strict scrutiny) and itself demonstrates sex discrimination in violation of California's guarantee of equal protection. (See *Citizens for Responsible Behavior v. Superior Court* (1992) 1 Cal. App. 4th 1013, 1029 [2 Cal.Rptr.2d 648][citizen's initiative that would have barred a city from enacting any ordinance that banned discrimination against lesbians, gay men, bisexuals, or people with AIDS was facially neutral, but invalid because its intent "blatantly demonstrates an animus [against homosexuals]," citing *Parr v. Municipal Court* (1971) 3 Cal.3d 861, 862-63 [45 P.2d 816]].)

The California Legislature recently recognized the discriminatory intent of section 300, when it passed a bill that would permit same-sex couples to marry by removing the sex-based restriction in section 300.[4] In explaining the need for the new bill, the Legislature explained that:

> By excluding same-sex couples from marriage, California's marriage law discriminates against members of same-sex couples based on their sexual orientation and based on their gender. The exclusion of same-sex couples from marriage is based in significant part on, and perpetuates, gender stereotypes about the roles of men and women in families and in society.

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[4] Governor Schwarzenegger has announced that he will veto the bill, as he did with a similar bill in 2005. Nevertheless, the Legislature's findings are relevant to its understanding of the existing statute. (See *Freedom Newspapers v. Orange County Employees Ret. Sys.* (1976) 6 Cal. 4th 821, 832-33 [863 P.2d 218, 25 Cal.Rptr.2d 148]["The Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute."][internal citations omitted].)

(Assem. Bill No. 43, approved by Assem., June 5, 2007 and by Senate, Sept. 7, 2007 (2007-2008 Reg. Sess.).)

The legislative history of the 1977 bill that defined marriage expressly as between a woman and a man reveals that the sex-based classification in the statute was enacted with the specific objective of reinforcing gender stereotypes, which were based on notions of a homemaker/caretaker mother and a breadwinner father.[5] Marriage's "special benefits were designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children. In other words, the legal benefits granted married couples were actually designed to accommodate motherhood." (See Assem. Com. on Judiciary, Digest of Assem. Bill No. 607 (1977-1978 Reg. Sess.) April 14, 1977, pp. 1-2, Respondent's Appendix, Case No. A110449, Vol. V, at pp. 1039-1040.) Rather than shed the historical and outmoded roots of marriage in which wives were financially dependent on and subordinate to their husbands, supporters of the bill embraced them, arguing that marriage helps "to guarantee the presence of a male parent when a woman produces children" and thereby "protect[s] the children, even though in doing so we indirectly provide special protections for a

[5] At a December 23, 2004 hearing, the trial court took judicial notice of the legislative history of section 300, including the 1977 amendment. (Clerk's Transcript, Case No. A110651, Vol. II, p. 631, Respondent's Appendix, Case No. A110652, Vol. I, pp. 91-109.)

financially dependent mother." (*Ibid.*)

This Court has rejected such gender stereotypes about the vulnerability of women as a justification for sex-based classifications in the law. For example, in *Arp v. Worker's Compensation Appeals Bd.*, *supra*, 19 Cal.3d 395, the Court held that the statutory presumption of a widow's dependency violated both state and federal equal protection provisions. The Court reasoned that "neither administrative convenience nor 'outdated misconceptions' and 'loose fitting characterizations' will support gender-based classifications." (*Id.* at pp. 400, 409.) The Court acknowledged that the "widow's conclusive presumption of total dependency . . . is the relic of an era in which the majority of persons – certainly the majority of those in positions of power – accepted as axiomatic that 'the God of nature made woman frail, lovely and dependent . . . .'" (*Id.* at p. 404.) Rejecting this antiquated logic, the Court recognized that women no longer need to be "dependent." (*Ibid.*) In finding that the statute was not justified by any compelling state interest, the Court explained that although the statute purported to aid women, it did so at the expense of equality "by perpetuating the paternalistic notion that a woman's financial contribution is unlikely to be of substantial importance to the family unit." (*Id.* at p. 407.) Because such a statute "den[ies] equal protection and clearly . . . conflict[s] with the state policy of abolishing archaic stereotypes," it "cannot be said . . . to be necessary to the realization of a

compelling state goal." (*Id.* at pp. 407-08.)

2. The Marriage Statute Discriminates By Perpetuating Gender Stereotypes

The marriage statute's sex-based classification perpetuates gender stereotypes, an effect that California law recognizes as unlawful sex discrimination. (See, e.g., *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal. 3d 1 [striking down law containing a sex-based classification that perpetuated gender stereotypes].) The notion that marriage, a cherished and fundamental institution, is the exclusive domain of different-sex couples relies on a vision of the family based in large part on the preservation of traditional gender norms. Allowing gay men and lesbians to marry:

> threatens not the family as such, but a certain traditional ideology of the family. That ideology is one in which men, but not women, belong in the public world of work and are not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands.

(Koppelman, *The Miscegenation Analogy* (1988) 98 Yale L.J. 145, 159.) Thus, "[h]omosexuals are a threat to the family only if the survival of the family requires that men and women follow traditional sex roles." (*Id.* at p. 160.) In this manner, the marriage law provides legal framework for, and state-sanctioned reinforcement of, conventional gender norms.

