1st Civil Nos. A110449, A110450, A110451, A110463, A110651, A110652

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

COORDINATION PROCEEDING SPECIAL TITLE (RULE 1550(b))
MARRIAGE CASES

LANCY WOO AND CHRISTY CHUNG, ET AL.,
Respondents,

vs.

STATE OF CALIFORNIA, ET AL.,
Appellants.

SAN FRANCISCO SUPERIOR COURT CASE NO. 504-038
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365
CASE NOS. A110449, A110450, A110451, A110463, A110651, A110652
THE HONORABLE RICHARD A. KRAMER, JUDGE

BRIEF OF AMICI CURIAE AGUILAS, ASIAN AMERICAN JUSTICE CENTER,* ASIAN PACIFIC AMERICAN BAR ASSOCIATION,* ASIAN PACIFIC AMERICAN LEGAL CENTER,* ASIAN AND PACIFIC ISLANDER LESBIAN AND BISEXUAL WOMEN AND TRANSGENDER NETWORK, ASIAN PACIFIC ISLANDER PRIDE COUNCIL, BIENESTAR HUMAN SERVICES, COALITION FOR HUMANE IMMIGRANT RIGHTS, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, EQUAL JUSTICE SOCIETY, JAPANESE AMERICAN BAR ASSOCIATION,* LA RAZA CENTRO LEGAL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, MULTICULTURAL BAR ALLIANCE OF LOS ANGELES, NATIONAL BLACK JUSTICE COALITION, NATIONAL LAWYERS GUILD OF SAN FRANCISCO, PEOPLE FOR THE AMERICAN WAY FOUNDATION, UNITED LESBIANS OF AFRICAN HERITAGE, VENTURA COUNTY BLACK ATTORNEYS ASSOCIATION AND ZUNA INSTITUTE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI*

Amici are groups that represent the full diversity of the state of California and advocate for equal rights for all its residents. *Amici* work towards an end to discrimination on the basis of race, sex, ethnicity, national origin, disability, and religion as well as sexual orientation. Many *amici* represent communities that have faced marriage discrimination based on race or national origin in the past and are therefore interested in seeing not only that such discrimination does not continue to affect their own communities but that all people are free from such discrimination on any invidious ground.[1]

The most recent U.S. Census data shows that nearly 100,000 same-sex couples reside in California, more than in any other state.[2] Further, these data show that individuals in same-sex relationships come from every racial, ethnic, religious, and social background in the state. Same-sex

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[1] The Asian and Pacific American legal groups identified on the cover of this brief with an asterisk are joining this brief because, as legal groups with a focus on civil rights issues, they have extensive knowledge and interests in the arguments made here. As groups representing Asian and Pacific Islander Americans (APIs), they have a profound connection to the presentation in the brief of Asian Pacific Islander Legal Outreach, et al, concerning the history of discrimination against APIs, especially restrictions on marriage, and the lessons that history has for this case. Accordingly, they are taking the unusual step of joining both amicus briefs.

[2] See Badgett & Sears, *Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000* (May 2004) p. 1-2 (hereafter "*Same-Sex Couples in California*") *available at* <http://www.law.ucla.edu/williamsproj/publications/CaliforniaCouplesReport.pdf>. There is also significant reason to believe that the Census data significantly undercounts the number of same-sex couples, including respondent concern about revealing same-sex orientation and belief that the existing Census categories do not adequately describe a same-sex relationship. Sears, Gates & Rubenstein, *Same-Sex Couples and Same-Sex Couples Raising Children* (Sept. 2005) p. 3-4, *available at* <http://www.law.ucla.edu/williamsproj/publications/USReport.pdf>.

parents are more likely to be racial minorities than are their different-sex counterparts. Moreover, over 50% of the children raised by same-sex couples in the state are Hispanic and more than 50% are of color. And the Census data further show these same-sex couples to be economically vulnerable – the average household income for same-sex parents is lower than for different-sex parents and the assets owed by the former group are worth considerably less than those owed by the latter. Given the wide-ranging diversity present in California's population of same-sex couples, each of the civil rights groups, community groups, and bar associations joining as *amici* here have a particular interest in this litigation. More detailed statements of interest for each *amicus curiae* are attached hereto at Tab A.

INTRODUCTION AND SUMMARY OF ARGUMENT

California courts have led the nation in the struggle for equal civil rights for all Americans. For example, the state's highest court recognized the pernicious and racist nature of anti-miscegenation laws well before the U.S. Supreme Court. Similarly, more than thirty years ago, the California Supreme Court recognized the unjustifiable discrimination faced by women and held that classifications based on gender deserve the strictest scrutiny, a step beyond the "intermediate" scrutiny currently applied by the federal courts. And our state's high court has also been cognizant of the systemic inequality imposed on its gay and lesbian citizens. More than two decades ago, the Court recognized the equal protection clause protects gay men and lesbians, holding that a public utility may not discriminate against gay job applicants because sexual orientation has no bearing on work qualifications or job performance. Recently, the Court has confirmed the equal rights and duties of gay parents, holding in a trio of cases that same-sex couples who

have and raise children are subject to the same rules as heterosexual parents.

The Superior Court's judgment that the different-sex requirement in the state's marriage law violates the equal protection guarantee is a logical and necessary extension of the state's tradition of recognizing that all Californians are entitled to equality regardless of sexual orientation. *Amici* agree with the respondents that the state's marriage law infringes on the fundamental rights of gay men and lesbians to marry the person of their choice as well as their rights to free expression. *Amici* further agree that the law unconstitutionally discriminates on the basis of sex and sexual orientation and cannot withstand even rational basis scrutiny.

If this Court were to disagree, however, it would be necessary to decide whether laws that discriminate against gay men and lesbians should be held to a standard higher than rational basis scrutiny. In this brief, *amici* argue that such laws must be subjected to heightened scrutiny. The state and the anti-gay groups contend that the ban on marriage by same-sex individuals does not discriminate on the basis of sexual orientation and that, therefore, disputes about the level of scrutiny applied to statutes that do so discriminate are rendered irrelevant. Appellant's argument is incorrect as a matter of law and logic and runs counter to California Supreme Court and U.S. Supreme Court precedent – the state's marriage law does in fact discriminate on the basis of sexual orientation. Furthermore, legislative classifications that burden the rights of gay men and lesbians, such as the marriage statute here, should be subject to heightened scrutiny review for at least three reasons. *First*, sexual orientation has no bearing on an individual's ability to contribute to society. *Second*, as a group, gay men and lesbians have suffered pernicious discrimination and brutal violence in every sphere of life for the past century. *Third*, sexual orientation is immutable because the trait is central to individual identity and the

government has no right to demand it be changed as a precondition of equal rights.

This Court should determine that heightened scrutiny is warranted for classifications that abridge the rights of lesbians and gay men, and should affirm the Superior Court's judgment that the withholding of marriage from same-sex couples violates the California Constitution.

ARGUMENT

The California Constitution's equal protection clause guarantees that "[a] person may not be . . . denied equal protection of the laws." (Cal. Const. art. I., § 7, subd.(a).) California courts have adopted a two-tiered analysis in reviewing statutory classifications under this provision. (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784.) Economic regulations are afforded a presumption of constitutionality and are deemed valid provided that the distinctions drawn by the legislature "bear some rational relationship to a conceivable legitimate state purpose." (*Ibid.*) But when legislative actions involve "suspect classifications," the California courts will adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Id.* at pp. 784-785 [citing *Shapiro v. Thompson* (1969) 394 U.S. 618, 638, and *Sherbert v. Verner* (1963) 374 U.S. 398, 406].)

When a statutory classification triggers strict scrutiny review, the state "bear[s] the heavy burden of proving not only that it has a compelling interest which justifies the classification but also that the discrimination is necessary to promote that interest." (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 592.) The state's burden under strict scrutiny is exceedingly high, "one that is almost never satisfied." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 504; *Hays v. Wood* (1979) 25 Cal.3d 772, 796 (conc. opn. of Mosk, J.).) If the state fails to meet this burden, the classification will be

struck down as a violation of equal protection. (*Westbrook*, *supra*, 2 Cal.3d at pp. 784-785; see *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 16-17.)

I. THE MARRIAGE STATUTE DISCRIMINATES ON THE BASIS OF SEXUAL ORIENTATION

The California Family Code states, in pertinent part, that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." (Cal. Fam. Code § 300.)[3] Because this statute draws a legal distinction on the basis of sexual orientation, it is subject to heightened scrutiny under the equal protection clause of the California Constitution. (See *Perez v. Sharp* (1948) 32 Cal.2d 711, 715.) Even if the marriage statute could somehow be interpreted as sexual-orientation neutral on its face, the fact that it was specifically and intentionally enacted for the express purpose of excluding gay and lesbian couples from the institution of marriage renders it constitutionally suspect.

A. The Family Code discriminates against gay men and lesbians and appellants' argument that it does not employs reasoning that has been repeatedly rejected in the context of race discrimination

Although the text of section 300 does not contain the words "heterosexual" or "homosexual," it divides the citizens of this state into those two groups no less efficiently and systematically than if it explicitly

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[3] Section 308.5 of the Family Code states that "[o]nly marriage between a man and a woman is valid or recognized in California." (Cal. Fam. Code § 308.5.) *Amici* agree with respondents that section 308.5 is not at issue here because, properly construed, it prevents the state from recognizing marriages entered into by same-sex couples in *other* states. (See Woo Respondents' Answering Brief ("Woo RAB"), *Woo v. California*, A110451, at p. 18; see also *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424.) However, if section 308.5 were construed to prevent individuals of the same sex from marrying in California, it would be invalid for the same reasons set forth in this brief with respect to section 300.

used those labels. The terms "gay" and "homosexual" are defined as "relating to, or having a sexual orientation to persons of the same sex"[4] or "relating to, or characterized by a tendency to direct sexual desire toward individuals of one's own sex."[5] Likewise, the terms "straight" and "heterosexual" are defined as "sexually oriented to persons of the opposite sex"[6] or "relating to, or characterized by a tendency to direct sexual desire toward individuals of the opposite sex."[7] By this very definition, gay men and lesbians are attracted to and interested in marriage with persons of their same sex. Likewise, heterosexual men and women feel attraction for and seek marriage with persons of the other sex.

