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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING SPECIAL TITLE [RULE 1550(b)]:	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365
MARRIAGE CASES	**CORRECTED REPLY BRIEF OF *WOO* PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF MANDATE ON THIRD AMENDED COMPLAINT**
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Allen v. Wright
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American Academy of Pediatrics v. Lungren
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Andersen v. King County
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Baehr v. Lewin
(1993) 852 P.2d 44 25

Baker v. State of Vermont
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Banks v. Housing Authority of San Francisco
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Barbeau v. Attorney General
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Bixby v. Pierno
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Boren v. Department of Employment Development
(1976) 59 Cal.App.3d 250 18

Brown v. Board of Education
(1954) 347 U.S. 483 ..... 1, 4, 5

Castle v. State
(Wash. Super. Ct. Sept 7, 2004) No 04-2-00614-4, 2004 WL 1985215 9

Catholic Charities of Sacramento v. Superior Court
(2004) 32 Cal.4th 527 ..... 15, 17, 21

Children's Hosp. and Med. Ctr. v. Belshe
(2003) 97 Cal.App.4th 740 20

City of Cleburne v. Cleburne Living Center, Inc.
(1985) 473 U.S. 432 25

Connerly v. State Personnel Bd.
(2001) 92 Cal.App.4th 16 16

Cruzan v. Director, Mo. Dep't of Health
(1990) 497 U.S. 261 6

Eisenstadt v. Baird
(1972) 405 U.S. 438 11

Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.
(1979) 24 Cal.3d 458 20

Gerawan Farming, Inc. v. Kawamura
(2004) 33 Cal.4th 1 21

Gerawan Farming, Inc. v. Lyons
(2000) 24 Cal.4th 468 21

Goodridge v. Department of Public Health
(Mass. 2003) 798 N.E.2d 941 ..... 2, 3, 13, 24, 25

Griswold v. Connecticut
(1965) 381 U.S. 479 11

Halpern v. Attorney General
(Ontario Ct. App. 2003) 172 OAC 276 3

Harris v. Capital Growth Investors XIV
(1991) 52 Cal.3d 1142 18-19

Hays v. Wood
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Heckler v. Mathews
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Hill v. National Collegiate Athletic Assn.
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Holmes v. California National Guard
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Isbister v. Boys' Club of Santa Cruz
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J.E.B. v. Alabama ex rel. T.B.
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James v. Marinship Corp.
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Keenan v. Superior Court
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Lawrence v. Texas
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Lockyer v. City and County of San Francisco
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Loving v. Virginia (1967)
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McLaughlin v. Florida
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Mississippi University for Women v. Hogan
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Opinion of the Justices
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Opinion of the Justices to the Senate
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Ortiz v. Los Angeles Police Relief Ass'n, Inc.
(2002) 98 Cal. App.4th 1288 14

Pace v. Alabama
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Palmore v. Sidoti
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Parr v. Municipal Court
(1971) 3 Cal.3d 861 25

People v. Belous
(1969) 71 Cal.2d 954 13

Perez v. Sharp
(1948) 32 Cal.2d 711 ..... *passim*

Planned Parenthood of Southeastern Penn. v. Casey
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Plessy v. Ferguson
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Railway Express Agency v. New York
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Regents of Cal. v. Bakke
(1978) 438 U.S. 265 16

Romer v. Evans
(1996) 517 U.S. 620 21

Rosengarten v. Downes
(Conn. Ct. App. 2002) 802 A.2d 170, *appeal dismissed* (Conn. 2002) 806 A.2d 1066 8

Ross v. City of Yorba Linda
(1991) 1 Cal.App.4th 954 26

Shaw v. Reno
(1993) 509 U.S. 630 16

Shelley v. Kraemer
(1948) 334 U.S. 1 16

Stanley v. Illinois
(1972) 405 U.S. 645 11

Sweatt v. Painter
(1950) 339 U.S. 629 10

Turner v. Safley
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United States v. Virginia
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Conservatorship of Valerie N.
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Waters v. Gaston County
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Watson v. City of Memphis
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Wheelock v. Wheelock
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STATUTES

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42 U.S.C.
§ 402 9

Family Code
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OTHER AUTHORITIES

A.B. 205 (2003) 4, 7, 14, 17

Alabama Repeals Ban against Interracial Marriage,
Chattanooga Times B2 (Nov. 8, 2000) 24

Analysis by Assembly Judiciary Committee,
A.B. 607 (1977) 19

Analysis by Senate Judiciary Committee,
A.B. 607 (1977) 19

Analysis by Senate Republican Caucus,
A.B. 607 (1977) 19

Assembly Judiciary Committee Analysis, A.B. 607 (1977) 17

Attorney General's Reply Brief in *Knight v. Schwarzenegger* 7, 8, 22

E.J. Graff, *What is Marriage For? The Strange History of Our Most Intimate Institution* (1999) 24

Enrolled Bill Report, Governor's Office, Legal Affairs Department, 8/18/77 19

Letter from Attorney General Richard Blumenthal to Governor Mitt Romney (May 17, 2004) (http://www.cslib.org/attygenl/press/2004/other/governorromneyletter.pdf) 8

Letter from N.Y. Attorney General to Darrin B. Derosia and Peter Case Graham (May 3, 2004) (http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf) 9

Letter from United States General Accounting Office to Majority Leader Bill Frist (Jan 23, 2004) (http://www.gao.gov/new.items/d04353r.pdf) 9

Mass. Senate Bill 2175 25

N.Y. Bar Ass'n, *Report on Marriage Rights for Same-Sex Couples in New York* (2004) 13 Colum. J. Gender & L. 70 8

Senate Democratic Caucus Report, A.B. 607 (1977) 19

I. INTRODUCTION

Each of the Petitioners in this case seeks to marry the one person he or she finds irreplaceable. After having spent anywhere from 4 to over 51 years together, each of these couples seek the full scope of tangible and intangible benefits and responsibilities, as well as the esteemed status, that their heterosexual parents, children, siblings, neighbors, friends, and colleagues all are able to enjoy through marriage. Petitioners contend that the exclusion of same-sex couples from marriage in Family Code section 300 violates their rights under the California Constitution to privacy, equal protection based on sex and sexual orientation, and expression. In response, the State concedes that California's statutes do not provide full equality to individuals in same-sex relationships, but argues that it is constitutionally sufficient for the State to provide "substantially equivalent rights and benefits through an alternative scheme." (State's Opposition Brief ("Opp.") at p. 21.) In essence, the State argues that, for same-sex couples, a status less than full equality, in the form of domestic partnerships, is good enough.

This case poses the question of whether the California Constitution permits California to maintain this blatant system of apartheid in its family law by relegating same-sex couples and their children to a separate, concededly unequal and inferior, legal status. Although acknowledging that the exclusion of same-sex couples from marriage discriminates on the basis of sex and on the basis of sexual orientation, the Legislature nevertheless has stopped short of legislating equality. Instead, the People of California, acting through majoritarian processes, have created a dual regime of family law that insists on maintaining distinctions between different-sex couples, who are in the majority and who may marry, and same-sex couples, who constitute a small minority and who may not marry. Such legally-mandated segregation marks lesbians and gay men (and by extension, their children) with an unmistakable badge of inferiority. Indeed, the only real reason for the segregation is to make that mark. This differential treatment not only decrees that different legal rules apply to the two types of families, but also ensures that only different-sex couples are entitled to the State's imprimatur as married—a status that is recognized, throughout the Nation and around the world, as the most highly valued and most protected family relationship in the eyes of the law.

