

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

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

Case No. A110449

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff/Respondent,

vs.

STATE OF CALIFORNIA,

Defendant/Appellant,

Superior Court Case
No. 429539
(Consolidated for trial with
Woo v. Lockyer, Superior
Court Case No. 504038)

RESPONDENT'S BRIEF

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INTRODUCTION

This appeal presents the question whether it is constitutional for the State of California to prohibit gay men and lesbians from getting married just because it always has.

In countless ways, California law now protects gay men and lesbians against discrimination in virtually every sphere of public and private life. The Legislature has found that, despite longstanding discrimination, many gay men and lesbians “have formed lasting, committed, and caring relationships” with another person, with whom they “share [their] lives” and, in many instances, “raise children and care for other dependent family members.” (Fam. Code § 297, Note.) Yet, at the same time, California does not allow these men and women to marry. Instead, it has said that they must obtain legal recognition of their families, and order their lives, under a totally different banner than everyone else: domestic partnerships. There is thus just one word for the present state of California family law: segregated.

In striking ways, the State’s emphasis on the “common understanding” of marriage and California’s separate domestic partnership scheme highlights why California’s marriage law is unconstitutional. It demonstrates, perhaps better than anything, that marriage itself is extremely cherished in our culture, apart from the many legal rights and obligations that come with it. As the extensive, uncontradicted evidence shows, married couples enjoy a sense of legitimacy in the eyes of society that other couples do not. It is intangible and, to some extent, indescribable. But everyone knows that it is real. By barring the gay men and lesbians of this State from getting married, California sends a very powerful and unmistakable message: that *their* family commitments are *not* equal in

dignity to those of their heterosexual counterparts. A separate system of legal recognition for lesbian and gay couples and their children is no less demeaning than separate school systems were for blacks or separate military academies were for women. California's insistence on segregation speaks, loudly and clearly, for itself.

The State defends this unequal state of affairs only on the ground that “[t]he word ‘marriage’ has a particular meaning for millions of Californians, and that common understanding of marriage is important to them.” (Appellant’s Opening Brief [“AOB”] 33.) The State never explains why it is “important” to some people that California continue to refuse to allow gay men and lesbians to marry. But regardless, this sole justification should be rejected. California’s marriage ban implicates several of the most personal and fundamental liberty interests protected by the due process, equal protection and privacy clauses of our State’s Constitution: the right to choose one’s spouse free from undue government intrusion and free from arbitrary discrimination based on sex or sexual orientation. Placing the status quo ahead of these liberty and equality interests violates the most fundamental promises California has made to its citizens. Countless decisions under both state and federal law say that tradition alone can never justify a law that infringes on constitutional rights, and common sense compels the same conclusion.

Moreover, even if one speculated why (according to the State) “millions of Californians” do not want the family commitments made by gay and lesbian citizens to be equated with those made by other people, the conclusion would be no different. The Constitution does not tolerate discriminatory laws motivated by religious beliefs, prejudice, or moral

disapproval alone, whether held by hundreds, “millions,” or even a majority of voters.

The State also suggests that the constitutional calculus is somehow affected by the fact that California’s marriage ban is the result of careful legislative choices and delicate policy balancing. Perhaps. Even so, protecting the fruits of the legislative process is not a legitimate state interest where the resulting laws infringe on constitutional rights. If it were, then the Legislature and the voters would have carte blanche to do as they please. The State’s nod to the California Legislature also is misplaced because very recently, while this appeal was pending, the Legislature *decided to legalize marriage for same-sex couples*. (Assem. Bill No. 849, approved by Senate, Sept. 1, 2005 and by Assembly, Sept. 6, 2005 (2005-2006 Reg. Session) [hereafter "AB 849"].) The Governor vetoed that legislation—but only so that the issue could be settled *by this Court*.

This Court should do so by affirming the court below. Although California is to be commended for affording same-sex couples many of the same legal rights that married couples enjoy, this is irrelevant. Even if registered domestic partners enjoyed all of the same legal rights as spouses (they don’t), California does not allow gay men and lesbians to get married. That is the civil right at issue here that California refuses them—one of the most precious it has to bestow—and for that, the State must have a compelling justification. It doesn’t even have a rational one.==

FACTUAL BACKGROUND

A. As The American Understanding Of Freedom And Equality Has Evolved, So Too Have This Nation’s Marriage Laws.

Civil marriage is a cornerstone of American society. (Respondent's Appendix ("RA") 243 ¶ 14.) It is the dividing line between friend and

family. (RA 305-07 ¶¶ 3, 5-6, 8, 10-12; RA 297-302 ¶¶ 3, 9, 12, 14.) Nothing else can substitute, either legally or socially. (See RA 298-302 ¶¶ 5, 8-9, 12.) Certainly, "domestic partnerships" do not. (See, e.g., RA 241 ¶ 6, RA 298 ¶ 5, RA 301 ¶ 12, RA 306-307 ¶ 11, RA 312 ¶¶ 12-16, RA 318 ¶ 10, RA 323 ¶ 10.)

The government rewards marriage with more than a thousand important legal rights, privileges, duties and benefits. (RA 241 ¶ 7.) In the United States, marriage has always been authorized by civil rather than religious law. (RA 242 ¶ 9.) Marriage is important to government because it organizes households, property ownership and inheritance rights, and creates an infrastructure that obliges spouses rather than the public to support each other and their dependents. (RA 242 ¶¶ 10-12.)

The State now asks this Court to “maintain” the marriage laws (the “common understanding of marriage,” as it says) as they now stand. (AOB 7.) But the civil marriage laws have never been static. Far from it. Historically, they have changed—sometimes dramatically—to reflect the evolving American understanding of freedom and equality. (RA 243-52 ¶¶ 17-51.)

- 1. Historically, Marriage Was "Commonly Understood" As A Union Between Persons Of The Same Race.**

Until remarkably recently, the marriage laws in this country were a powerful expression of racism. Slaves had no legal right to marry. (See generally RA 244-46 ¶¶ 19-26.) And free persons of African descent, as well as other non-Caucasian individuals, were prohibited from marrying Caucasians in most colonies and subsequently, states. (*Id.*; see also *Perez v. Sharp* (1948) 32 Cal.2d 711, 747-48, 761.) At its first session in 1850,

for example, the California Legislature considered interracial marriage “undesirable,” since “[n]egroes are socially inferior.” (*Id.* at 727.)

Even after the abolition of slavery, forty-one states prohibited marriage between a white person and a “Negro” or “mulatto.” (RA 245 ¶ 21.) Some, including California, also outlawed marriage between a white person and a Native American or Asian-American. They did so for religious reasons and because some feared allowing such unions would “corrupt” marriage. (*Id.*)

Long after the Fourteenth Amendment, the laws restricting marriage on the basis of race continued to enjoy widespread public support. (RA 237 ¶ 33.) That was still the case in 1948, when the California Supreme Court became the first court in this Nation to strike down an anti-miscegenation law on constitutional grounds. (*Perez, supra*, 32 Cal.2d at 731-32.) Twenty years later, the United States Supreme Court finally followed suit and struck down all remaining laws banning interracial marriage. (*Loving v. Virginia* (1967) 388 U.S. 1, 12.)

The courts then, as perhaps now, were well ahead of popular sentiment. At the time, these landmark decisions defied commonly-held views of the kind of unions the marriage laws should permit. (RA 237 ¶33.) Indeed, it took yet another *34 years* after *Loving* before a majority of whites in the United States finally approved of interracial marriages. (*Id.*)

2. Historically, The "Common Understanding" Of Marriage Also Reflected Deeply Discriminatory Attitudes Towards Women.

At this Nation’s founding, marriage law was governed by the doctrine known as “coverture.” (RA 246 ¶ 28.) A married couple became a single legal entity, with the husband as its legal, economic, and political representative. (*Id.*) Married women entirely lost their independent legal

identity—including their right to hold property and to sue or be sued, and, in some cases, even their legal ability to commit a crime. (See generally RA 246-49 ¶¶ 27-37.) Under the most conservative form of this doctrine, the law enforced women's "consent" to their husbands' rule in all ways, including even to be "disciplined" with a horsewhip. (See *Joyner v. Joyner* (1862) 59 N.C. 322, 325.) Almost unimaginable now, less than 30 years ago in California a wife could not legally refuse to have sexual relations with her husband. (See Penal Code § 262 [establishing crime of marital rape].)

Assumptions about gender roles were responsible for this unequal state of legal affairs. As reflected in countless opinions, husbands were viewed as providers acting in the public sphere, whereas wives were confined to the role of dependent: domestic homemaker, mother, and sexual property. (See, e.g., *Muller v. Oregon* (1908) 208 U.S. 412, 421; *Bradwell v. Illinois* (1872) 83 U.S. 130, 141 (Mem.) [conc. opn. of Bradley, J.]; *Baker v. Baker* (1859) 13 Cal. 87, 103-104.)

