IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

B. BIRGIT KOEBKE, et al., Plaintiffs and Appellants, vs. BERNARDO HEIGHTS COUNTRY CLUB, Defendant and Respondent.	S124179 (Court of Appeal No. D041058)

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERIES UNION OF SOUTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES, THE AMERICAN CIVIL LIBERIES UNION FOUNDATION LESBIAN AND GAY RIGHTS PROJECT, THE ANTI-DEFAMATION LEAGUE, EQUALITY CALIFORNIA, AND TOM HOMANN LAW ASSOCIATION FILED IN SUPPORT OF PLAINTIFFS-APPELLANTS B. BIRGIT KOEBKE AND KENDALL E. FRENCH

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D041058

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TABLE OF CONTENTS

INTRODUCTION **1**

ARGUMENT **6**

THE CLUB'S POLICY OF DENYING BENEFITS BASED ON MEMBERS' MARITAL STATUS DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE UNRUH ACT 6

A. BHCC's policy constitutes illegal sexual orientation discrimination under the Unruh Act 6

B. Appellants' Unruh Act claims may be resolved without ruling on the validity of California's marriage laws 10

C. *Beaty v. Truck Insurance Exchange* was wrongly decided and following it would result in an end-around against the Unruh Act's ban on sexual orientation discrimination 12

THE UNRUH ACT PROHIBITS DISCRIMINATION ON THE BASIS OF MARITAL STATUS 15

A. The Fourth Appellate District's conclusion that the Unruh Act does not cover marital status discrimination is at odds with the basic canons of interpretation long applied to the Unruh Act and should be overturned . 15

B. Like discrimination based race, sex, religion, and the other enumerated classes in the Unruh Act, marital status discrimination is rooted in inaccurate stereotypes 17

C. Unmarried couples historically have suffered from pervasive and invidious discrimination 18

CONCLUSION **21**

TABLE OF AUTHORITIES

FEDERAL CASES

Eisenstadt v. Baird (1972) 405 U.S. 438 19

Gen. Elec. Co. v. Gilbert (1976) 429 U.S. 125 13

Hartmann v. Stone (1995) 68 F.3d 973 9

Korematsu v. United States (1945) 323 U.S. 214 9

McLaughlin v. Florida (1964) 379 U.S: 184 10

Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 669 13

STATE CASES

Attorney General v. Desilets (1994) 418 Mass. 316 19

Beaty v. Truck Ins. Exch. (1992) 6 Cal. App. 4th 1455 12

Boren v. California Dept. of Employment Dev. (1976) 59 Cal. App. 3d 250.. 13, 14

Curran v. Mount Diablo Council of the Boy Scouts of Amer. (1983) 147 Cal. App. 3d 712 .... 15, 7

Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142 .... *passim*

Hubert v. Williams (1982) 133 Cal. App. 3d Supp. 1 6

In re Cox (1970) 3 Cal. 3d 205 15

Koebke v. Bernardo Heights Country Club (2004) 10 Cal. Rptr. 3d 16

Levin v. Yeshiva University (2001) 54 N.E.2d 1099 .... 11, 12

Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721 15

Rolon v. Kulwitzky (1984) 153 Cal. App. 3d 289 .... 7, 15

Smith v. Fair Employment and Hous. Comm'n (1996) 12 Cal. 4th 1143 18

Stoumen v. Reilly (1951) 37 Cal. 2d 713 6

Swanner v. Anchorage Equal Rights Comm'n (1994) 874 P.2d 274 18

Tanner v. Oregon Health Sciences Univ. (1998) 971 P.2d 435 11

Warfield v. Peninsula Gold & Country Club (1995) 10 Cal. 4th 594 7

Whitman v. Mercy Mem'l Hosp. (1983) 128 Mich. App. 155 19

Yolles v. Golf Club of Avon, Inc. (2004) 2004 WL 203325 .... 19, 20

FEDERAL STATUTES

42 U.S.C. § 2000e 13

STATE STATUTES

Cal. Civ. Code § 51(b) 7, 15

Cal. Fam. Code § 300 7

MISCELLANEOUS

Children's Living Arrangements and Characteristics: March 2002 18

Consumer Task Force on Marital Status Discrimination, Final Report of the Office of City Attorney, Los Angeles (1990) 19