By restricting marriage to different-sex couples, the statute prevents gay people and *only* gay people from marrying their chosen partners. But as the California Supreme Court explained in *Perez* , "the right to marry is the right to join in marriage with the person of one's *choice*," and a statutory prohibition on an individual's marriage to any person "restricts the scope of his choice and thereby restricts his right to marry." (*Perez*, *supra*, 32 Cal.2d at p. 715 [emphasis added]; see also *Goodridge v. Dept of Public Health* (Mass. 2003) 798 N.E.2d 941, 958 ["the right to marry means little if it does not include the right to marry the person of one's choice"].) Because "the constitutionality of state action must be tested according to whether the rights of an individual are restricted because of" membership in a certain group, (*Perez*, *supra*, 32 Cal.2d at p. 716), the Family Code's restriction on the right of gay men and lesbians to marry the partners of

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[4] The American Heritage Dictionary of the English Language (4th ed. 2000); The American Heritage Stedman's Medical Dictionary (2002).

[5] Merriam-Webster's Medical Dictionary (2002).

[6] The American Heritage Dictionary of the English Language (4th ed. 2000); The American Heritage Stedman's Medical Dictionary (2002).

[7] Merriam-Webster's Medical Dictionary (2002).

their choice discriminates on the basis of sexual orientation; that the legislature refrained from using the words "gay" or "lesbian" in the statute does not change this fact.

The anti-gay groups in these coordinated cases – the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families – argue that the statute does not classify on the basis of sexual orientation because the denial of marriage to same-sex couples applies equally to both heterosexual and gay individuals. (Prop. 22 Br. at pp. 43-45; CCF Br. at pp. 20-23.)[8] Thus, the theory goes, since neither a heterosexual man nor a gay man is allowed to marry another man, there is no discrimination on the basis of orientation.

Appellants are incorrect. This type of "equal application" argument has been uniformly rejected by both the California and federal courts in dealing with other equal protection challenges. This precise argument was made in defense of the anti-miscegenation statutes that were prevalent throughout the country in the first half of the last century and subsequently rejected.[9] In *Perez*, a challenge was brought to California's anti-miscegenation law and the state argued "that a statute such as [the one in

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[8] The Proposition 22 Legal Defense and Education Fund Appellant's Opening Brief in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, A110651, is abbreviated as "Prop. 22 Br." And the Campaign for California Families Appellant's Opening Brief in *Campaign for California Families v. Newsom*, A110652, is abbreviated as "CCF Br."

[9] It should be noted that, while California has been a national leader in vindicating the rights of minority groups and individuals in the second half of the 20th century as discussed in this brief, the state's history on issues of diversity and civil rights has many inglorious chapters as well. Especially in the years before the middle of the last century, the influx of new immigrants and notable racial ethnic diversity of the state inspired exceedingly gross violations of equal protection and individual liberties, many with direct parallels to the discriminatory restriction at issue here, as examined in the Asian Pacific Islander Legal Outreach amicus brief.

question] does not discriminate against any racial group, since it applies alike to all persons whether Caucasian, Negro, or members of any other race." (*Perez*, *supra*, 32 Cal.2d at p. 716.) Similarly in *Loving v. Virginia*, the Supreme Court noted that "the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage," there is no discrimination on the basis of race. (*Loving v. Commonwealth of Va.* (1967) 388 U.S. 1, 8.) The argument has also been made in defense of other discriminatory state actions targeting members of disfavored minority groups. In *Shelley v. Kraemer* (1948) 334 U.S. 1, 21-22, the respondents sought to defend enforcement of racially restrictive covenants on the basis that whites could also be excluded from ownership or occupancy under an appropriate agreement. And in *McLaughlin v. State of Fla.* (1964) 379 U.S. 184, 189-190, the court noted that statutes against interracial cohabitation had been defended on the "equal application" principle.

In all of these cases, the courts rejected such reasoning and held that equal protection principles prohibit such purportedly equal proscriptions. In *Perez*, our Supreme Court made clear that, in this context, the state's equal protection clause guaranteed the rights of *individuals* rather than groups and that majoritarian lawmaking must therefore be judged by whether it restricts the rights of individuals, not whether it burdens different groups equally. (*Perez*, *supra*, 32 Cal.2d at pp. 716-717) The U.S. Supreme Court in *Loving* also rejected the notion that mere "equal application" could remove the statutory classification from the purview of the Fourteenth Amendment. (*Loving*, *supra*, 388 U.S. at p. 8; accord *City of Richmond v. Deans* (1930) 281 U.S. 704 [striking down statutes preventing land transfers from whites to blacks and vice versa in residential areas even though they applied equally to both races]; *Harmon v. Tyler*

(1927) 273 U.S. 668 [same]; *Buchanan v. Warley* (1917) 245 U.S. 60 [same].)

Accepting the appellants' reasoning would lead to absurd results. Under their theory, a state ban on all marriage ceremonies conducted by rabbis or where the participants wear yarmulkes would not discriminate on the basis of religion. After all, both Jews and non-Jews alike would be subject to the bans. But "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." (*Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 270; see id. at p. 327 (dis. opn. of Stevens, J.) ["a classification based on the wearing of yarmulkes is a religion-based classification"]; *Watkins v. U.S. Army* (1989) 875 F.2d 699, 714 (conc. opn. of Norris, J.) [noting that although regulations speak of homosexual acts, this is a proxy for the homosexual orientation actually targeted].) Similarly here, the state's ban on marriage entered into by partners of the same sex discriminates on the basis of orientation because it singles out an activity for prohibition that *only* gay men and lesbians would seek to engage in.

Indeed, the California Family Code's prohibition on marriage by same-sex couples can be seen as even more restrictive of fundamental rights than the anti-miscegenation laws struck down in *Perez* and *Loving*. Under the laws against interracial marriage, only some members of the disfavored minority were prevented from marrying the person of their choice – *i.e.*, those blacks and Asians who wanted to marry across racial boundaries. In addition, at least *some* members of the white majority were also denied the right to marry outside their own race. But under section 300 *every single* gay man and lesbian is precluded from marrying the person of his or her choice while *no* heterosexual person is similarly denied

that fundamental right. (See Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes* (2005) 153 U. Penn. L.Rev. 2215, 2248-2249.) The very fact that the statutory provision is so perfectly tailored to effectuate its invidious purpose is further evidence that the statute discriminates on the basis of orientation. (Cf. *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520, 535-536 [statutes which prohibited only the animal sacrifice of the Santeria religion were not neutral or generally applicable].)[10]

As the U.S. Supreme Court noted more than four decades ago, the equal application argument "represents a limited view of the Equal Protection Clause which has not withstood analysis." (*McLaughlin*, *supra*, 379 U.S. at p. 188 [overruling *Pace v. Alabama* (1883) 106 U.S. 583, which had relied on the "equal application" theory to uphold an Alabama statute banning interracial fornication].) By making the equal application argument, the state and the anti-gay appellees place themselves squarely in the grand tradition of those who once sought to uphold anti-miscegenation laws, racially restrictive covenants, and bans on interracial cohabitation. Just as the courts in those cases recognized that the statutory restrictions in question discriminated on the basis of race, so too should this Court recognize that the California Family Code discriminates on the basis of sexual orientation.

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[10] This is not to claim that sexual orientation discrimination is the same as, or more or less pernicious than, race or national origin discrimination. Rather, invidious discrimination on the basis of one characteristic need not be the same, nor "better" or "worse" than, invidious discrimination on the basis of another characteristic. This state's constitution rightly places all of these types of wrongful discrimination beyond the power of the government to effectuate, but does not attempt the futile exercise of trying to rank-order them by some arbitrary and subjective measure of the degree of offensiveness.

B. **The statutory exclusion of same-sex couples is animated by a discriminatory purpose**

Even if section 300 did not on its face discriminate on the basis of sexual orientation, it would still be subject to heightened scrutiny. As the California courts have held, while a disparate impact on a minority group is not by itself enough to invalidate a statute, a facially neutral statute will still be subject to heightened equal protection review if it evinces a discriminatory purpose. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 836 & fn.7; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 294 [making clear that the intent test is identical under the Equal Protection Clause of the Fourteenth Amendment and the corresponding state constitutional provision]; accord *Washington v. Davis* (1976) 426 U.S. 229, 239-240; *Wright v. Rockefeller* (1964) 376 U.S. 52 [electoral district lines were invalid if legislature in fact drew them on racial lines *or* was motivated by racial considerations]; *Lawrence v. Texas* (2003) 539 U.S. 558, 600 (dis. opn. of Scalia, J.) [discriminatory purpose is always sufficient to subject even a facially neutral law to strict scrutiny].)

Here, the marriage statute not only contains a classification based on sexual orientation on its face but also was enacted with the express discriminatory purpose of excluding same-sex couples from marriage. As the California Supreme Court recently recognized, when the Legislature enacted the 1977 amendment to then-section 4100 of the Civil Code (later section 300 of the Family Code), it specifically stated that "[t]he 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 fn.11 [citing Sen. Comm. on Judiciary, Analysis of Aseem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977].) Indeed, the Legislature itself has left no doubt on the question by retrospectively recognizing that section 300's precise purpose was to

discriminate against gay men and lesbians on the basis of their sexual orientation. Assembly Bill 849, which recently sought to amend the definition of marriage in California to make it sex-neutral, noted that "the Legislature amended the state's marriage law [in 1977] to specify that, as a matter of state law, the gender-neutral definition of marriage could permit same-sex couples to marry and have access to equal rights and therefore would be changed. The sex-specific definition of marriage that the Legislature adopted specifically discriminated in favor of different-sex couples and, consequently, discriminated and continues to discriminate against same-sex couples." (Assem. Bill. No. 849 (2005-2006 Reg. Sess.), 2005 Bill Text CA A.B. 849.)[11]

By deliberately excluding same-sex couples from lawful marriage, the "state legislature[] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (*Baluyut*, *supra*, 12 Cal.4th at p. 837.) As such, an invidious intent to discriminate against gay men and lesbians underlies California's marriage law and renders section 300 subject to heightened review under the state's equal protection clause.