In this fiftieth anniversary year of *Brown v. Board of Education* (1954) 347 U.S. 483—and in

California, the State that nearly two full decades before *Loving v. Virginia* (1967) 388 U.S. 1, stood alone in constitutionally invalidating antimiscegenation statutes notwithstanding their popularity—it should be obvious that the California Constitution does not permit such inequality to continue. There can be no doubt that the maintenance of two separate family statuses is the maintenance of inequality under the law.

II. ARGUMENT

A. Domestic Partnerships Are Not Equal To Marriage.

Petitioners seek marriage, not simply a bundle of specific legal rights and benefits. To suggest that marriage is no more than such a bundle offends not only same-sex couples, such as Petitioners, who yearn for the right to wed, but every person who values marriage as a "cherished" institution. (*Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941, 948, 949.) The benefits attached to marriage "are enormous, touching nearly every aspect of life and death." (*Id.* at 955.) But those benefits are not the same thing as marriage. They also do not *define* marriage, let alone provide a constitutionally adequate substitute for it.

Marriage is valued for itself, for what it conveys to the couple and to others. It "is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." (*Ibid.*) "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." (*Id.* at 954.) Petitioners seek to marry because they wish to express their love and devotion to one another through the public commitment that is unique to marriage. They wish to marry so that the nature of their relationship will be clear to others and respected by others, and so that their dignity as equal citizens will be apparent. Petitioner Corey Davis explains: "Having our government deny us the right to marry says that our relationship does not count. It tells us and other people that our relationship is a temporary thing. [Being excluded from the right to marry] make[s] us feel like our relationship is not as valued or respected as a marriage." (Dec. Corey Davis, ¶ 19.) This impacts the Petitioners' families as well. Ericka Sokolower-Shain, the daughter of Petitioners Jody Sokolower and Karen Shain believes "[i]t is unfair that my parents are not allowed to get married when they have been together much longer than most other couples and are going to be

together forever. It is hard for me knowing that the law treats my family differently than other families. To me, this sends a message that my family is not as good or as deserving of respect as other families. I am proud of my parents and my family, and it makes me upset that we are treated as second-class citizens who do not get the same rights as other people, just because my parents are both women." (Dec. Ericka Sokol Ower-Shain, ¶ 12.)

Because marriage is imbued with such great cultural significance, "[w]ithout the right to marry – or more properly, the right to choose to marry – one is excluded from the full range of human experiences and denied full protection of the law for one's avowed commitment to an intimate and lasting human relationship." (*Goodridge*, 798 N.E.2d at 957 [internal citations omitted].) In the words of Petitioners Myra Beals and Ida Matson, who have been together for twenty-seven years, "Over time, this wears away at a person." (Beals Dec. at ¶ 23). By relegating same-sex couples to a different legal status with a different-name, California deliberately has withheld the intangible components that accrue to the term "marriage" from lesbians and gay men and deliberately has chosen to preserve those intangible benefits for different-sex couples only. This is the very opposite of the equality that Petitioners seek.

1. Even if domestic partnerships provided all of the benefits of marriage, which they do not, creating a separate legal status for same-sex relationships violates the California Constitution's guarantee of equal protection.

Because marriage is a privileged status, the statutory exclusion of same-sex couples from marriage in Family Code section 300 is deeply stigmatizing. It "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently . . . inferior to opposite-sex relationships and are not worthy of respect." (*Goodridge,* 798 N.E.2d at 962; see also *Halpern v. Attorney General* (Ontario Ct. App. 2003) 172 OAC 276 107 [exclusion of same-sex couples from marriage "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships" and "offends the dignity of persons in same-sex relationships."]; *Barbeau v. Attorney General* (B.C. Ct. App. 2003) 2003 BCCA 251 at ¶ 130 [exclusion of same-sex couples from marriage "conveys the ominous message that they are unworthy of marriage"].)

Contrary to the State's argument, creating a separate legal status for same-sex couples does

not cure this government-imposed discrimination. Relegating same-sex couples to a separate legal status, rather than simply permitting them to marry, would not be necessary *except* for the impermissible purpose of excluding lesbians and gay men from a valued institution. As the State candidly admits, "domestic partnership does not have the same meaning as marriage" (Opp. at 27), and it is precisely in order to preserve that meaning for different-sex couples that the State has relegated same-sex couples to a separate status. Thus, even if domestic partnerships could extend all of the benefits of marriage to same-sex couples (which, as explained below, they do not), they would be unequal and therefore unconstitutional. This exclusion has a very real impact on same-sex couples, as Petitioner Art Adams explains: "Even after A.B. 205 goes into effect and we are given more rights and protections, we are still excluded from the right to marry and as a result treated as second-class citizens." (Dec. Arthur Adams, ¶ 17.)

The constitutional guarantee of equality is not only about equal access to tangible things such as goods and services, education, and employment. It is also about the right to be free from government discrimination. "[T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against." (*Heckler v. Mathews* (1984) 465 U.S. 728, 739.) Rather, official discrimination is harmful in itself, because it "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore less worthy participants in the political community." (*Id.* at 739-40; see also *Allen v. Wright* (1984) 468 U.S. 737, 755 ["[T]he stigmatizing injury often caused by … discrimination … is one of the most serious consequences of discriminatory government action."].)

Historically, the most egregious examples of this type of official discrimination are found in our nation's history of racial segregation. In *Plessy v. Ferguson* (1896) 163 U.S. 537, 552, the United States Supreme Court approved state-imposed segregation in the form of "separate but equal" public accommodations. In *Brown v. Board of Educ.* (1954) 347 U.S. 483, the Court acknowledged the invidious effect of separating individuals solely because of their race. "The impact is greater when it has the sanction of the law...." (*Id.* at 494.) Repudiating *Plessy*, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal [and] deprive [those affected] of the equal protection of the laws guaranteed by

the Fourteenth Amendment." (*Id.* at 495; see also *Watson v. City of Memphis* (1963) 373 U.S. 526, 538 ["The sufficiency of [African-American] facilities is beside the point; it is the segregation by race that is unconstitutional."].)

Courts have rejected the "separate but equal" doctrine in other contexts as well. In *United States v. Virginia* (1996) 518 U.S. 515, the Supreme Court rejected the State of Virginia's attempt to justify its exclusion of women from the Virginia Military Institute on the ground that the State had provided a separate and allegedly "equal" facility for women. The Court held that the "parallel" institution did not replicate the numerous benefits provided by the established institution, including intangible benefits such as its "standing in the community, traditions, and prestige." (*Id.* at 554.) The separate women's college was found to be "no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade." (*Id.* at 555.) Accordingly, the Court held that permitting women to be relegated to a separate institution would have "denie[d] to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." (*Id.* at 532 [citations omitted].)

California case law similarly recognizes that "separate but equal" institutions are inherently unequal. California courts have invalidated "separate but equal" public accommodations based on race, (see, e.g., *Banks v. Housing Authority of San Francisco* (1953) 260 P.2d 668 ["separate but equal" doctrine did not justify racial segregation in public housing]; *James v. Marinship Corp.* (1944) 155 P.2d 329, 338-40 [rejecting the contention that African-American auxiliary unions were "separate but equal"]), and "parallel" institutions for women. (*Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72 [holding Boys' Club could not discriminate against girls]; see also *Perez v. Sharp* (1948) 32 Cal.2d 711 [holding that, in the context of marriage, the separate but equal doctrine is demeaning to human dignity and wrongly treats people as interchangeable commodities].)