Married Couple and Unmarried-Partner Households: 2000 .... 17, 18

Unmarried Together: More older couples skip the wedding but still find bliss, AARP Online Bulletin (October 2004) 20

INTRODUCTION

This case is about a country club's refusal to treat its gay and lesbian members equally to its other members. B. Birgit Koebke ("Koebke") and Kendall E. French ("French") (collectively, "Appellants") are a lesbian couple who are registered domestic partners and who have been in a committed relationship for over a decade. The Appellants have brought a challenge under, *inter alia*, California's Unruh Civil Rights Act ("the Unruh Act" or "the Act") to the policy of Respondent Bernardo Heights Country Club ("BHCC" or "the Club") of extending golfing benefits to the legal spouses of married club members but not to the committed domestic partners of its gay and lesbian members. [1]

In 1987, before she and French were a couple, Koebke bought an equity membership in BHCC[2] for $18,000 and has paid monthly dues of hundreds of dollars ever since. During their lives, each of BHCC's equity members has an equal ownership interest in all the property and assets of BHCC, and is required to contribute equally for capital and operational assessments in addition to dues and

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1 Koebke and Kendall also allege, and have offered evidence to support their allegations, that BHCC has deprived them of benefits it, in practice, has provided to unmarried heterosexual members. The grant of summary judgment on that claim was reversed by the Court of Appeal. This brief focuses on the Club's policy that facially discriminates against Appellants by denying them benefits provided to legally married couples.

2 BHCC is a social and recreational club whose facilities include a golf course, driving range, putting greens, locker rooms, clubhouse, dining room, bars, meeting facilities and a "pro" shop.

other charges. In return, BHCC's equity members are entitled to play golf at BHCC at any time without paying additional green fees. *See* Clerk's Tr. at 229. Moreover, under the Club's By-laws, a member's "legal spouse and unmarried sons and daughters under the age of twenty-two (22) residing with them" can play unlimited golf with the named member without having to pay any additional fees. Clerk's Tr. at 322, 390.[3]

Other individuals, by contrast, are treated as the member's "guests" and are only allowed to play golf at BHCC a maximum of six times per year and not more than once every two months.[4] *See* Clerk's Tr. at 303, 366. Such individuals must also pay a green fee of between fifty and seventy dollars each time they use the facilities, even though spouses and the other enumerated family members never have to pay such fees. *See* Clerk's Tr. at 178, 229, 322, 366, 390.

Finally, under the Club's current By-laws, "[i]n the event of the death of a sole owner of a Regular membership . . . not survived by a spouse, son or daughter, the membership shall terminate," along with all of the property rights that belong to members. Clerk's Tr. at 400. Members with surviving legal spouses and/or

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3 According to the Club's Rules and Regulations, members' grandchildren under the age of twenty-two may also play golf with the member or any other player in the member's household without payment of additional green fees. See Clerk's Tr. at 366.

4 Relatives who are neither the members' legal spouses, children under the age of twenty-two living at home, nor grandchildren under the age of twenty-two can play golf with the member or other player in the member's household fourteen, as opposed to six, times a year. *See* Clerk's Tr. at 366.

children, on the other hand, may transfer their membership to such family members upon their deaths. *See* Clerk's Tr. at 399.

Koebke and French have been each other's domestic partners for over a decade, and have gone to substantial lengths to formalize their commitment to one another. They have entered into a written "Statement of Domestic Partnership," confirming that each considers the other "to be her primary life companion and spouse." Clerk's Tr. at 278, 336; *see also* Clerk's Tr. at 272. They have executed estate-planning documents and durable powers of attorney allowing each to make health care decisions for the other and manage each other's assets in the event that one becomes incapacitated. They own property together and have committed to spending their lives together. They would legally marry if they could. *See* Clerk's Tr. at 336, 227.