By enacting the current marriage statute, the legislature gave these gender stereotypes the force of law by creating an exclusionary legal framework that perpetuates them. Of course, individuals and couples

remain free individually to embrace "traditional" gender roles or not, and to structure their relationships accordingly. However, the constitutional guarantee of equal protection prohibits the state from relying on stereotypical roles to justify sex-based classifications in marriage.

a) Perpetuation of Gender Stereotypes Is A Form Of Sex Discrimination

The Court of Appeal has cited no authority for the proposition that a law must be designed "to discriminate against either gender" to amount to unconstitutional sex discrimination (*In re Marriage Cases*, *supra*, 49 Cal.Rptr.3d at p. 708). In fact, California courts have long viewed with skepticism distinctions based on gender stereotypes, regardless of whether those stereotypes are enforced "equally" against men and women or whether they appear to denigrate one gender more than the other. Thus, in *In re Marriage of Carney,* (1979) 24 Cal.3d 725 [598 P.2d 36, 157 Cal.Rptr. 383], this court held that the trial court had erred when it based a child custody determination on gender stereotypes about what activities a physically handicapped father would be able to engage in with his son. Citing *Sail'er Inn*, this Court criticized the trial-court's "sex-stereotypical" belief that a "normal relationship between father and boys [required] vigorous sporting activities." (*Id.* at p. 736.) The Court noted that the trial court's reasoning would apply equally to mothers, but found that such equal application did not support the trial court's ruling. (*Id.* at p. 737, fn.9.)

The Court is similarly skeptical of "benign" stereotyping. For example, in *Sail'er Inn, supra*, 5 Cal.3d 1, the Court held unconstitutional a law adopted to protect rather than to harm women because the law could only be justified by archaic stereotypes about women. (*Id.* at p. 10.) In rejecting the law, which permitted women to tend bar only in establishments owned by themselves or their husbands, the Court commented that "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." (*Id.* at p. 20.) The Court also rejected the state's asserted rationale that "women bartenders would be an 'unwholesome influence' on the public," and emphasized that "notions of what is a 'ladylike' or proper pursuit for a woman in our society . . . . cannot justify discrimination against women in employment." (*Id.* at p. 21.) Thus, the Court invalidated the law because it was based on two of the central rationales advanced in support of the current marriage law: that women should be "protected" from irresponsible men, and that women have a different role in society from men.

Similarly, in *Koire, supra*, 40 Cal.3d 24, the Court invalidated a sex-based differential pricing scheme in which a car wash gave discounted prices to women on designated "Ladies' Days." In doing so, the Court explained that the sex-based pricing scheme was "detrimental to both men and women, because it reinforces harmful stereotypes," such as an attitude that women must be aided by men's "chivalry." (*Id.* at pp. 34-35.) The

Court recognized that sex-based classifications in the law have a significant effect on social expectations regarding the sexes and supposed sex differences. As the Court explained:

> When the law "emphasizes irrelevant differences between men and women[,] [it] cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes . . . . As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become."

(*Id.* at pp. 34-35 [quoting Kanowitz, Women and the Law (1969) p. 4]; see also *Rotary Club of Duarte v. Bd. of Directors of Rotary Int'l* (1986) 178 Cal.App.3d 1035, 1062 [224 Cal.Rptr. 213] [striking down the Rotary Club's single sex policy on the ground that "'discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life'"] [quoting *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 625 [104 S.Ct. 3244, 82 L.Ed.2d 462]].)[6]

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[6] Appellants allege that *Jespersen v. Harrah's Operating Co., Inc.* (9th Cir. 2007) 444 F.3d 1104, represents a break from California's sex

The Judicial Council of California has recognized the corrosive effect of gender stereotypes and has made clear that reliance on gender stereotypes is a form of gender discrimination. In its 1996 Report, the Council's Advisory Committee on Gender Bias found "serious problems" of gender bias in "decision-making, court practices and procedures, the fair allocation of judicial resources and courtroom demeanor." (Judicial Council of Cal., Advisory Com. Rep., Achieving Equal Justice for Women and Men in the California Courts (1996) p. 25.) This bias included reliance by judges and attorneys on gender stereotypes – for example, beliefs that women "should be taking care of children and not be in the workplace;" that women are too emotional; and that men should "protect and flatter women." (*Id.* at p. 62).

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stereotyping precedents. In *Jespersen,* the Ninth Circuit granted summary judgment to a casino whose employee alleged that the casino's grooming policy, which included a requirement that women wear make-up, constituted illegal sex-stereotyping. (*Id.* at 1107). At the outset, of course, *Jesperson* was decided under a federal statute rather than the California Constitution, and therefore does not guide the limits of California protection. Moreover, the Ninth Circuit was explicitly constrained by the plaintiff's failure to introduce any evidence of either a disparate impact or the operation of a gender stereotype. (*Id.* at 1110-12 ["Jespersen did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women"]; ["[The dress code] is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear"].) This contrasts sharply with the present case, in which the disparate impact on individuals who are barred from marrying the spouse of their choice based on sex is manifest,

b) Arguments Advanced By Proponents Of The Marriage Exclusion Demonstrate How It Perpetuates Gender Stereotypes

The marriage statute unquestionably perpetuates gender stereotypes. Its impact in this regard is evident in the arguments advanced in opposition to marriage for same-sex couples in this case, which are rooted in impermissible stereotypes regarding the appropriate role of men and women in the family.

Proponents of the current marriage exclusion adopt such distinct roles for husbands and wives that the desire to settle down with another individual of the same sex itself becomes an act of gender transgression: In a same-sex couple, which one is the "husband" and which one is the "wife"?

For example, one declarant claimed:

> Masculine identity has always and everywhere been defined primarily in connection with three functions of men: provider, protector, and progenitor. But women have moved into the public sphere and become providers. Moreover, they have demanded that the state take over from individual men as protectors. That leaves progenitor – fatherhood – as the only possible source of healthy masculine identity.

(Declaration of Katherine Young in Support of Proposition 22 Legal Defense and Education Fund's Motion for Summary Judgment / Summary Adjudication, Clerk's Transcript, Case No. A110651,Vol. II, at p. 456,

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and the legislative history of section 300 makes plain that sex stereotypes underlie the current marriage statute and are perpetuated by it.

