Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365

After A Decision of 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

BRIEF OF *AMICUS CURIAE* EQUAL JUSTICE SOCIETY IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel certifies, pursuant to Rule 8.208 of the California Rules of Court, that he represents Equal Justice Society, which is an organization joining in the attached application and brief of *amicus curiae*:

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Statement Of Interest

The Equal Justice Society is a national organization of scholars, advocates and citizens that seeks to promote equality and enduring social change through law and public policy, public education, and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Specifically, EJS works to ensure that antidiscrimination law and jurisprudence continue to address racial and societal inequities in a responsible fashion. Consistent with that mission, EJS works to confront all manifestations of invidious discrimination and second-class citizenship. Such threats to our collective dignity spring from a common source and endanger us all, no matter the context in which they arise.

Introduction

The Equal Justice Society respectfully submits this brief to respond to the vision of equality propounded by the State through the brief of the Attorney General. In its attempt to defend the discriminatory exclusion of same-sex couples from the state institution of civil marriage, the State offers an account of the concept of equality under the California Constitution, and of the judicial response that antigay discrimination should provoke under that charter, that is both misguided and disturbing. The protection of disfavored minorities against invidious, persistent, and long-standing discrimination is both a proper and a central function of judges in

our constitutional system of government. This Court has long defended that role, setting a worthy example in the elimination of state-mandated inequality in the modern era. The State urges this Court to adopt an approach to antigay discrimination that would distort the principles that have guided the protection of equal citizenship in this State. The Court should decline that invitation. For over half a century, both this Court and the Supreme Court of the United States have embraced, as one of their central functions, the elimination of caste and second-class citizenship from the American community. The present case calls squarely upon this Court to take up that role once again.[1]

I. The State Fails to Understand the Function that the Judiciary Performs When it Protects the Equal Status of All Citizens.

The State places great weight upon arguments concerning the role of the judiciary and the importance of deferring to legislative or popular preferences. (See Answer Brief of State of California and the Attorney General to Opening Brief on the Merits (hereafter AG Brief) at pp. 43–54.) We agree that it is important to focus on the proper role of the judiciary in this case. The State's discussion misconceives that role, attempting to lay emphasis on a "problem" of judicial legitimacy that this dispute does not

[1] In addition to the arguments set forth herein, the Equal Justice Society wishes to indicate its support for the arguments contained in the *amicus curiae* brief of the American Psychoanalytic Association. That brief addresses aspects of the principle of equality that are different from those explored here, but no less important.

present. This is a case about equality — about the ability of a disfavored minority of citizens to enjoy the same status under state law that is afforded to everyone else. The enforcement of equal status among all citizens is one of the central functions of the judiciary in the modern era.

A. The Respondents Do Not Seek to Restrict the Policy Options Available to the Legislature; Rather, They Seek to Participate in the Policy that the Legislature Itself has Chosen.

The judiciary performs different functions when it reviews the constitutionality of a law that applies to all people, on the one hand, and when it reviews the constitutionality of a law that singles out a minority of citizens for inferior treatment, on the other. It is the difference between being asked to foreclose a legislative policy option altogether and being asked to find that a policy, otherwise legitimate and within the powers of the legislature, must simply be applied equally to all citizens.

When a court is asked to review a law under one of those provisions of the Constitution that place categorical limitations on the types of policies that the legislature can enact — the right to privacy, for example, which may forbid restrictions on intimate or personal conduct, or the right to free speech, which may prohibit government from interfering with expression — it is being asked to determine whether the legislature may *ever* pursue the challenged policy. A finding that the law is unconstitutional under one of these provisions may permanently foreclose the legislature from utilizing

that particular policy solution. It is in such cases that invocations of judicial deference and modesty are most appropriate. Even then, principles of judicial deference only constitute the beginning of the analysis. Constitutions embody values, and those values sometimes warrant a declaration that a given type of law is, in fact, categorically prohibited — that the legislature may never regulate the people in a certain manner. But it is fair to say that, when such a declaration is what a litigant seeks, judges should be particularly mindful of the impact that their ruling will have upon the legislature's ability to respond to pressing social problems. Granting the requested relief may permanently constrain the options that the legislature can draw upon.

That is not this case.

When, in contrast, a court is asked to review a law that selectively makes rights, opportunities, or a preferred status available to only one class of citizens, while denying the benefits of that law to another class of citizens, a very different question is presented. A litigant who invokes the constitutional principle of equal protection is not asking the court to prohibit the legislature from pursuing a policy option altogether. Rather, the litigant is asking that the legislature be required to extend whatever policies it selects to all citizens in similar circumstances, rather than reserving its laws to one privileged group. Where it is such equality principles that are at stake, concerns over judicial deference and modesty

are less urgent. An equal protection claim does not pose any threat to the legislature's ability to craft whatever policy solutions it deems best for the people in its charge. It merely limits the legislature's ability to exclude one disfavored class of citizens from the policy solution it has chosen.