But because Koebke and French are not legal spouses, BHCC refuses to provide Koebke with the same benefits it provides its other members, even though Koebke has an equal ownership interest in the Club and pays the same dues. Under BHCC's policy, Koebke and French (as Koebke's "guest") can only play golf together at the Club a maximum of six times a year and only if French pays a considerable fee that is not levied against legal spouses of other Club members. Moreover, should Koebke die, she cannot transfer her membership to French as legally married members can do with their partners.

Appellants filed suit in California Superior Court for the County of San Diego on May 11, 2001, asserting, *inter alia*, that BHCC violated the Unruh Act by discriminating against them on the basis of sex, sexual orientation, and marital status. *See* Clerk's Tr. at 1. On September 19, 2001, the Superior Court sustained a demurrer by BHCC with partial leave to amend. *See* Clerk's Tr. at 165. Appellants then filed an amended complaint. BHCC subsequently moved for summary judgment, which the Superior Court granted by a written order dated August 9, 2002.

The Fourth District Court of Appeal affirmed the trial court's rulings (1) that BHCC's restriction of benefits to legal spouses, at a time when same-sex couples cannot get married in California, was not intentional discrimination on the basis of either sex or sexual orientation; and (2) that the Unruh Act does not ban marital status discrimination. The Court of Appeal remanded the case for further consideration of whether the Club discriminated based on sexual orientation and sex by, in practice, granting at least some unmarried different-sex couples benefits denied to unmarried same-sex couples. On June 9, 2004, this Court granted Appellants' petition for review.

On this appeal, one of the issues the Court must decide is whether a business violates the Unruh Act's ban on sexual orientation discrimination when it provides services to married couples but not to gay and lesbian couples in lifelong, committed

relationships. In this case, BHCC instituted a blanket marital status classification that effectively excludes 100% of its gay or lesbian members from access to benefits simply because they cannot legally marry. *Amici* submit that, by applying that classification to deny benefits to lesbian and gay couples who have entered committed relationships and created lasting bonds of interdependence (financial and otherwise) that are no different from the heterosexual married couples who are afforded those benefits, BHCC discriminated on the basis of sexual orientation in violation of the Unruh Act.

Another issue that this Court must consider is whether the Unruh Act prohibits marital status discrimination. In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1162-69, this Court explained that the Unruh Act prohibits discrimination on the basis of "personal characteristics" that bear "little or no relationship to [individuals'] abilities to be responsible consumers of public accommodations." Whether a committed couple is married or not says nothing about whether that couple has the ability to be responsible consumers. Indeed, like race, sex, religion, and the other categories explicitly mentioned in the Unruh Act, individuals historically have been subject to adverse treatment by public and private entities because of their marital status. *Amici* submit that marital status is the very type of arbitrary classification that the Unruh Act covers and that the Court should overturn the lower courts' conclusion to the contrary.

For these reasons and those discussed in Appellants' briefs, the judgment granting BHCC's motion for summary judgment should be reversed.

ARGUMENT

THE CLUB'S POLICY OF DENYING BENEFITS BASED ON MEMBERS' MARITAL STATUS DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE UNRUH ACT

A. BHCC's policy constitutes illegal sexual orientation discrimination under the Unruh Act

By adopting a policy that discriminates in the provision of privileges on the basis of marital status, and thereby making it impossible for gay and lesbian couples in committed relationships to obtain those privileges, BHCC has engaged in sexual orientation discrimination prohibited by the Unruh Act. Although the Unruh Act does not specifically mention sexual orientation within its protected categories, California appellate courts have recognized that sexual orientation, along with a number of other "personal characteristics," *see Harris*, 52 Cal. 3d at 1161, are nonetheless covered by the Act's prohibitions. *See, e.g., Stoumen v. Reilly* (1951) 37 Cal. 2d 713, 716-17 (recognizing that the statutory predecessor to the Unruh Act prohibited exclusion on the basis of sexual orientation); *Hubert v. Williams* (1982) 133 Cal. App. 3d Supp. 1, 5 (holding that gay people are a protected class under the Unruh Act and finding "no compelling societal interest which could justify an exclusion based upon class status as homosexual"); *Harris*, 52 Cal. 3d at 1155 (approving cases holding that Unruh Act prohibits sexual orientation

discrimination).[5] Therefore, it is well-established—and undisputed by the Respondent—that under the Unruh Act, lesbians and gay men, like all persons in California, "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b).[6]