¶ 67.) The same declarant presents a stereotyped view of marriage as necessary to protect women from irresponsible men who, absent the bonds of marriage, would succumb to a presumed biological urge to abandon their families:

> At the heart of human existence is a natural asymmetry between the sexes. Because women produce a limited number of eggs, they choose their mates with long-term goals in mind . . . . Because men produce countless sperm, by contrast, they can easily impregnate many women, sire many children and keep moving on to other women; they need not, in purely biological terms, invest much in caring for any of these women and children. But every society has strongly encouraged men to invest heavily in family life.

(*Id.* at p. 441, ¶ 35; see also Brief of Amici Curiae United Families International and Family Leader Foundation, *In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d 675 [arguing that marriage protects "the child and the often vulnerable mother" from lacking adequate support]; Brief of Amici Curiae The Church of Jesus Christ of Latter-Day Saints et al., *In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d 675 [arguing that marriage is necessary to protect "children and vulnerable women."].)

Similarly, arguments in favor of the marriage exclusion that cite supposed benefits for child welfare are equally rooted in legally and sociologically discredited gender stereotypes regarding the roles of men and women in parenting.[7] For example, one declarant at the trial level

[7] Any argument against marriage for same-sex couples based on the state interest of encouraging marriage among different-sex parents relies on

contended that male and female parents are inherently different because male parents purportedly provide "intelligence/problem solving skills," "responsibility and autonomy," and "initiative, risk taking and independence" while female parents provide love that is "[un]conditional, comforting, and the foundation of human attachment fostering empathic character in children." (Brief of Amicus Curia American Center for Law & Justice Northeast, Inc., at 23-25, *In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d 675.) Another declarant at the trial level contended that a "mother contributes differently than a father to the development of children. . . . [M]others commonly use an 'attentive and hands-on approach' to child rearing. . . ." (Declaration of George A. Rekers in Support of Proposition 22's Motion for Summary Judgment / Summary Adjudication, Appellant's Appendix, Case No. A110652, Vol. III, at p. 578, ¶ 16.) According to supporters of the marriage exclusion, children raised with parents of the same sex would suffer "specific disadvantages" as a result of growing up in an environment where both parents are the same sex: "[i]n a home headed by an adult sexually involved with same-sex

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a logical fallacy, as articulated by many sources, including Chief Judge Kaye of the New York Court of Appeals: Even if the state does have a legitimate interest in encouraging different-sex parents to marry, that interest does not justify the exclusion of same-sex parents from the institution of marriage. (*Hernandez v. Robles* (2006) 7 N.Y.3d 338, 394 [821 N.Y.S.2d 770] (dis. opn. of Kaye, C.J.).) Thus, any formulation of a child-welfare argument must be based on a sex-stereotype-based preference for parents of different sexes over parents of the same sex.

persons, only a mother-child relationship or a father-child relationship is modeled." (*Id.* at p. 578, ¶ 22.)

The assumption inherent in these arguments is that children benefit from each gender's ostensibly unique, biologically-determined contributions to child-rearing. But these claimed gender-specific parenting styles simply reflect deep-seated stereotypes regarding male and female characteristics that are properly condemned as sex discrimination. By maintaining the current law, the state perpetuates the insult that mothers are unable to teach "intelligence" or "problem solving skills" and that fathers can not provide "comforting" or "empathetic" love to their children – and perpetuates the absurd proposition that, even if these stereotypes were true, prohibiting same sex couples from marrying would have a favorable influence on child welfare.[8]

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[8] In fact, while there are studies demonstrating that children (unsurprisingly) benefit from living with two loving parents, such research also consistently finds that children living in same-sex-couple-headed households do as well as those living in different-sex-couple-headed households. (See, e.g., Am. Psychol. Ass'n, *APA Policy Statement: Resolution on Sexual Orientation, Parents, and Children* (2004) ["[R]esearch has shown that adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."]; Perrin et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents* (2002) 109 Pediatrics 341, 341 ["Children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual."]; Stacey & Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* (2001) 66 Am. Soc. Rev. 159, 176 ["[E]very relevant study to date shows that parental sexual orientation per

c) California Courts Have Consistently Rejected Sex Stereotypes Advanced By Proponents Of The Marriage Exclusion

California courts do not permit the law to enforce gender stereotypes with respect to parenting. The gender stereotypes that underlie the marriage exclusion have consistently been rejected in California jurisprudence and must be rejected here.

There was a time when male and female parents were assumed to occupy different parenting roles by virtue of their gender. For example, an appellate court in *White v. White* (1952) 109 Cal.App.2d 522, 523 [240 P.2d 1015], held that an award of child custody to the mother was proper when the child was of "tender years." In doing so, the court explained that if the child had been "of an age to require education and preparation for labor and business," traditionally male-centered spheres, custody would have been awarded to the father. (*Ibid.*)

But as society and the courts have adopted more modern views of gender equality, California courts have recognized the impropriety of the government endorsing or enforcing gender-based assumptions about parenting roles. In *Burchard v. Garay* (1986) 42 Cal.3d 531 [724 P.2d 486, 229 Cal.Rptr. 800], the Court rejected the argument that the father should be awarded custody of the couple's children because the father's new wife

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se has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment."].)

did not work and thus "could care for the child in their home," while the children's mother was employed. (*Id.* at pp. 539-40.) The Court explained that

> in an era when over 50 percent of mothers and almost 80 percent of divorced mothers work, the courts must not presume that a working mother is a less satisfactory parent or less fully committed to the care of her child. A custody determination must be based upon a true assessment of the emotional bonds between parent and child.