Ensuring the equal status of all citizens before the law is one of the central functions of the judiciary in the modern era — so much so that the principle of "Equal Justice Under Law" is inscribed above the entrance to the building of the Supreme Court of the United States. (See <http://www.supremecourtus.gov/about/westpediment.pdf> [as of Sept. 22, 2007].) "The Equal Protection Clause," the Supreme Court has written, "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." (*Plyler v. Doe* (1982) 457 U.S. 202, 213 [102 S.Ct. 2382, 72 L.Ed.2d 786].) The Court reaffirmed this proposition in the opening passage of the very first decision in which it recognized the imperative for judges to ensure the equal status of gay men and lesbians.

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." (*Plessy v. Ferguson* (1896) 163 U.S. 537, 559 [16 S.Ct. 1138, 1146, 41 L.Ed. 256] (dis. opn.).) Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

(*Romer v. Evans* (1996) 517 U.S. 620, 623 [116 S.Ct. 1620, 134 L.Ed.2d 855]; see also *Davis v. Passman* (1979) 442 U.S. 228, 235 fn.11 [99 S.Ct.

2264, 60 L.Ed.2d 846] [finding that equal protection claim by congressional staffer claiming sex discrimination is justiciable because such an equal protection claim "falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a] coordinate branch of government'" under the political question doctrine (quoting *Baker v. Carr* (1962) 369 U.S. 186, 217 [82 S.Ct. 691, 7 L.Ed.2d 663])].)

The application of these principles to the present dispute is straightforward. The litigants in this case do not challenge the constitutionality of marriage. They do not seek to place any limitations on the power of the legislature to craft general marriage policies for the people of California, nor to shape the rights, duties and obligations of marriage to respond to contemporary needs and priorities. The constitutional claim in this case will not restrict in any way the ability of the legislature to experiment with different solutions to intractable or unexpected problems in family law, now or in the future. The respondents seek only to be included in the marriage laws that the legislature has already adopted for the rest of the population.

B. The Authorities Relied Upon by the State Reaffirm the Proper Role of this Court in Ensuring Equal Justice Under Law.

The brief of the Attorney General conspicuously fails to recognize this basic distinction between the role of a court in prohibiting the

legislature from utilizing a challenged policy altogether and the role of a court in requiring only that the policy be applied equally to all citizens. The cases that the State relies upon in discussing the issue of judicial deference all involve categorical challenges to the constitutionality of contested policies. They are cases in which the plaintiffs have sought a declaration that a controversial law — a restriction on defamation remedies, or a law prohibiting physician-assisted suicide, or an abortion restriction, or the death penalty — was prohibited altogether. (See AG Brief, *supra,* at pp.49–51 [discussing *Washington v. Glucksberg* (assisted suicide), *Werner v. Southern California Associated Newspapers* (defamation), *Roe v. Wade*(abortion) and *People v. Anderson* (death penalty)].) The State cites no authority that has applied the extravagant principle of judicial deference that it invokes to a law that discriminates against a disfavored minority.

More telling still, the State invokes the dissenting opinion of Justice Frankfurter in *Baker v. Carr, supra*, 369 U.S. 186. *Baker* is indeed instructive. In that landmark equality case, the *majority* of the Supreme Court concluded that courts had a duty to ensure equal representation in federal legislative districts, overruling its own recent precedents to the contrary and rejecting Justice Frankfurter's arguments about judicial deference. Frankfurter's limited view about the role of the judiciary in enforcing equal citizenship rights did not carry the day. Indeed, this Court has already rejected the abdication of the judicial role that Justice

Frankfurter advocated in equality cases, and it did so in a case that involved sex discrimination, just as this case does. (See *Goesaert v. Cleary* (1948) 335 U.S. 464, 466 [69 S.Ct. 198, 93 L.Ed. 163] (lead opn. of Frankfurter, J.) [deferring to "legislative judgment" in upholding discriminatory law that excluded women from employment as bartenders]; declined to follow, *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 17 fn.15 [95 Cal. Rptr. 239] [rejecting *Goesaert* and finding that sex discrimination requires strict judicial scrutiny].)

The State also cites then-Judge Ginsburg's scholarly criticisms of *Roe v. Wade*, arguing that her writings are relevant to this Court's consideration. We agree. Judge Ginsburg's criticism did not lie with the Court's decision to strike down the offending law in that case. Rather, it lay precisely with the failure of the Supreme Court of the United States to ground its reproductive rights decision on the principle of equal citizenship for women — a principle, Judge Ginsburg wrote, that would have offered a more clearly legitimate basis for exercising judicial power and hence would have strengthened the Court's decision significantly. (See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade* (1985) 63 N.C. L. Rev. 375, 386 ["Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."].) Chief Justice Traynor, another authority upon

whom the State relies, was correct when he criticized those who carelessly respond to constitutional arguments with the "misbegotten catchphrase" of "judicial activism." (Roger J. Traynor, *The Limits of Judicial Creativity* (1978) 29 Hastings L.J. 1025, 1030.)