Here, BHCC contends that its policy discriminates on the basis of marital status, but not sexual orientation. Answer Brief at 40. *Amici* respectfully submit that, even if it were permissible under the Act to discriminate between married and unmarried heterosexual couples (which it is not), a policy that excludes all gay couples based on their being unmarried intentionally discriminates on the basis of sexual orientation. Under current California law (as well as under the laws of virtually every other state in the U.S.), two people of the same sex cannot get married. *See* Cal. Fam. Code § 300 (West 2003) ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ."). Heterosexual

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5 *See also Curran v. Mount Diablo Council of the Boy Scouts of Amer.* (1983) 147 Cal. App. 3d 712, 733-34 (holding that the Boy Scouts' expulsion of the plaintiff because he was gay violated the Unruh Civil Rights Act) ("[T]he Unruh Act prohibits arbitrary discrimination against homosexuals."); *Rolon v. Kulwitzky* (1984) 153 Cal. App. 3d 289, 290-92 (enjoining restaurant policy that only permitted couples of different sexes to be seated in semi-private booths as Unruh Act violation).

6 Unsurprisingly, given the Act's broad language and case law holding that it can apply to a country club, *see Warfield v. Peninsula Gold & Country Club* (1995) 10 Cal. 4th 594, 618-23, Respondent has not to date attempted to show that the BHCC is not a business establishment covered by the Act.

couples, by contrast, can get married if they so choose. Thus, one clearly cannot make the assumption that a gay couple has not made a lifetime commitment to one another based on that couple's "failure" to marry. Rather, members of a gay couple who have done virtually everything in their power to create an interdependent, lifelong familial relationship with one another still will be unable to marry legally, no matter how much they wish to marry. But for the fact that they have not been allowed to marry, such a committed couple is in precisely the same situation as a married couple and therefore no justification exists for not treating them the same. Any differential treatment simply because of a gay couple's "failure" to be married is arbitrary, and as such, illegal discrimination.

Moreover, because gay and lesbian couples are by definition currently unable to marry, any classification that hinges exclusively on marriage inherently and foreseeably excludes 100% of gay couples and constitutes intentional sexual orientation discrimination. BHCC's assertion that its marital status classification in this case penalizes unmarried heterosexual couples equally cannot insulate BHCC from liability. First, the policy does not place an equal burden on unmarried heterosexuals for the simple reason that they can marry and qualify for the benefits. Gay couples, because they cannot marry, suffer a burden that is different in kind, not just degree.

Second, a classification that discriminates imperfectly—i.e., by singling out only a subset of the protected class, or by adopting a broader classification that includes 100% of the protected class but also people who do not belong to the class, such as here—is nonetheless illegal discrimination. Few people would doubt that discrimination against people of Japanese ancestry is racial discrimination, even though it only targets a small subset of the class of Asian people. *See Korematsu v. United States* (1945) 323 U.S. 214, 233-34 (Murphy, J., dissenting) (rejecting majority's conclusion that classification based on Japanese ancestry was not race discrimination). Likewise, singling people out and punishing them for wearing particular religious garb, such as a yarmulke, would be religious discrimination, even though not all Jews wear yarmulkes. *See Hartmann v. Stone* (6th Cir. 1995) 68 F.3d 973, 985. Similarly, it is hard to imagine that a policy that deprived individuals of benefits based on the fact that they had dark skin, even if that ended up burdening some people of Mediterranean and Indian sub-continent heritage as well as African-Americans, would not be characterized as racial discrimination. In other words, the simple fact that there is not a perfect, one-to-one correspondence between the classification and the protected class—where only a subset of the class is targeted, or a broader swath of people are burdened than solely the protected class—does not change the fact that it is illegal discrimination.