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[11] Although A.B. 849 failed to become law because of a gubernatorial veto, this fact does not reduce its persuasive force with respect to whether the California marriage law was passed with an intent to discriminate against gay people. (*Freedom Newspapers, Inc. v. Orange County Employees Ret. Sys.* (1993) 6 Cal.4th 821, 832-833 ["The Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute."].)

II. THIS COURT IS FREE TO HOLD THAT SEXUAL ORIENTATION CLASSIFICATIONS ARE SUSPECT UNDER CALIFORNIA LAW

A. Although neither the state nor federal Supreme Court has explicitly determined the standard of review applicable to statutes that discriminate on the basis of sexual orientation, these classifications long have been viewed with suspicion

The California Supreme Court has not ruled on whether legislative classifications that discriminate on the basis of sexual orientation are accorded heightened scrutiny under the California equal protection clause. (E.g., *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013, 1026 fn.8; *Hinman v. Dept of Personnel Admin.* (1979) 167 Cal.App.3d 516, 526 fn. 8; but see *Childrens Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 769 [noting that sexual orientation classifications are suspect].) Likewise, the U.S. Supreme Court has not decided the level of scrutiny to accord these classifications under the Fourteenth Amendment. (See, e.g., *Lawrence v. Texas* (2003) 539 U.S. 558, 567; *Romer v. Evans* (1996) 517 U.S. 620, 632.)

However, both courts have been suspicious of such classifications. In *Romer*, although the Supreme Court did not reach the question of whether heightened scrutiny was appropriate, it struck down the discriminatory Colorado constitutional amendment at issue because it "fail[ed], indeed defie[d], *even* th[e] conventional [rational basis] inquiry." (*Romer*, *supra*, 517 U.S. at 632 [emphasis added]; see Tobias Barrington Wolff, *Principled Silence* (1996) 106 Yale L.J. 247, 252 [Romer's holding is "entirely consistent with a future determination that gay people require heightened judicial protection"].) Further, although *Lawrence* avoided the issue presented here, striking down Texas' ban on "sodomy" based on the privacy protections of the Due Process Clause, (*Lawrence*, *supra*, at pp.

564, 574-575), Justice O'Connor, concurring, faulted the law on equal protection grounds, observing that sexual orientation classifications must undergo "more searching" equal protection review. (*Lawrence*, *supra*, at p. 580.)[12] California courts have been even more wary of classifications that discriminate on the basis of sexual orientation. (See *infra* pp. 16-18.)

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[12] While some lower federal courts have held that laws classifying on the basis of sexual orientation are not suspect, these courts have relied uniformly on either *Bowers v. Hardwick* (1986) 478 U.S. 186, or on decisions that relied on *Bowers*, to reach this conclusion. (See, e.g., *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (6th Cir. 1997) 128 F.3d 289, 292-293 [relying explicitly on *Bowers* to hold that laws excluding gay people cannot be deemed suspect because the conduct that ostensibly defines the class was constitutionally proscribable]; *Richenberg v. Perry* (8th Cir. 1996) 97 F.3d 256, 260 fn.5 [citing to *Bowers* and post-*Bowers* lower court decisions to justify denial of strict scrutiny]; *Padula v. Webster* (D.C. Cir. 1987) 822 F.2d 97, 102-103 [relying on *Bowers* to find no heightened scrutiny because same-sex intimate conduct may be prohibited]; *Ben-Shalom v. Marsh* (7th Cir. 1989) 881 F.2d 454 [same]; *Woodward v. U.S.* (Fed. Cir. 1989) 871 F.2d 1068, 1076 [same].) Other lower courts have in turn relied on these cases to hold that statutes discriminating against gay men and lesbians deserve no heightened scrutiny. (See, e.g., *Steffan v. Perry* (D.C. Cir. 1994) 41 F.3d 677 [relying solely on *Padula*]; *Thomasson v. Perry* (4th Cir. 1996) 80 F.3d 915, 928 [relying solely on *Steffan*]; *High Tech Gays v. Defense Industrial Security Clearance Office* (9th Cir. 1990) 895 F.2d 563, 571 [relying on *Bowers* as well as *Ben-Shalom*, *Woodward*, and *Padula*]; *Lofton v. Secretary of the Dep't of Children and Family Services*, (11th Cir. 2004) 358 F.3d 804, 818 [relying on *Equality Foundation*, *Richenberg*, *Steffan*, and *Thomasson* to deny heightened scrutiny]; see also Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays* (1996) 96 Colum. L.Rev. 1753, 1772-73 [noting that many courts have considered the heightened scrutiny test preempted by the *Bowers* decision].)

Because every one of these cases relies either on *Bowers* or cases that relied on *Bowers*, they are unsound and lack precedential or interpretive force. As the Supreme Court stated in *Lawrence*, *supra*, 539 U.S. at p. 578, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."

B. <u>The equal protection clause of the California Constitution offers broader protection than its federal counterpart</u>

Regardless of federal law on the issue, the California Supreme Court has historically interpreted our Constitution to provide for more robust review of statutes that burden minority rights. Our Supreme Court has held that the two corresponding provisions are "independent protections." (See, e.g., *Department of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588.) "[A]lthough our court will carefully consider federal . . . decisions with respect to the federal equal protection clause insofar as they are persuasive, we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards of our state equal protection clause." (*Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 469.) In fact, the California Constitution speaks directly to this independence – "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const. art. I, § 24.)

This independence has led the California courts to apply heightened scrutiny to statutes affecting a greater range of groups than the federal courts have recognized as in need of protection. For example, in *Serrano v. Priest* (1976) 18 Cal.3d 728, the state Supreme Court found that government distinctions based on wealth warrant heightened scrutiny, thereby rejecting the U.S. Supreme Court's contrary holding in *San Antonio*

Moreover, with the exception of *Lofton* and *Equality Foundation*, all of the federal circuit cases holding that discrimination against gay men and lesbians did not merit heightened scrutiny arose in the military and national security context. Thus, these cases have no application to other contexts wherein no special deference is owed to the government's judgment. (See, e.g., *Able v. U.S.* (2d Cir. 1998) 155 F.3d 628, 634 ["deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons" advanced than would otherwise be the case]; *High Tech Gays*, *supra*.)

Independent School Dist. v. Rodriguez (1973) 411 U.S. 1. The state's equal protection provisions, according to the Curt, are "possessed of an independent vitality which, in a given case, may demand an analysis" different than that undertaken by the federal courts. (*Serrano*, *supra*, 18 Cal.3d at p. 764; see also ibid. [federal law is persuasive but will not be followed when greater protections are required under state law]; *Molar v. Gates* (1979) 98 Cal.App.3d 1, 12.)

Serrano is only one of many cases in which the California courts have applied heightened scrutiny protection beyond the narrow scope adopted by the federal courts. Classifications based on sex have been accorded strict scrutiny in California since 1971 while, to this day, sex-based rules receive only "intermediate scrutiny" under the Fourteenth Amendment. (Compare *Sail'er Inn*, *supra*, 5 Cal.3d at 17, with *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, 723-724.) Similarly, the California Supreme Court recognized alienage as a suspect classification in 1969 while the U.S. Supreme Court did not do the same until 1971. (Compare *Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 580, with *Graham v. Richardson* (1971) 403 U.S. 365, 372.) Even within the arena of race, long-recognized as a suspect classification by both the federal and state judiciaries, the California Supreme Court has been ahead of the federal courts in invalidating discriminatory legislation. Most notably, in *Perez* the state's high court struck down a racial restriction on marriage, the first state court to do so, almost 20 years before the U.S. Supreme Court did the same for the nation as a whole. (Compare *Perez*, *supra*, 32 Cal.2d 711, with *Loving*, *supra*, 388 U.S. 1 [striking down Virginia's ban on interracial marriage]; see also *Loving*, *supra*, at p. 6 fn.5 [noting that the Supreme Court of California was the "first state court to recognize that miscegenation statutes violate" equal protection].)

Further, the California courts have been swifter in recognizing improper discrimination directed against gay men and lesbians than have the federal courts. By 1979, the California Supreme Court had already ruled that pernicious employment discrimination against gay men and lesbians by a public utility smacked of the "'second-class citizenship' which the equal protection clause was intended to guarantee" against. (*Gay Law Students Ass'n*, *supra*, 24 Cal.3d at p. 470.) Seven years later, the U.S. Supreme Court, in contrast, sanctioned this very second-class citizenship by upholding the constitutionality of statutes criminalizing same-sex intimacy.[13] (*Bowers v. Hardwick* (1986) 478 U.S. 186, 193 [describing the claim that gay people possessed a right to engage in "homosexual conduct" as "at best, facetious"].) Likewise, five years before the U.S. Supreme Court decided *Romer v. Evans* the California courts already had struck down a ballot initiative substantially similar to Colorado's Amendment 2. (*Citizens for Responsible Behavior, supra*.) In that case, the California Court of Appeal held that the equal protection guarantees of the California Constitution applied to gay men and lesbians and that the proposed ballot initiative barring the city from prohibiting discrimination on the basis of sexual orientation failed even rational basis review. (*Id*. at 1026-1028.)[14] And at least one California Court of Appeal has already correctly

[13] The California Legislature decriminalized consensual sexual intimacy between consenting adults regardless of the partners' respective sexes in 1975. (Concurrence in Senate Amendments, AB 489 (May 1, 1975) [amending in relevant part Cal. Pen. Code § 286]; see Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity* (1986) 40 U. Miami L.Rev. 521, 646.)

[14] As the Supreme Court did in *Romer*, the California Court of Appeal noted that there was no reason to decide the issue of whether or not heightened scrutiny applies to sexual orientation classifications because the initiative was so clearly defective under even the most lenient form of review. (*Citizens for Responsible Behavior*, *supra*, 1 Cal.App.4th at p. 1027 fn.9.)

recognized that statutes classifying on the basis of sexual orientation are suspect and thus must be subject to strict scrutiny. (See *Childrens Hospital & Medical Center*, *supra*, 97 Cal.App.4th at p. 769 [listing rules that use race and sexual orientation as paradigm examples of suspect classifications].)