Separate but equal is no less unacceptable when applied to discriminate against lesbians and gay men, as the Massachusetts Supreme Judicial Court already has held. When asked to review the permissibility of a bill that would have excluded same-sex couples from marriage while granting them all of its "tangible benefits" in the form of civil unions, the Massachusetts high court found that

such a "separate but equal" family code would "relegate same-sex couples to a different status" and impose grave constitutional harm. (*Opinion of the Justices* (Mass. 2004) 802 N.E.2d 565, 569, 571.) The decision to reserve the term "marriage" to different-sex couples, the court explained, is "more than semantic." (*Id.* at 570.) It is, rather, "a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." (*Ibid.*; see also *Barbeau v. Attorney General* (B.C. Ct. App. 2003) 2003 BCCA 251 at ¶ 156 ["Any other form of recognition for same-sex relationships, including the parallel institution of [registered domestic partnerships] falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal,' or to leave it to governments to choose amongst less-than-equal solutions."].)

This Court should resist the State's invitation to resurrect the "separate but equal" fallacy that was repudiated 50 years ago. Rather, to decide whether domestic partnerships satisfy the constitutional mandate of equality, the Court need only consider whether married heterosexuals in California would be satisfied if civil marriage was reserved exclusively for same-sex couples and different-sex couples were provided only with domestic partnerships. As the California Supreme Court long ago recognized, "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. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." (*Hays v. Wood* (1979) 25 Cal.3d 772, 786 [quoting *Railway Express Agency v. New York* (1949) 336 U.S. 106, 113 (Jackson, J., concurring)].) The guarantee of equality "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." (*Cruzan v. Director, Mo. Dep't of Health* (1990) 497 U.S. 261, 300 (Scalia, J., concurring).) Rather than permitting same-sex couples to marry or replacing marriage with a new status that is open to both different and same-sex couples, California has created a separate status for same-sex couples for no reason other than to reserve the privileged status of marriage to heterosexuals alone. That fact alone underscores the inequality of domestic partnerships to marriage.

2. Domestic partnerships do not provide all of the benefits of marriage.

As the State concedes, domestic partnerships do not provide all of the tangible rights and benefits given to spouses under state law. (See, e.g., Opp. at p. 1, n.2 [domestic partnership does not provide all of the rights and benefits of marriage under state law]; Attorney General's Reply in *Knight v. Schwarzenegger* at p. 2 ["As discussed in defendants' opening brief, from formation to termination, domestic partnerships are treated differently than marriage."].)

Even after the substantive provisions of A.B. 205 go into effect on January 1, 2005, registered domestic partners still will be unable to file joint state income taxes, still will be denied equal access to long-term care, and still will not have the same protections afforded to spouses with regard to property taxes. (See Petitioners' Opening Brief at p. 28, n.16 [discussing differences between domestic partnerships and marriage under state law].)

The California Legislature has acknowledged that A.B. 205 is not equal to marriage. In granting same-sex couples the opportunity to obtain most, but by no means all, of the legal protections that are available to different-sex couples through the separate institution of marriage, the Legislature expressly "f[ound] and declare[d]" that:

> [e]xpanding the rights and creating responsibilities of registered domestic partners . . . would *reduce* discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.

(A.B. 205 (2003), § 1(b) [emphasis added].) Notably, the Legislature acknowledged that A.B. 205 will "*reduce*" but not *eliminate* such discrimination in the law. This acknowledgment that domestic partnership laws can move the law only part way toward full equality is echoed in the opening declaration of A.B. 205, that the Act was "intended to help California move *closer*" to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution." (A.B. 205 (2003), § 1(a) [emphasis added].)

Consistent with the Legislature's acknowledgement that domestic partnership is only a partial remedy for inequality, Governor Schwarzenegger and Attorney General Lockyer recently vigorously defended A.B. 205 against the charge that it established "marriage in all but name" for same-sex couples. On behalf of the Governor, the Attorney General eloquently explained that California's dual system of marriage laws and domestic partnership laws carefully maintain second-class status for

same-sex couples and their families:

> [F]rom formation to termination, domestic partnerships are treated differently than marriage. Unlike marriage, domestic partnerships are formed and terminated by filing documents with the Secretary of State, much like a business partnership. Domestic partnerships may not be recognized in other states or countries, and domestic partners cannot file joint tax returns. Domestic partners also lack all of the rights extended to married couples under federal laws such as social security, medicare, and federal employment benefit laws. *And beyond the legal details, marriage has a unique role in society that no domestic partnership law or civil union can duplicate.*

(Attorney General's Reply Brief in *Knight v. Schwarzenegger* at p. 2:4-11 [emphasis added].)

In addition to not providing equal legal benefits, the State's decision to relegate same-sex couples to a separate legal status other than marriage makes those couples vulnerable to the confusion that inevitably will result from the creation of a new legal category. As a report of the New York Bar Association has explained in discussing civil unions: "While marriage is a clearly defined bundle of benefits and responsibilities, civil union [or, in this case, domestic partnership] is a new concept that is likely to lead to decades of litigation, limiting its value as a planning tool for same-sex couples." (N.Y. Bar Ass'n, *Report on Marriage Rights for Same-Sex Couples in New York* (2004) 13 Colum. J. Gender & L. 70, 89–90.)

Creating a new legal status for same-sex couples also severely hampers the ability of those couples to have their relationships respected in other jurisdictions. For different-sex couples, marriage is automatically recognized in all 50 states; if a couple is married in one state, they can be confident their relationship will be understood and respected if they travel or move to another state. By contrast, the term "domestic partnership" has no fixed legal meaning outside of California and is unfamiliar to most courts, public officials, and private entities in other states. Accordingly, same-sex couples who register as domestic partners in California cannot be sure their relationship will protect them in other states.[1] Although some states also would refuse to respect a marriage between a same-

[1] For example, the Connecticut Court of Appeals has held that Connecticut does not recognize the relationships of same-sex couples with Vermont "civil unions." (*Rosengarten v. Downes* (Conn. Ct. App. 2002) 802 A.2d 170, *appeal dismissed* (Conn. 2002) 806 A.2d 1066.) At the same time, the Connecticut Attorney General expressly has left open whether Connecticut recognizes the relationships of same-sex couples who have married in Massachusetts. (Letter from Attorney General Richard Blumenthal to Governor Mitt Romney (May 17, 2004) (http://www.cslib.org/attygenl/press/2004/ other/governorromneyletter.pdf).)

sex couple, others would do so as a matter of comity.[2] This clearly is the case in Massachusetts, where same-sex couples already can marry. It is likely true in Vermont, which follows the "general rule that a marriage valid where it is celebrated . . . is valid everywhere," (*Wheelock v. Wheelock* (Vt. 1931) 154 A. 665, 666), and where any "public policy" objection is unlikely given that state's enactment of civil unions after *Baker v. State* (Vt. 1999) 744 A.2d 864. It is also likely true in New York, where the Attorney General has issued an opinion stating that New York will respect marriages of same-sex couples. (Letter from N.Y. Attorney General to Darrin B. Derosia and Peter Case Graham (May 3, 2004) (http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf).) Similarly, Connecticut, New Jersey, New Mexico, Oregon and Rhode Island have no provision denying recognition of marriages between same-sex couples and also have laws allowing at least some benefits to same-sex couples, as do a growing number of other countries.[3] Thus, even in light of other states' and the federal government's laws excluding same-sex couples from the right to marry, same-sex couples would be less vulnerable to having their families disrespected outside of California if California permitted them to marry, rather than shunting them into a new, separate, unfamiliar, and legally inferior status.