B. Appellants' Unruh Act claims may be resolved without ruling on the validity of California's marriage laws

Although it is the Club's reliance on marriage that creates the sexual orientation-based classification in the provision of golf privileges, the Court need not rule on the validity of the marriage laws in order to resolve Appellants' claims. In *McLaughlin v. Florida* (1964) 379 U.S. 184, which involved a challenge to Florida's law against interracial cohabitation, the state of Florida argued that the interracial cohabitation law was constitutional because it was "ancillary to and served the same purpose as" the state's law banning interracial marriage, which had not yet been declared unconstitutional. *Id.* at 195. The Supreme Court, however, concluded that the legality of the cohabitation law should be tested independently of the legality of the related ban on interracial marriage. *See id.* at 195 ("[E]ven if we posit the constitutionality of the ban against [interracial marriage], it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment. Assuming . . . that the basic prohibition is constitutional, in this case the law against interracial marriage, it does not follow that there is no constitutional limit to the means which may be used to enforce it . . . . [The interracial cohabitation law] must therefore itself pass muster under the Fourteenth Amendment . . . .").

Similarly, here, Appellants have not challenged in this case California's ban on marriage by same-sex couples but rather, challenge BHCC's decision to use

marriage as the exclusive benchmark to decide whose life partners get golf privileges and whose do not. BHCC could have chosen to provide such privileges using any number of guidelines: that only members themselves get free and unlimited privileges, that only members' children get privileges, that members' entire extended families get privileges, that members' same- and different-sex domestic partners get privileges, etc. Among these many options, BHCC chose marriage as the sole defining line for eligibility for golf privileges, knowing that all gay and lesbian couples cannot marry and therefore would be excluded from receiving any benefits under the policy. That is sexual orientation discrimination.

In *Tanner v. Oregon Health Sciences Univ.* (Or. Ct. App. 1998) 971 P.2d 435, 447-48, an Oregon appellate court recognized that a marriage-based employment benefits policy discriminates based on sexual orientation even if it treats all unmarried people alike. Rather than engaging in mental gymnastics, the court pointed out the obvious: benefits are not available "on equal terms" as long as the state conditions benefits on marriage while denying lesbian and gay couples the opportunity to marry. *Id.*; *see also Levin v. Yeshiva Univ.* (N.Y. 2001) 754 N.E.2d 1099, 1104 (holding that a university policy restricting housing benefits to married students disadvantaged lesbian and gay students and their partners). To paraphrase a judge from New York's highest court addressing a parallel argument: "[t]he State marriage law merely defines who can and cannot marry; it was not intended to

permit . . . [providers of public accommodations] to violate [the civil rights laws]." *Id.* at 1111 (Kaye, C.J., concurring and dissenting).

C. *Beaty v. Truck Insurance Exchange* was wrongly decided and following it would result in an end-around against the Unruh Act's ban on sexual orientation discrimination

Beaty v. Truck Ins. Exch. (1992) 6 Cal. App. 4th 1455, a case out of the Third District of the California Court of Appeal upon which BHCC relies for the proposition that a marriage-based classification does not classify by sexual orientation because it excludes unmarried heterosexuals as well as all lesbians and gay men, was decided incorrectly and in any event is distinguishable and should not be followed here. *Beaty* did not address the fact that any defendant that wanted to exclude all gay couples from receiving benefits could do so simply by adopting a blanket marriage requirement and excluding some heterosexual couples as well. Under such a rule, by failing to make it possible for gay and lesbian couples (who cannot marry) to obtain benefits even when their relationships have every indicia of the sort of commitment present in a legal marriage, businesses would have free rein to discriminate arbitrarily against gay couples without risking any liability under civil rights laws covering sexual orientation. This is completely illogical.

Using similar reasoning, General Electric once argued that a policy distinguishing between pregnant persons and non-pregnant persons did not classify individuals based on sex, despite the obvious reality that only women can get

pregnant. *See Gen. Elec. Co. v. Gilbert* (1976) 429 U.S. 125 (1976), *superceded by statute as stated in Newport News Shipbuilding & Dry Dock Co. v. EEOC* (1983) 462 U.S. 669, 678-79. In *Gilbert,* the U.S. Supreme Court held that a classification based on pregnancy did not constitute sex discrimination because, although it burdened women, it excluded both men and non-pregnant women. *Id.* The decision was widely criticized and ultimately repudiated by congressional action. *See* 42 U.S.C. § 2000e; *Newport News*, 462 U.S. at 684. Just as a pregnancy classification discriminates based on sex because it burdens some women but no men, a marriage-based classification discriminates based on sexual orientation because it burdens all lesbians and gay couples but only a small subset of heterosexual ones. In other words, just as the ability to get pregnant is unique to women (and therefore, pregnancy discrimination is sex discrimination), the inability to get married is unique to gay couples (and therefore, using marital status as an exclusive benchmark for defining family is sexual orientation discrimination.[7]