Finally, this state's courts have also been ahead of the federal system and almost all other states in confirming the rights of same-sex parents with respect to the children they have raised. In a trio of cases decided the same day, the California Supreme Court held that the non-birth parents of children born to same-sex couples have the same rights and responsibilities as birth parents. (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 [former partner could not abandon parental responsibilities when she had agreed to raise the child, supported her partner's insemination, and held the child out as her own]; *K.M. v. E.G.* (2005) 37 Cal.4th 130 [egg donor who was the registered partner of the birth mother was a full parent under state law]; *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156 [birth mother was estopped from attacking a pre-birth judgment of parentage based on her own stipulation that her same-sex partner was the child's other legal parent].)

III. SEXUAL ORIENTATION CLASSIFICATIONS SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY UNDER EQUAL PROTECTION DOCTRINE

In deciding when heightened scrutiny applies, California's courts have emphasized three factors. *First*, courts have been vigilant in closely examining those enactments that classify based on characteristics that "bear[] no relation to ability to perform or contribute to society," thus indicating that the discrimination in question is truly arbitrary. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18; accord *Frontiero v. Richardson* (1973) 411 U.S. 677, 686-687 ["the sex characteristic frequently bears no relation to ability to perform or contribute to society"]; *McLaughlin*, *supra*, 379 U.S. at p.

192 (describing race as a suspect classification because it is irrelevant to any constitutionally permissible legislative purpose). *Second*, courts have focused on protecting those groups that have been the victims of a "stigma of inferiority," "second class citizenship," and a history of past discrimination. (*Sail'er Inn*, *supra*, 5 Cal.3d at 18; *Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at p. 579 [alienage is a suspect class partly because of the history of prejudice against aliens].) *Third*, some courts have taken into account whether the relevant trait is "immutable" in that the trait is fundamental to one's identity and the government may not condition equal rights on its abandonment. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 19; accord *Frontiero*, *supra*, 411 U.S. at p. 682.) Because gay men and lesbians satisfy all three of these criteria, legislative classifications that burden them as a group – such as California Family Code section 300 – must be deemed suspect and reviewed under heightened scrutiny.[15]

A. <u>Sexual orientation has no effect on an individual's ability to contribute to society</u>

An important criterion in deciding whether heightened scrutiny applies to any legislative classification is whether the characteristic on which the discrimination is based correlates to unfounded stereotypes and prejudices rather than bearing any relation to the group members' ability to contribute to society. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18 [gender bears no

[15] Indeed, respected commentators for years have been concluding that the doctrine developed in cases of race and sex discrimination seems unavoidably to require analogous treatment for sexual orientation classifications. (See, e.g., Yoshino, *supra*; Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited* (1996) 57 U. Pitt. L.Rev. 237; Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity* (1989) 36 UCLA L.Rev. 915; Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection* (1988) 55 U. Chi. L.Rev. 1161; Ely, Democracy and Distrust (1980) pp. 162-64.)

relation to ability and therefore is a suspect class]; accord *Frontiero*, *supra*, 411 U.S. at p. 686; see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family* (2002) 115 Harv. L.Rev. 947, 961.) Where no such relation exists, the classification should be considered "suspect" because it is highly likely that the classification was motivated solely by antipathy towards members of the group. (See, e.g., Ely, Democracy and Distrust (1980) p. 150.) In addition to race and gender, California courts have recognized that national origin, alienage, illegitimacy, and wealth have no bearing on relative abilities and, therefore, constitute suspect classifications. (See generally, *Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at pp. 580-581; *Serrano*, *supra*, 5 Cal.3d at p. 597; accord *Mathews v. Lucas* (1976) 427 U.S. 495, 505.) Like these other characteristics, an individual's sexual orientation bears no relation to his or her ability to contribute to society.

Classifications based on sexual orientation do not reflect any "real and undeniable differences" between gay people on the one hand and heterosexual people on the other. While at one time homosexuality was widely considered a mental illness and gay people were labeled as deviants and degenerates who were unable to maintain healthy relationships, all of these harmful stereotypes have proven baseless. (American Psychiatric Association, *Position Statement on Homosexuality and Civil Rights* (1973) 131 Am. J. Psychiatry 497)[16] It is now well-established among medical and psychological professionals that homosexuality implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.

[16] See also American Psychological Association, *Just the Facts About Sexual Orientation on Youth: A Primer for Principals, Educators and School Personnel*, (2005) (hereafter "*Just the Facts*") *available at* <http://www.apa.org/pi/lgbc/publications/justthefacts.html> (noting that a wide variety of major medical and psychological professional groups consider homosexuality to be a valid and normal sexual orientation).

(*Ibid.*)

The clear public policy of California is that sexual orientation in no way inherently limits occupation or affects an individual's ability to perform in the workplace. (See, e.g., Cal. Gov't Code § 12940 [prohibiting sexual orientation discrimination in the workplace]; *Gay Law Students Ass'n*, *supra*.) In fact, gay men and lesbians contribute actively and vibrantly to the state and national economy. The most recent U.S. Census data show that 71% of members of same-sex couples are employed, compared with only 62% of members of married different-sex couples. (See Badgett & Sears, *Same-Sex Couples in California*, *supra*, p. 1.) The California Supreme Court has also recognized that gay or lesbian status bears no relation to one's ability to perform and succeed in the workplace. (See *Gay Law Students Ass'n*, *supra*, 24 Cal.3d at pp. 474-475 [because equal protection prohibits "arbitrary discrimination on grounds unrelated to a worker's qualifications," the public utility could not "automatically exclude[] all homosexuals from consideration for employment"].)

It is also beyond dispute in California that sexual orientation has no bearing on one's ability to form loving and lasting intimate relationships, to create families, and to raise children. The Family Code provides that registered domestic partners generally shall have the same rights and responsibilities as spouses, including equal parenting rights and duties and the opportunity to seek stepparent adoption. (See, e.g., Assem. Bill. No. 205, 2003 Cal. Stat. ch. 421 [providing that registered domestic partners shall have the same rights and responsibilities as spouses, with specified exceptions]; Assem. Bill No. 205, 2001 Cal. Stat. ch. 893 [providing that domestic partners may adopt each other's children using the stepparent adoption procedures of Family Code sections 9000-9007].) Moreover, decisions dating back nearly forty years show that the state's courts indulge no presumption that a parent's sexual orientation adversely affects their

abilities to have healthy relationships with their children. (See, e.g., *Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525 [holding that the court may not determine custody on the basis of sexual orientation]; see also *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031 [holding that visitation rights may not be restricted on the basis of one parent's sexual orientation].)[17] And as discussed above, the state Supreme Court has recently confirmed that same-sex parents have the same rights and responsibilities as different-sex parents when it comes to the children they have had and raised together – a clear reiteration that, as a matter of California law, the sexual orientation of the parent has no bearing on the ability to raise healthy children. (See *Elisa B.*, *supra*, 37 Cal.4th 108; *K.M.*, *supra*, 37 Cal.4th 130; *Kristine H., supra*, 37 Cal.4th 156; see also *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417 [holding that both of a child's parents may be of the same sex under California law].)[18]

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[17] California policy is consistent with leading national organizations like the American Psychological Association, the American Academy of Child and Adolescent Psychiatry and others, which for many years have urged state courts to focus on the needs of children and the quality of parenting, rather than parental sexual orientation, because sexual orientation is irrelevant to effective parenting. (See, e.g., American Psychological Association, *Resolution on Child Custody and Placement* (1977) 32 Am. Psychologist 432; American Academy of Child and Adolescent Psychiatry, *Policy Statement on Gay, Lesbian, and Bisexual Parents* (1999) *available at* <http://www.aacap.org/ publications/policy/ps46.htm>.)

[18] Indeed, same-sex couples in California are currently raising more than 70,000 children, including more than 50,000 of their own biological children. (Badgett & Sears, *Same-Sex Couples in California*, *supra*, p. 2.) Many studies over the last thirty years have consistently demonstrated that children raised by gay and lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as do children raised by heterosexual parents. (American Psychiatric Association, *Adoption and Co-Parenting of Children by Same-Sex Couples Position Statement* (2002) *available at* <http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf>.)

The state's strong public policy of recognizing the fundamental equality of same-sex couples in matters of family has been codified in A.B. 205, the California Domestic Partner Rights and Responsibilities Act of 2003. This Act provides that all registered couples, regardless of sexual orientation, will have the same right, responsibilities, obligations and duties to each other and any children they raise as different-sex married couples. (Cal. Fam. Code § 297.5.) In enacting A.B. 205, the Legislature made clear that "despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex," and that "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships." (2003 Cal. Stat. ch. 421, § 1, subd. (b); see also *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 838.)

But California Family Code section 300 betrays this public policy and ignores the real-world contributions of gay people to society in favor of outdated stereotypes about the group and bald animus towards their relationships. A law that classifies in such a manner relegates the whole

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This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults. (*Ibid.*) Medical and psychological groups focused on children agree that "[t]here is no evidence to suggest or support that parents with a gay, lesbian or bi-sexual orientation are per se different from or deficient in parenting skills, child-centered concerns and parent-child attachments, when compared to parents with a heterosexual orientation." (American Academy of Child and Adolescent Psychiatry, *Policy Statement: Gay, Lesbian and Bisexual Parents* (1999) *available at* <http://www.aacap.org/publications/policy/ps46.htm>; American Academy of Pediatrics, *Statement in Support of Gay and Lesbian Parenting* (2002) *available at* <http://www.hrc.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=7770>.)

class "to an inferior legal status without regard to the capabilities or characteristics of its individual members." (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18; accord *City of Cleburne v. Cleburne Living Center*, (1985), 473 U.S. 432, 441.) Where this is the case, "courts must look closely at classifications based on [the] characteristic lest outdated social stereotypes result in invidious laws or practices." (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 18-19.)

B. Gay men and lesbians have been subject to the stigma of second class citizenship and have historically been the targets of pernicious stereotyping, discrimination and violence

Gay men and lesbians have long faced social and economic discrimination in both the private and public spheres. In addition, gay people have been the victims of a disproportionate number of hate crime and violence. This type of discrimination has often been analogized to that experienced by groups that have been granted heightened scrutiny protection under California equal protection law. (See e.g., *Gay Law Students Ass'n*, *supra*, 24 Cal.3d at p. 488 ["The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities."]; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276 [gay men and lesbians "share a history of persecution comparable to that of Blacks and women"]; *id*. at p. 1279 ["[o]utside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' and such 'immediate and severe opprobrium' as homosexuals."] [internal citation omitted].) Indeed, all courts that have considered the issue have decided that lesbians and gay men have historically been subject to systematic discrimination. (See, e.g., *High Tech Gays*, *supra*, 895 F.2d at p. 573 [concluding that gay men and lesbians have

been subject to a history of discrimination that is ongoing]; *Tanner v. Oregon Health Sciences Univ.* (Or.Ct.App. 1998) 971 P.2d 435, 447 ["Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice."].)