Indeed, in the very decision of this Court upon which the State relies most heavily for its judicial deference argument — *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121 [216 P.2d 825] — Justice Traynor himself drew a clear distinction between the limits of the judiciary's role in placing categorical constraints on legislative policies, on the one hand, and the continuing importance of the judiciary in ensuring equal protection of the laws to all citizens, on the other. The passage of *Werner* that the State quotes at such length in discussing the need for "judicial modesty" is contained within the Court's extended response to a *Lochner*-style argument that the plaintiff made in that case. (See *id.* at p. 130; AG Brief, *supra*, at p. 49.) Erwin Werner had asked this Court to strike down the special damages requirement contained in California's defamation law, arguing that the statutory hurdle to recovery undervalued the financial worth of a person's reputation. Werner filed his claim in the late 1940s, when the Supreme Court of the United States had only recently repudiated the *Lochner* line of cases and ended the country's long nightmare with aggressive judicial review of purely economic legislation. Justice Traynor used the dispute in *Werner* as an occasion for adding this

Court's voice to that repudiation. Invoking one of Justice Holmes's classic *Lochner*-era dissents, Justice Traynor made it clear that the California Constitution could not be used to revive the discredited "*Adair-Coppage* line of cases" that had done such harm in preventing states from "legislat[ing] against what are found to be injurious practices in their internal commercial and business affairs." (*Werner*, *supra,* 35 Cal.2d at p.129 [quoting *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, 536–37 [69 S.Ct. 251, 93 L.Ed. 212]]; see also *id.* [discussing *Baldwin v. Missouri* (1930) 281 U.S. 586, 595 [50 S.Ct. 436, 74 L.Ed. 1056] (dis. opn. of Holmes, J.)].) It was in response to this type of interference with legislative policymaking that the *Werner* Court issued the pronouncements that the State relies upon, refusing to second guess the process of "trial and error" that is an inevitable feature of the legislature's selection of general regulatory policies. (*Id.* at p.130.)

But Erwin Werner also asserted an equal protection claim: He argued that the extension of certain privileges to the press and not to other speakers denied equal protection to defamation plaintiffs — specifically, to those who were harmed by defamation contained in radio and newspaper stories, as opposed to those harmed by some other communication. The Court rejected this argument on the merits (which is hardly surprising, since it is unclear whether "individuals defamed in radio or newsprint" even constitute a distinct class of people). But the treatment that the Court gave

to Werner's equality claim differed dramatically from its treatment of his *Lochner* claim. Gone was the language cited by the State that the Court had deployed in refusing to entertain Werner's economic due process argument. Where the equal treatment of citizens was concerned, the Court engaged deeply with the merits of the claim, explaining that "[a] classification is reasonable . . . only if there are differences between the classes and the differences are reasonably related to the purposes of the statute." (*Werner*, *supra,* 35 Cal.2d at p.131; see also *id.* ["The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free."].) Although the particular statute at issue in *Werner* was able to pass muster under the low level of scrutiny that applied in that case, the majority made a clear commitment to give serious and thorough attention to Werner's equality claim, drawing a contrast to its categorical rejection of his *Lochner*-style economic due process claim that was both sharp and deliberate. This Court has gone on to describe *Werner* as "the definitive statement of the subject . . . of the equal protection provisions of our state Constitution," *Hays v. Wood* (1979) 25 Cal.3d 772, 790 [160 Cal. Rptr. 102]— a decision embodying the principle that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." (*Id.* at pp. 786–87;

see also *id.* at p. 787 [explaining that, even when a classification provokes only rational-basis review, this Court's "function is, as we have recently indicated, to conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals"] [citations].)

In short, the State has failed to understand the import of *Werner*. The decision constitutes a strong affirmation of the judiciary's role in securing the equal status of all people in California before the law. The *Werner* Court used the rejection of a different, inappropriate and discredited form of judicial review as the means of highlighting the continuing role of judges in enforcing equality principles.

II. The State's Approach to Equal Protection is Inconsistent with Established Precedent and Presents a Vision of Equality Doctrine that this Court Should Reject.

The State's misconception about the role of the judiciary in enforcing equality principles is coupled with a deep misunderstanding of the content of those principles. The State asserts that, with the recent enactment of laws that have begun to recognize the equal citizenship of gay people in California, all remaining acts of discrimination against gay citizens under California law may now be treated as a matter of little judicial concern and can be validated with minimal constitutional scrutiny. (AG Brief, *supra*, at pp. 24–38.) This proposition is as wrong as it sounds. Just as classifications based on race, sex, and religion continue to be

sources of intense judicial concern, despite the enactment of myriad laws outlawing discrimination on those grounds, so classifications based on sexual identity continue to provoke constitutional scrutiny that is searching and strict. The fact that gay people have won some hard-fought battles and have begun to secure a measure of equal treatment under California law does not provide special immunity for the remaining sources of inequality that still brand gay men and lesbians as unequal citizens. To accept the vision of "equal protection" set forth in the brief of the Attorney General would be to pervert one of the great principles embodied in the California Constitution.