(*Id.* at p. 540.) The Court expressly rejected the "assumption, unsupported by scientific evidence, that a working mother cannot provide such care – an assumption particularly unfair when, as here, the mother has in fact been the primary caregiver." (*Ibid.*)

California courts have acknowledged that government-imposed gender stereotypes about marriage and parenting harm men as well as women. *In re Marriage of Carney*, *supra*, 24 Cal.3d 725, discussed above, rejected the discriminatory principle that a father's physical handicap prevented him from fulfilling gender-based expectations of what a father should be. The Court criticized the trial court's "belief that there could be no 'normal relationship between father and boys' unless [father] William engaged in vigorous sporting activities with his sons," which the Court called "conventional sex-stereotypical thinking." (*Id.* at p. 736.)

Indeed, the Court bluntly demonstrated the restrictive, outdated nature of the trial court's logic:

> For some, the [trial] court's emphasis on the importance of a father's 'playing baseball' or 'going fishing' with his sons may evoke nostalgic memories of a Norman Rockwell cover on the old Saturday Evening Post. But it has at least been understood that a boy need not prove his masculinity on the playing fields of Eton, nor must a man compete with his son in athletics in order to be a good father: their relationship is no less 'normal' if it is built on shared experiences in such fields of interest as science, music, arts and crafts, history or travel, or in pursuing such classic hobbies as stamp or coin collecting. In short, an afternoon that a father and son spend together at a museum or the zoo is surely no less enriching than an equivalent amount of time spent catching either balls or fish.

(*In re Marriage of Carney, supra*, 24 Cal.3d at pp. 736-37.) Instead of focusing on stereotypical sex-based family roles, the Court focused on the individualized, meaningful interactions between fathers and children free of gendered notions of masculinity and fatherhood. Explaining that the "sex stereotype, of course, cuts both ways," the Court pointed to the similarly restrictive obligations that the trial court's logic would impose on mothers: "If the trial court's approach herein were to prevail, in the next case a divorced mother who became physically handicapped could be deprived of her young daughters because she is unable to participate with them in embroidery, Haute cuisine, or the fine arts of washing and ironing." (*Id.* at p. 737, fn.9.) The Court exposed the discrimination inherent in using the law to impose antiquated gender stereotypes and revealed the way in which such stereotypes bear no relation to successful parenting.

Moreover, even if male and female parenting relationships were

somehow inherently different from each other, they do not disqualify same-sex couples from child rearing. This Court has made clear that "traditional" assumptions regarding gender and family cannot justify discriminating against same-sex domestic partners or withholding parental rights and responsibilities from both parents in a family formed by a same-sex couple.

Consistent with the basic principle that stereotypes about gender are inappropriate considerations with respect to children and parenting, this Court and courts below have held that both members of a same-sex couple can become legal parents to a child through adoption. In *Sharon S. v. Superior Court (Annette F.)* (2003) 31 Cal.4th 417 [73 P.3d 554, 2 Cal.Rptr.3d 699], the Court held that a woman could adopt her same-sex partner's biological child through the second-parent adoption statutory scheme. In doing so, the Court explained that "second parent adoptions offer the possibility of obtaining the security and advantages of two parents for some of California's neediest children." (*Id.* at p. 438.) Rather than express concern that the child would have two parents of the same sex, the Court recognized the importance of "a legal relationship with a second parent," regardless of the parent's gender or sexual orientation. (*Id.* at p. 437.) Indeed, the Court explained that its "decision encourages and strengthens family bonds." (*Id.* at p. 438.)

Furthermore, in one of three consolidated parental rights cases decided by the Court two years ago, *Elisa B. v. Superior Court (Emily B.)*

(2005) 37 Cal.4th 108 [117 P.3d 660, 33 Cal.Rptr.3d 46], the Court found that two women who chose to have children together while in a committed relationship were both the children's parents under the Uniform Parentage Act, even though the couple had not completed a second-parent adoption. The couple had formed a viable family unit in which one mother, Emily, "would be the stay-at-home mother" and the other mother, Elisa, "would be the primary breadwinner for the family." (*Id.* at p. 114.) The question presented in the case was whether the non-biological parent, Elisa, was a presumed parent of the children under California Family Code § 7611(d) and the rule established by the Court in *In re Nicholas H.* (2002) 28 Cal.4th 56 [46 P.3d 932, 120 Cal.Rptr.2d 146]. The Court of Appeal had held that Elisa was not a presumed parent because the rule in *Nicholas H.* could not be applied to a woman when the children already had an identified legal mother. (*Elisa B. v. Superior Court (Emily B.)* (2004) 118 Cal.App.4th 966, 977-78 [13 Cal.Rptr.3d 494] [finding *Nicholas H.* "inapposite because . . . [h]ere, the twins have a natural, biological mother, Emily, who is not disclaiming her maternal rights and obligations"].) This Court rejected such reasoning, noting that while "most of the decisional law has focused on the definition of the presumed father," the same concept applies "to a woman seeking presumed mother status." (*Elisa B.*, 37 Cal.4th at pp. 119-20.) There was simply "no reason" that a child could not have two mothers. (*Id.* at p. 119 ["We perceive no reason why both parents of a child

cannot be women."].) Accordingly, the Court concluded that the rule for determining whether a person is a presumed parent under the statutory scheme applied regardless of the gender or sexual orientation of the person, and regardless of the gender of the child's existing legal parent. (*Id.* at pp. 124-25 ["A person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children – regardless of her gender or sexual orientation."].) Because Elisa had received the children into her home and openly held them out as her own, she, like a man subject to the same standard, was a presumed parent charged with parental rights and responsibilities. (*Id.* at pp. 120-22.)