After much change, both legislative and judicial, spouses in California now have the same legal rights, regardless of their sex, once they marry. (See generally RA 246-252 ¶¶ 27-50.) But gender remains a legal hurdle to getting married.

B. California Intentionally Denies Lesbians And Gay Men The Right To Marry, Even Though It Also Has Determined That There Is Absolutely Nothing Wrong With Gay and Lesbian Families.

Much as it once did on the basis of race, California today uses gender to deny an entire class of its citizens the right to marry the loved one of their choice: namely, its hundreds of thousands of gay and lesbian citizens. (See RA 189.)

Section 300 of the Family Code provides: "Marriage 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." (Fam. Code § 300 [emphasis added].) Until 1977, California's marriage statutes were gender-neutral. The Legislature added the sex classification in 1977 to ensure that no gay or lesbian couples could make even a colorable claim to marriage. (See RA 98.)

Family Code Section 308.5 provides: "Only marriage *between a man and a woman* is valid or recognized in California." Section 308.5 is a recent addition to the Family Code that was passed by initiative in March 2000 to prevent California from having to recognize marriages between lesbians and gay men performed out of state. (See RA 89-92.)

While the anti-miscegenation laws were premised on the indefensible, and since discredited notion that non-Caucasians were somehow inferior, the California Legislature has found that in every relevant measure, the lesbians and gay men of this state and their families are equal to their heterosexual counterparts. California law now protects lesbians and gay men against sexual orientation discrimination in virtually every area of public and private life. (See Appendix A [listing statutes].) And with regard to their families, the legislative findings accompanying California's landmark domestic partnership law, A.B. 205 (the California Domestic Partners Rights and Responsibilities Act of 2003), found that committed and caring gay and lesbian couples "share lives together, participate in their communities together, and many raise children and care for other dependent family members together." (Fam. Code § 297, Note) The Legislature further determined that "[e]xpanding the [legal] rights and creating responsibilities of" such couples "would further California's

interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.” (*Id.*)

C. The Legislature Has Concluded That California Should No Longer Prohibit Its Gay And Lesbian Citizens From Marrying, But The Governor Has Left the Matter For This Court To Decide.

In the last eight years, courts in Hawaii, Alaska, Vermont, Massachusetts, New York, Oregon and Washington have each concluded that prohibiting marriage by same-sex couples violates their respective state constitutions. (See *Baehr v. Lewin* (1993) 74 Hawaii 530; *Brause v. Bureau of Vital Statistics* (Alaska Super. Ct.) 1998 WL 88743 [non pub. opn.]; *Baker v. State* (1999) 170 Vt. 194; *v. Dep't of Public Health* (2003) 440 Mass. 309; *Opinion of the Justices to the Senate* (2004) 440 Mass. 1201; *Hernandez v. Robles* (2005) 794 N.Y.S.2d 579; *Li v. State* (Or. Cir., April 20, 2004) No. 0403-03057, 2004 WL 1258167 [non pub. opn.]; *Andersen v. King County* (Wash. Super. Ct., Aug. 4, 2004) No. 04-2-04964-SEA, 2004 WL 1738447 [non pub. opn.]¹)

After the trial court in this case reached the same conclusion and while this appeal was pending, the California Legislature passed historic legislation that would have legalized marriage for lesbians and gay men across this state. (AB 849.) The Legislature made extensive findings, including the following:

- (a) Civil marriage is a legal institution recognized by the state *in order to promote stable relationships and to protect individuals who are in those*

¹ So, too, have increasing numbers of democratic nations, including Canada, Belgium, the Netherlands, Spain and South Africa. (RA 331-545.)

relationships. The institution of marriage also provides important protections for the families of those who are married, including not only any children or other dependents they may have, but also members of their extended families . . .

(d) . . . The gender-specific definition of marriage that the Legislature adopted [in 1977] specifically discriminated in favor of different-sex couples and, consequently, discriminated and continues to discriminate against same-sex couples

(g) California's discriminatory exclusion of same-sex couples from marriage harms same-sex couples and their families . . . [including by] (i) . . . denying them *the unique public recognition and affirmation that marriage confers on heterosexual couples.*

(j) The Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. *The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners.* (AB 849 §3 [emphases added].)

On September 29, 2005, the Governor vetoed AB 849. (*See* Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess Journal No. 4 (2005-2006 Reg. Sess.) pp. 3737-38 [hereafter "Veto Message"].) The Governor stated, "I do not believe the Legislature can reverse an initiative approved by the people of California," and elaborated further that, in his view, the California Constitution forbids the Legislature from amending Family Code Section 308.5 "without a vote of the people." He went on to conclude that:

[t]he ultimate issue regarding the constitutionality of section 308.5 and its prohibition against same-sex marriage is currently before the Court of Appeal in San Francisco and will likely be decided by the Supreme Court. This bill simply adds confusion to a constitutional issue. If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective. (*Id.*)

Nothing in the Governor's veto message disagreed with or even questioned any of the Legislature's findings. On the contrary, the Governor stressed

that “I believe that lesbian and gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationships.” (*Id.*)

STATEMENT OF THE CASE

On March 11, 2004, the City and County of San Francisco filed this action in San Francisco Superior Court challenging the constitutionality of the State’s ban on marriages between persons of the same sex under the due process, equal protection and privacy clauses of the California Constitution. (RA 1.) The case was thereafter consolidated with *Woo v. Lockyer*, and later coordinated with four other similar actions. (AA 107.) The coordinated cases were assigned to San Francisco Superior Court Judge Richard Kramer. (*Id.*)

In briefing the merits, the City submitted extensive evidence, including expert declarations demonstrating that:

- (1) the marriage laws have constantly evolved (RA 239-253);
- (2) homosexuals have historically been subject to pervasive discrimination (RA 223-238);
- (3) there is a large and growing number of same-sex couples in California, and they are demographically similar in every respect to married couples (RA 186-212);
- (4) homosexuality does not affect an individual's ability to contribute to society (RA 254-279);
- (5) preventing gay men and lesbians from marrying harms their children (*id.*);
- (6) marriage tremendously benefits spouses and society (RA 989-1022); and

(7) there is a growing international trend in democratic nations toward providing same-sex couples the same status and treatment as opposite-sex couples (RA 331-832).

The City also proffered declarations of individuals demonstrating that denial of marriage harms same-sex couples and their families in tangible and intangible ways, but that allowing same-sex marriages will not harm persons in different-sex marriages. (RA 292-330.) Finally, the City proffered evidence demonstrating that it costs governments at all levels, including the City itself, millions of dollars annually to deny marriage to same-sex couples. (RA 135-165, 213-222.)

The State did not dispute any of this evidence, either by objection or by contrary evidence. The extensive factual record in this case is therefore uncontested.

On April 13, 2005, the Superior Court issued a decision striking down the marriage ban in Family Code Sections 300 and 308.5 on the ground that it unconstitutionally classifies on the basis of sex and impinges on the fundamental right to marry without a compelling reason, or even a rational one.² (AA 107-131.) On April 14, 2005, it issued a declaratory judgment to that effect (AA 160), as well as a writ of mandate directing the State Registrar of Vital Statistics to take various steps to prepare and furnish gender-neutral forms for marriage applications, licenses and certificates of registry of marriage and related measures, and to implement all of its duties with respect to marriage in manner that is gender-neutral. (AA 167-72.) This appeal followed. (AA 213.)

² The Superior Court did not reach the City's alternative arguments that the marriage laws unconstitutionally discriminate based on sexual orientation and violate the constitutional right to privacy. (AA 109.)

ARGUMENT

The judgment is reviewed de novo because the facts are undisputed and the question is one of law. (*Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 522; *Salus v. San Diego County Employees Retirement Assoc.* (2004) 117 Cal.App.4th 734, 738.) This Court exercises its independent judgment "as to the legal effect of the undisputed facts and must affirm on any ground supported by the record." (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.)

I. THE TRIAL COURT CORRECTLY APPLIED STRICT SCRUTINY TO THE MARRIAGE BAN UNDER CALIFORNIA'S EQUAL PROTECTION CLAUSE.

Laws that restrict the exercise of fundamental rights or impose legal disabilities on the basis of inherently suspect classifications—that is, classifications that generally bear no relation to ability to perform in society yet have been the subject of lasting social disfavor, such as race or sex—are constitutionally suspect. Faced with such laws, the courts play a critical role in ensuring that any such restriction is necessary and narrowly tailored to serve a compelling government interest. (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 440; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 33.) In such cases, the courts have a paramount duty to protect individual rights from undue legislative encroachment and to "smoke out" illegitimate uses of suspect classifications. (*City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 493.)