This error by the State is of exceptional importance to this litigation. The State has conceded that, but for this one argument, gay people satisfy all the requirements for strict judicial scrutiny, indicating that they would be entitled to recognition as a suspect class under this Court's precedents. (See AG Brief, *supra*, at pp. 24–25 [State "does not contest" that gay people satisfy the traditional doctrinal requirements for heightened judicial scrutiny and concedes that "there would be an argument that sexual orientation should be a suspect classification" if these requirements control the analysis.].) As we will explain, it is that concession — and not the State's misguided effort to avoid its import — that should control the question of heightened judicial review.

A. The State's Interpretation of *Carolene Products* Would Overrule Decades of Well Established Equal Protection Precedents.

It is important to understand the real-world implications of the argument that the State has offered for avoiding heightened judicial review in this case. Even if a group exhibits all the indicia that this Court and others have found to warrant strict judicial scrutiny — a defining characteristic with no relationship to one's ability to contribute to society; a long and vicious history of discrimination and oppression; and an inability to change one's minority status, with the prospect of serious psychic and dignitary harm if one is forced to make the attempt — the State asserts that discrimination against the group provokes only the most minimal form of judicial scrutiny if the group has shown an ability "to use the political process to address their needs." (AG Brief, *supra*, at pp. 24–25.) There are two obvious problems with this assertion.

First. If the State had its way, then discrimination on the basis of race, gender and religion would apparently no longer constitute a source of judicial concern. Racial minorities, women, and those who practice non-Christian faiths in the United States are all "obviously able to wield political power in defense of [their] interests." (AG Brief, *supra*, at p. 25.) They enjoy the benefit of protective legislation at the federal level and in States throughout the Nation in nearly every area of human endeavor — in

the workplace,[2] education,[3] housing,[4] voting,[5] and the use of public accommodations[6] — and they are key constituencies in political elections. But the more that people of color, women, and religious minorities become integrated into mainstream society, according to the State's position, the more constitutionally *acceptable* it becomes to pass laws that discriminate against those groups.

This is not the law. The Supreme Court of the United States and this Court have continued to be vigilant in stamping out the remnants of racism and sexism, even as the principle of Equal Justice Under Law has become more firmly established. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] [vacating capital murder sentence because prosecutor used peremptory strikes to target Black venire persons and rejecting district court findings to the contrary as clearly erroneous]; *United States v. Virginia* (1996) 518 U.S. 515 [finding that long tradition of excluding women categorically from Virginia Military Institute, a

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[2] (See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e [outlawing workplace discrimination based on race, sex or religion].)

[3] (See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 [conditioning federal education funds on the adoption of non-discrimination policies toward female students].)

[4] (See, e.g., Fair Housing Act, Title VIII of the Civil Rights Act, of 1968, 42 U.S.C. § 3601 et seq. [prohibiting racial discrimination in housing].)

[5] (See, e.g., Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. [enforcing the prohibition on racial discrimination in voting].)

[6] (See, e.g., Civ. Code § 51(b) [The Unruh Act, outlawing discrimination on the basis of race, sex, religion and other characteristics in the full and equal use of public accommodations].)

distinguished and unique state-funded entity, violates Equal Protection Clause]; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 643, fn.2 [183 Cal. Rptr. 508] [explaining that "a statute placing the primary duty of child support on fathers," former Civil Code, § 196, would violate the California Constitution because of its reliance on "outmoded beliefs"].) It would be perverse to suggest that the Civil Rights Act of 1964, the Unruh Act, and other landmark legislation should make it *more* constitutionally acceptable to deny equal citizenship to people who have fought against invidious discrimination for so long.

We assume that the State does not question the continuing need for judicial vigilance against discrimination on the basis of race, gender and religion. The State presumably does not believe, in other words, that these forms of invidious discrimination have become constitutionally unimportant because legislatures have acted to fight against them. Why, then, is antigay discrimination different?

The only explanation is that the State believes that people of color, women and religious minorities "snuck in under the wire": they succeeded in securing judicial rulings establishing that discrimination against them is presumptively unconstitutional *before* they secured the benefit of protective legislation. That, apparently, is why they are now "safe," their constitutional protection against invidious discrimination permanently secure. This is the only way to understand the State's discussion of the late