As with race and gender, this long history of pernicious discrimination counsels towards subjecting laws that discriminate on the basis of sexual orientation to heightened scrutiny under the California equal protection clause. (See, e.g., *Sail'er Inn*, *supra*, 5 Cal.3d at p. 19 [cataloguing discrimination against women as justifying strict scrutiny]; *ibid*. [noting that history of discrimination against blacks warrants strict scrutiny]; *Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at pp. 579-580 [prejudice against aliens justifies strict scrutiny]; Yoshino, *supra*, 96 Colum. L.Rev. at p. 1772 [noting that a history of discrimination is a widely accepted criterion of suspect class status and that no court has found gay people to have failed this test].)

1. *Social Discrimination*

For much of recent history, medical science has classified same-sex attraction as a sexual "pathology"[19] akin to pedophilia, necrophilia, fetishism, sadism, and masochism. (Somerville, Queering the Color Line (2000) p. 18.) Gay people have historically been referred to as "inverts," "deviants," "degenerates," "sex criminals" and "perverts," and often

[19] Despite the different schools of thought regarding sexual orientation in the medical profession, "all agreed, however, on one point . . . [h]omosexuality was a pathological condition." (Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* in Cases and Materials on Sexual Orientation and the Law (William B. Rubenstein edit., 1997) p. 109 (hereafter "Homosexuality and American Psychiatry").)

institutionalized to “cure” them of their disease.[20] (Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World 1890-1940 (1994) pp. 14-15 (hereafter “Gay New York”); Katz, *Gay American History* in Cases and Materials on Sexual Orientation and the Law (William B. Rubenstein edit., 1997) p. 100 [treatment was usually aimed at “asexualization” or “heterosexual reorientation”]. More than half of the state legislatures enacted laws allowing police to force persons convicted of certain sexual offenses, including sodomy, to undergo psychiatric examinations. (Chauncey, *The Postwar Sex Crime Panic* in True Stories From the American Past (William Graebner edit., 1993) pp. 166-167, 177; Marc Stein, City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972 (2000) pp. 124-125.) Scientists, writing in the late nineteenth and early twentieth century, produced physical “data” about the supposed “pathology” of homosexuality using techniques and methodologies borrowed from an earlier generation of comparative anatomists who, in studies of persons of different races, declared that “the grown-up Negro partakes, as regards his intellectual faculties, of the nature of the child, the female, and the senile white.” (Somerville, *supra*, at p. 26 [quoting Vogt, Lectures on Man (1864)].)

Armed with the arsenal of anti-gay discourse from the scientific and medical communities, state governments have repeatedly signaled to gay people that their relationships are not worthy of dignity, that their intimate activities are immoral and criminal, and that they are not fit to be parents or raise families. Indeed, until the recent *Lawrence* decision, a number of

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[20] See, e.g., Duberman, Cures (1991) [memoir of experiences undergoing so-called conversion therapy, which did not “cure” the author but did cause considerable mental stress]. It was not until 1973 that the American Psychiatric Association removed homosexuality from its classification as a mental illness. (See Bayer, *supra*, at p. 109.)

states had laws making most forms of same-sex intimacy a crime.[21] (See, e.g., *Doe v. Commonwealth's Attorney for City of Richmond* (E.D. Va. 1975) 403 F.Supp. 1199, aff'd (1976) 425 U.S. 901 [upholding constitutionality of Virginia's sodomy prohibition against two consenting gay men]; *Baker v. Wade* (5th Cir. 1985) 769 F.2d 289, 292 (en banc) [upholding constitutionality of Texas sodomy law].) Gay people have also faced constant discrimination from the states in their struggle to form and maintain stable families and raise children. Most egregiously, a number of courts have denied parental rights to gay or lesbian parents in favor of less fit caregivers, often to the detriment of the children involved. (See, e.g., *Weigland v. Houghton* (Miss. 1999) 730 So.2d 581 [placing child in home with convicted felon and wife abuser because the father was gay]; *S.E.G. v. R.A.G.* (Mo.Ct.App. 1987) 735 S.W.2d 164 [denying custody to lesbian mother in favor of an alcoholic father]; *Bottoms v. Bottoms* (Va. 1995) 457 S.E.2d 102 [awarding custody to grandmother because the mother was a lesbian even though the grandmother lived with a man who had sexually abused the mother more than 800 times]; see generally *Jacobson v. Jacobson* (N.D. 1981) 314 N.W.2d 78 [reasoning that it was not in the best interests of the children to be placed with their mother in light of society's mores toward homosexuality and the mother's involvement in a lesbian relationship]; *Thigpen v. Carpenter* (Ark.Ct.App. 1987) 730 S.W.2d 510 [lesbian mother was denied custody of her child because of Arkansas

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[21] Until 1961, all 50 states outlawed "sodomy." At the time *Bowers* was decided, rejecting the due process challenge to Georgia's prohibition on same-sex oral intercourse, 24 states and the District of Columbia provided criminal penalties for acts of consensual sodomy. (*Bowers*, *supra*, 478 U.S. at p. 194; see Apasu-Gbotsu, *supra*, 40 U. Miami L.Rev. at p. 524 fn.9.) When *Bowers* was overturned by *Lawrence* in 2003, that number had dropped but there were still 13 states that criminalized the intimate expressive conduct which the Supreme Court recognized as a fundamental right of free men and women. (*Lawrence*, *supra*, 539 U.S. at p. 573.)

sodomy law that made the mother a criminal].)

2. *Economic Discrimination*

Economic discrimination against gay men and lesbians has also been pervasive and well-documented in the courts. Gay people have been denied jobs in a host of professions or fired from jobs they already held because of their sexual orientation. (See, e.g., *Gay Law Students Ass'n*, *supra*, 24 Cal.3d at p. 463 [class action suit alleging systemic discrimination in hiring, firing, and promotion on the basis of sexual orientation by a public utility]; *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256 [action for wrongful termination on the basis of orientation]; *Collins v. Shell Oil Company* (Cal.Super.Ct. 1991) 56 Fair Empl.Prac.Cas. (BNA) 440 [gay man fired after employer's discovery of a document he drafted concerning safe sex rules for a private party he planned to attend]; see also *DeSantis v. Pacific Tel. & Tel. Co.* (9th Cir. 1979) 608 F.2d 327 [Title VII suit for discrimination based on sexual orientation at a nursery school and telephone companies]; *Gaylord v. Tacoma School Dist. No. 10* (Wash. 1977) 559 P.2d 1340 [school teacher fired for immorality because he was a known gay man].)

Even when not fired or discriminated against in the hiring process, gay and lesbian workers often face harassment, verbal abuse, and physical violence on the job from their own co-workers and supervisors. (See, e.g., *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338 [lesbian schoolteacher alleged that she was harassed because of her orientation and school district retaliated when she complained]; *Carreno v. Local Union No. 226, International Brotherhood. of Electrical Workers* (D. Kan. 1990) 54 Fair Empl.Prac.Cas. (BNA) 81, 83 [gay employee suffered physical and verbal anti-gay harassment].)

Discrimination against gay men and lesbians in public sector

employment has been no less severe. In the 1950s, the United States Senate investigated the employment of "homosexuals and other sex perverts" in government and declared that gay people, like communists, constituted "security risks." (Employment of Homosexuals and Other Sex Perverts in Government, Interim Report by the Subcomm. for Comm. on Expenditure in the Exec. Depts (1950) S. Doc. 241, 81st Cong., 2d Sess. 1 at p. 3.) The report contended that gay men and lesbians were unsuitable for government employment because overt acts of homosexuality were criminal under state and federal law and because, in the Committee's words, gay people "lack the emotional stability of normal persons." (*Id.* at p. 4.) The Committee further concluded that "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility," (*ibid.*), and great efforts were consequently made to purge the government of gay employees. (Cain, *Litigating for Lesbian and Gay Rights: A Legal History* (1993) 79 Va. L.Rev. 1551, 1567.)

Furthermore, in 1953, President Eisenhower issued Executive Order 10,450, requiring the dismissal of all "sex perverts," including gay men and lesbians, from government employment, civilian or military.[22] (*Id.* at p.

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[22] Scholars and jurists have pointed out that the Framers of the Constitution considered service in the military, much like voting, to be a fundamental right and responsibility of citizenship. (See, e.g., Amar, *Women and the Constitution* (1995) 18 Harv. J.L. & Pub. Pol'y 465, 467 ["Political rights . . . are quintessentially the rights to vote, hold office, serve on a jury, and serve in a militia."]; Worthen, *The Right to Keep and Bear Arms in Light of* Thornton*: The People and Essential Attributes of Sovereignty* (1998) 1998 B.Y.U. L.Rev. 137, 174; see also *Elk v. Wilkins* (1884) 112 U.S. 94, 110-111 (dis. opn. of Harlan, J.) [describing service in the militia as a duty of citizenship]. Under this theory, the government's continued refusal to permit openly gay persons to serve in the military constitutes the denial of a fundamental right of citizenship, relegating gay people to second-class citizenship. (See, e.g., United States General Accounting Office, Report to

1566.) This Executive Order required all private corporations with federal contracts to discover and discharge their gay employees. (D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970 (1983) p. 44.) As a result, thousands of men and women were discharged or forced to resign from their jobs because they were gay or suspected of being gay. (*Ibid.*; see generally Dean, Imperial Brotherhood: Gender and the Making of Cold War Foreign Policy (2001).)