The Superior Court applied strict scrutiny under the Equal Protection Clause to the marriage ban for two reasons: first, because it rests upon a sex-based classification, and second, because the prohibition against marriage by lesbians and gay men restricts the exercise of a fundamental right. (AA 122-127.) It was correct on both counts.

A. The Marriage Ban Is Subject To Strict Scrutiny Because It Classifies On The Basis Of Sex.

1. Under The Equal Protection Clause, Sex-Based Classifications Are Subject To Strict Scrutiny.

Article I, section 7(a) of the California Constitution provides: "A person may not be . . . denied equal protection of the laws." As the State suggests (AOB 31 n.17), the test for equal protection under the United States and California Constitutions is "generally equivalent" and guarantees that persons similarly situated shall be treated equally under the law. (*Dep't of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588; *Los Angeles v. Southern Cal. Telephone Co.* (1948) 32 Cal.2d 378, 389; *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1114.) Nonetheless, what the State ignores when it stresses various marriage cases arising under federal law (see, e.g., AOB 18 [discussing *Baker v. Nelson* (Minn. 1971) 191 N.W. 2d 185]; *id.* at 20 [discussing *Singer v. Hara* (Wash. Ct. App. 1974) 522 P.2d 1187 and *Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588]; *id.* at 22 [discussing *Dean v. District of Columbia* (D.C.Ct.App. 1995) 653 A.2d 307]; *id.* at 23 [discussing *Standhardt v. Superior Court* (Ariz.Ct.App. 2003) 77 P.3d 451]; *id.* at 24 [discussing *In re Kandu* (Bankr. W.D. Wash. 2004) 315 B.R. 123]), is that California's equal protection clause provides independent protections and broader rights under certain circumstances than the federal Constitution.³ (*Kirchner, supra*, 62 Cal.2d at 588; *People v. Leung* (1992)

³ The validity of the decisions discussed by the State is questionable even as a matter of federal law, most having been reached before two decisions that changed the legal landscape with respect to discrimination against lesbians and gay men in this country: *Lawrence v. Texas* (2003) 539 U.S. 558 [overruling *Bowers v. Hardwick* (1986) 478 U.S. 186 and holding laws criminalizing same-sex intimate conduct violate due process] and *Romer v. Evans* (1996) 517 U.S. 620 [striking down state initiative banning anti-discrimination legislation designed to protect lesbians and gay men as lacking even a rational basis].

5 Cal.App.4th 482, 494.) As the California Supreme Court explained in *Serrano v. Priest* (1976) 18 Cal.3d 728, "our state equal protection provisions ... are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable." (*Id.* at 764 [internal quotation marks omitted]; see also *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, 469 ["[W]e do not consider ourselves bound by [federal] decisions in interpreting the reach of the safeguards of our state equal protection clause".])

Unlike federal law (see *Craig v. Boren* (1976) 429 U.S. 190, 197), California's equal protection guarantee requires the highest level of scrutiny for gender classifications, which must reflect the narrowest and least restrictive means for accomplishing a compelling state purpose. (*Arp v. Workers Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 400; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-18; *Connerly, supra*, 92 Cal.App.4th at 33.) For several reasons, the marriage ban triggers this standard.

2. Family Code Sections 300 And 308.5 Facially Classify On The Basis Of Sex.

To specify who may marry, the marriage statutes do not employ sex-neutral classifications, such as "person," "applicant" or "spouse." Instead, they use the terms "man" and "woman." (Fam. Code §§ 300, 308.5.) These terms are undeniably sex-based classifications. How could they not be? (See *Goodridge, supra*, 440 Mass. at 345-46 [conc. opn. of Greaney, J.,] ["That the classification is sex based is self-evident"].)

The State nonetheless argues that the marriage ban does not rest on any gender classification because the laws purportedly "do not favor one gender over the other." (AOB 27.) That is incorrect. To classify is simply

to "specify[] who will and who will not come within the operation of a particular law." (*Connerly, supra*, 92 Cal.App.4th at 32.) A statute thus need not "confer a preference before strict scrutiny applies"; all that is required is a facial classification based on sex. (*Id.* at 43-44.) Because California law relies explicitly on gender to prescribe who may marry whom, strict scrutiny applies.

None of the State's cases is on point. Several involve laws, unlike those challenged here, that were *gender-neutral* on their face. (See *Hardy v. Stumpf* (1978) 21 Cal.3d 1 [city requirement that police applicants be able to scale a six-foot wall]; *Reese v. Alcoholic Beverage Control Appeals Board* (1977) 64 Cal.App.3d 675 [liquor license regulation concerning "spouses" of law enforcement personnel].) In that situation, strict scrutiny applies only upon a showing of sex-based disparate treatment. But the marriage ban "on its face, employs a suspect classification," and thus triggers strict scrutiny under *Connerly*.⁴

⁴ Of the State's two remaining cases involving gender-based equal protection challenges, one did not consider what level of constitutional scrutiny was appropriate (*Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 364-65), and the other is ambiguous on the question yet still irrelevant (*Miller v. California Commn. On The Status Of Women* (1984) 151 Cal.App.3d 693, 699). The court in *Miller* upheld a statute creating a statewide commission to develop information and advocate measures to foster the social and economic equality of women. The Court of Appeal did not clearly adopt *or* reject strict scrutiny, but instead concluded only that "the use of gender-framed measures, supported by public resources, to remedy gender bias serves the interests of equality protected by our constitution." (*Id.* at 699.)

The result in *Miller*, however, is consistent with the application of strict scrutiny for facial gender classifications. (See *Connerly, supra*, 92 Cal.App.4th at 46 ["[G]overnmental entities may use . . . gender-neutral methods of fostering equal opportunity and . . . , in some instances, even . . . gender-specific remedies may be employed. . . . Assuming that strict (continued on next page)

If strict scrutiny applied only when a facial classification also had a disparate impact, then a statute permitting marriage only between "two people of the same race" would not trigger strict scrutiny either, because it would treat all races equally. That is wrong, of course: a statute that classifies *everyone* by means of the same suspect criterion still classifies on the basis of that criterion—and is suspect. (See *Loving, supra*, 388 U.S. at 9; see also *Powers v. Ohio* (1991) 499 U.S. 400, 410[“[T]he suggestion that racial classifications may survive when visited upon all persons . . . has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree”]; *McLaughlin v. Florida* (1964) 379 U.S. 184, 191.)

3. The Marriage Statutes Subject *Individuals* To Differential Treatment On The Basis Of Sex.

Even if strict scrutiny applied only when a statute treats men and women differently, the marriage ban does so. Equal protection rights belong to *individuals*, not classes. (*Perez, supra*, 32 Cal.2d at 716; *Loving, supra*, 388 U.S. at 8-9.) Under the anti-miscegenation laws, *individuals* were treated differently based on their race: a white person could marry a white person, but a black person could not. Just so here: though a man may marry a woman, a woman may not. The better-reasoned decisions in this area recognize this as a form of sex-based discrimination. (See *Brause v. Bureau of Vital Statistics, supra*, 1998 WL 88743 at *6; *Baker v. State of*

(footnote continued from previous page)

scrutiny is required, a *monitoring* program designed to collect and report accurate and up-to-date information is justified by the compelling governmental need for such information"].)

Vermont, supra, 744 A.2d at 906 [conc. & dis. opn. of Johnson, J.]; *Baehr v. Lewin, supra*, 74 Haw. at 572, 580.)

4. The Marriage Statutes Are Based On And Reinforce Sex-Role Stereotypes.

Moreover, the Equal Protection Clause no longer tolerates sex-role stereotyping as a basis for lawmaking. Where the State controls access to a right or an institution, it may not “exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’” (*United States v. Virginia* (1996) 518 U.S. 515, 541 [quoting *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, 725]; see also *id.* at 550 [“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”]; *Sail’er Inn, supra*, 5 Cal.3d at 18 [“[C]ourts must look closely at classifications based on [sex] lest outdated social stereotypes result in invidious laws or practices”]; *People v. Statley* (1949) 91 Cal.App.2d Supp. 943, 951.)

By limiting marriage to a man and a woman, the State legitimates and endorses stereotypical beliefs that the sexes not only can, but *must* “complement” each other. (See *Baker v. Vermont, supra*, 744 A.2d at 906 [“the sex-based classification contained in the marriage laws is . . . a vestige of sex-role stereotyping that applies to both men and women”] [conc. & dis. opn. of Johnson, J.].) This outdated understanding of gender—that men or women can access only a portion of the human experience and must be completed by the opposite gender—vastly discounts the great range of human potential in every individual. Likewise, “negative social and legal attitudes toward homosexuality can best be understood as preserving

traditional concepts of masculinity and femininity as well as upholding the political, market and family structures premised on gender differentiation.” (Law, S., *Homosexuality and the Social Meaning of Gender*, (1988) Wisc. L. Rev. 187, 188, 209.) By restricting marriage to the union of a man and woman, the State places its imprimatur on gendered standards for intimate behavior, family support, homemaking and raising children.