Further, by excluding same-sex couples from marriage, the State is depriving them of the strongest basis on which to seek the many federal benefits that are provided only to spouses. By its own count, the federal government grants 1,138 benefits to married couples. (Letter from United States General Accounting Office to Majority Leader Bill Frist (Jan 23, 2004) (http://www.gao.gov/new.items/d04353r.pdf).) These include, among others, access to social security protections upon the death, disability or retirement of a spouse;[4] access to continued health

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[2] The federal "Defense of Marriage" Act, 28 U.S.C. § 1738C, does not prevent states from recognizing the marriages of same-sex couples. It merely purports to authorize them to do so.

[3] Even in states that with statutes that purport to preclude any recognition of marriages of same-sex couples, a married same-sex couple would be positioned to enjoy such benefits should the state law precluding recognition of their marriage be repealed or invalidated. In Washington, for example, two trial courts recently struck down a state statute precluding recognition of marriages between same-sex couples. (*Castle v. State* (Wash. Super. Ct. Sept 7, 2004) No 04-2-00614-4, 2004 WL 1985215 [appeal pending]; *Andersen v. King County* (Wash. Super. Ct. Aug 4, 2004) No 04-2-04964-4-SEA, 2004 WL 1738447 [appeal pending].)

[4] Under social security law, if a covered worker is retired, disabled or dies, his or her same-sex partner cannot claim benefits for the benefit of himself or herself or of any children based on the worker's work credits. (*See* 42 U.S.C. § 402 (b-f).)

coverage for a spouse after one is laid off, under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"); access to protections under the Employee Retirement Income Security Act ("ERISA"), such as the ability to leave a pension to your spouse; and access to protections under the Federal Family and Medical Leave Act, such as the ability to take up to 12 weeks off every 12 months to care for a spouse, a spouse's child, or a spouse's parent. While the Defense of Marriage Act ("DOMA") currently purports to deny any federal benefits to married same-sex couples, same-sex couples who are married have the strongest basis for seeking federal benefits and challenging that exclusion. In addition, if DOMA is repealed or held to be unconstitutional, same-sex couples who have married in California will be more likely to receive federal benefits than same-sex couples who are in domestic partnerships.

In sum, by relegating same-sex couples to domestic partnership rather than marriage, the State is not only stigmatizing lesbians and gay men and depriving them of the many profound intangible benefits associated with marriage, it is failing to provide true equality with regard to the tangible benefits and protections as well. Thus, despite the State's assertion that same-sex couples must be satisfied with domestic partnerships, "[i]t is difficult to believe that one who had a free choice between [marriage and domestic partnership] would consider the question close." (*Sweatt v. Painter* (1950) 339 U.S. 629, 634.)

B. The Marriage Statute Deprives Petitioners of their Fundamental Right to Marry and Violates Their Right To Privacy.

1. Petitioners seek the right to marry, not the right to same-sex marriage.

There is no question that the right to marry is fundamental. The State does not dispute this point. (See, e.g., Opp. at p. 30 ["Hence, courts have held that marriage is a fundamental rights."].) Rather, the State argues that same-sex couples are not included within this fundamental right, and that lesbians and gay men have a constitutionally protected right to marry only if a separate right to "same-sex marriage" is deeply rooted in the traditions of California or this country.

As the United States Supreme Court explained in *Planned Parenthood of Southeastern Penn. v. Casey* (1994) 505 U.S. 833, it is

tempting . . . to suppose that the Due Process Clause protects only those practices,

> defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law. . . .

(*Id.* at 847.)

If the State's position here – that the right in question must be defined at the most specific level – were correct, there would be no protection for the use of contraceptives by unmarried couples, see *Eisenstadt v. Baird* (1972) 405 U.S. 438, or even by married couples, see *Griswold v. Connecticut* (1965) 381 U.S. 479; there would be no recognition for the right to raise one's illegitimate children, see *Stanley v. Illinois* (1972) 405 U.S. 645, nor for the right to engage in private consensual sexual intimacy without state interference, see *Lawrence v. Texas* (2003) 539 U.S. 558. Yet liberty has been found to protect all these departures from "tradition." As *Casey* and other cases indicate, tradition informs our constitutional liberty, but it does not define or circumscribe it. *Lawrence*, decided last year, illustrates how analysis of a liberty interest engages both tradition and experience, reminding us that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." (*Id.* at 579.)

Here, Petitioners do not seek a right to "same-sex marriage." Rather, they seek to exercise the same fundamental right to marry that is available to different-sex couples. The State concedes that in other cases involving infringements on that right, courts have not defined the right narrowly or with regard to the specific restriction at issue. For example, the State acknowledges that the question in *Loving* and *Perez* was not whether there was a "deeply-rooted tradition of interracial marriage," nor was the question in *Turner v. Safley* (1987) 482 U.S. 78, whether there was a "deeply-rooted tradition of inmate marriage." (Opp. at p. 30.) Rather, in those cases, courts scrutinized the restrictions at issue and determined whether they were relevant to the attributes of marriage that render it worthy of constitutional protection. In *Turner*, for example, the Court held that even though the limitations imposed by incarceration prevented inmates from physically consummating their marriages, [m]any important attributes of marriage remain." (*Turner, supra*, 42 U.S. at 95.) The Court held:

> [I]nmate marriages, like others, are expressions of emotional support and public commitment. . . . [F]or some inmates and their spouses, . . . the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. . . . [M]arital status often is a precondition to the receipt of government benefits . . ., property rights . . ., and, other, less tangible benefits (e.g., legitimation of children born out of wedlock)[.]

(*Id.* at 95-96.) "Taken together," the Court concluded, "these . . . elements are sufficient to form a constitutionally protected marital relationship in the prison context." (*Id.* at 96.) Similarly, in *Loving* and *Perez*, the United States and California Supreme Courts rejected the notion that a person's race is in any way relevant to his or her qualifications for marriage. To the contrary, as the Court noted in *Perez*, laws that restrict marriage based on race are fundamentally incompatible with the right to marry because such laws may bar a person "from marrying the person of his choice and that person to him may be irreplaceable." (*Perez, supra*, 32 Cal.2d at 725.)

Contrary to the State's argument, there is no principled basis for applying a different approach to the challenged restriction in this case. Thus, the State must do more than simply urge this Court to define the right in question based on the very restriction that is being challenged. Rather, the Constitution requires that the State must explain why, beyond the simple fact of historical exclusion, the right to marry must exclude same-sex couples.