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[7] In similar fashion, the Court of Appeal in *Boren v. California Dept. of Employment Dev.* (1976) 59 Cal. App. 3d 250, recognized that a statute that intentionally disqualifies those historically treated unequally may constitute impermissible discrimination, even if the statute is facially neutral. *Id.* at 257. In *Boren*, the challenged statute was an unemployment insurance code provision that disqualified any person leaving his or her job because of marital or domestic duties and who did not supply the family's major support. Like BHCC here, the respondents in *Boren* argued that the statute was devoid of a suspect classification because the statute "affect[ed] male and female employees alike;" that any inferiority of treatment arose from social and cultural patterns, not the statute; and that the statute was designed primarily so that only those unemployed by lack of

Thus, *Beaty* was wrongly decided and should not be followed here. Instead, *amici* respectfully submit, the Court should find that a blanket policy that excludes all gay couples from receiving the benefits that all married couples receive is sexual orientation discrimination, and illegal under the Unruh Act.

A ruling to the contrary—i.e., allowing businesses to condition benefits based on marriage—will sanction wide-spread discrimination against lesbians and gay men despite the fact that such discrimination has been unlawful under California law for over 50 years. If the Court of Appeal's ruling is upheld, other businesses will rely on proxy criteria and limit their services to married individuals, accomplishing through this sleight of hand the sexual orientation discrimination that they cannot engage in more overtly. The Unruh Act should not sanction such invidious, intentional acts of discrimination.

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work received benefits. *Id.* at 256. The court rejected this explanation of the drafter's intent as ignoring reality. Noting that the social and cultural conditions casting wives in the role of secondary breadwinners long antedated the challenged statute, the court rightly concluded that the statute's effect was "obvious to its authors. . . . To argue that it was not designed to accomplish its obvious result is unrealistic. Section 1264 was designed to disqualify a selected group of female claimants." *Id.* at 258.

THE UNRUH ACT PROHIBITS DISCRIMINATION ON THE BASIS OF MARITAL STATUS

A. The Fourth Appellate District's conclusion that the Unruh Act does not cover marital status discrimination is at odds with the basic canons of interpretation long applied to the Unruh Act and should be overturned

The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b) (West 2003). This Court repeatedly has held that the list of explicitly mentioned categories is illustrative, that the classes that previously had been recognized as covered under the Act remain covered, and that additional bases of discrimination can be covered as well even if they are not specifically mentioned in the text of the Unruh Act. *See, e.g., In re Cox* (1970) 3 Cal. 3d 205, 212, 216-17 (the Unruh Act prohibits all "arbitrary discrimination"; listing of prohibited classifications is "illustrative rather than restrictive"); *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal 3d 721, 725; *Harris,* 52 Cal. 3d at 1152.[8]

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[8] *See also Rolon v. Kulwitzky* (1984) 153 Cal. App. 3d 289, 291 ("the listing of discriminations in section 51 is not exclusive"); *Curran v. Mount Diablo Council of the Boy Scouts of Amer.*, 147 Cal. App. 3d 712, 733 (1983) ("The Act's reference to particular bases of discrimination—'sex, color, race, religion, ancestry or national origin'—is illustrative rather than restrictive.").

In *Harris*, this Court further explained that the Unruh Act covers discrimination on grounds not explicitly mentioned in the Act where it is based on "personal characteristics" similar to the grounds already covered by the Act. Thus, discrimination based on personal characteristics that bear "little or no relationship to [individuals'] abilities to be responsible consumers of public accommodations," and which are not justified by "legitimate business interests," also are covered. 52 Cal. 3d at 1162-69. The Court further noted that the fact that a given characteristic was covered under other civil rights laws would support the conclusion that it should be included within the scope of the Unruh Act as well. *Id.* at 1161-62, nn.9-10.