The uncontested historical evidence and the legislative history of Section 300 also show that the sex restriction in the marriage statutes is based upon invidious sex-role stereotypes. (See RA 239-253 [declaration of marriage historian Nancy Cott]; RA 96-102 [legislative history] [benefits of marriage "provide special protections for a financially dependent mother"; State should not provide this "windfall" to homosexuals].) It therefore warrants strict scrutiny.

B. The Marriage Ban Restricts The Exercise Of Lesbians' And Gay Men's Fundamental Right To Marry.

The trial court also correctly reviewed the marriage ban under strict scrutiny under the Equal Protection Clause because it “implicate[s] the basic human right to marry a person of one's choice.” (AA 127.)⁵

⁵ The City argued in the trial court that, because the marriage ban impinges the fundamental liberty right to choose one's own spouse, the Due Process Clause required strict scrutiny. The trial court agreed that a fundamental right was implicated, but analyzed the question under the Equal Protection Clause, which likewise requires strict scrutiny when a classification impinges a fundamental constitutional right. The State does not refute the trial court's fundamental rights analysis under the Equal Protection Clause, but instead addresses the matter only under the Due Process Clause. (AOB 38-40.) Because the question is substantively the same under either equal protection or due process jurisprudence, we address the State's due process arguments here.

Under the Equal Protection Clause, no classification-based restrictions on a fundamental right are constitutional unless they have a compelling justification and are narrowly tailored. (*Darces v. Woods* (1984) 35 Cal.3d 871, 885.) “A fundamental right means a fundamental constitutional right.” (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 448.) In determining the scope of fundamental constitutional rights, courts look first to state law and “the full panoply of rights Californians have come to expect as their due.” (*Serrano v. Priest, supra*, 18 Cal.3d 728, 764.) State courts have a “duty” to develop additional fundamental constitutional rights beyond those recognized under federal law and those made explicit in the state constitution, if such rights are “within the intention and spirit of our local constitutional language and . . . necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.” (*Id.* at 765, fn. 43.)

The right to marry the person of one's choice is a fundamental constitutional right. The California Supreme Court said so nearly 60 years ago: “[T]he essence of the right to marry is freedom to join in marriage with the *person of one's choice*”. (*Perez, supra*, 32 Cal.2d at 717 [emphasis added].) As the Court put it, the right to choose one’s own spouse is “as fundamental as the right to send one's child to a particular school or the right to have offspring.” (*Id.* at 715.) Imagine, for example, a statute that said a 20-year-old person could not marry a 50-year-old person; or that a judge could not marry a lawyer.

Since *Perez*, numerous California decisions have confirmed that marriage is a fundamental right. (See *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161; *People v. Belous* (1969) 71 Cal.2d 954, 963; *McCourtney v. Cory* (1981) 123 Cal.App.3d 431, 438; *Boren v. Dep't of*

Employment Dev. (1976) 59 Cal.App.3d 250, 259.) The right to marry also has long been regarded a fundamental constitutional right under federal law. (See, e.g., *Washington v. Glucksberg* (1997) 521 U.S. 702, 720; *Zablocki v. Redhail* (1978) 434 U.S. 374, 383, 387; *Cleveland Bd. of Education v. LaFleur* (1974) 414 U.S. 632, 639; *Loving, supra*, 388 U.S. at 12; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399.)

This freedom, to choose one's spouse, is deeply important both to those people who wish to marry and to society. It "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Loving, supra*, 388 U.S. at 12.) "[M]arriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275.) It "is a social institution of the highest importance," and "the decision whether *and whom* to marry is among life's momentous acts of self-definition." (*Goodridge, supra*, 440 Mass. at 322.) "Civil marriage anchors an ordered society" in myriad ways, but "is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." (*Id.*)

The right to choose one's own spouse is of constitutional dimension because the liberty interest at stake is so fundamental. "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." (*Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 617-618.) "Protecting these relationships from unwarranted state interference

therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." (*Id.* at 619.) This respect for personal liberty extends to *everyone*, including lesbians and gay men. (See *Lawrence, supra*, 539 U.S. at 573-574.)

The State acknowledges that "marriage is a fundamental right" (AOB 39), but argues that there is no fundamental right implicated here because "same-sex marriage is not deeply rooted in our culture."⁶ (AOB 38-40.) The trial court correctly rejected this. (AA 126-127.) Here, the threshold question is not whether gay men and lesbians have a fundamental right to marry, but whether *all* people do.

For example, *Eisenstadt v. Baird* (1972) 405 U.S. 438, held that the liberty right to use birth control, first announced in the context of a marital relationship in *Griswold v. Connecticut* (1965) 381 U.S. 479, was not limited to married persons: "If the right of privacy means anything, it is *the right of the individual, married or single*, to be free from unwarranted governmental intrusion" in this arena. (*Eisenstadt, supra*, 405 U.S. at 453 [emphasis added].)

In *Lawrence, supra*, the Supreme Court struck down a statute criminalizing sodomy between persons of the same sex, and overturned *Bowers v. Hardwick* (1986) 478 U.S. 186, which had *upheld* a statute

⁶It also maintains that due process is not violated because registered domestic partners are "the equivalent of spouses." AOB 38. But they're not. The California Supreme Court decision in *Koebke* that the State cites did not address the constitutionality of the marriage laws, but the legal rights afforded by domestic partnership registration. Because no constitutional challenge was involved, the case did not consider or address both the tangible and intangible, non-legal, ways in which domestic partnership registration falls far short of civil marriage.

criminalizing sodomy against constitutional challenge by a gay man. The Court criticized *Bowers* (among other reasons) for defining the personal dignity interest at stake far too narrowly. *Bowers* had asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." (*Id.* at 190.) "That statement," concluded *Lawrence*, "discloses the Court's own failure to appreciate the extent of liberty at stake." (539 U.S. at 567.)

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. (*Id.*)

Bowers thus should not have considered "homosexual" liberty, but rather human liberty. As the Court explained, "our laws and traditions afford constitutional protection" to matters that "involve the most intimate personal choices *a person* may make in a lifetime, choices central to personal dignity and autonomy." (*Id.* at 574 [emphasis added].). They include "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education." (*Id.*) Concluded the Court: "Persons in a homosexual relationship may seek autonomy for these purposes *just as heterosexual persons do.*" (*Id.* [emphasis added].)

So too here. The issue is not whether lesbians and gay men have a fundamental right to marry, but whether *all* people do. Neither *Perez* nor *Loving* asked whether there was a deeply rooted tradition of "interracial marriage." Indeed, the State acknowledges that there was no such deeply rooted tradition before *Perez*. (AOB 39.) The liberty interest at stake, rather, was exactly what the Court said it was: the "freedom to join in marriage with the person of one's choice." (*Perez, supra*, 32 Cal.2d at 717.) As the Court explained, "the right to marry is the right of individuals, not of

... groups." (*Id.* at 716.) When some citizens enjoy a right that others do not, it defies logic to determine whether that right is fundamental by asking whether the very class of people to whom it is denied has a long history of exercising it. Fundamental constitutional rights would mean precious little if they belonged only to those who already enjoy them.⁷

The State's only answer is that *Perez* "did not redefine the definition of marriage" (AOB 39-40), but that effort to distinguish *Perez* has nothing to do with whether *everyone* has a fundamental right to get married, or just some people. And, in fact, the distinction is wrong. The "definition" of marriage, as that term is used here, is just another way of referring to *the laws* relating to who may enter into this type of civil union. This Court is no more being asked to "redefine" marriage than the California Supreme Court was asked to do so in *Perez*: there, at issue was a longstanding racial restriction on who may get married; here, a longstanding gender restriction. The constitutional question presented here would be no different if the Family Code defined marriage as a "union between two persons," and then went on to state (either in the same provision or in a separate one) that "two persons of the same sex may not marry." As many courts have recognized, casting marriage as heterosexual *by definition* just begs the question. (See *Goodridge, supra*, 440 Mass. at 348 [conc. opn. of Greaney, J.]; *Castle v. State* (Wash. Sup. Ct., Sep. 7, 2004) 2004 WL 1985215, at *4; *Brause v. Bureau of Vital Statistics, supra*, 1998 WL 88743 at *2; *Halpern v. Toronto*

⁷This, of course, is not to say that recognizing the right to choose one's spouse as a fundamental right enjoyed by *all* people means the state can never burden that right. We can all think of obvious examples that doubtless would pass strict scrutiny if challenged—age or consanguinity limits, for example.