Therefore, the Court recognized that children benefit from having a legal relationship with both of the individuals who are functioning as their parents, regardless of the sex of those two individuals. (*Elisa B. v. Superior Court (Emily B.)*, *supra*, 37 Cal.4th at p. 122 [explaining that denying parental status to Elisa "would leave [the children] with only one parent and would deprive them of the support of their second parent"]; see also *id.* at p. 123 [noting that "the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public"].) The Court thus properly acknowledged that

two parents of the same sex can and do form families and that such families must receive legal recognition.

In the cases discussed above, this Court has repeatedly recognized the importance of disregarding or overruling sex-based classifications in statutory or common law that would deny families formed by same-sex couples legal protections. By doing so, the Court has rejected the outdated, stereotype-based rationales for marriage – the exact rationales upon which the marriage exclusion of section 300 is based and upon which supporters of the current statutory exclusion rely.

d) The Marriage Statute Further Perpetuates Gender Stereotypes By Discriminating On The Basis Of Sexual Orientation

By excluding same-sex couples from the favored institution of marriage and instituting a second-tier system for same-sex couples, the state endorses the view that the desire to settle down with someone of the same sex is itself an act of gender non-conformity. The stereotype here is, as one Massachusetts court stated in the context of an employment case, "that 'real' men should date women, not other men." (*Centola v. Potter* (D.Mass. 2002) 183 F.Supp.2d 403, 410.) Likewise, as one Oregon court explained in the same context, a woman who "is attracted to and dates other women" does not conform with the "stereotype of how a woman ought to behave." (*Heller v. Columbia Edgewater Country Club* (D.Or. 2002) 195 F.Supp.2d 1212, 1224.) Although these stereotypes have a long history and

a close nexus with the stereotypes once used to justify the exclusion of women from the business world and to denigrate the traditional "female" role in family and society, they harm men and women alike. Such stereotypes cannot justify the Court of Appeal's reliance on "equal application" reasoning and they cannot justify the sex-based classification in the marriage statute.[9]

The correlation between sex stereotyping and animus against lesbians and gay men is well documented. Historically, fears of homosexuality were linked with resistance to women's advancement as America's so-called "purity movement" attempted "to reinforce traditional female gender roles in the face of a generation of 'new women,' educated and economically independent of men." (Eskridge, Gaylaw: Challenging the Apartheid of the Closet (1999) p. 20.) Indeed, "[t]he modern stigmatization of homosexuals as violators of gender norms . . . developed simultaneously with widespread anxieties about gender identity in the face

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[9] Recently, an Iowa state trial court held that Iowa's marriage exclusion offended that state's Equal Protection Clause. (See *Varnum v. Brien* (Dist. Ct. Polk County Aug. 30, 2007, CV5965) p. 49.) The court found as a fact that "sex-role conformity remains embedded" in the marriage exclusion because "as a condition of marriage . . . male Plaintiffs must conform to the State's view that men should fall in love with, be intimate with, and marry only women, while female Plaintiffs must conform to the State's view that women should fall in love with, be intimate with, and marry only men." (*Id.* at p. 40.) The marriage exclusion clearly failed the intermediate scrutiny mandated by Iowa's equal protection jurisprudence (see *id.* at p. 49); it lacked even a "rational

of an emerging ideology of gender equality." (Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination* (1994) 69 N.Y.U. L. Rev. 197, 240.) In the 1970's, Phyllis Schlafly famously argued against the passage of a national Equal Rights Amendment on the ground that it would require granting same-sex couples the right to marry because "[i]t is precisely 'on account of sex' that a state now denies a marriage license to a man and a man, or to a woman and a woman." (Schlafly, The Power of the Positive Woman (1977) p. 90.) Schlafly also explicitly tied the possibility of marriage for same-sex couples to "degradat[ion]" of women's homemaker and other traditional gender roles within families. (*Id.* at 85-90.)

Beyond such outspoken connections, the stigmatization of lesbians and gay men has long been linked to the subordination of women. As Andrew Koppelman explained:

> The two stigmas – sex-inappropriateness and homosexuality – are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; . . . they appear to be guilty of some kind of insubordination.

(Koppelman, *Romer v. Evans and Invidious Intent* (1997) 6 Wm. & Mary Bill Rts. J. 89, 129.)

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relationship to the achievement of any legitimate government interest." (*Id.*

Perhaps for this reason, numerous studies have observed the connections between anti-gay sentiment and strongly-held beliefs in gender stereotypes. These studies find that those with negative feelings about homosexuality equate it with gender-nonconformity, which reinforces their views that an integral part of being a "real" man is a sexual attraction to women, that an integral part of being a "real" woman is a sexual attraction to men, and that women and men should occupy "traditional" family and social roles in which women are subordinate to men. (See, e.g., Dunbar et al., *Some Correlates of Attitudes Toward Homosexuality* (1973) 89 J. Social Psychology 271 [subjects "who were most prejudiced against homosexuals . . . held stronger stereotypes of masculinity and femininity"]; Herek, *Heterosexuals' Attitudes toward Lesbians and Gay Men: Correlates and Gender Differences* (1988) 25 J. Sex Research 451 [hostility toward gay men and lesbians "is associated with traditional attitudes about gender- and family-roles"]; Kite & Whitley, *Sex Differences in Attitudes Toward Homosexual Persons, Behaviors, and Civil Rights* (1996) 22 Personality & Social Psychology Bulletin 336 ["[B]oth women's and men's negative attitudes toward homosexuality are strongly associated with support for traditional sex roles."]; Morrison et al., *Gender Stereotyping, Homonegativity, and Misconceptions about Coercive Behavior Among Adolescents* (1997) 28 Youth & Society 351 [finding a correlation in

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at p. 61.)

adolescents between homophobia and sex-stereotypic beliefs and a correlation between homophobia and a belief that sexual coercion is normative rather than anomalous].) A 2006 study found, "[r]espondents were more anti-gay if they . . . believed that a woman's place is in the home rather than supporting equality between the sexes." (Hicks & Lee, *Public Attitudes Toward Gays and Lesbians: Trends and Predictors* (2006) 51 J. Homosexuality 57.) One recent study notes that, although attitudes toward lesbians and gay men have improved over time, traditional sexist beliefs still correlate to anti-gay behavior, including violence. (Whitley, *Gender Role Variables and Attitudes Toward Homosexuality* (2001) 45 Sex Roles: A Journal of Research 691.) These studies confirm that both negative attitudes toward homosexuals and antigay behavior are closely related to a belief in traditional sex stereotypes. (*Id.* at 702-03.)