In direct contravention of these statements in *Harris,* the Court of Appeal here concluded that the Unruh Act does not cover marital status because, "while the Legislature has in several antidiscrimination statutes included marital status as a protected category, it has chosen not to do so in Unruh. This evidences an intent not to include marital status as a protected category." 10 Cal. Rptr. 3d at 775. Contrary to the Court of Appeal's conclusion, the very fact that marital status is covered by other civil rights statutes is strong evidence that the Unruh Act covers it as well. *Harris*, 52 Cal. 3d at 1161-62, nn. 9-10. Further, *Harris* requires the court to analyze whether the challenged classification is similar to the grounds of prohibited discrimination listed in the Act—an analysis in which the Court of Appeal neglected

to engage. As discussed below, a proper application of *Harris* necessarily leads to the conclusion that the Unruh Act bans marital status discrimination.

B. Like discrimination based race, sex, religion, and the other enumerated classes in the Unruh Act, marital status discrimination is rooted in inaccurate stereotypes

The Court of Appeal's conclusion ignores the reality that marital status is precisely the kind of "personal characteristic" that, like race, sex, religion, and the other enumerated classes, is irrelevant to an individual's ability to be a "responsible consumer[] of public accommodations" such as a golf club. *See* Harris, 52 Cal. 3d at 1162-69. BHCC does not seriously contend otherwise; instead, BHCC justifies its policy discriminating against the Appellants and other unmarried couples on the ground that it wishes to create a "family-friendly" environment. Answer Brief at 36. The implication is that unmarried persons are unlikely to be in committed relationships or to have children. *Id.* (arguing that Unruh Act does not prohibit "singles-only" events). But the Club's justification is based on false premises: the reality is that an unmarried couple household is almost just as likely to have children as a married couple household. As reported in the 2000 census, there are 5.5 million households headed by unmarried (heterosexual and gay) couples.[9] Of the unmarried couple households, 43% had at least one child living in the household, compared to

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9 *See Married Couple and Unmarried-Partner Households: 2000*, at 1 (available at www.census.gov/prod/2003pubs/censr-5.pdf). As reported by the Census, California had more unmarried couples than any other state: 684,000, or 12% of the 5.5 million total. *Id.* at 7.

46% of married couple households.[10] In total, there are 2,101,000 children living in unmarried-partner households.[11] Thus, the Club's argument that granting unmarried couples equal benefits would frustrate its "family-friendly" environment is grounded in erroneous assumptions, and should not be a basis for affirming the Court of Appeal's decision.

C. Unmarried couples historically have suffered from pervasive and invidious discrimination

The Court should find that marital status is a protected category under the Unruh Act for the additional reason that, contrary to the Club's arguments, individuals (like the Appellants) who live together outside of marriage long have encountered bias and discrimination based on offensive stereotypes about their "lifestyles." These stereotypes paint unmarried persons as less responsible and less committed to their partners than married couples. Unmarried couples also have been discriminated against out of the belief that their cohabitation constitutes a "sin." Because of these views, unmarried couples have experienced adverse treatment in nearly every aspect of their lives, including:

- Housing. *See, e.g., Smith v. Fair Employment and Hous. Comm'n* (1996) 12 Cal. 4th 1143, 1155, 1160 (landlord refused to rent to a couple because they were unmarried); *Swanner v. Anchorage Equal Rights Comm'n* (1994) 874

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[10] *Id.* at 10. The Census also reported that 22 % of same-sex male households and 34 % of same-sex female households included at least one child. *Id.* at 9.

[11] *See Children's Living Arrangements and Characteristics: March 2002*, at 4 (available at www.census.gov/prod/2003pubs/p20-547.pdf).