(Ont.Ct.App. 2003) 36 R.F.L. 5th 127.) Surely, circular semantics cannot forestall serious judicial inquiry into the denial of a constitutionally guaranteed, fundamental right.

II. THE SUPERIOR COURT CORRECTLY RULED THAT THE MARRIAGE BAN DOES NOT SURVIVE ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

The State defends the marriage ban only on the ground that “[t]he word ‘marriage’ has a particular meaning for millions of Californians, and that common understanding of marriage is important to them.” (AOB 33.) Quite apart from the fact that there is no evidence that this is so,⁸ the State never explains *why* preserving that “common understanding” is a legitimate goal for California to pursue, much less a compelling one. Perhaps that’s because it isn’t. It is purely arbitrary for the State to preserve in the law, *solely for its own sake*, one view of what constitutes a family. Thus, the issue here is not even the degree of “fit” between the law and a legitimate (possibly compelling) state interest. As the Superior Court correctly ruled, the State’s only justification for the marriage ban does not withstand even rational basis review,⁹ much less strict scrutiny,¹⁰ because the State has

⁸ See also AOB 2 [similar unsupported assertion].

⁹ Under rational basis review, the marriage ban is unconstitutional unless it is rationally related to a legitimate government interest that could have been within the contemplation of the Legislature or the voters when Sections 300 and 308.5 were enacted. This requires “a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.” (AA 111 [citing *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711] [citation omitted].)

¹⁰ Under strict scrutiny, the marriage ban fails unless the State can show that it is necessary to serve an actual and compelling state interest, and that interest “cannot be served by alternative means less intrusive on fundamental rights.” (AA 110; AA 127; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 357-358; *id.* at 340-41.)

failed to identify a single, legitimate state interest in support of the marriage ban. (AA 112, 127.) Preserving the “common understanding of marriage” is a euphemism, not a proper governmental objective.

A. Maintaining The Status Quo Solely For Its Own Sake Is Purely Arbitrary.

Traditionally—in fact, from this Nation’s founding—only white men have held the offices of President and Vice-President of the United States. But that does not mean Congress constitutionally could pass a law barring people of color or women from holding either office. Likewise, women commonly have been underrepresented in the science and mathematics fields; but nobody would suggest that any state legislature or Congress would therefore be free to pass a statute limiting the number of women admitted into graduate programs in the sciences. Nor is it conceivable that the F.C.C. could promulgate regulations forbidding the networks from hiring a blind lead anchor on the evening news (or a bald one, for that matter), simply because it would be unprecedented and might make some viewers balk. Whether a particular practice is longstanding or deeply engrained in our cultural consciousness, then, does not mean that it is constitutional when written into law.

Indeed, preserving the status quo solely for its own sake is not a legitimate governmental objective, much less a compelling one, and the State cites no authority for its claim that it is. (AOB 33, 36, 37, 40.). If “maintaining” a “common understanding” alone were sufficient to justify a law, such a rationale would sweep far too broadly and justify a great deal that most everyone would agree is purely arbitrary and sometimes even

deeply offensive.¹¹ Quite sensibly, then—and repeatedly—the courts have held that laws cannot be justified on the basis of tradition alone under *any* level of scrutiny. (See *Perez, supra*, 32 Cal. 2d at 727 [strict scrutiny]; *cf. Am. Academy of Pediatrics, supra*, 16 Cal. 4th at 338-39 [similar]; *Lawrence, supra*, 539 U.S. at 577-78 [rational basis]; see also *In re Anderson* (1968) 69 Cal.2d 613, 641 [conc. opn. of Tobriner, J.] ["no length of uncritical history or mindless tradition may sanction a procedure when 'the unconstitutionality of the course pursued has . . . been made clear'"] [citation omitted].) *Lawrence* perhaps put it best:

[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. (539 U.S. at 578-79)

Thus, "[a] prime part of the history of our constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." (*United States v. Virginia* (1996) 518 U.S. 515, 557.)

The fact that history or tradition is no *justification* for a law is fully consistent with the more general principle of constitutional review, equally

¹¹ At the same time, the fact that the government has no interest in maintaining the status quo for its own sake does not mean it must purge all hint of tradition from the law. Many of this Nation's legal traditions are of course quite admirable: its pervasive commitment to democratic ideals, to take a basic example. Others, however, have proved in time to be folly (such as denying the vote to women), or, like slavery, deeply shameful. This is precisely why laws can never be justified purely by their longstanding popularity. If they were, it would give the green light to legislating cultural inequities *into* law on a massive scale, and all such laws would be impervious to constitutional review at any level of scrutiny because, by definition, there *is* no other way to "preserve" a "commonly understood" practice than to persist in it.

well-established, that laws must be judged by contemporary norms, not historic ones. As the California Supreme Court has explained:

Constitutional concepts are not static. . . . The Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

(*Belous, supra*, 71 Cal. 2d at 967 [citations omitted]; see also *Brown v. Board of Education* (1952) 347 U.S. 483, 492-93 [overruling *Plessy v. Ferguson* (1896) 163 U.S. 537].)¹²

Thus many courts throughout this country, like the trial court here (AA 127), have rejected the “status quo” justification the State has put forward for California’s marriage ban. (See, e.g., *Baker v. Vermont, supra*, 170 Vt. at 223; *People v. Greenleaf* (2004) 780 N.Y.S.2d 899, 901-902; *Goodridge, supra*, 440 Mass. at 349 [conc. opn. of Greaney, J.].) So, too, should this Court. Nothing could be more arbitrary than to uphold a law simply because it is the law and always has been. In that event, the courts would be powerless to adjudicate constitutional controversies. The anti-miscegenation statutes struck down in both *Perez* and *Loving* would survive to this day.

¹² Accord *Brown v. Merlo* (1973) 8 Cal. 3d 855, 866 n.6 (“present constitutionality” of classification scheme “must be evaluated in light of the contemporary treatment accorded similarly situated individuals”); see also *id.* at 863 n.4, 868; *Perez, supra*, 32 Cal. 2d at 737 [conc. opn. of Carter, J.] [“The rule is that the constitutionality of a statute is not determined once and for all by a decision upholding it. A change in conditions may invalidate a statute which was reasonable and valid when enacted”]; *People v. Moon* (2005) 37 Cal.4th 1, 48.

There is also a more troubling aspect of the State's position that this Court cannot avoid confronting. For what perhaps lies behind the views of at least some of the "millions" of Californians to whom the "common understanding of marriage" is said to be important (AOB 33), is a concern that the marriages of opposite-sex couples would somehow be tarnished if gay men and lesbians also could get married. The State of course never says so, but, again, it never explains why the "common understanding" of marriage is "vitally important to the interests of the state" (AOB 2), nor was there any evidence below on that question, and so we are left to speculate.

To the extent this kind of concern is the reason, however, it would be unfortunate. Marriage quite obviously is not a private membership organization. (Cf. *Boy Scouts of America v. Dale* (2000) 530 U.S. 640.) Whatever their personal views of gay men and lesbians, and regardless whether those views are sincerely held on the basis of religious beliefs¹³ or otherwise, no married couple has the right to exclude gay men and lesbians from their ranks. Nor may the State pursue that objective on their behalf: moral disapproval or private animus is never a legitimate governmental

¹³ If religious beliefs are the reason that some Californians believe it is "important" to prohibit lesbians and gay men from getting married (AOB 33), it also would violate the no-preference and anti-establishment clauses to give those views any weight. (See Cal. Const., art. 1 § 4 ["Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The legislature shall make no law respecting an establishment of religion"]; *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 876 ["[T]he establishment clause prohibits not only explicit denominational preferences, but also government favoritism of religion in general"]; *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 600 [to be valid, law must have "a clearly secular legislative purpose"]; see also *Fox v. City of Los Angeles* (1978) 22 Cal.3d 798, 805.

objective. (See, e.g., *Norwood v. Harrison* (1973) 413 U.S. 455; *Lawrence, supra*, 539 U.S. at 583; *Santa Barbara v. Adamson* (1980) 27 Cal. 3d 123,133; *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 225-26; *Perez, supra*, 32 Cal.2d at 727 [“prejudices in the community” do not justify discriminatory marriage laws]; see also *id.* at 736 [conc. opn. of Carter, J.] [“Nor may the police power be used as a guise to cloak prejudice and intolerance. Prejudice and intolerance are the cancers of civilization”]; *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 97-98.) Majoritarian animus toward lesbians and gay men is no exception. (See *Lawrence, supra*, 539 U.S. at 583; *Romer v. Evans, supra*, 517 U.S. at 634; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1030.)