This the State cannot do. The right to marry is protected because it "involves the most intimate and personal choices a person can make in a lifetime, choices central to personal dignity and autonomy." (*Planned Parenthood v. Casey, supra*, 505 U.S. at 851 [quoted in *Lawrence, supra*, 539 U.S. at 574].) Moreover, if there was any doubt previously, the United States Supreme Court now has made clear that persons in a lesbian or gay relationship "may seek autonomy for these purposes, just as heterosexual persons do." (*Lawrence, supra*, 539 U.S. at 574.)[5]

2. Petitioners have a legally protected privacy interest in being able to marry their chosen partners.

The right to privacy is "inalienable" and belongs to "every Californian." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 17-18.) Where a statute directly and substantially restricts "an interest fundamental to personal autonomy, . . . a compelling interest must be present to

[5] Although Petitioners are not raising any federal constitutional claims, Petitioners have cited federal cases because these cases set the floor for any claims raised under California Constitution. The California Constitution has been interpreted to be more protective than the federal. Indeed, with regard to the right to privacy in particular, "past California cases establish that the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by federal courts." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.) Nonetheless, however, California courts often look to federal precedents to expand and explicate the principles that equally underlie the similar guarantees under the California Constitution.

overcome the vital privacy interest." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 330 [quoting *Hill*, 7 Cal.4th at 34].)

To establish an invasion of privacy under the California Constitution, the following elements must be established: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. (*Hill*, *supra*, 7 Cal.4th at 39-40; *American Academy of Pediatrics*, *supra*, 16 Cal.4th at 330.) Petitioners have met this standard. Under settled California law, the right to privacy includes the right to marry the person of one's choice. (*People v. Belous* (1969) 71 Cal.2d 954, 963; *Perez, supra*, 32 Cal.2d at 715.) Further, the Petitioners have a reasonable expectation of being able to exercise that right without restrictions based on their gender or sexual orientation, and without undue interference from the State, as all other Californians are free to do.[6] And finally, the restriction in Family Code section 300 is not merely an incidental or insignificant burden on Petitioners' right to marry; rather, it is an insurmountable barrier that prevents each of the Petitioners from marrying the person of his or her choice. (*Goodridge*, *supra*, 798 N.E.2d at 958 ["the right to marry means little if it does not mean the right to marry the person of one's choice."].)

Rather than attempting to justify that prohibition, which it cannot do, the State argues that Petitioners have failed to identify "a legally cognizable privacy interest that has been invaded." (Opp. at pp. 33-35.) This argument has no merit. As the California Supreme Court has made clear, once a right of privacy has been established, it is presumed to belong to all persons, and the State must have a compelling interest to justify any restrictions that directly and substantially interfere with that right.

In *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, for example, the Court struck down a state law that completely barred developmentally disabled women from access to sterilization. The

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[6] The historical exclusion of same-sex couples from the right to marry is not an adequate defense to a claim that the exclusion violates the right to privacy. As the California Supreme Court has made clear, "it plainly would defeat the voters' fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." (*American Academy of Pediatrics, supra*, 16 Cal.4th at 339.)

Court held that a disabled person has "the same constitutional right of privacy to choose whether or not to be sterilized as does a competent person." (*Id.* at 166; see also *ibid.* ["denying the same right to procreative choice to persons whose disability makes them reliant on others as it extends to competent persons degrades the disabled"].) Similarly, in this case, the State concedes that same-sex couples generally have the same interests as different-sex couples in forming stable committed relationships and are similarly situated to different-sex couples in their need for the rights, benefits, and protections given to spouses. (See Opp. at p. 2 [quoting A.B. 205, para. 1(b)].) Accordingly, there can be no serious dispute that Petitioners have the same interests in marital privacy as others, including the freedom to marry the person of one's choice. To hold otherwise would degrade persons in same-sex relationships, which the State cannot do. (See, e.g., *Lawrence, supra*, 539 U.S. at 578 ["The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny . . ."].)

The decision in *Ortiz v. Los Angeles Police Relief Ass'n, Inc.* (2002) 98 Cal. App.4th 1288, also strongly supports the conclusion that Petitioners have a right to marital privacy and that the statutory exclusion in Family Code 300 is subject to strict scrutiny. In Ortiz, the Court of Appeal held that, "[b]eyond question," the right to privacy includes "the right to join in marriage with the person of one's choice." (*Id.* at p. 1303 [quoting *Perez, supra*, 32 Cal.2d at 715].) In concluding that the employer's policy did *not* violate this right, the Court distinguished between "restriction[s] with incidental effects on . . . marriage" and laws that forbid marriage altogether (as in *Loving*). (*Id.* at 1311-1312 [citing *Waters v. Gaston County* (4th Cir. 1995) 57 F.3d 422, 426].) The Court concluded that the employer's policy was not subject to strict scrutiny because it imposed only an incidental burden on the plaintiff's right to marry. "The rule is not a flat prohibition on marriage that affects entire classes of individuals statewide. [The employer] did not (and could not) prohibit Ortiz and Estrada from getting married. Rather, like an antinepotism policy, [the employer] required Ortiz to choose between marriage and her job." (*Id.* at 1312.)

In contrast, the statutory restriction in this case is a flat prohibition that affects an entire class of individuals statewide. Accordingly, that prohibition is subject to strict scrutiny. As shown in Section II(G) below, the State has failed to meet that test.

C. California's Marriage Statute Discriminates on the Basis of Sex.

Although the State concedes that classifications based on sex are suspect, (Opp. at p. 20), it argues that Family Code section 300 is not unconstitutional because it "does not classify based on gender" (Opp. at p. 19-20.) This argument must be rejected.

On its face, the statute explicitly employs a sex-based classification. Specifically, the statute provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman." (Fam. Code § 300). Under this statute, Petitioner Del Martin is prohibited from marrying Petitioner Phyllis Lyon, her partner of more than 50 years, because Del is female. If Del were male, she could marry Phyllis. By any measure, this is a sex-based classification.

Despite the statute's express reliance on sex, the State argues that the statute does not *discriminate* on the basis of sex because it "treats men and women in identical fashion." (Opp. at p. 20.) Both the United States and California Supreme Courts have rejected this "equal application" theory. In *McLaughlin v. Florida* (1964) 379 U.S. 184, the United States Supreme Court held that a penalty on interracial cohabitation was a form of race discrimination, even though the statute applied equally to both races – "all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple [was] subject to the same penalty." (*Id.* at 188; see also *id.* ["It is readily apparent that [the statute] treats the interracial couple made up of a white person and a Negro differently than it does any other couple."].) The Court held that even where a statute applies "equally" to both classifications, the Court must inquire "whether the classifications drawn in a statute are reasonable in light of its purpose [or] whether there is an arbitrary or invidious discrimination between those classes covered by [the statute]." (*Id.* at 191.)

The same is true of the marriage statute in California. Although the statute "equally" prohibits men and women from marrying people of the same sex, mere equal application does not immunize the statute from the heightened scrutiny applied to "all gender-based classifications today." (*United States v. Virginia* (1996) 518 U.S. 515, 555 [quoting *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 136]; see also *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527 [rejecting argument that Catholic Charities did not discriminate on the basis of sex because it sought to withhold contraception-related coverage "equally" for both men and women].)

Recognizing this problem, the State tries to distinguish *Loving* by arguing that the purpose of the Virginia statute was to "maintain the pernicious doctrine of white supremacy," and, according to the State, there is no similar invidious purpose involved in excluding same-sex couples from the right to marry. This argument fails on multiple counts. First, while it is true that the Court in Loving noted that the statute was intended to maintain white supremacy, the Court expressly found that the statute would be unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." (*Loving*, *supra*, 388 U.S. at 12, n.11.) Similarly, in *McLaughlin*, the Court struck down a statute that "equally" punished blacks and whites who cohabited, even though the Court made no finding or mention about the statute's purpose being to maintain white supremacy. (*McLaughlin v. Florida* (1964) 379 U.S. 184). Indeed, under contemporary constitutional standards, it has long been clear that race- and sex-based classifications must be subjected to heightened scrutiny, regardless of the purpose. (*Shaw v. Reno* (1993) 509 U.S. 630, 642 ["No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect[.]"]; *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 723-24 [sex-based classifications trigger heightened scrutiny, even where a purportedly neutral or benign justification for the classification is asserted]; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 35 ["The strict scrutiny standard of review applies . . regardless of whether the law may be said to benefit and burden the races [or sexes] equally."].)

