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Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Given the importance of the constitutional issues presented by the Marriage Cases, it is not surprising that the Court has heard from what may be an unprecedented number of amici, including many who have a direct interest in maintaining the integrity and strength of our state Constitution's central guarantees of equality, due process, privacy, and expression. Respondents here answer the briefs of amici who urge the Court to reverse the decision of the trial court and to permit the State to continue to bar same-sex couples from civil marriage.[1]

The questions to be decided here are issues of constitutional law and require the application of legal principles. At the same time, however, the Marriage Cases are before this Court against a backdrop of significant public engagement and discourse. This context is not unique to this case, or to this Court. This Court has long demonstrated a commitment to embracing principles of full equality even at times when such basic application of the law eluded other courts. Unlike the U.S. Supreme Court, which came to recognize and profoundly regret the ignominy that was *Plessy v. Ferguson* (1896) 163 U.S. 537, this Court charted a path that history has entirely vindicated. In *Perez v. Sharp* (1948) 32 Cal.2d 711, this Court held that the promise of equality in the California Constitution must extend to all her citizens, regardless of private or public prejudice.

Respondents respectfully suggest that this history is instructive here. There is a growing recognition and appreciation that the equal dignity and citizenship of lesbian and gay couples in California must include their right

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[1] For the Court's convenience, Respondents have attached an Appendix listing all of the amici and their counsel, and indicating which parties they support. (See Appendix filed herewith at pp. 1-10.)

to participate equally in the institution of civil marriage. It remains only for this Court, in the discharge of its role as guardian of the state's Constitution, to give formal voice to that reality.

The range of amici who have chosen to add their names and their voices in support of Respondents' legal arguments further attests that the time to recognize the right of same sex couples to marry in California is at hand.

Amicus briefs urging the Court to end the exclusion of same-sex couples from marriage have been filed by nineteen California cities and counties, including the five most populated cities in California (the cities of Los Angeles, San Diego, San Jose, Long Beach, and Oakland), as well as by sixteen state legislators. By contrast, there were no amicus briefs supporting the marriage restriction submitted by any local governments or public officials (other than those who are Appellants in this action and their counsel).

Amicus briefs opposing the marriage ban in order to end the harms inflicted on children of lesbian and gay parents and on lesbian and gay (as well as non-gay) adults and youth have been filed by the American Psychological Association, the California Psychological Association, the American Psychiatric Association, the National Association of Social Workers and its California chapter, the California District of the American Academy of Pediatrics, the American Psychoanalytic Association, and the American Anthropological Association. By contrast, no national, regional or local associations of child welfare experts, social scientists, or psychologists have defended the marriage ban.

Amicus briefs supporting the constitutional rights of same-sex couples to marry also were submitted by the American Academy of Matrimonial Lawyers and its Northern California Chapter, as well as by the

Los Angeles County Bar Association, the Santa Clara County Bar Association, the Bar Association of San Francisco, the Beverly Hills Bar Association, California Women Lawyers, the Women Lawyers Association of Los Angeles, the San Francisco Trial Lawyers Association, the National Asian Pacific American Bar Association, the Asian American Bar Association of the Greater Bay Area, the Asian Pacific American Bar Association of Los Angeles County, the Korean American Bar Association of Southern California, the Japanese American Bar Association of Greater Los Angeles, the Philippine American Bar Association, the South Asian Bar Association of Northern California, the Southern California Chinese Lawyers Association, Bay Area Lawyers for Individual Freedom, the Lesbian and Gay Lawyers Association of Los Angeles, the National Lesbian and Gay Law Association, Sacramento Lawyers for the Equality of Gays and Lesbians, and the Tom Homann Law Association. By contrast, no briefs in favor of the current marriage ban have been submitted by any bar or legal associations.

Further, while some amici argue that the decisions in *Perez v. Sharp*, *supra*, 32 Cal.2d 711 and *Loving v. Virginia* (1967) 388 U.S. 1 have no relevance to the Marriage Cases, that view is not shared by the California State Conference of the NAACP, the NAACP Legal Defense and Educational Fund, Inc., the Civil Rights Clinic of Howard University School of Law, and myriad other leading civil rights organizations that have filed amicus briefs urging this Court to apply the principles in those historic decisions to strike the restriction challenged here.