The truth is, marriage is not intended as a proxy for anyone’s view of model citizenship. (See, e.g., *Turner v. Safley* (1987) 482 U.S. 78 [prisoners retain right to marry]; *Zablocki v. Redhail* (1978) 434 U.S. 374 [deadbeat dads retain right to marry]; *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 844 [California’s strong public policy favoring marriage is “not based on anachronistic notions of morality”]; see also AB 849 §3(a) [defining the purposes of marriage].) Nor is anything in California’s marriage laws intended to protect any married person from being unwillingly associated with any other married person. If *that* is the reason that “millions” of Californians (AOB 33) do not want the law to recognize the family commitments made by gay men and lesbians as equivalent to those made by heterosexual individuals, then it, too, would be improper.

Alternatively, it is possible that some people do not want gay men and lesbians to be permitted to marry based upon either a belief that men

and women should play certain socially-prescribed, gender-specific roles in the family and/or incorrect stereotypes about gay people.¹⁴ If so, however, that too would be an impermissible state purpose. As discussed above, the California Constitution has long forbid the use of stereotyped gender roles to justify a law. Thus, beliefs—even deeply embedded ones—about whether men or women are inherently better at partnering with members of the opposite sex because of their innate abilities to provide financial support, nurture children, impose discipline or keep the home will not do.

Moreover, as the State concedes (AOB 34 fn. 22), the marriage ban cannot be justified on the basis of any stereotypes, whether gender-based or otherwise, that lesbians and gay men do not form lasting, committed family relationships, or do not have and raise children. Indeed, such prejudices are belied both by the uncontradicted evidence (RA 190-192, 257-258, 296-330, 911-916) and by California public policy. The Legislature has recognized, both in adopting the current domestic partner statute (Fam. Code § 297 Note) and, more recently, a non-discriminatory marriage law (AB 849), that lesbians and gay men form "family relationships" that the State has an interest in promoting and protecting. (See also *Koebke, supra*, 36 Cal.4th at 847; *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 611-12.) Concomitantly, the California Supreme Court has recognized that the state has an interest in assuring that same-sex couples have the same parental rights and obligations as heterosexual parents with respect to children they jointly adopt or bring into the world.

¹⁴ The record shows Family Code Section 300 was based in part on the incorrect assumption that gay people rarely or never have or raise children *and* on outdated stereotypes about men's and women's roles within a family. (See RA 98-99 [bill digest].)

(*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 119, 123; *K.M. v. E.G.* (2005) 37 Cal.4th 130, 143; *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, 166; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 442.)

Even under the rational basis test, to be legitimate, a legislative purpose must remain consistent with *current* public policy. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 866 fn.6 ["[T]he *present* constitutionality of the . . . statute's classification scheme must be evaluated in light of the *contemporary treatment accorded similarly situated individuals*"] [emphasis added]; see also *id.* at 868-869 ["One of the most basic, and familiar, tenets of the common law is that "[when] the reason of a rule ceases, so should the rule itself." (Civ. Code § 3510.) [A] classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered"].) Notions that gay men and lesbians do not form committed relationships or raise children just like their heterosexual counterparts are no longer consistent with public policy and must be rejected as legitimate state interests in support of the marriage ban.

B. California's Domestic Partnership Legislation Does Not Cure The Constitutional Violation, But Proves It.

The State places great emphasis on California's landmark domestic partnership legislation, but for the reasons explained above, the State's only explanation for why it is in the State's interest to prohibit gay people from getting *married*—because it always has—is arbitrary. It therefore is unnecessary for this Court to inquire whether that interest is at all furthered by extending legal rights and obligations to same-sex couples under a separate legal regime. Indeed, as explained below, and as the Superior Court correctly recognized, California's domestic partnership

legislation *undermines* the State's argument for the constitutionality of California's marriage ban. (AA 115.)

1. Registered Domestic Partners Do Not Enjoy The Same Legal Rights As Married Couples.

In the first place, California's domestic partnership legislation does not confer the same legal rights and benefits to same-sex couples that married couples enjoy. Not even the well-intentioned Legislature that passed AB 205 thought otherwise. In its initial form, the bill (which was later amended to eliminate certain rights) sought "to extend to registered domestic partners most, but *not all*, of the protections provided under California law to different-sex couples who marry and the corresponding obligations imposed upon them." (RA 882 [emphasis added].)

For example, AB 205 does not allow same-sex couples to file their taxes jointly, even for state income tax purposes. (Fam. Code §297.5 subd. (g).) This means that for lesbian and gay families in which one partner earns substantially more than the other, the family must pay hundreds, thousands or even tens of thousands of dollars more each year in state income taxes than a similarly situated married heterosexual couple.

Likewise, registered domestic partners do not enjoy the exemption from property tax reassessments on inter-spousal real-estate transfers that married couples enjoy (Cal. Const. art. XIII A § 2 subd. (g))—which can cost gay and lesbian families tens or even hundreds of thousands of dollars over their lifetimes.¹⁵ Additional exemptions from property taxes that

¹⁵ The Legislature recently adopted legislation to address this issue that would take effect in January 2006. (See SB 565, 2004-2005 Leg. Sess. [adding subsection (p) to Rev. & Tax. Code § 62].) However, like the Legislature's various other piecemeal efforts to address lesbian and gay (continued on next page)

heterosexual families enjoy likewise might not apply to gay and lesbian families if they are not treated as parents and grandparents within the meaning of these exemptions. (See *id.* subd. (h).)

A third example concerns community property. For married heterosexual couples, the lower earning or non-working spouse is protected by community property laws that make all income earned by either spouse during the course of a marriage community property, and tax that income accordingly. Domestic partners, however, are not entitled to have earned income treated as community property under state income tax laws even though such income is community property for other purposes. (Fam. Code § 297.5 subd. (g).) This is another way in which lesbian and gay couples with disparate incomes continue to shoulder a higher tax burden than similarly situated married heterosexual couples.

AB 205 also does not extend any rights or obligations of marriage that are established by constitutional provision or initiatives (Fam. Code § 297.5 subd. (j)), nor does it provide any security for couples or families who travel outside California's borders. Nor is it likely that other states or countries will ever recognize California's "domestic partnerships" as equivalent to marriages, since even California does not.

2. The Domestic Partnership Regime Proves In One Gesture The Profound Importance Of Marriage And The Irrationality Of Preventing Lesbians And Gay Men From Marrying.

Even if there were precise parity between the legal rights of registered domestic partners and those of spouses, that still would not make

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relationships, this one is prospective only and may be challenged in the courts.

California’s decision to prevent gay and lesbian couples from getting married any more defensible. On the contrary, it highlights just how irrational the marriage ban is.

The courts should not blind themselves to the social reality underlying statutory text. Just as “[e]very one kn[ew]” that the railroad car segregation statute at issue in *Plessy v. Ferguson, supra*, “had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons” (163 U.S. at 556 [dis. opn. of Harlan, J.]), so here everyone knows that the domestic partnership law was not created to exclude heterosexuals from domestic partnerships, but rather to soften the sting of excluding gays and lesbians from marriage while leaving the commitment to segregation fundamentally intact. “[M]arriage is considered a more substantial relationship and is accorded a greater stature.” (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 31; see also *Goodridge, supra*, 440 Mass. at 322 [marriage is “an esteemed institution”].) Even the State admits that “‘domestic partnership’ does not have the same meaning as ‘marriage.’” (AOB 36.)¹⁶

¹⁶ The uncontradicted—and overwhelming—evidence submitted by the City demonstrates the same thing (see RA 241 ¶6), including the many testimonials of the gay men and women and their family members who know with great personal certainty that marriage is profoundly different. In the straightforward words of one couple’s teenage son, “Domestic partnership is not the same as marriage. It’s less than marriage and everybody knows it.” (RA 318 ¶10.) In the words of another person who has registered as a domestic partner, that act felt as perfunctory and meaningful as “getting a dog license.” (RA 298 ¶5 [“In fact, I think we may have been standing in the same line that you stand in to get a dog license”]; see also RA 301 ¶12, RA 306-307 ¶11, RA 312 ¶¶12-16, RA 318 ¶10, RA 323 ¶10.)