This widespread, systematic discrimination against gay people has had real effects on their economic position and security. Contrary to popular images of affluent, urban, white gay men, the median household income for same-sex parents in California is $10,000 lower than the median household income for married couples with children, while the mean household income is more than $13,000 lower. (Badgett & Sears, *Same-Sex Couples in California*, *supra*, p. 15)[23] Further, the homeownership rate for same-sex parents is far lower than for married couples with children (only 51.1% as compare to 63.2%). (*Ibid.*) And even when same-sex couples with children own homes, those homes tend to be approximately

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Congressional Requesters, Defense Force Management: DoD's Policy on Homosexuality (1992) 103d Cong., 1st Sess., at p. 2 [policy requiring dismissal of homosexual service members]; *Abel*, *supra*, 155 F.3d at p. 628 [upholding the U.S. military's "Don't Ask, Don't Tell" policy].)

[23] Although these data reflect U.S. Census information only from same-sex couples, it is nonetheless informative as to the demographic characteristics of gay men and lesbians in California as a whole. Since the Census does not ask about sexual orientation, it is impossible to get an accurate count of the gay and lesbian population. But while it is difficult to assess exactly how coupled gay men and lesbians might differ from their single counterparts, single people in general tend to be younger, less educated, and have lower incomes than do their coupled counterparts. (See Sears, Gates & Rubenstein, *supra*, p. 3.)

$37,500 less valuable that the homes of married parents. (*Ibid.*)[24]

Moreover, same-sex couples raising children represent the full diversity of the California population. Same-sex parents are more likely than different-sex parents to be racial minorities, limited-English speakers, and/or disabled. (*Ibid.*) While approximately 39% of same-sex parents in California identify themselves as non-white, only 28% of parents in married couples put themselves into this category. (*Id.* at p. 16.) To the extent that racial minorities, limited-English speakers, and recent immigrants face economic discrimination, the effects of this discrimination are felt more strongly within the child-raising gay community than without, subjecting many gay and lesbian parents to discrimination based both on sexual orientation as well as race, gender, alienage, or disability. (See Gates & Sears, *Black Same-Sex Couples in California: Data from Census 2000* (Sept. 2005) pp. 7-9 [concluding that black same-sex couples are demographically far more similar to different-sex black couples than they are to non-black same-sex couples];[25] Gates & Sears, *Latino/as in Same-Sex Couples in California: Data from Census 2000* (May 2005) pp. 9-12

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[24] These data disprove Justice Scalia's assertion in *Romer* that because gay men and lesbians "tend to reside in disproportionate numbers in certain communities . . . have high disposable income . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide." (*Romer*, *supra*, 517 U.S. at pp. 645-646 (dis. opn. of Scalia, J.).) To the extent Justice Scalia's unsupported assertion can even be understood as an empirical claim, it is patently incorrect for the simple reason that the underlying assumption about the gay community's supposed disproportional wealth is deeply flawed. The truth is that the average same-sex couple with children in California is significantly worse off financially than are their married different-sex counterparts.

[25] *Available at* <http://www.law.ucla.edu/williamsproj/publications/AfricanAmericanReport.pdf>.

[finding the same with respect to Latino and Latina same-sex couples];[26] Gates & Sears, *Asians and Pacific Islanders in Same-Sex Couples in California: Data from Census 2000* (Sept. 2005) pp. 7-8 [finding the same with respect to Asian and Pacific Islanders in same-sex couples].)[27]

3. *Violence*

Finally, gay people have been subject to pervasive, overt hostility and a disproportionate level of hate violence because of widespread social animus towards homosexuality. According to a major national study, nearly *three-quarters* (74%) of gay men, lesbians, and bisexuals report having been the target of prejudice and discrimination based on their sexual orientation. And almost a full third (32%) of those surveyed reported that they had been the target of physical violence because someone believed they were gay or lesbian. (Henry J. Kaiser Family Foundation, *Inside Out: Report on the Experience of Lesbians, Gays and Bisexuals in America and the Public's View on Issues and Policies Related to Sexual Orientation* (2001) p. 4.)[28] In fact, gay men and lesbians are consistently among the leading targets of hate crimes – an especially shocking fact given that only 1-5% percent of the general population is estimated to be gay. (Rubenstein, et al., *Some Demographic Characteristics of the Gay Community in the United States* (2003) pp. 4-5.)[29] The FBI has reported that sexual orientation prejudice accounted for 15.6 percent of bias-motivated crimes at

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[26] *Available at* <http://www.law.ucla.edu/williamsproj/publications/Latino-as%20in%20same-sex%20couples%20in%20california%20-s.pdf>.

[27] *Available at* <http://www.law.ucla.edu/williamsproj/publications/API_Report.pdf>.

[28] *Available at* <http://www.kff.org/kaiserpolls/3193-index.cfm>.

[29] *Available at* <http://www.law.ucla.edu/williamsproj/publications/GayDemographics.pdf>.

the national level in 2004. (Federal Bureau of Investigation, *Hate Crime Statistics 2004* (2005) [only crimes based on race or religious identity ranked higher].)[30] And in California, hate crimes against gay men and lesbians comprise 18.7 percent of bias related crimes, surpassed only by those against racial minorities (who comprise a much larger percentage of the state population than do gay people). (Criminal Justice Statistics Center, California Department of Justice, *Hate Crime in California 2004* (2005) p. 7.)[31]

Moreover, hate crimes motivated by animus toward gay people have often been characterized by their extraordinarily brutal nature. (E.g., Rotenberk, *Study Links Homophobia, 151 Murders*, Chicago Sun-Times (Dec. 21, 1994) p. 27.) In 1998, Wyoming college student Matthew Shepard was savagely beaten by aggressors who chanted "It's gay awareness week" before chaining him to a fence to die. (Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. Times (Nov. 21, 1998) p. A9 [describing the murder].) In 1999, Private Barry Winchell, a gay soldier at Fort Campbell, Kentucky, was taunted and harassed for months by his fellow soldiers before one of them bludgeoned him to death with a baseball bat while he slept in an Army barracks. (Clines, *For Gay Soldier, A Daily Barrage of Threats and Slurs*, N.Y. Times (Dec. 12, 1999) p. 33.) And also in 1999, Billy Jack Gaither of Sylacauga, Alabama, was brutally beaten, had his throat slit, was stuffed in the back of a car, murdered with an ax, and then lit on fire because he was gay. (Firestone, *Trial in Gay Killing Opens, To New Details of Savagery*, N.Y. Times (Aug. 4, 1999).) These gruesome hate crimes and thousands more like them attest to the severity of anti-gay prejudice in society and the need for strong legal protections for

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[30] *Available at* <http://www.fbi.gov/ucr/hc2004/section1.htm>.

[31] *Available at* <http://ag.ca.gov/cjsc/publications/hatecrimes/hc04/preface.pdf>.

gay people. (See also, *Naboszny v. Podlesney* (7th Cir. 1996) 92 F.3d 446, 454-455 [a gay student was repeatedly harassed, beaten, and even "mock raped," to which a school official replied, "boys will be boys"]; Holmberg, *Beheading Stuns Gay Community*, Richmond Times Dispatch (Mar. 7, 1999) p. B1 [telling how Henry Edward Northington was decapitated by attackers who then left his severed head at a spot frequented by gay people].)

In addition, those who report sexual-orientation-related bias crimes sometimes are treated with rank hostility from the very authorities charged with their protection. A 2001 report of the National Coalition of Anti-Violence Project found that in 756 anti-gay bias incidents reported to local police and hospitals in the previous year, 12 percent of victims reported having been verbally or physically abused when they reported the incident. (Empire State Pride Agency Foundation, *State of the State Report 2001* (2001) p. 15.)[32]

C. Sexual orientation is an immutable trait as defined by relevant law

In addition to determining whether the defining characteristic of a group has any relation to the individual's ability to perform or contribute to society and whether the group has suffered a history of purposeful discrimination, some courts look to whether the trait in question is "immutable."[33] To the extent that courts consider this factor, immutability

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[32] *Available at* <http://www.prideagenda.org/pride/publications.html>.

[33] California's courts do not strictly require that a group possess an "immutable" trait before according strict scrutiny review. (*Purdy & Fitzpatrick*, *supra*, 71 Cal.2d at pp. 579-580 [examining the criteria for suspect classification without mention of immutability as relevant to the inquiry]; accord *Murgia*, *supra*, 427 U.S. at p. 313 [same]; *City of Cleburne*, *supra*, 473 U.S. at 442 fn.10 [calling into question the role of the "immutability" criteria]; *Watkins*, *supra*, 875 F.2d at p. 725 (conc. opn. of

has never meant "genetic" or "incapable of change" as urged by the anti-gay groups. (See *Watkins*, *supra*, 875 F.2d at p. 726 (conc. opn. of Norris, J.) [stating that immutability "has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class"]; see *Tanner*, *supra*, 971 P.2d at p. 446 [focus is on whether the characteristic has historically defined a distinct, socially-recognized group subjected to adverse prejudice].)

Indeed, such a requirement would call into question every classification designated as "suspect" by the courts. The poor may become wealthy. Those of disfavored religious minorities may convert. Aliens can become naturalized citizens. National origin may be hidden by changing one's name and customs. Illegitimate children may be adopted. Light-skinned blacks may even find it possible to "pass" as white. And one's sex can even be changed through surgery and hormone therapy. (*Watkins*, *supra*, 875 F.2d at p. 726 (conc. opn. of Norris, J.); *Tanner*, *supra*, 971 P.2d at p. 446 [noting that strict immutability it not necessary because alienage, religion and sex may be changed at will]; see also Yoshino, *supra*, 96 Colum. L.Rev. at p. 1818-19.) But legislative classifications burdening all of these groups have been held to be suspect, setting the appellants' offered

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Norris, J.) [noting that immutable traits have never been a required element of suspect classification analysis].)

Prominent academic commentators have also pointed out that the immutability criterion does little work, and it is the role of prejudice and the lack of a relation to the ability to contribute criterion that truly are at center stage in the equal protection inquiry. (Ely, *supra*, at p. 150; Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability* (1994) 46 Stan. L.Rev. 503, 508-510.) The underlying problem is that immutability is both underinclusive and overinclusive as a criterion – there are suspect classifications that do not rely on an immutable characteristic and there are also many immutable characteristics that do not give rise to suspect classifications. Because of this, the immutability inquiry has limited explanatory power. (See Ely, *supra*, at p. 150.)

definition of "immutable" in direct contradiction of applicable precedent. (See *supra* at pp. 15-17 [summarizing state and federal cases holding all of these classes to be suspect under the relevant equal protection clauses]; see also *Parham v. Hughes* (1979) 441 U.S. 347, 351 [describing race, national origin, alienage, illegitimacy, and gender as immutable].)