Professor John Hart Ely. The State seeks to bolster its position by citing to Professor Ely, but it is then confronted with the embarrassing fact that Professor Ely himself concluded that discrimination against gay people was constitutionally suspect. (See AG Brief, *supra*, at pp. 35–36 & fn.23; Ely, Democracy and Distrust (1980) p.163.) The State dismisses that conclusion as "a bit dated" in light of subsequent events. (AG Brief, *supra*, at p. 36, fn.23.) But, if subsequent events have not made discrimination against people of color, women, and religious minorities any more constitutionally acceptable, how can subsequent events serve to authorize discrimination against gay people? Apparently, the State's answer is: because those other groups have snuck in under the wire. The State urges this Court to hold that it is only when judges step out *ahead* of legislatures that they should feel comfortable in protecting the equal citizenship status of disfavored minorities. When judges *follow the lead* of legislatures in recognizing the invidious quality of discrimination against a disfavored minority, the State would have this Court rule that the judiciary has "missed its chance" and should turn a blind eye toward any subsequent laws or policies that deny equal citizenship to that minority group.[7]

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[7] One of the "subsequent events" that followed Professor Ely's acknowledgement of the suspect nature of antigay discrimination was the Supreme Court's decision in *Bowers v. Hardwick* (1986) 478 U.S. 186 [106 S.Ct. 2841, 92 L.Ed.2d 140], which was decided six years after the publication of Professor Ely's book and branded gay people as presumptive felons for seventeen years until the Court finally repudiated that awful

There is no principled way to avoid these untenable results, if the State has its way. Either invidious discrimination ceases to be constitutionally suspect when a historically oppressed group finally begins to demonstrate an ability "to use the political process to address their needs" through the enactment of hard-won protective legislation, AG Brief at page 25 — in which case discrimination on the basis of race, gender and religion would no longer present constitutional problems — or else invidious discrimination against those groups can only continue to be branded as constitutionally suspect by adopting a "snuck under the wire" approach — a "solution" that benefits only those groups lucky enough to

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decision in *Lawrence v. Texas* (2003) 539 U.S. 558 [123 S.Ct. 2472, 156 L.Ed.2d 508].

The State's attempt to dismiss the significance of the overruling of *Bowers v. Hardwick* is disingenuous. The plaintiffs in this case have pointed out that *Bowers* lay at the foundation of the early rulings that refused to subject antigay discrimination to serious constitutional scrutiny. In response, the State asserts that, "While it is true that some of the cases rejecting suspect classification status have cited *Bowers*, others have not." It then cites two cases from the Ninth Circuit, *Holmes v. California Army National Guard* (9th Cir. 1997) 124 F.3d 1126 and *Flores v. Morgan Hill Unified School District* (9th Cir. 2003) 324 F.3d 1130. (AG Brief, *supra*, at p. 37.) But, of course, the courts in those cases did not need to cite *Bowers*, because *Bowers* had already dictated the outcome of the suspect class issue in that Circuit. The Ninth Circuit issued its major ruling on the issue in *High Tech Gays v. Defense Industrial Security Clearance Office* (9th Cir. 1990) 895 F.2d 563, relying squarely upon *Bowers* in reaching the conclusion that antigay discrimination received only rational basis review. The *Holmes* and *Flores* courts in turn relied upon that case as controlling Circuit precedent. (See *Holmes*, *supra*, 124 F.3d at p.1132; *Flores*, *supra*, 324 F.3d at p.1137.) To suggest that the decisions of those courts were not based upon *Bowers*, merely because they did not include redundant citations to *Bowers* on top of their citations to the Circuit precedent that had already given *Bowers* its full effect, is simply dishonest.

secure favorable judicial rulings before they secure favorable legislation. Neither position is acceptable.[8]

Second. The State's argument completely disregards the fact that, under the decisions of this Court and of the Supreme Court of the United States, *all* people are entitled to constitutional protection against regulation based on a suspect classification, not just those whose minority status limits their political power. The State presumably would not suggest that White people, or men, or Protestants, have ever been unable to "wield political

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[8] The State attempts to bolster its position by citing to one sentence in the *Cleburne* case and suggesting that the Supreme Court of the United States has endorsed its approach. (See AG Brief, *supra*, at p. 30 & fn.21, [citing *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 443 [105 S.Ct. 3249, 87 L.Ed.2d 313]].) This assertion merits only a brief response. First, *Cleburne* dealt with a class of individuals — the mentally retarded — whose defining characteristic had a clear and pervasive impact upon their ability to contribute to society. The question in that case was how to tell the difference between differential treatment that was acceptable and invidious discrimination that was not. The State presumably accepts the fact that gay men and lesbians do not occupy a similar status. Second, notwithstanding the language that the State cites, the *Cleburne* Court unanimously declared the discriminatory statute before it to be unconstitutional, with the Justices differing only as to the best explanation for that result. And third, the majority in *Cleburne* applied a form of judicial scrutiny that was obviously much more searching than minimal rationality review — a standard usually described as "rational basis with bite." (See, e.g., Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996–1997 Term*, (1998) 19 Cardozo L. Rev. 2259, 2299 fn.259 ["*Cleburne* belongs to a small class of cases often assembled under the heading 'rational-basis with bite.'"].) *Cleburne* is thus a particularly inapt precedent to rely upon in arguing for judicial abstention in the present dispute. The case is, in fact, one of the most noteworthy instances in which the Supreme Court of the United States has acted to strike down a discriminatory statute even after expressly noting that the disfavored group already enjoyed the benefit of some protective legislation.