This intangible but very real difference between marriage and domestic partnership, which has nothing to do with concrete benefits but goes instead to human dignity, matters for purposes of constitutional analysis every bit as much as the tit-for-tat comparison and tally of various tangible rights. (See *Sweatt v. Painter* (1950) 339 U.S. 629, 634; see also *United States v. Virginia, supra*, 518 U.S. at 548; *Brown v. Board of Education, supra*, 347 U.S. at 493; *McLaurin v. Oklahoma State Regents* (1950) 339 U.S. 637, 641.) Here, it is beyond debate in both the evidence and the caselaw that segregated legal regimes stigmatize, demean and degrade.¹⁷ The segregated domestic partnership regime thus does not cure the constitutional violation, but proves it.¹⁸

¹⁷See RA 961 ¶5; see also *United States v. Virginia, supra*, 518 U.S. 515; *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718; *Runyon v. McCrary* (1976) 427 U.S. 160; *Palmer v. Thompson* (1971) 403 U.S. 217, 245, and cases cited in fn.2 therein; *Brown v. Louisiana* (1966) 383 U.S. 131, 139; *Watson v. Memphis* (1963) 373 U.S. 526; *Johnson v. Virginia* (1963) 373 U.S. 61; *Turner v. City of Memphis* (1962) 369 U.S. 350; *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715; *Brown v. Board of Education, supra*, 347 U.S. at 494; *Shelley v. Kraemer* (1948) 334 U.S. 1; *Plessy v. Ferguson, supra*, 163 U.S. at 556, 560 [dis. opn. of Harlan, J.]; *People ex rel. Deukmejian v. CHE, Inc.* (1983) 150 Cal.App.3d 123, 135.

¹⁸The State urges this Court to do as the Vermont Supreme Court did in *Baker v. Vermont, supra*, 170 Vt. 194, and allow the Legislature to decide “an appropriate way in which to afford equivalent rights and benefits” to same-sex couples (AOB 6, 22-23), but *Baker* involved a different question. At issue there was whether “the exclusion of same-sex couples from the *benefits and protections incident to marriage*” was unconstitutional (*id.* at 215 [emphasis added]) under Vermont’s “common benefits” clause, which differs in scope and purpose from the federal equal protection clause (see *id.* at 212). Although the Court directed the Legislature to craft an appropriate remedy for the constitutional violation, *Baker* expressly left open whether it would be constitutional for the State to confer equal benefits on gay and lesbian couples yet refuse to allow them to (continued on next page)

Indeed, the very breadth of this State’s extensive domestic partnership benefits reveals California’s segregated family law regime as *particularly* arbitrary and irrational in ways perhaps never before seen. On the one hand, the State’s decision to afford broad legal protections to gay and lesbian couples in countless ways (see Appendix A), including through domestic partnerships, reflects a legislative determination that those families are just as deserving of respect in the eyes of the law as any other, *i.e.*, that there is nothing harmful, undesirable or threatening to society about the family commitments made by gay men and lesbians in the least. Yet, on the other hand, the State’s refusal to permit gay men and lesbians actually to get *married* is based on the opposite premise—that gay and lesbian families (for whatever reason) do not deserve to be equally and fully integrated into the fabric of civil society, but must instead be relegated to second-class citizenship. The present state of California’s family law thus reflects entirely irreconcilable legislative judgments. In words of the Superior Court, if the domestic partnership regime shows that same-sex couples are worthy of the *rights* of marriage, why then are they not also worthy of marriage *rites*? (See AA 115.)

Even if California’s domestic partnership law gave gay and lesbian couples *exactly the same* legal protections as marriage, then, it would make no difference other than to emphasize just how empty of legitimate purpose—and thus pointed—the segregation is. Because the law gives

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marry, stating that the question was not at issue. (See *id.* at 224.) The Massachusetts Supreme Court, when it did reach that question, held that nothing could cure the constitutional violation of denying marriage other than marriage itself. (*Opinion of the Justices to the Senate, supra*, 440 Mass. 1201.)

great respect to individual dignity interests, the means matter every bit as much as the end. When Rosa Parks got on the bus, she certainly would have arrived at her destination in whatever seat she chose, but it was offensive to our core constitutional principles for her government to make her get there by taking a backseat.

C. The Constitutional Question Cannot Be Deferred To Either The Legislative Branch Or The Voters.

Finally, the State argues repeatedly that the marriage ban reflects “a careful balance” of legislative choices (AOB 4, 6, 34) and argues that “the legislative process . . . is best suited to consider . . . the complex social and policy implications involved in the definition of marriage.” (AOB 35.) But the State has not identified any “complex social and policy implication” of permitting gay men and lesbians to get married. On the contrary, its only stated reason for refusing to permit such marriages is because it always has. Moreover, the Legislature *has* spoken: in its view, lesbians and gay men should be permitted to get married, and it has made extensive legislative findings as to why that is so. (See AB 849.)

In all events, if the mere passage of a law alone could justify it, no law would *ever* be subject to meaningful judicial review. The Constitution would be little more than an advisory document for the political branches, and there would be no judicial check or balance on the Legislature.

The Superior Court rightly gave these arguments short shrift. (See AA 111.) If the Superior Court had held otherwise, it would have abdicated its most crucial judicial function: evaluating the constitutionality of legislation. (See *Goodridge, supra*, 440 Mass. at 338-339 [“To label the court's role as usurping that of the Legislature . . . is to misunderstand the nature and purpose of judicial review. We owe great deference to the

Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues"].

III. THE RECORD PROVIDES TWO ADDITIONAL, INDEPENDENT GROUNDS FOR UPHOLDING THE TRIAL COURT'S DECISION TO APPLY STRICT SCRUTINY TO INVALIDATE THE SEX RESTRICTION.

The trial court opted to apply strict scrutiny under the Equal Protection Clause. The record also supports two alternative reasons why strict scrutiny is constitutionally required: the marriage ban violates California's constitutional right to privacy, and it intentionally discriminates based on sexual orientation.

A. The Sex Restriction Violates The Constitutional Privacy Right To Choose One's Own Spouse Free From State Interference.

Californians enjoy an express right to privacy under the California Constitution that has no federal equivalent. (Cal. Const. Art. I, § 1). The right of privacy “is the right to be left alone.” (RA 105 [ballot materials].) Among other matters, it protects “our families, our thoughts, our emotions, our expressions, our personalities, . . . and our freedom to associate with the people we choose.” (*Id.*)

Under the Privacy Clause, the right to choose a spouse is "virtually synonymous with the right to intimate association." (*Ortiz v. Los Angeles Police Relief Ass'n, Inc.* (2002) 98 Cal.App.4th 1288, 1303.) This privacy right requires strict judicial scrutiny of governmental interference in the intensely personal decision of whom to marry. (*Id.* at 1300-1307.) Because it is now beyond dispute that there is a constitutionally protected right to intimate association with persons of the same sex (*Lawrence, supra*, 539 U.S. 558), the California Privacy Clause protects the right to

choose a person of the same sex as a spouse without undue government interference.

Because this case "involves an obvious invasion of an interest fundamental to personal autonomy," *i.e.*, "the freedom to pursue consensual family relationships," the State must demonstrate a "compelling interest" for the marriage ban. (*Am. Academy of Pediatrics, supra*, 16 Cal.4th at 340 [internal quotation omitted].) In other words, strict scrutiny applies.

The State argues that *Ortiz* does not apply because there is no privacy interest in "same-sex marriage." (AOB 43.) But as already discussed, that poses the wrong question. Moreover, the California Supreme Court has rejected just this type of argument in the privacy context. (See *Am. Academy of Pediatrics, supra*, 16 Cal.4th at 338-339 ["[I]t plainly would defeat the voters' fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right"].) So, too, should this Court. Privacy rights belong to *all* Californians, not just some.

B. The California Equal Protection Clause Requires Strict Scrutiny Because The Marriage Ban Intentionally Discriminates Based On Sexual Orientation.

This Court should also subject the sex restriction in the marriage statute to strict judicial scrutiny because it intentionally discriminates on the basis of sexual orientation in violation of the California Equal Protection Clause.

1. Sections 300 And 308.5 Classify On The Basis Of Sexual Orientation Both By Design And In Effect.

Although Section 300 does not contain the words "sexual orientation," the State is wrong that it does not classify on the basis of sexual orientation. (AOB 29.) Indeed, the State's position is peculiar: if the statute does not classify on the basis of *gender*, then surely it classifies at least on the basis of sexual orientation. If not sexual orientation, then what? (All laws draw lines of *some* kind.)

Under the California Constitution, the equal protection clause is offended not only by intentional (de jure) discrimination, but also by de facto discrimination. (*Crawford v. Board of Education* (1976) 17 Cal.3d 280, 286.) Federal law is more stringent, but even there, a facially benign classification is suspect if it has a disparate impact on a protected group and there is evidence of a discriminatory legislative intent. (*Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 272.)

Under either test, the State's refusal to permit two people of the same sex to marry discriminates on the basis of sexual orientation. It is obvious that this has a de facto disparate impact on gays and lesbians. Who but a gay or bisexual man (or woman) would want to marry another man (or woman)? Moreover, the legislative history shows that this discrimination was intentional: the central purpose behind limiting marriage to one man and woman was to prohibit lesbians and gay men from getting married. (See generally RA 1023-1182 [legislative history of 1977 amendment to Family Code § 4100, later recodified as § 300]; RA 88-92 [ballot pamphlet materials for Proposition 22, later codified as § 308.5].)