Rather, a trait is considered immutable if it is central to individual identity and the government has no legitimate basis for requiring it to be abandoned as a condition of equal treatment. (*Watkins*, *supra*, 875 F.2d at p. 726 (conc. opn. of Norris, J.) [a trait is immutable if it is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]" or "if changing it would involve great difficulty, such as requiring a major physical change[,] . . . a traumatic change of identity"]; see also Marcosson, *Constructive Immutability* (2001) 3 U. Pa. J. Const. L. 646, 652 [a trait should be treated as immutable if to change it would involve substantial difficulty or cost].) Sexual orientation is such a trait. (See *Hernandez-Montiel v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084, 1087, 1093 [holding sexual orientation to be an immutable trait because it is "inherent in [] identity" and "so fundamental to one's identity that a person should not be required to abandon" it]; *Karouni v. Gonzales* (9th Cir. 2005) 399 F.3d 1163, 1173 [same]; *Tanner*, *supra*, 971 P.2d at p. 447 ["Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens . . . ."].)

As set forth above, major health and mental health professional associations have all rejected the idea that homosexuality is a disorder that requires a cure. Instead, these associations have recognized that sexual orientation is a fundamental part of one's identity on par with gender, ethnicity, and culture. (American Psychological Association, *Just the*

Facts, *supra*.)[34] Thus, to the extent a change in sexual identity is even possible, any such change would "involve great difficulty and [require] . . . a traumatic change of identity." (*Watkins*, *supra*, 875 F.2d at p. 726 (conc. opn. of Norris, J.).) Given the severe psychological trauma that can accompany efforts at conversion therapy "it would be abhorrent for government to penalize a person for refusing to change" orientation even if such a thing were possible. (*Ibid*.)

In an *amicus* brief to the United States Supreme Court in support of the petitioners in *Lawrence v. Texas*, the American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers affirmed that decades of rigorous research and clinical experience had proven that same-sex orientation "is a normal variant of human sexual expression" that "is not a mental or psychological disorder," is "highly resistant to change," and is fundamental to the identities of gay men and lesbians. (Brief of *Amici Curiae* American Psychological Association, et al. at pp. 4-5 in *Lawrence v. Texas*, *supra*, 539 U.S. 559.)[35]

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[34] This report was co-sponsored by the American Academy of Pediatrics, the American Counseling Association, the American Association of School Administrators, the American Federation of Teachers, the American Psychological Association, the American School Health Association, the Interfaith Alliance Foundation, the National Association of School Psychologists, the National Association of Social Workers, and the National Education Association.

[35] Moreover, medical and scientific associations have uniformly rejected attempts to change sexual orientation or "cure" individuals of homosexuality, commonly known as "conversion therapy" or "reparative therapy." (American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies) Position Statement* (2000) p. 1, *available at* <http://www.psych.org/edu/other_res/lib_archives/archives/200001.pdf>; American Psychological Association, *Just the Facts*, *supra*.) In fact, "the potential risks of 'reparative therapy' are great, including depression,

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For the reasons discussed above, gay men and lesbians satisfy all three of the criteria relevant to the equal protection analysis for heightened scrutiny, and legislative classifications that burden their rights cannot be upheld unless they pass muster under such scrutiny. (*Sail'er Inn*, *supra*, 5 Cal.3d at p. 20.) Undertaking the equal protection analysis set forth above

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anxiety and self-destructive behavior." (*Statement of the American Psychiatric Association* in *Just the Facts*, *supra*.) The National Association of Social Workers has stated that "[n]o data demonstrate that reparative or conversion therapies are effective, and in fact they may be harmful." (*Statement of the National Association of Social Workers* in *Just the Facts*, *supra*; see also *Statement of the American Academy of Pediatrics* in *Just the Facts*, *supra* ["Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation"].)

The health professional *amici* in *Lawrence* went on to describe attempts at conversion therapy in the following way:

> In addition to the lack of scientific evidence for the effectiveness of efforts to change sexual orientation, there is reason to believe such efforts can be harmful to the psychological well-being of those who attempt them. Clinical observations and self-reports indicate that many individuals who unsuccessfully attempt to change their sexual orientation undergo considerable psychological distress. In fact, the potential psychological risks to some patients undergoing conversion therapies are sufficiently significant that treatment protocols have been developed to assist them in overcoming a wide range of psychological and relational problems.
>
> Accordingly, the mainstream view in the mental health professions is that the most appropriate response of a therapist treating an individual who is troubled about his or her homosexual feelings is to help that person cope with social prejudices against homosexuality and lead a happy and satisfying life as a lesbian or gay man.

(Brief of *Amici Curiae* American Psychological Association, et al. at p. 14 in *Lawrence v. Texas*, *supra*, 539 U.S. 559 [footnotes omitted].)

demonstrates that the marriage statute is precisely the type of state-sponsored discrimination that heightened scrutiny is designed to prevent. Family Code section 300's failure to recognize that sexual orientation has no bearing on one's contributions to society and its implicit demand that gay people act like heterosexual people in order to exercise their fundamental rights "relegate[s] [a whole class] to an inferior legal status." (*Id.* at p. 18.)

There can be no question that the marriage statute does not survive the application of heightened scrutiny. The state has fallen far short of meeting its burden to show: (1) a compelling state interest that justifies the discrimination, and (2) that section 300 is necessary to achieve that compelling interest. (*Id.* at 16-17; *Warden v. State Bar* (1999) 21 Cal.4th 628, 640-641.) The state's purported interests in the legislation, sounding only in "tradition" and "common understanding," are based on nothing more than "outdated social stereotypes [that] result in invidious laws or practices." (*Sail'er Inn*, *supra*, at pp. 16-17.) *Amici* agree with the Superior Court and the respondents that Family Code section 300 fails to meet even the threshold of being *rationally* related to a *legitimate* state purpose, much less the burden of being *necessary* to further a *compelling* governmental interest. (Lockyer Appellant's Appendix, *Woo v. California*, A110451, at p. 111 [Final Decision on Application for Writ of Mandate, Motions for Summary Judgment, and Motion for Judgment on the Pleadings, Dated April 13, 2005]; Woo RAB at pp. 56-72).

CONCLUSION

California courts have been at the forefront of equal protection jurisprudence for decades, often recognizing when discriminatory legislative classifications require heightened scrutiny before the federal courts come to the same conclusion. Here, it is undeniable that section 300 of the Family Code discriminates on the basis of sexual orientation. Gay men and lesbians, as a group, fulfill all of the criteria for heightened scrutiny protection. The defining characteristic of their group bears no relation to their abilities or contributions to society and they have long been subject to both pernicious discrimination and second-class citizenship. In addition, their shared trait is a closely-held and fundamental part of their identities that it would be unfair to require them to change (even assuming it could be changed) in order to achieve equal rights. In this case, the state cannot even provide a rational basis for the discrimination, much less show a compelling interest for it or that that the discrimination is necessary to achieve that interest. For all these reasons, this Court should subject section 300 of the Family Code to heightened scrutiny review and affirm the judgment of the Superior Court.

Dated: January 9, 2006

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this Brief of Amici Curiae consists of 12,462 words (including footnotes) as counted by the Microsoft Word 2003 word-processing program.

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ADDENDUM

AGUILAS was founded in 1992 to create a supportive, culturally specific environment for gay, lesbian, and bisexual Latinos. It is the largest Latino gay and lesbian organization in Northern California and has served over 900 Latino gay men through it's HIV prevention services in San Francisco. In addition AGUILAS serves to provide leadership and support to it's target group through it's commitment and dedication and advocacy for the needs of this community. Many couples in the gay and lesbian Latino community currently are being denied the right of marriage and are therefore unable to protect their relationships, children and families. The current status has contributed to the marginalization of this community and creates barriers for members to meet their responsibilities as partners, parents, and family members. In light of these facts, AGUILAS strongly supports the efforts to extend marriage rights to same-sex couples.

The **Asian American Justice Center** (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy advocacy and community education on discrimination issues. AAJC was an *amici* in support of plaintiffs in *Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941, and *Kerrigan v. Department of Public Health* (Conn.Super.Ct.) (pending). The question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans.

The **Asian Pacific American Bar Association** of Los Angeles County (APABA) is a member organization comprised of attorneys, judges, commissioners and law students throughout Los Angeles County and serves as a voice for issues of concern to the Asian and Pacific Islander ("API") community. Established in 1998, APABA provides legal education and assistance to underserved API communities and also sponsors programs in professional development, community education, and law student mentorship. As an API organization, APABA well knows the history of discrimination against Asian Americans, Pacific Islanders, and other immigrants and people of color, and our activities seek to ensure access and justice for those without a voice. As an organization that believes in civil rights, we believe that achieving marriage equality furthers

the civil rights interests not only of members of our own community but of all Americans.

The **Asian Pacific American Legal Center of Southern California** (APALC) is a nonprofit legal organization dedicated to serving the Asian American communities in this area through impact litigation, direct legal services, community education, leadership development, and public policy advocacy. Founded in 1983, APALC provides multilingual legal and educational services, with programs focusing on immigration, family law, language rights, inter-ethnic relations, dispute resolution, and civil rights advocacy. APALC long has been committed to working collaboratively and creatively to reduce discrimination based on national origin, race and other personal characteristics in all areas of law and policy. In the family law context, marriage discrimination against lesbian and gay couples causes persistent harm to thousands of families among the communities APALC serves in Southern California. Given California's ignoble history of marriage discrimination based on race and national origin, APALC is particularly aware of and committed to opposing similarly invidious discrimination based on other personal characteristics, such as sexual orientation, that harm its constituents. APALC also is all too aware of the disproportionate harms inflicted upon gay and lesbian Asian Americans who are newer immigrants, have limited English proficiency, and have limited economic means, for whom exclusion from civil marriage exacerbates the difficulties of living on society's precarious margins. APALC's bridge-building work, premised on the belief that the civil rights of all communities are inextricably linked, has been recognized nationally for addressing issues affecting African Americans, Latinos, and gay men and lesbians. For all these reasons, APALC supports the respondents in this action and urges affirmance of the order of the Superior Court.