Similarly, while some amici claim that sexual orientation does not merit heightened scrutiny and that comparisons to discrimination based on race, national origin, and alienage are inappropriate, the leading national and state organizations with expertise regarding proper application of

heightened scrutiny disagree. These include, among others: the Mexican American Legal Defense and Education Fund, La Raza Centro Legal, more than sixty Asian Pacific American organizations, the Anti-Defamation League, the Southern Poverty Law Center, and the Equal Justice Society.

Likewise, although some amici argue that the marriage restriction does not discriminate based on sex, leading national and state legal organizations that specialize in sex discrimination law – the California Women's Law Center, Equal Rights Advocates, and Legal Momentum (formerly known as NOW Legal Defense and Education Fund) – have submitted briefs urging the Court to hold that the ban impermissibly discriminates based on sex and perpetuates inaccurate and harmful gender stereotypes.

And while some amici who support the marriage ban claim that religious sentiment is overwhelmingly opposed to Respondents' claims, religious groups and leaders have weighed in on both sides, with more than 400 religious organizations and leaders supporting the right of same-sex couples to marry.

Finally, some of the country's most respected legal scholars filed amicus briefs supporting equal marriage rights, including, among others, Professor and former California Supreme Court Associate Justice Joseph R. Grodin, Associate Dean Scott Altman, and constitutional and family law Professors Dean Paul Brest, Grace Ganz Blumberg, Jesse Choper, William N. Eskridge, Jr., Susan R. Estrich, Kenneth L. Karst, Herma Hill Kay, Joan H. Hollinger, Pamela S. Karlan, Lawrence Levine, Kathleen M. Sullivan, Jonathan D. Varat, and Michael S. Wald.

Since California's inception as a State, this Court has played an instrumental role in ensuring that the guarantees of the California Constitution are applied equally to all. Judicial vindication of

constitutional principles in these cases has yielded some of the most defining and respected moments in our state's history. (See, e.g., *Perez v. Sharp, supra*, 32 Ca.2d 711 [striking laws barring interracial marriage]; *Sei Fujii v. State of California* (1952) 38 Cal.2d 718 [striking California's alien land law]; *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [striking voter initiative amending California Constitution to permit private race discrimination in the sale of housing]; *Sail'er Inn, Inc. v Kirby* (1971) 5 Cal.3d 1 [striking law restricting women's choice of occupations].)

This has been true for lesbian and gay Californians as well. This Court repeatedly has ensured that laws and legal principles are applied equally to lesbian and gay people, including in the area of family law. (See, e.g., *Stoumen v. Reilly* (1951) 37 Cal.2d 713 [holding that the State could not close a bar simply because gay people associated there]; *Morrison v. State Bd. of Education* (1969) 1 Cal.3d 214 [holding that the State could not discharge a teacher for private same-sex conduct]; *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458 [holding that public utility could not discriminate against employees based on sexual orientation]; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [holding that the State could not discriminate against gay men in the enforcement of a criminal statute]; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417 [permitting second-parent adoptions by same-sex couples]; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 [holding that parentage statutes must be construed gender neutrally to protect children of same-sex parents]; *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 [holding that state law prohibits discrimination against domestic partners]). Our state has responded favorably to these decisions, because they are consistent with settled policies favoring inclusion and a deeply shared value of respecting diversity. The same is true of the question now before the

Court. Respondents wish to participate and share in the institution of civil marriage on equal terms; they do not wish to abolish or alter it, and their participation will not diminish the existing rights of others in any way.

As this Court has long recognized, the freedom to marry the person of one's choice is an essential aspect of human dignity. For most people, being able to exercise that freedom and to join with one's chosen partner in marriage is one of the most meaningful and cherished decisions in a person's life. To be denied that freedom is to suffer a unique – and uniquely personal and demeaning – harm.

To deny same-sex couples the same legal right to marry that heterosexual couples celebrate, and to permit the State to limit same-sex couples to the separate and lesser status of registered domestic partnerships, would suggest that they are not valued as equal members of our diverse community, and that it is legitimate for their government to treat them differently, and in an intentionally inferior way, from how it treats their neighbors, coworkers, family members, and friends. Such a message cannot be reconciled with California's constitutional principles, and would be an unworthy legacy for our state. With that in mind, Respondents respond below to the amici who oppose relief in the Marriage Cases.