Because of the close connection between discrimination based on gender and discrimination based on sexual orientation, the Court of Appeals' judgment that excluding same sex couples from the right to marry is not an act of sex discrimination cannot withstand scrutiny. Enacting legislation that denies a benefit to individuals based on their sexual orientation is itself an act of sex discrimination. This is especially true where, as here, the rationale the legislature provided in support of its action is the goal of promoting traditional conceptions of motherhood and fatherhood that derive from gender stereotypes. That the legislature chose

an express sex-based classification to accomplish its goal of limiting marital status only to heterosexuals further reinforces the impropriety of treating sexual orientation discrimination as a matter analytically and doctrinally distinct from sex discrimination. A judgment that recognizes sexual orientation discrimination as a type of sex discrimination is consistent with the everyday experiences of both those who suffer discrimination and those who perpetuate it. In contrast, erecting rigid analytical distinctions between sexual orientation discrimination and sex discrimination ascribes greater weight to broad descriptive labels than they deserve. Accordingly, regardless of whether the marital status exclusion in California law is regarded as sex-based discrimination or sexual-orientation based discrimination, the result in this case should be the same. The exclusion should be subject to strict scrutiny, and cannot survive.

3. The Marriage Statute's Sex-Based Classification Cannot Be Justified By "Real Differences" Between Men And Women

Appellants have argued that the marriage statute's sex-based classification is based on "real" differences between men and women, such as the fact that women bear children and men do not. (See, e.g., Answer Brief of Campaign for California Families at pp. 15, 73-75.)

There are, of course, real differences between men and women. But these differences bear no rational relationship to the state's denial of marriage rights to same-sex couples. Real differences between the sexes

can only justify a sex-based classification under the very narrow circumstances when (1) the differences are universal and (2) the differences are pertinent to the purpose of the challenged classification. (*United States v. Virginia* (1996) 518 U.S. 515, 541, 550 [116 S.Ct. 2264, 135 L.Ed.2d 735] (hereafter *VMI*).) In *VMI*, the U.S. Supreme Court interpreted the federal Constitution – which provides less substantive protection from gender discrimination than the California Constitution – to hold that the common physical differences in strength, speed, and other physical attributes between men and women did not justify the sex-based classification at issue because they did not hold true for all men and all women. Here, likewise, the physical differences between men and women do not justify the sex-based classification in the marriage statute because not all men and women possess such differences: not all women who can marry can bear children, not all heterosexual couples are capable of biological procreation, many same-sex couples are raising children that were born as a result of prior heterosexual relationships, and many heterosexual and same-sex couples can and do adopt children.

Furthermore, the differences between men and women are not rationally related to the underlying purpose of the sex-based classification articulated in the marriage statute's legislative history, that of protecting children and creating a stable setting for families that include children. (See Assem. Com. on Judiciary, Digest of Assem. Bill No. 607 (1977-1978

Reg. Sess.) April 14, 1977, pp. 1-2, Respondent's Appendix, Case No. A110449, Vol. V, pp. 1039-1040.) Even assuming that the state has a legitimate interest in encouraging marriage between different-sex parents, there is no connection between this goal and the exclusion of same-sex couples from the institution of marriage. Likewise, there is no legitimate purpose served by limiting the protections of marriage to those children born as a result of heterosexual intercourse or raised by their two biological parents, as opposed to children who are adopted, born through assisted reproduction, or are for any other reason being raised by persons other than their biological parents. (*Hernandez v. Robles*, *supra*, 821 N.Y.S.2d at p. 801 fn.5 (dis. opn. of Kaye, C.J.).)

In fact, because of California's policies favoring equality for same-sex parents, discussed above, the state has disavowed any "real differences" argument relating to child well-being. (Answer Brief of Governor Schwarzenegger, at p. 30, fn. 22 ("It has been suggested by some, for example, that same-sex relationships are less committed or stable than are opposite-sex relationships . . . [and] that same-sex marriage would place children at risk. Once again, this assertion is inconsistent with California's determination to extend to registered domestic partners the 'same rights, responsibilities, and benefits' as spouses."); *cf. In re Marriage Cases*, *supra*, 49 Cal. Rptr. 3d at p. 724, fn. 33 ("[T]he Attorney General takes the position that arguments suggesting families headed by opposite-sex parents

are somehow better for children, or more deserving of state recognition, are contrary to California policy."). Thus, "real differences" arguments must be seen for what they are: an attempt to mask rationalizations based on gender stereotypes regarding supposedly appropriate marital and parenting roles. (See, e.g., Declaration of Katherine Young in Support of Proposition 22's Motion for Summary Judgment / Summary Adjudication, Clerk's Transcript, Case No. A110651, Vol. II, at p. 441, ¶ 35 [arguing that because women "produced a limited number of eggs" and men have "countless sperm," men "need not, in purely biological terms, invest much in caring for any of these women or children"]; Brief of Amici Curiae United Families International and Family Leader Foundation, *In re Marriage Cases*, *supra*, 49 Cal.Rptr.3d 675 [arguing that marriage protects "the child and the often vulnerable mother" from lacking adequate support]; Brief of Amici Curiae The Church of Jesus Christ of Latter-Day Saints et al., *In re Marriage Cases*, *supra*, 49 Cal.Rptr.3d 675 [arguing that marriage is necessary to protect "children and vulnerable women."].)