The **Asian and Pacific Islander Lesbian and Bisexual Women and Transgender Network** (APLBTN) is a national coalition of local community groups that serves as a network to empower and support Asian and Pacific Islander lesbians, bisexual women and transgender people. APLBTN aims to create visibility, build leadership, develop resources and strengthen ties within our communities through outreach and education. APLBTN also works to create alliances with other organizations and communities that are struggling with similar forms of invisibility, marginalization, stereotyping and disempowerment. Because securing equal legal respect for our loving, committed family relationships is

critically important to for the protection and support of its members, APLBTN joins in this effort to achieve marriage equality for same-sex couples. **Asian American Queer Women Activists** and **Asian Pacific Islander Queer Women & Transgender Coalition** are two member organizations of APLBTN in the Greater Los Angeles area that seeks progressive social change through public education, community organizing and political activism in the Asian American and Pacific Islander communities. Their priority is the elimination of all forms of discrimination based on sexual orientation and gender identity, including the discrimination against same-sex relationships in California's current marriage laws, and they therefore join this brief.

The **Asian Pacific Islander Pride Council** (APIPC) is a network of eight Asian and Pacific Islander lesbian, gay, bisexual, transgender, queer organizations and alliances in the greater Los Angeles area whose mission is to provide and cultivate support, resources and advocacy to and for the Asian Pacific Islander lesbian, gay, bisexual, transgender, queer, and mainstream communities of Southern California. Working as a coalition, each year, the APIPC's member organizations collaboratively organize numerous events that address issues and concerns that affect the Asian Pacific Islander LGBT community as a whole, including the issue of marriage equality. In addition, all of its member organizations include numerous members who have been in long-term relationships, some of whom are also raising children, who desire to obtain the benefits and undertake the responsibilities of civil marriage when marriage equality is achieved.

Bienestar Human Services ("Bienestar") is the largest Latino non-profit, community-based agency in the United States. Bienestar's early focus on AIDS education has broadened to address issues facing Southern California's Latino community, especially gay, lesbian, bisexual, and transgender Latinos, many of whom are involved in committed relationships and forming strong families throughout California. Bienestar is concerned with how race/national origin discrimination and language barriers can combine with sexual orientation bias. Bienestar recognizes that California's current marriage law unjustly impedes access to the protections and rights that should be afforded equally to all California families, and is interested in this litigation on behalf of its many constituents who are harmed due to the limitation of marriage only to different-sex couples. Ending marriage discrimination would strengthen families throughout the

state, and specifically would offer benefits to a great many in the Latino community. At the same time, Bienestar believes that to rule against marriage equality would further marginalize an already disenfranchised group of people, leaving families and children vulnerable without adequate legal safeguards, and very likely increasing anti-gay bias.

The **Coalition for Humane Immigrant Rights of Los Angeles** ("CHIRLA") is a nonprofit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of the issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to advocate more effectively for positive change. Toward those goals, CHIRLA provides legal representation, extensive referral services, and a support network for immigrants and refugees; educates and organizes community members; and works to improve race and ethnic human relations throughout Southern California. With reference to this case, CHIRLA underscores the significant challenges facing immigrants in California; accordingly, the organization advocates for nondiscriminatory, respectful laws that offer equal treatment and dignity to all families.

The **Disability Rights Education and Defense Fund** ("DREDF"), based in Berkeley, California, is a national law and policy center dedicated to securing equal citizenship for Americans with disabilities. Recognized for its expertise in the interpretation of federal and California disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination. DREDF is a member of the Executive Committee of the Leadership Conference on Civil Rights, the nation's oldest, largest and most diverse civil and human rights coalition. Consistent with its civil rights mission, DREDF supports legal protections, including marriage equality, for all diversity and minority communities in California and throughout the country.

The **Equal Justice Society** (EJS) is a national organization of scholars, advocates and concerned individuals advancing creative legal strategies and public policy for enduring social change. As heirs of the innovative legal and political strategists of *Brown v. Board of Education*, EJS works to achieve social and racial justice and to ensure that the rights of all are

expanded, rather than diminished, by our courts and policy makers. EJS believes that marriage equality for gay men and lesbians is vital to these goals.

Celebrating its 30th anniversary in 2006, the **Japanese American Bar Association** (JABA) is one of the oldest Asian Pacific American bar associations in the country and consists of a diverse membership of nearly 300 attorneys, judicial officers, and law students of Japanese American and other Asian Pacific American ancestry in the greater Los Angeles area, including some who are gay or lesbian. JABA is dedicated to offering programs and services that not only promote the professional interests of its membership, but that also provide education, services, access, and representation for and on behalf of underserved segments of the Japanese American and broader Asian Pacific American community. With a deep appreciation of the unique history of Japanese Americans and the failure of constitutional protections that led to their internment during World War II, JABA has a proud history of actively advocating and devoting resources to and on issues of civil rights and social justice, especially for those members of society who continue to suffer from discrimination and unequal treatment.

La Raza Centro Legal ("LRCL") is a bilingual and multicultural public interest law agency that seeks to create a more just and inclusive society in the interests of the Latino, indigenous, immigrant and low-income people of San Francisco and the greater Bay Area. It is towards the goal of social justice that LRCL embraces community empowerment: the process of promoting and increasing the community's capacity to influence society by strengthening community leadership, invigorating community ties, assisting community members to identify appropriate solutions to their own problems, and to develop the appropriate strategies to achieve their aspirations for justice. With a passion for justice, LRCL works within the community promoting dignity and respect for the rights of all.

The **Lawyers' Committee for Civil Rights** of the San Francisco Bay Area (LCCR) is affiliated with the national Lawyers' Committee for Civil Rights Under Law, begun in 1963 at the request of President John F. Kennedy. LCCR was formed in 1968 to support the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating cases on behalf of the traditionally underrepresented. In addition, LCCR monitors judicial decisions and legislation that affect the

traditionally disadvantaged and frequently files amicus briefs in cases challenging discriminatory practices (See, e.g., *Branch v. Smith* (2003) 123 S. Ct. 1429 [challenge to discriminatory voting practices]; *Mukhtar v. California State Univ.* (9th Cir. 2003) 319 F.3d 1073 [challenge to discriminatory employment practice].) Since advancing the rights of lesbian, gay, bisexual, and transgender individuals is integral to any civil rights agenda, our amicus work has encompassed these issues as well. (See, e.g., *Evans v. City of Berkeley*, Cal. Sup. Ct. No. S112621 (pending) [amicus supporting City's refusal to provide public subsidies to organizations that discriminate on the basis of sexual orientation].)

Established in 1968, the **Mexican American Legal Defense and Educational Fund** ("MALDEF") is the leading national civil rights organization representing the 40 million Latinos living in the United States though litigation, advocacy, and educational outreach. With its headquarters in Los Angeles and offices in Atlanta, Chicago, Houston, Sacramento, San Antonio and Washington, D.C., MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment under the law of Latinos, and is a respected public policy voice in Sacramento and Washington, D.C. on issues affecting Latinos. MALDEF sets as a primary goal defending the right of all Latino families to equal treatment under law, including those headed by lesbian or gay Latinos who wish the equal right to marry and in which Latino children are disadvantaged because their same-sex parents are denied civil marriage.

The **Multi-Cultural Bar Alliance of Los Angeles** (the MCBA) is a diverse, growing coalition of voluntary bar associations in Southern California. Currently, the MCBA consists of approximately 17 bar groups with various interests; it was formed in the early 1990s as a way to unite underrepresented lawyers and foster peaceful and collaborative solutions between and among our communities.

The **National Black Justice Coalition** ("NBJC") is a non-profit, civil rights organization of black lesbian, gay, bisexual and transgender people and allies dedicated to foster equality. NBJC advocates for social justice by educating and mobilizing opinion leaders, including elected officials, clergy and media, with a focus on black communities. Black communities have

historically suffered for discrimination and have turned to the courts for redress. The issue presented by this appeal has significant implications for the civil rights of black lesbians and gay men in this State – whether they will receive equal treatment under the law and the legal recognition and protections of marriage for their relationships and families. NBJC envisions a world where all people are fully empowered to participate safely, openly and honestly in family, faith and community, regardless of race, gender-identity or sexual orientation.

The **National Lawyers Guild of San Francisco** ("NLG-SF") is part of the larger organization founded in 1937 as the first racially integrated national bar association. The National Lawyers Guild is the oldest and largest public interest/human rights bar organization in the United States, with more than 200 chapters. The National Lawyers Guild is dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, and legal workers of America in an organization that shall function as an effective political and social force in the service of the people. We have over 1300 active members in California. For these reasons, NLG-SF supports the respondents in this case and urges that this Court affirm the trial court's holding that excluding same-sex couples from the right to marry violates the California Constitution.

People for the American Way Foundation ("PFAWF") is a nonpartisan citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has more than 750,000 members and other supporters across the country, including more than 147,000 in California, as well as two regional offices in this state. PFAWF has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. PFAWF regularly participates in civil rights litigation, and has participated in litigation in other states to secure the right of same-sex couples to marry. PFAWF joins this brief in order to help vindicate that right in this case.

United Lesbians of African Heritage (ULOAH) is a nonprofit organization dedicated to serving the black lesbian community through community education, leadership development and advocacy. Founded in

1989, ULOAH combats prejudice and discrimination based on race, sexual orientation and gender identity or expression. ULOAH knows from long experience the pervasive harm to black lesbians that results from sexual orientation stigma and bias. Accordingly, ULOAH supports the respondents in this case and urges this Court to affirm the judgment of the Superior Court.

The **Ventura County Black Attorneys Association** (VCBA) is an affiliate of the Ventura County Bar Association. VCBA members meet regularly to address issues of particular concern to attorneys of color or the broader African American community, and to network with and provide mutual support to members of other minority bar associations in the Ventura County area.

Zuna Institute is a national non-profit organization that advocates for the needs of black lesbians in the areas of health, public policy, economic development, and education. Zuna seeks to eliminate the barriers faced by black lesbians on a daily basis, including the inability of same-sex couples to marry, which causes great harm to black lesbians and their families, and which demeans the dignity and freedom of all people.