Second, both the United States and the California Supreme Courts have made clear that the federal and state equal protection clauses protect individuals, not groups. (See *J.E.B., supra*, 511 U.S. at 152 (Kennedy, J., concurring) ["The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals."]; *Regents of Cal. v. Bakke* (1978) 438 U.S. 265, 299 [holding that equal protection is an individual, personal right]; *Shelley v. Kraemer* (1948) 334 U.S. 1, 22 ["The rights created by the …Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."].) In *Perez*, the California Supreme Court was the first in the nation to apply this principle in the context of marriage, holding: "The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to the rights of the Negro

race, the Caucasian race, or any other race, but to the rights of individuals." (*Perez, supra*, 32 Cal.2d at 716.) The same analysis applies to California's current restriction on marriage, which restricts the right of individuals to marry based on sex.

Third, in enacting A.B. 205, the California Legislature already determined that the current marriage law discriminates on the basis of sex. In enacting A.B. 205, the Legislature expressly found that "[e]xpanding the rights and creating responsibilities of registered domestic partners would . . . reduce *discrimination on the bas[i]s of sex* ... in a manner consistent with the requirements of the California Constitution." (See 2003 Cal. Legis. Serv. Ch. 421 (A.B. 205) § 1(b) (West) (emphasis added).) In contending that the marriage statute does not discriminate on the basis of sex, the State "merely restates its disagreement with the Legislature's determination." (*Catholic Charities*, 32 Cal.4th at 566.) Nonetheless, as this Court has made clear, "[T]he Legislature was entitled to reach that conclusion." (*Ibid.*; see also *id.* at 564 ["To identify subtle forms of gender discrimination . . . is within the Legislature's competence," and the courts must defer to such legislative determinations].)

Finally, as explained above, sex-based classifications are subject to strict scrutiny regardless of whether the statute is shown to have been enacted with an explicit discriminatory intent. Nonetheless, even if such a showing was necessary, it is easily made in this case. The legislative history of the 1977 amendment, which expressly restricted marriage to different-sex couples, shows that the Legislature relied upon and impermissibly sought to perpetuate stereotypes about the role of men and women in marriage. The Assembly Judiciary Committee Analysis, for example, described the purpose of limiting marriage to different-sex couples as follows:

> Marriage as a legal institution carries with it a number of special benefits. . . . Without exception, these special benefits were designed to meet situations where one spouse, typically the female, could not adequately provide for herself because she was engaged in raising children. In other words, the legal benefits granted married couples were actually designed to accommodate motherhood. . . . [.]
>
> Assuming the legitimacy of the above arguments, it then becomes difficult to justify extending the "benefits" of marriage to childless heterosexual couples. . . . [I]t is somewhat impractical to limit the benefits of marriage to just those [heterosexual] couples who are presently engaged in rearing children. . . . [However], [w]hy extend the same windfall to homosexual couples except in those rare situations (perhaps not so rare among females) where they function as parents with at least one of the partners devoting a significant period of his or her life to staying home and raising children?

(Assembly Judiciary Committee Analysis, A.B. 607 (1977))

Especially in light of this blatant recourse to gender stereotypes, it is not enough merely to assert, as the State does, that marriage contains an irreducibly gendered "core" that need not be justified. (See Opp. at p. 23 [asserting that "the centuries-old understanding of marriage as a male-female union is simply the core of the institution"].)[7] To the contrary, retaining the requirement that marriage must consist of a man and woman, long after any legal purpose for this requirement has ceased to exist, serves only to perpetuate the unfounded stereotype that men and women "naturally" must play distinct roles. Now that all other sex-based distinctions within marriage have been abolished, retaining this requirement is inexplicable on any rational, much less compelling, ground.

D. The Marriage Statute Discriminates on the Basis of Sexual Orientation.

The State contends that "Family Code section 300 does not *expressly* discriminate based on sexual orientation." (Opp. at p. 24 (emphasis added).) Under California law, however, a statute may violate the California Constitution even if it does not explicitly employ a prohibited category. For example, in *Boren v. Department of Employment Development* (1976) 59 Cal.App.3d 250, an appellate court invalidated an insurance code provision that disqualified any person who left his or her job because of marital or domestic duties and who did not supply the family's major support. The court held that despite the statute's ostensibly "neutral" language, it unconstitutionally discriminated on the basis of sex because "[i]ts disqualification would fall primarily and almost exclusively upon working wives. To argue that it was not designed to accomplish its obvious result is unrealistic." (*Id.* at 258.)

Here, the statutory exclusion in Family Code section 300 does not simply fall "primarily" or "almost exclusively" on same-sex couples. Rather, it erects a complete and insurmountable barrier that categorically excludes all lesbian and gay couples from marriage. (*See Lawrence, supra*, 539 U.S. at 581 (O'Connor, J., concurring) (recognizing that adverse treatment of those with same-sex "partners" is discrimination based on "sexual orientation"); see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155, 1161 [describing the refusal of a business to treat a same-

[7] Indeed, the falsity of that assertion is amply demonstrated by the legal marriages now available on a non-gendered basis in the Netherlands, Belgium, seven provinces and territories across Canada, and in the state of Massachusetts.

sex couple in the same manner as a different-sex couple as a form of discrimination based on "homosexuality"].)

Further, as the California Supreme Court noted in its decision in *Lockyer v. City and County of San Francisco*, "[t]he legislative history of the measure makes its objective clear[:] . . . The purpose of the bill is to prohibit persons of the same sex from entering lawful marriage." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1076 n. 11.) Indeed, the legislative history makes reference to this intentionally discriminatory purpose at every turn. (See, e.g., Enrolled Bill Report, Governor's Office, Legal Affairs Department, 8/18/77, at p. 1 [concluding that the proposed amendment was unnecessary in light of the absence of "any judicial challenges [to the existing language] by homosexuals"]; see also *id.* at pp. 2-3 [using the terms "gay couples" and "same-sex couples" interchangeably in describing the legal benefits denied to such couples due to their exclusion from marriage]; Senate Democratic Caucus Report, A.B. 607 (1977) [referring to the bill's intended impact on "homosexuals" and "gay men and women couples"]; Analysis by Senate Republican Caucus, A.B. 607 (1977) [discussing bill's intended impact on "heterosexual" and "homosexual" couples]; Analysis by Senate Judiciary Committee, A.B. 607 (1977) [same]; and Analysis by Assembly Judiciary Committee, A.B. 607 (1977) [describing bill's intent to prohibit "homosexual marriage"].)