power in defense of [their] interests" in the United States. Yet our constitutional jurisprudence clearly establishes that each of these groups is entitled to have classifications based on race, gender or religion subjected to careful constitutional scrutiny. (See, e.g., *Johnson v. California* (2005) 543 U.S. 499 [125 S.Ct. 1141, 160 L.Ed.2d 949] [applying strict scrutiny to prison security policy that segregated all incoming inmates based on race, without regard to race of particular inmates and without any finding of systematic oppression or improper purpose]; *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718 [102 S.Ct. 3331, 73 L.Ed.2d 1090] [invalidating restriction that prevented men from enrolling in state nursing program].) The State's reading of *Carolene Products* footnote four simply fails to account in any way for this entire portion of modern equal protection jurisprudence.[9]

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[9] The Equal Justice Society has argued, and continues to believe strongly, that the approach that the Supreme Court of the United States has adopted in reviewing legislative efforts aimed at remedying the effects of past discrimination — treating affirmative action and desegregation programs as presumptively unconstitutional, and even suggesting that they are the moral equivalent of Jim Crow, see, e.g., *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1* (2007) _U.S._, 127 S.Ct. 2738, pages 2783–88 (plur. opn. of Roberts, C.J.) [likening efforts at voluntary school integration to Jim Crow segregation and invalidating programs under a strict scrutiny standard] — has been both wrong and tragic. We firmly believe that courts are capable of distinguishing between a classification that aims to deny equal citizenship and a classification that aims to secure it — the difference between a "No Trespassing" sign and a Welcome Mat, as Justice John Paul Stevens has put it. But EJS has always embraced the principle of Equal Justice Under Law for all citizens. We fully endorse the proposition, aptly reflected in modern equal protection doctrine, that any attempt to deny

There is no question that the famous *Carolene Products* footnote forms an important part of our modern equal protection vocabulary. The Supreme Court took its first, tentative step in that case toward recognizing the proper role of the judiciary in safeguarding equal citizenship in the face of ever-persistent efforts to deny that equality to traditionally disfavored groups, offering one account of when judicial intervention might be required. But we are speaking of a single clause, in dictum, in a 1937 decision that dealt with the regulation of "filled milk" traveling in interstate commerce. It is improper to project onto those few words an exhaustive and fully realized analytical approach to every discriminatory law or policy that might ever arise — a load that the Supreme Court certainly never intended for its words to bear, as Supreme Court Justice Lewis Powell and others have made clear. (See Lewis F. Powell, Jr., *Carolene Products Revisited* (1982) 82 Colum. L. Rev. 1087, 1090 ["Footnote 4 is a fertile

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equal citizenship to men, Whites or Protestants — or to heterosexuals, for that matter — should be treated as both suspect and presumptively unconstitutional.

In this connection, we note the State's offhand suggestion that recognizing antigay discrimination as constitutionally suspect "could . . . imperil efforts to remedy discrimination against gay men and lesbians" by making a "reverse discrimination" argument available to straight Californians. (AG Brief, *supra*, at p.36.) It is telling that the only potential "remedy" that the State can identify as being "imperiled" is the domestic partnership law itself, which is the inadequate remedy to the very constitutional violation at issue in this dispute. (See *id.*, at pp. 36–37.) Gay people in California are seeking equal treatment and protection against discrimination — remedies that will only be confirmed and strengthened by recognizing the invidious nature of antigay laws.

starting place for constitutional theory. Generally, it has been a constructive influence in the development of modern constitutional doctrine. But it is not a developed theory in itself. Nor is there reason to think that [its author, Justice Harlan Fiske] Stone intended it to be."]; see also, e.g., Bruce A. Ackerman, *Beyond Carolene Products* (1985) 98 Harv. L. Rev. 713 [explaining that the principles underlying the *Carolene Products* footnote remain vital but that the Court's initial formulation requires updating in light of new social realities and new forms of discrimination].) It would be surprising indeed if the entire function of the judiciary in securing Equal Justice Under Law could be reduced to half a sentence, as the State would have it. Every "reverse discrimination" case that the Supreme Court has ever decided gives the lie to that suggestion.

The State concedes that, its *Carolene Products* argument aside, gay people bear all the recognized doctrinal hallmarks of a suspect class. (AG Brief, *supra*, at pp. 24–25.) In its effort to blunt the impact of that concession, it asserts a completely untenable position that would invalidate whole swaths of our current equal protection jurisprudence. We respectfully submit that it is the State's concession, and not its attempts to avoid the meaning of that concession, that should most occupy the attention of this Court.

B. The Constitutionality of Antigay Laws Must be Measured Against the Persistence of Invidious Discrimination Over Time, Not Against a Myopic View of the Politics of the Moment.