II. California's Domestic Partnership Act Does Not Remedy The Sex Discrimination Embodied In And Perpetuated By The Current Marriage Statute

By restricting marriage to different-sex couples, the current marriage statute places the stamp of state approval on the view that men and women serve different roles in a marriage. As a result of this, the sex discrimination inherent in an exclusionary definition of marriage harms all

Californians – not only individuals who desire to marry a partner of the same sex – because it perpetuates a conception of marriage that is intertwined with stereotypical approaches to how a man or a woman ought to behave and what the roles of men and women should be with regard to home and family.

Although California's Domestic Partnership Act admirably seeks to grant to registered domestic partners "the same rights, protections, . . . benefits, . . . responsibilities, obligations, and duties under law" that married couples have (Fam. Code § 297.5), it cannot cure the harmful gender discrimination inherent in California's decision to deprive same sex couples of marital status.[10] Rather, this system creates a second-tier union that excludes committed domestic partners from the state-sanctioned gravitas that marriage enjoys, and implicitly devalues domestic partnerships as temporary and immature. At the same time, by solidifying the status of marriage as an institution only available to different-sex couples, the existence of domestic partnerships actually ends up entrenching impermissible stereotypes of gender ever more deeply.

The current statutory structure gives state support to the concept that

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[10] As the trial court explained, "[t]he idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal." (Final Decision, *supra*, at p. 9, Appellant's Appendix, Case No. A110459, at p. 115.) Indeed, as the trial court concluded, "the existence of marriage-like rights without marriage actually

a relationship that does not conform to gender norms is not entitled to the prestige of marriage. Marriage is a state-sanctioned public symbol of maturity, extolling the adult virtues of commitment, mutuality, fidelity, and honor. (See *Turner v. Safley* (1987) 482 U.S. 78, 95-96 [107 S.Ct. 2254, 96 L.Ed.2d 64] [describing the "expressions of emotional support and public commitment" attendant on marriage as "an important and significant aspect of the marital relationship."]; see also Sullivan, *State of the Union* (May 8, 2000) The New Republic, at p. 18 [describing marriage as "a fundamental mark of citizenship"].) As the Massachusetts Supreme Judicial Court recognized:

> Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family . . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Goodridge v. Dept. of Public Health (2003) 440 Mass. 309, 322 [798 N.E.2d 941]; see also *Lewis v. Harris*, (2006) 188 N.J. 415, 465-66 [908 A.2d 196] (dis. & conc. opn. of Poritz, C.J.) [quoting *Goodridge*]; Karst, *The Freedom of Intimate Association* (1980) 89 Yale L. J. 624, 651 ["[F]or most people, marriage is . . . primarily a symbolic statement of commitment and self-identification."].) Marriage signals permanence—a

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cuts against the existence of a rational government interest for denying

"commitment" offering "security" and "safe haven." (See *Turner v. Safley*, *supra*, at p. 95; *Goodridge v. Dept. of Public Health*, *supra*, at p. 955.) These significant symbolic benefits are directly linked to the institution of "marriage" and do not accrue to domestic partnerships. (See *Goodridge v. Dept. of Public Health*, *supra*, 798 N.E. at 954 [noting the "enormous private and social advantages [bestowed] on those who choose to marry"]; Goldfarb, *supra*, at p. 283 ["[O]nly marriage conveys full legal and social respect and support for a relationship."]).

The singular status of marriage is borne out by experience under California's domestic partnership law. Marriage is the only union that receives widespread public recognition because "only marriage is sufficiently familiar to the general public to ensure" this recognition and the rights that go along with it. (Goldfarb, *Granting Same-Sex Couples the "Full Rights and Benefits" of Marriage: Easier Said than Done* (2007) 59 Rutgers L. Rev. 281, 283 (hereafter Goldfarb); see also *Andersen v. King County* (2006) 158 Wash.2d 1, 131 [138 P.3d 963] (dis. opn. of Fairhurst, J.) ["There is no equally respected social union. Nor is there a comparable public acknowledgment of a couple's decision to commit their lives to each other"].) Because domestic partnerships are neither familiar to nor recognized by much of the public, Californians who have registered under our Domestic Partnership Act have been denied rights to which they are

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marriage to same-sex couples." (*Ibid.*)

entitled under the statute. (See Goldberg, *A Wedding Sure Beats a Contract,* L.A. Times (Aug. 9, 2007) p. A21 [discussing situations in which registered domestic partners were denied benefits to which they were entitled under the Domestic Partnership Act]; Dolan, *Alimony Provides a Same-Sex Union Test*, L.A. Times (July 22, 2007) [reporting on *In re Marriage of Garber* (Super. Ct. Orange County, June 13, 2007, 04D006519), which holds that for spousal support purposes a domestic partnership is cohabitation, not marriage]; Respondents' Supplemental Brief at 11-13.) Thus, the Domestic Partnership Act has fallen short of guaranteeing registered domestic partners the rights, privileges, and obligations of marriage.

In fact, by creating a scheme that provides domestic partners with many of the benefits of marriage while depriving them of marital status, the Domestic Partnership Act's scheme actually emphasizes the importance of marriage's intangible benefits and highlights the fact that domestic partnerships – *i.e.*, partnerships that, by definition, do not reinforce or conform to "traditional" gender roles – are excluded from them. (See *In re Opinions of the Justices to the Senate* (2004), 440 Mass. 1201, 1206 [802 N.E.2d 565] [stating that a proposed civil unions bill reserving the term "marriage" for opposite-sex couples "exaggerate[s]" the constitutional infirmity of the marriage ban overturned in *Goodridge*]; *Lewis v. Harris*, *supra*, 908 A.2d at p. 226 (dis. & conc. opn. of Poritz, C.J.) ["By excluding

same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples."]; Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource* (2001) 74 S. Cal. L. Rev. 925, 933 ["[W]hen many of the rights, obligations, and privileges of marriage may be enjoyed by unmarried couples . . . the choice to marry civilly arguably takes on even greater symbolic meaning than it has in the past."].)