The State argues that "California's understanding of marriage as between a man and a woman" was not "*originally* drafted with discriminatory animus toward same-sex couples." (AOB 29 [emphasis

added].) But whatever the Legislature might have thought about gays and lesbians in the mid-1800's—or whether it even was cognizant of them at all—is irrelevant. Sections 300 and 308.5, at issue here, amended the Family Code in 1977 and 2000 respectively for the express and well-documented purpose of keeping gays and lesbians from marrying. That is clear evidence of intentional discrimination against gay men and lesbians, and it is, together with disparate impact, sufficient to establish a sexual orientation classification.

2. Sexual Orientation Is A Suspect Classification Under California's Equal Protection Clause.

Race, sex, and religion are all considered suspect classifications because they are so rarely relevant to a legitimate government interest. (*Owens v. City of Signal Hill* (1984) 154 Cal.App.3d 123, 128; *Sail'er Inn, supra*, 5 Cal.3d at 17.) The State is wrong that sexual orientation discrimination is any different. (AOB 30-31.) Its only reason that sexual orientation is *not* a suspect classification is because the question is one of first impression under California law.¹⁹ (AOB 30.) However, the criteria for treatment as a suspect classification are the following:

¹⁹ Federal law is also unsettled. *Romer v. Evans* (1996) 517 U.S. 620 (cited AOB 31) did not decide the question because it did not need to; the law there was so arbitrary that it did not even pass rational basis review. Neither did *Lawrence* (cited AOB 31); that case rested on substantive due process grounds. (See 539 U.S. at 564.)

Although the Ninth Circuit's decision in *High Tech Gays v. Defense Industrial Security Clearance Office* (9th Cir. 1990) 895 F.2d 563 (cited AOB 31 n.19) held that sexual orientation is not a suspect classification, it relied solely on the Supreme Court's now discredited analysis in *Bowers v. Hardwick* (1986) 478 U.S. 186 (see *High Tech Gays, supra*, 895 F.2d at 571), which *Lawrence* overruled. Even the Ninth Circuit is no longer bound by the decision. (See *Miller v. Gammie* (9th Cir. 2003) (en banc) 335 F.3d 889, 899.) Under pre-*Bowers* decisions by the Ninth Circuit, (continued on next page)

- (1) the classification is "an immutable trait, a status into which the class members are locked by the accident of birth";
- (2) the trait "frequently bears no relation to ability to perform or contribute to society"; and
- (3) the trait bears a "stigma of inferiority and second class citizenship," in other words, a history of "severe legal and social disabilities." (*Sail'er Inn, supra*, 5 Cal.3d at 18-19.)

As explained below, sexual orientation meets every one.²⁰

First, sexual orientation is as inherent in and fundamental to one's identity as is race, sex or religion. (See *Koebke, supra*, 36 Cal.4th at 842-843.) In that sense, it is just as "immutable" as sex (which can be changed through extraordinary measures, as some might argue also is true of sexual orientation). Sexual orientation and sexual identity "are so fundamental to one's identity that a person should not be required to abandon them." (*Hernandez-Monteil v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084, 1093; accord *Karouni v. Gonzales* (9th Cir. 2005) 399 F.3d 1163, 1173.) "The kinds of intimate relationships a person forms. . . implicate deeply held personal beliefs and core values." (*Koebke, supra*, 36 Cal.4th at 843.) Indeed, imagine a world where men could marry only men, and women only women; surely few heterosexual people could imagine trying to change

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homosexuals are recognized as entitled to heightened protection under the Fourteenth Amendment. (*Hatheway v. Sect. of Army* (9th Cir. 1981) 641 F.2d 1376, 1382; *Beller v. Middendorf* (9th Cir. 1980) 632 F.2d 788, 808-810.) Judge Henderson came to the same conclusion in a careful, thorough analysis in *High Tech Gays*. (See *id.* (N.D.Cal. 1987) 668 F.Supp. 1361, 1369-70, rev'd (9th Cir. 1990) 895 F.2d 563.)

²⁰The proposition appears so self-evident that at least one court has *assumed* that sexual orientation is a suspect classification that triggers strict scrutiny under California's Equal Protection Clause. (*Children's Hospital and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 769.)

their sexual identity in order to hew to the norm. Because sexual orientation is "an innate characteristic" and "such an integral part of human freedom" (*Karouni, supra*, 399 F.3d at 1173 [internal citations omitted]), it satisfies the first factor.

Second, sexual orientation bears no relation to one's ability to contribute to society. (See RA 257 ¶¶ 11-12.) Long gone are the days when the medical and psychiatric establishments believed homosexuality to be a disease or a defect. (RA 255-256 ¶¶ 3, 5; RA 228 ¶ 11.) Thus, workplace discrimination against gay men and lesbians has long been recognized as irrational because it constitutes "arbitrary discrimination on grounds unrelated to a worker's qualifications." (*Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, 474-475.)

Finally, the Legislature has found that gays and lesbians have been subject to a long history of social discrimination. (See Fam. Code 297, Note). The United States Supreme Court, the California Supreme Court, and lower courts have concluded the same thing. (See *Lawrence, supra*, 539 U.S. at 571; *Gay Law Students Assn., supra*, 24 Cal.3d at 488 [struggle for gay rights bears "a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities"]; *Smith v. Fair Employment and Housing Commission* (1996) 12 Cal.4th 1143, 1210 fn.7 [conc. & dis. opn. of Kennard, J.] ["homosexual couples have been subject to a . . . continuing . . . history of discrimination"]); see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276 [homosexuals "share a history of persecution comparable to that of Blacks and women"]; *Snetsinger v. Mont. Univ. System* (Mont. 2004) 104 P.3d 445, 455 ["It is overwhelmingly clear that gays and lesbians have been historically subject to unequal treatment and invidious discrimination"].)

Thus, it "is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" (*Rowland v. Mad River Local Sch. Dist.* (1985) 470 U.S. 1009, 1014 [Brennan, J., dissenting from denial of certiorari] [quoting *Plyler v. Doe* (1982) 457 U.S. 202, 216].) This is the *sine qua non* of a suspect classification.

CONCLUSION

The judgment should be affirmed.

Dated: November 9, 2005

Respectfully submitted,

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APPENDIX A:

STATUTES PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

- Civil Code § 51.7 (freedom from violence);
- Code of Civil Procedure §204 (jury service exemptions); *id.* § 231.5 (peremptory juror challenges);
 - Education Code § 200 (equal rights and responsibilities in state educational institutions); *id.* § 233(a)(2) (school curriculums); *id.* § 32228 (public school resources to combat bias); *id.* § 35294.21(b)(6) (school staffing); *id.* § 44253.2(e)(5) (cultural diversity); *id.* § 44253.3 (teacher credentialing); *id.* § 51930 (goals of health education); *id.* § 51933 (sexual health education materials); *id.* § 67380 (statistics on hate violence complied by publicly funded higher education institutions); *id.* § 87100 (equal employment opportunity in community college system);
 - Family Code §§ 297, 297.5, 298, 298.5, 299, 299.2, 299.3, 299.5, 299.6 (domestic partnerships); *id.* § 9000(b), (f) (adoption); see also Cal. Code Regs., tit. 22 §§ 88030, 89002, 89317 (adoptions and foster families);
 - Government Code §§ 12920, 12921 (non-discrimination in employment and housing); *id.* §12940 (employment discrimination); *id.* § 12944 (licensing discrimination); *id.* § 12955 (housing discrimination); *id.* § 18500 (goals for civil service system); *id.* §§ 50262-50265 (establishing and defining mission of local human relations commissions);
 - Health & Safety Code § 1365.5 (health care service plans); *id.* §§ 1529.2 , 1563 (foster family and community care licensing personnel training); *id.* §1586.7 (adult day care facilities);
 - Insurance Code § 10140 (life and disability insurance); *id.* § 12693.28 (administration of Healthy Families Program);

- Labor Code § 4600.6(g) (workers compensation insurance);
- Penal Code §422, 422.5, 422.6, 422.7, 422.75, 422.80, 422.85, 422.865, 3053.4 (hate crimes and penalties); *id.* § 628.1 (hate crimes reporting by public education institutions); *id.* §666.7 (sentence enhancement for felony damage to institutional property); *id.* §13519.4 (law enforcement training on cultural diversity);
 - Public Contract Code § 61.8 (state contracting);
 - Welfare & Institutions Code § 16001.9(1)(22) (rights of foster children); *id.* § 16003 (training for relatives or extended family members of caregivers of foster care children); *id.* §16013 (access to services and programs by persons providing services and care to foster children).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,321 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 9, 2005.

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