Finally, we wish to respond to the suggestion that pervades the State's argument for treating antigay discrimination as presumptively constitutional: the notion that "the gay and lesbian community in California is obviously able to wield political power," AG Brief, *supra*, at page25, such that any further discrimination that gay people experience at the hands of state authorities in California should be viewed simply as a part of the ebb and flow of ordinary politics. It would require the most severe myopia, both as to history and as to present reality, to accept this characterization of the daily lives of gay people anywhere in America today, including in California. It is a characterization that relies in large part upon the State's misplaced assumption that the current state of the statutory laws in California constitutes the only frame of reference that is relevant in determining how the California Constitution should respond to antigay discrimination. That assumption misconceives the purpose and function of a Constitution.

The founding document of a polity, be it a Nation or a State, is not written to respond to the politics of the moment. The purpose of a Constitution is to articulate principles that will guide and limit the actions of the State across generations. Chief Justice Marshall first stated the point

in *McCulloch v. Maryland* (1819) 17 U.S. 316, 407 [4 Wheat. 316, 4 L.Ed.579], when he offered the following account of how a Constitution operates:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Chief Justice Marshall was writing in *McCulloch* with reference to the power of the federal government to enact laws in response to needs that were not expressly anticipated or provided for at the time of the founding. But his defining statement about the enduring and multi-generational frame of reference that characterizes constitutional interpretation has applied with equal force to the protection of the People against new and unanticipated intrusions upon their rights. The Supreme Court made that interpretive principle resoundingly clear in *Brown v. Board of Education* when it explained its approach to the question of school segregation. "In

approaching this problem," the Court wrote, "we cannot turn the clock back to 1868, when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." (*Brown v. Board of Education* (1954) 347 U.S. 483, 492–93 [74 S.Ct. 686, 98 L.Ed. 873].) The Court reiterated that proposition most recently when it described the reasoning that led it to declare the oppression of gay couples through the criminal law to be unconstitutional in *Lawrence v. Texas* (2003) 539 U.S. 558, 578–79:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Whenever the Supreme Court has provided protection to disfavored groups against persistent and invidious forms of discrimination, it has consistently given voice to this basic understanding of how a Constitution functions, asking how discrimination against the group has operated over time. When it first found that discrimination on the basis of sex required

heightened judicial scrutiny, for example, a plurality of the Court identified our Nation's "long and unfortunate history of sex discrimination," not just the present state of the law at that moment, as its first and most important consideration. (*Frontiero v. Richardson* (1973) 411 U.S. 677, 684 [93 S.Ct. 2264, 60 L.Ed.2d 846] (plur. opn. of Brennan, J.).) Embracing this passage, a majority of the Court has gone on to explain that "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history." (*United States v. Virginia, supra,* 518 U.S. at pp. 531–32 [citing *Frontiero*].) When assessing the constitutional status of discrimination against a group of citizens, the first question has always been whether history demonstrates that tenacious and persistent prejudice subjects the group to a continuing danger of oppressive laws and exclusionary policies, even if the group comes to enjoy the benefit of various forms of legislative protection, as was the case in *United States v. Virginia*. That doctrinal focus is an appropriate expression of the role that a Constitution should play in safeguarding the equal status of citizens. A Constitution responds to problems that span generations.

The State concedes that gay people have suffered a long and vicious history of discrimination in this country. (*See* AG Brief, *supra*, at p.38 ["The history of discrimination based on sexual orientation is undeniable."].) We will not recount in detail the horrid particulars of that history, which have included the wholesale criminalization of gay people

and their relationships, draconian limitations on speech and assembly, their designation as mentally disordered, and the imposition of lobotomies and other forms of barbaric mutilation as "treatment" for the condition of being gay. (All of these atrocities have occurred as recently as the 1960s and many are more recent still, with the criminalization of gay people only truly repudiated by the Supreme Court in its 2003 decision of *Lawrence v. Texas.*) But we do think it appropriate, in light of the arguments contained in the brief of the Attorney General, to offer this Court a reminder of the profound inequality that gay people contend with to this day, throughout the United States.

Gay men and lesbians remain second-class citizens under federal law and under the laws of the vast majority of states in this Nation. They are prohibited by statute from serving equally and openly in the U.S. military. (See 10 U.S.C. § 654 ["Policy Concerning Homosexuality in the Armed Forces"].) Their relationships are categorically excluded by statute from any form of recognition by the federal government. (See 1 U.S.C. § 7.) In immigration, in the federal tax code, in retirement and ERISA, in the Family and Medical Leave Act, and in myriad other regions of federal law, gay men and lesbians are met with the same response: "No Homosexuals Need Apply." There is no federal statute that protects gay men and lesbians from any form of discrimination — in the workplace, in housing, in public accommodations, or anywhere else — and there never has been.