The State tries to avoid the inexorable conclusion that the exclusion was designed to discriminate against lesbian and gay couples by arguing that the 1977 amendment "was only intended to clarify long-existing law." (Opp. at p. 24.) To the contrary, however, that the legislature deliberately chose to reinforce and further codify an already-existing form of discrimination makes the amendment even more invidious. (See, e.g., Enrolled Bill Report, Governor's Office, Legal Affairs Department, 8/18/77 [noting that the bill is "unnecessary" because clerks already were denying marriage licenses to same sex couples and that "[a]ny challenges that would be made against the interpretation of the present code section will also be raised if this bill is signed – that is, whether the gay community is being denied equal protection."].)

Accordingly, despite the fact that the statute does not explicitly employ a classification based on sexual orientation, it is clear that its disqualification falls upon lesbians and gay men and that this

result was intentional.

E. Laws that Discriminate Based on Sexual Orientation Should Be Subject to Heightened Scrutiny

In their Opening Brief, Petitioners explain why laws that discriminate based on sexual orientation should be given heightened scrutiny under the California Constitution. The State does not refute this position. Rather, the State merely argues that "[n]o California court has applied strict scrutiny to a classification based on sexual orientation." In fact, although the California Supreme Court has not *expressly* ruled on what level of scrutiny applies to laws that classify on the basis of sexual orientation, it manifestly has viewed such laws with suspicion. (*Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458 [employment policies that discriminate against lesbians and gay men violate the state constitutional guarantee of equal protection]; see also *Children's Hosp. and Med. Ctr. v. Belshe* (2003) 97 Cal.App.4th 740 [identifying sexual orientation as a suspect classifications under the California Constitution]; *Holmes v. California National Guard* (2001) 90 Cal.App.4th 297 [affirming trial court decision holding that discrimination on the basis of sexual orientation is subject to heightened scrutiny].)

Moreover, the State does not respond in any way to either the Woo or CCSF Petitioners' arguments about *why* strict or some other form of heightened scrutiny is appropriate. As described in more detail in Petitioners' Opening Brief, sexual orientation meets the criteria for being a constitutionally suspect classification. First, lesbians and gay men historically have been, and continue to be, subjected to a great deal of prejudice. Second, like discrimination on the basis of race or sex, discrimination on the basis of sexual orientation is presumptively irrational because one's identity as straight or gay generally has nothing to do with one's abilities or qualifications. Third, lesbians and gay men are a minority, who, because of historical and ongoing discrimination and prejudice, have been and remain unable to protect themselves adequately through the political process. Like women and racial minorities, lesbians and gay men have secured some measure of success in the legislative arena, including the enactment of laws prohibiting discrimination in employment and some other areas. At the same time, however, lesbians and gay men continue to be targeted by, and vulnerable to, legislative initiatives designed to play upon anti-gay sentiments and to

deprive lesbian and gay persons of the same rights and protections taken for granted by heterosexuals. (See, e.g., *Romer v. Evans* (1996) 517 U.S. 620 [striking Colorado ballot initiative that sought to prevent lesbians and gay men from enacting anti-discrimination laws based on sexual orientation]; *Lawrence, supra*, 539 U.S. 558.) Under these circumstances, classifications based on sexual orientation should be given heightened scrutiny.

F. The Marriage Statute Violates Petitioner's Right to Free Expression.

The State contends that the marriage statute does not violate Petitioner's free expression rights because "[t]he marriage laws do not forbid petitioners from associating with anyone, individually or in groups." (Opp. at p. 36.)[8]

As explained in Petitioners' Opening Brief, however, marriage does not just involve tangible benefits. Courts, including the United States Supreme Court, have recognized that marriages are "expressions of emotional support and public commitment." (*Turner, supra*, 482 U.S. at 95.) The fact that marriage has an expressive component is demonstrated by our tradition of having a public wedding celebration, so that all of the couple's friends and family members are able to witness this declaration of love and commitment. Even after the ceremony itself, couples are able to continue to

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[8] In a footnote, the Attorney General conclusorily asserts that "Petitioners' argument is reminiscent of a position rejected by the California Supreme Court in *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527." (Opp. at p. 35 n.36.) *Catholic Charities* is inapposite on multiple counts. First, *Catholic Charities* involved a free exercise claim, not a free expression claim. (See *id.* at 558)

Second, to evaluate a free exercise claim, a court must first determine whether the law is facially neutral and of general applicability. If so, the law need not be justified by a compelling government interest. In *Catholic Charities*, the law was facially neutral; it did not single out religious providers. Here, by contrast, the law at issue is not facially neutral; rather it discriminates on its face and excludes an entire class of people – people who want to marry their same-sex partners.

Finally, although it was not necessary to resolve the claim at issue in the case, Court held that the law at issue in *Catholic Charities* fulfilled the compelling state interest in eliminating discrimination on the basis of gender. (*Id.* at 564.) Here, by contrast, the law perpetuates, rather than eliminates, discrimination on the basis of gender and on the basis of sexual orientation.

The State also asserts that the U.S. Supreme Court did not "mak[e] any determination on the constitutionality of same-sex marriage in *Lawrence*." (*Ibid.*) This assertion does not help the State meet its burden. First, the fact that the United States Supreme Court did not decide whether it is constitutional to deny same-sex couples the right to marry certainly does not mean that it is constitutional to do so. Moreover, as explained in Petitioners' Opening Brief, the California Constitution provides "broader" free expression protections than is provided by the federal Constitution, and these protections embrace expressions on "all subjects." (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 15 [quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 482].)

express the depth of their relationship by explaining to people that they are "married." The use of this phrase immediately conveys the seriousness of a couple's commitment and love for one another.

It is, of course, the case that couples can proclaim their love and commitment without being married. But declarations of a couple's love for each other, no matter how sincerely professed, nor deeply felt, simply do not convey the same force and authority if unaccompanied by the public declaration that the declarants are married. Marriage is a unique means of conveying to each other, and to the world, the strength and depth of a couple's relationship. There is no other means of expression in our society that equally conveys this message.

While many same-sex couples have commitment ceremonies, these ceremonies do not convey the same message to friends and family, and to the world; they are not an adequate expressive alternative to marriage. The terms "domestic partnership" and "commitment ceremony" are unfamiliar to many. Rather than being accorded an immediate level of respect, same-sex couples are often put in the position of justifying or explaining their relationship. This can be embarrassing and humiliating. Moreover, even for people who are familiar with those terms, they do not carry the same rich depth of meaning as the terms "marriage," "wedding," and "spouse." Petitioner Joshua Rymer explains: "Without the ability to marry we have always had some doubt as to whether others truly understand the level of our mutual commitment. At times we have felt that even our families may not have seen us in the same light as our more traditionally married siblings. This puts us in the position of having to explain to our friends and family the level of our mutual commitment." (Dec. Joshua Michael Rymer, ¶ 11.)

Notably, the State concedes that domestic partnership does not convey the same meaning as marriage, (Opp. at p. 27; see also Attorney General's Reply Brief in *Knight v. Schwarzenegger* at p. 2:4-11 [emphasis added].), but argues that same-sex couples are "not prevent[ed] from expressing themselves." (Opp. at p. 36 n.36.) The law in California is clear, however. Where a law infringes upon free expression, the State bears the burden of showing that the infringement is narrowly tailored to achieving state interests that are not only legitimate, but compelling. (*Keenan v. Superior Court* (2002) 27 Cal. 4th 413, 429, 436.) Indeed, the ban must be necessary – that is, the least restrictive way – of meeting those interests. (*Id.* at 429.) The State does not even attempt to carry this burden.