Set against (and excluded from) the dense symbolism of permanence and maturity that marriage enjoys, domestic partnerships become branded as immature and temporary – something to "grow out of." As the Ontario Court of Appeal recognized, "[d]enying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships." (*Halpern v. Canada (Attorney General)* (2003) 225 D.L.R. (4th) 529, 559 (O.A.C.).)

The Respondents' supplemental briefing outlines the many ways in which California's differing laws governing marriages and domestic partnerships reflect this presumption. (See Respondents' Supplemental Brief at 1-2, 4-5; City of San Francisco's Supplemental Brief at 5-8; Respondents' Supplemental Reply Brief at 4.) Marriages are solemnized;

domestic partnerships are not. Marriages are assumed to be permanent and cannot be entered into without a license or dissolved without the participation of the state. (See, e.g., Fam. Code §§ 300, 2330, 2401.) On the other hand, establishing a domestic partnership requires merely the filing of a notice. (See Fam. Code § 297, 298.5.) Indeed, the break-up of a domestic partnership can often be accomplished the same way. (See Fam. Code § 299.) Thus, California's marriage, divorce, and dissolution laws seem to presume that domestic partnerships are less permanent and less committed than marriages, thereby giving weight to the presumption that individuals and couples who do not conform to gender norms are entitled to less respect than those who do.[11]

CONCLUSION

The extensive case law and commentary discussed above demonstrate how California's jurisprudence and public policies have evolved as jurists and society have reached a deeper understanding of the conditions necessary to achieve true equality under the law. No longer do

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[11] Contrary to the Campaign for California Families' assertion, these are not merely "minor procedural differences." (See Campaign for California Families Supplemental Brief at 4-5; Campaign for California Families' Supplemental Reply Brief at 3-9.) Rather, this presumption has real-life consequences for California families. At least one study has suggested that the "lack of formalized social and cultural support for committed gay and lesbian relationships" accounts for the fact that same-sex committed relationships may tend to break up more readily than marriages. (See Kurdek, *Relationship Outcomes and Their Predictors:*

California courts allow statutes to rely on or enforce gender-based stereotypes regarding marital and parental roles. The expectation that a marital relationship must or should include a homemaker-woman and breadwinner-man has been repeatedly rejected. Instead, Californians enjoy increasing freedom to choose their own path and fulfill marital and parental roles in meaningful ways free from state-enforced gender stereotypes. Yet, California's marriage statute lags behind this jurisprudence in denying lesbians and gay men the fundamental right to marry their chosen partners. Just as this state has rejected sex stereotyping as a basis for discrimination in the fields of employment, matrimony, finance, child custody, and many other areas, it is now incumbent on the Court to do the same for the fundamental right to marry. Acknowledging the right of lesbians and gay men to marry would further support – and indeed is required by – the law's rejection of classifications that rely on and enforce stereotypical gender roles in marriage and the family. The well-intentioned Domestic Partnership Act does not cure the gender discrimination of California's marriage statute. Instead, it provides a second-class union that emphasizes the infirmity of the current statutory scheme.

For the foregoing reasons, as well as those stated in the Respondents' Briefs, this Court should reverse the decision of the Court of

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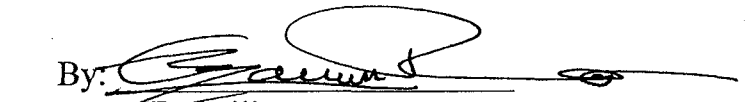
Longitudinal Evidence from Heterosexual Married, Gay Cohabitating, and Lesbian Cohabitating Couples (1998) 60 J. Marriage & Family 553, 565.)

Appeal, hold section 300 of the California Family Code to be unconstitutional under the California Constitution, and recognize the right to marry of lesbians and gay men in California.

DATED this 26th day of September, 2007.

Respectfully submitted,

IRELL & MANELLA, LLP

By: 

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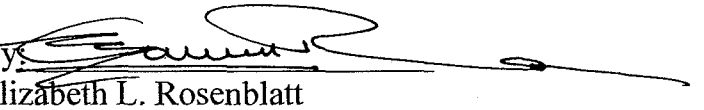
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is printed in Times New Roman, 13-point font and that the number of words contained in this brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 12,366 words, according to the word-count function on Microsoft Word 2003, the program used to create the brief.

By: 

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On September 26, 2007, I served the foregoing document described as **APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION AND [PROPOSED] AMICI CURIAE BRIEF OF AMICI CONCERNED WITH WOMEN'S RIGHTS** on each interested party, as follows:

SEE ATTACHED SERVICE LIST

[X] (BY MAIL) I placed a true copy of the foregoing document in a sealed envelope addressed to each interested party, as stated on the attached service list. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Irell & Manella LLP, Los Angeles, California. I am readily familiar with Irell & Manella LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

Executed on September 26, 2007, at Los Angeles, California.

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

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Court of Appeal No. A110449

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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
Court of Appeal Case No. A110450

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Clinton, et al. v. California, et al.
San Francisco Superior Court Case No. 429548
Court of Appeal Case No. A110463

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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Campaign for California Families v. Newsom, et al.
San Francisco Superior Court Case No. CGC 04-428794
Court of Appeal Case No. A110652

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