The landscape is only slightly better among the fifty States. Same-sex couples can marry in only one State, Massachusetts, and "civil unions" are available in just five more.[10] Only California and Hawai'i offer domestic partnership benefits on a statewide level. In the remaining forty-two States, gay couples have no opportunity to formalize their relationships in a statewide civil institution. Thirty-one states provide no statutory protection against discrimination directed toward gay people in the workplace. And, to this day, many gay parents must still fight to hold onto their children against states that treat them as presumptively unfit, while others who wish to become parents are categorically prohibited from adopting merely because they are gay. This is the reality that gay people live with every day throughout the United States: the reality of second-class citizenship.

The State dismisses this reality as irrelevant. Things are better now in California, the State assures us, and this Court need look no further in deciding that antigay discrimination is not a matter of judicial concern.

The quaint notion that California is a world apart, blissfully separate from the rest of the Nation, has no place in this dispute. Things are indeed better in California than they are in many other States. The recent victories that gay people have won in their quest for equal status under California

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[10] The five are Vermont, Connecticut, New Jersey, New Hampshire, and Oregon.

law — and those victories are indeed recent, most less than a decade old — are cause for celebration. But the suggestion that the judiciary should now view antigay discrimination as no more cause for concern than laws that disadvantage certain taxpayers, or non-resident rate payers, or physicians and chiropractors, see AG Brief, *supra*, at pages 32–33, can only be described as willfully perverse. (See also *id.*, at p. 36 [suggesting that recognizing the suspect status of antigay discrimination "could result in a situation in which almost everyone is a member of some suspect classification"].)

California is part of a Nation that continues to treat gay people as second-class citizens in every field of human endeavor. The recent progress that gay couples have made in this State is remarkable precisely because it is both the exception in the United States and so new within California itself. We can hope that this progress will endure. But the relevant question for this Court, in determining how the California Constitution should respond to antigay discrimination, is what the character of that discrimination has been over the course of time in the American polity. As to that question, we respectfully submit, there can be no disagreement.

Conclusion

The arguments contained in the brief of the Attorney General would have this Court distort the constitutional principle of equality beyond

recognition, all in service of maintaining an official policy of otherness and separation toward its gay and lesbian citizens. This is an unworthy effort. The threshold question for this Court in an equal protection case, now as in the past, is to ask whether the State is excluding a class of citizens from the full benefits of state law merely in order "to make them unequal to everyone else." (*Romer v. Evans*, *supra,* 517 U.S. at p.635.) When the class of citizens in question has endured a long and continuing history of oppression and second-class citizenship, all because of hostility toward a characteristic that forms an integral component of their identity and has no impact upon their ability to contribute to society, that threshold question becomes particularly urgent. The answer to that question is clear in this case.

Antigay discrimination is an unjustifiable affront to the dignity of over a million LGBT citizens in California — and, indeed, an affront to all of us who subscribe to the principle of Equal Justice Under Law. We respectfully urge this Court to reject the State's effort to avoid that conclusion and instead make it clear that the California Constitution, too, guarantees that "persons in every generation can invoke its principles in their own search for greater freedom." (*Lawrence v. Texas*, *supra,* 539 U.S. at pp. 578–79.)

September 26, 2007

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VERIFICATION OF COUNSEL

In re Marriage Cases, California Supreme Court, S147999

I, Bijal V. Vakil, declare:

I am counsel for Equal Justice Society in the above-entitled matter. I have read the foregoing Petition for Review and know the contents thereof.

The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

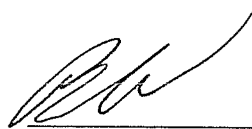
Executed on September 26, 2007, at Santa Clara County, California.

I declare (or certify) under penalty of perjury that the foregoing is true and correct.

Bijal V. Vakil

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I certify that the text of this brief contains 7,829 words, not including the tables of contents and authorities, the caption page, signature block, verification, or this certification, as counted by the computer program used to prepare this brief.



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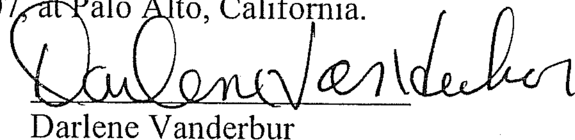
PROOF OF SERVICE

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party to the above-entitled action. I am employed in the County of Santa Clara and my business address is McDermott Will & Emery LLP, 3150 Porter Drive, Palo Alto, California 94304.

On **September 26, 2007**, I served the attached document(s) described as **Brief Of *Amicus Curiae* Equal Justice Society In Support Of Parties Challenging The Marriage Exclusion** on the interested parties in this action by enclosing true copies of the document in sealed envelopes and/or packages with postage fully prepaid thereon. I then placed the envelopes/packages in a U.S. Postal Service mailbox in Palo Alto, California, addressed as follows: See Attached Service List.

I, Darlene Vanderbur, declare under penalty of perjury that the foregoing is true and correct.

Executed on **September 26, 2007**, at Palo Alto, California.



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