Same-sex couples are prevented by law from expressing their love and commitment in the most meaningful way available – by getting married. As explained above, while there are other means for same-sex couples to try to express their love and commitment for each other, these alternatives are not adequate. They do not convey the same message to the members of the couple themselves and to the world at large. Accordingly, because no adequate alternative means exists for Petitioners to express to one another and to society at large the importance of their relationships, and their shared love and commitment, and because there is no legitimate, let alone compelling, reason selectively to deny Petitioners' the ability to convey the message that they are "married" to one another, Respondents are unconstitutionally infringing Petitioners' rights to freedom of expression and expressive association under the California Constitution.

G. The State Has Failed To Identify Any Legitimate, Much Less Compelling, Interests To Justify The Exclusion of An Entire Class Of Persons From Marriage.

The State asserts only two interests in excluding same-sex couples from marriage: (1) deference to "the traditional understanding of marriage;" and (2) deference to the "legislative process." (Opp. at p. 1.) Neither of these interests is sufficient even under the lowest level of scrutiny, and certainly both fail to pass muster under heightened scrutiny.

1. Tradition is an insufficient basis upon which to restrict an important right to an entire class of people.

Contrary to the State's argument, deference to tradition, without more, is not a legitimate, much less a compelling, state interest.

The State may not maintain an arbitrary and discriminatory statute, simply because it has done so in the past. At the time Perez was decided, there was a nearly "unbroken line of judicial support, both state and federal, for the validity of [anti-miscegenation laws]." (*Perez*, supra, 32 Cal.2d at 752 (Shenk, J., dissenting).) Even the United States Supreme Court had approved such laws, affirming a conviction under a statute authorizing up to seven years of hard labor as punishment for entering into an interracial relationship. (*Pace v. Alabama* (1883) 106 U.S. 583.)

The *Perez* majority was not deterred, however, by Justice Shenk's citation in his dissent of the unbroken tradition of 19 decisions upholding anti-miscegenation laws, (*Perez, supra*, 32 Cal.2d at

752), nor by his complaints that "such laws have been in effect in this country since before our national independence and in this state since our first legislative session." (*Id.* at 742.) The majority understood that the long-standing duration of a wrong cannot justify its perpetuation. (See *id.* at 724-726.)

The *Perez* court also was not dissuaded by the widespread popular support for bans on interracial marriages that existed at the time of the decision.[9] Instead, the Court took solemnly its sworn obligation to ensure that, not matter how strongly "tradition" or public sentiment might support such laws, legislation infringing a right as fundamental as the right to marry "must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." (*Id.* at 715; see also *id.* at 732 (Carter, J., concurring) [condemning anti-miscegenation laws, however popular, as "the product of ignorance, prejudice and intolerance"].)

Similarly, the Massachusetts Supreme Judicial Court also rejected the invocation of tradition as a justification for continued discrimination. After the Massachusetts high court held that same-sex couples must be allowed to marry, the Massachusetts Senate asked the high court to determine whether a civil union bill would comply with that court's earlier *Goodridge* opinion. The civil union bill presented to the court prohibited same-sex couples from marrying, while creating a separate institution of civil unions. The purpose of creating a separate institution was to "preserv[e] the traditional historic nature and meaning of the institution of civil marriage." (Mass. Senate Bill 2175, § 1(g).) The court held that this bill compounded, rather than remedied the constitutional infirmity identified in the *Goodridge* opinion. (*Opinion of the Justices to the Senate* (2004) 440 Mass. 1201, 1206 ["The same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, Senate No. 2175. . . . Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a

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[9] Even nearly twenty years later, in 1967, 72% of Americans were opposed to interracial relationships and 48% thought they should be illegal. (E.J. Graff, *What is Marriage For? The Strange History of Our Most Intimate Institution* (1999) 79, 156.) In fact, just four years ago, when the voters of Alabama considered repealing the state's unenforceable ban on interracial marriage, more than 300,000 voters, comprising approximately 40% of that state's voting public, sought to maintain the ban on the books. *Alabama Repeals Ban against Interracial Marriage*, Chattanooga Times B2 (Nov. 8, 2000).

different status."].) With respect to the invocation of tradition as a justification, the court explained:

> These matters of belief and conviction [that marriage should be limited to one man and one woman] are properly outside the reach of judicial review or government interference. But neither by the government, under the guise of protecting 'traditional' values, even if they be the traditional values of the majority, enshrine in the law an invidious discrimination that our Constitution . . . forbids.

(*Opinions of the Justices to the Senate* (2004) 440 Mass. 1201, 1207 [quoting *Goodridge v. Department of Public Health* (2003) 440 Mass. 309, 312].)

The fact that some people disapprove of marriage for same-sex couples does not justify denying same-sex couples that right or creating a separate status of "domestic partnerships" for same-sex couples. The United States Supreme Court has long recognized that governmental discrimination is especially pernicious where it accommodates societal prejudice. (*Palmore v. Sidoti* (1984) 466 U.S. 429, 433 ["The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."]; see also *City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 448 ["[T]he [government] may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic"]; *Watson, supra*, 373 U.S. at 535 ["[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise."] [citations omitted].)

2. Deference to the legislative process is an insufficient basis upon which to restrict an important right to an entire class of people.

The Perez court also rejected the argument that courts should defer to legislative fact-finding and policy-making in this area. (*Perez, supra*, 32 Cal.2d 711.) The court understood that, under the Constitution, such deference is neither appropriate nor permissible when fundamental rights or invidious discrimination are involved. (*Id.* at 718-719; see also *Parr v. Municipal Court* (1971) 3 Cal.3d 861, 870 ["Constitutional questions are not determined by a consensus of current public opinion."]; *Baehr v. Lewin* (1993) 852 P.2d 44, 68 [rejecting dissent's contention that the matter is best left for the legislature, explaining: "The only legitimate inquiry we can make is whether it is constitutional."].)

In other contexts, even ones the involved "controversial topics," such as the right of a minor to terminate a pregnancy, California Courts have jealously guarded this principle, carefully analyzing laws to determine whether they violate the California Constitution, even when the law was enacted by the legislature and even where the issue is one on which people have strong feelings. (See, e.g., *American Academy of Pediatrics, supra*, 16 Cal.4th 307 [striking down statute that required pregnant minors to secure parental consent or judicial authorization before obtaining an abortion].)

As the courts have recognized, it is precisely the court's role to safeguard the rights of individuals and minorities, especially where issues of great public controversy and public importance are concerned:

> The separation of powers doctrine . . . establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. [Citations.] Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and *in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority.*

(*Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 964 n.3 [emphasis added].) Moreover, "[b]ecause of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.)

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CONCLUSION

For the reasons stated above, Petitioners urge the Court to conclude that the exclusion of same-sex couples from marriage in Family Code section 300 violates their rights under the California Constitution to privacy, equal protection based on sex and sexual orientation, and expression.

Dated: November 23, 2004

Respectfully submitted,

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PROOF OF SERVICE

I, Catherine Adkins, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 Bush Street, San Francisco, California 94104-2878.

On November 23, 2004, I served the document listed below on the interested parties in this action in the manner indicated below:

DOCUMENT(S) SERVED:

CORRECTED REPLY BRIEF OF *WOO* PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF MANDATE ON THIRD AMENDED COMPLAINT

[X] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

[ ] **BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand.

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[X] **BY FACSIMILE**: I transmitted such documents by facsimile

INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct; that this declaration is executed on November 23, 2004, at San Francisco, California.

Catherine Adkins

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