P.2d 274, 277 (same); *Attorney General v. Desilets* (1994) 418 Mass. 316, 319 (same);

- The right to make decisions about when and how many children to have. *See, e.g., Eisenstadt v. Baird* (1972) 405 U.S. 438, 446-455 (unmarried persons denied access to contraceptives);

- The right to be present in the delivery room during a partner's childbirth. *See, e.g., Whitman v. Mercy Mem'l Hosp.* (1983) 128 Mich. App. 155, 161-62 (hospital policy prohibited father of child from being present in the delivery room because he was not married to the mother); and

- In public accommodations, including country clubs. *See Yolles v. Golf Club of Avon, Inc.* (Jan. 6, 2004) 2004 WL 203325, *9 (noting that Connecticut statute "was originally designed to abolish invidious discrimination among existing members of Connecticut golf country clubs on the basis of sex, marital status and other impermissible considerations.").

The widespread discrimination against unmarried couples also has been extensively documented by public interest groups[12] and governmental agencies. For example, a 1990 Los Angeles City Attorney Consumer Task Force on Marital Status Discrimination found that unmarried adults were often, incorrectly, "typecast as carefree youngsters who party every night and who have few responsibilities in life." *See Consumer Task Force on Marital Status Discrimination*, Final Report of the Office of City Attorney, Los Angeles (1990) at 7. Businesses also felt free to discriminate on the basis of marital status under the belief that unmarried couples were unmarried by choice—a belief that plainly is not true for same-sex couples either then or now. *Id.* at 9. The Task Force found that, because of those inaccurate

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[12] *See, e.g.*, "Family Diversity: It's How We Live" available at http://www.unmarriedamerica.org/family-diversity/entry.htm.

and unfair stereotypes, there was pervasive and widespread discrimination against unmarried persons in housing, insurance, health care, and even against elderly unmarried adults in board-and-care homes. *Id.* at vi-ix. BHCC's contention, therefore, that unmarried persons have not been "broadly stigmatized by the wider society" is simply wrong.

In sum, the reality is that more and more couples are raising children and maintaining families outside marriage. Some of these couples may not be married for the reason that the Appellants are not—that is, they are committed same-sex partners who desire to but presently cannot legally marry. Or a heterosexual widowed female may choose not to get married to her partner out of respect for her deceased spouse or her children's wishes. *See Unmarried Together: More older couples skip the wedding but still find bliss*, AARP Online Bulletin (Oct. 2004).[13] The essential point is that, whatever the reason may be for a committed couple *not* being married, that reason has little if anything to do with that couple's ability to be responsible consumers. The Unruh Act was intended to protect individuals from precisely the type of arbitrary discrimination engaged here by the Club, and the Court should reverse Court of Appeal's ruling to the contrary.

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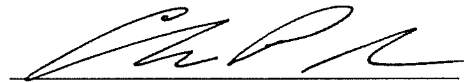
[13] Available at http://www.aarp.org/bulletin/yourlife/Articles/a2004-09-29-shacking.html.

CONCLUSION

For the reasons set forth above and those outlined in Appellants' briefs, the Court should reverse the judgment in favor of Respondent Bernardo Heights Country Club.

Dated: November 24, 2004

Respectfully submitted,



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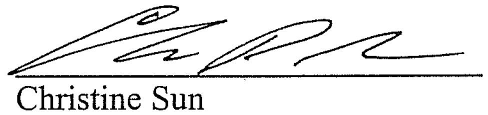
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of California Rule of Court 14(c)(1). This brief is printed in 13 point Times New Roman font and, exclusive of the portions exempted by Rule 14(c)(3), contains 4,706 words.



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PROOF OF SERVICE

I, Leah Cerri, declare that I am employed in the City and County of San Francisco, State of California; I am over the age of 18 years and not a party to the within action or cause; my business address is 1663 Mission Street, Suite 460, San Francisco, California 94103.

On November 24, 2004, I served a copy of the attached

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERIES UNION OF SOUTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES, THE AMERICAN CIVIL LIBERIES UNION FOUNDATION LESBIAN AND GAY RIGHTS PROJECT, THE ANTI-DEFAMATION LEAGUE, EQUALITY CALIFORNIA, AND TOM HOMANN LAW ASSOCIATION FILED IN SUPPORT OF PLAINTIFFS-APPELLANTS B. BIRGIT KOEBKE AND KENDELL E. FRENCH

on each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this proof of service was executed on November 24, 2004 at San Francisco, California.

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