ARGUMENT

I. INVALIDATING THE MARRIAGE EXCLUSION IS CONSISTENT WITH THIS COURT'S ROLE AS NEUTRAL ARBITER OF CONSTITUTIONAL ISSUES.

In prior cases, this Court repeatedly has affirmed the inherent equality and dignity of lesbian and gay people. Indeed, as Professor William N. Eskridge, Jr. has explained, "at *every* stage of California's evolving policy toward sexual minorities, this Court has played an active

and critical role, repeatedly ameliorating or trumping antigay legislation supported by popular prejudice and stereotyping and pressing state policy toward more equal treatment." (Br. of Prof. William N. Eskridge, Jr. at p. 5 (hereafter Prof. Eskridge), italics added.) As a result of this Court's rulings, as well as the enactment of laws and executive policies prohibiting official discrimination based on sexual orientation, California has increasingly embraced lesbian and gay people as equal members of society. Respondents now seek removal of the last barrier to their inclusion as fully equal citizens of this state by asking the Court to hold that their exclusion from civil marriage violates their rights to equal protection, privacy, due process, and freedom of association and expression under the California Constitution.

In opposition to this claim, some of the amici supporting Appellants argue not merely that Respondents are wrong on the constitutional merits, but that it would be *improper* for this Court to subject the marriage restriction to meaningful judicial review. Specifically, these amici argue: (1) that marriage is a matter of "public policy" and should be entrusted exclusively to "the democratic process" (Br. of Church of Jesus Christ of Latter-Day Saints, et al. at p. 25 (hereafter LDS, et al. or LDS Amici); see also Br. of Judicial Watch, Inc. at pp. 4-7, 17); and (2) that this Court should refrain from invalidating the marriage ban because it enjoys widespread popular support. (Br. of LDS, et al. at pp. 14-18; Br. of United Families International, et al. at pp. 33-37.) Neither of those arguments has merit.

First, there is no authority for the proposition that laws concerning marriage are, or should be, insulated from judicial review. That is the same argument raised by the State of California in *Perez v. Sharp* (1948) 32 Cal.2d 711 (hereafter *Perez*), and by the Commonwealth of Virginia in

Loving v. Virginia (1967) 388 U.S. 1 (hereafter *Loving*). But as those and other cases make clear,[2] the Legislature's authority over marriage must be exercised within constitutional bounds. (See *Beeler v. Beeler* (1954) 124 Cal.App.2d 679, 682 ["The regulation of marriage and divorce is solely within the province of the Legislature, *except as the same may be restricted by the Constitution.*" (italics added)].)

Second, judicial review is particularly appropriate in this case because the political process has reached an impasse. Twice in the past three years, the Legislature has voted to permit same-sex couples to marry, and the Governor has vetoed both measures based on the pendency of this litigation. In his most recent message Governor Schwarzenegger stated that the constitutionality of the marriage ban is "pending before the California Supreme Court" and reiterated his "position that the appropriate resolution to this issue is to allow the Court to rule." (Governor's veto message to Assem. on Assem. Bill. No. 43 (Oct. 12, 2007) Recess J. No. 9 (2007-2008 Reg. Sess.) pp. 3497-3498.)[3] Thus, without resolution by this Court,

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[2] See, e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374 (striking law restricting marriage by persons who had failed to pay child support); *Turner v. Safley* (1987) 482 U.S. 78 (striking policy barring most prisoners from marriage); *Boddie v. Connecticut* (1971) 401 U.S. 371 (striking state policy of refusing to waive otherwise applicable court fees for indigents who wished to file for divorce).

[3] See Respondents' Request for Judicial Notice of Governor's veto message to Assembly Bill No. 43, filed concurrently herewith; Governor's veto message to Assembly on Assembly Bill. No. 849 (Sept. 29, 2005) Recess Journal No. 4 (2005-2006 Reg. Sess.) pp. 3737-3738; Court of Appeal Opinion at p. 21 (hereafter Opn.) ("because the constitutionality of the marriage laws was pending before this appellate court at the time, the Governor believed Assembly Bill No. 849 would add 'confusion' to the constitutional issues under review.").

California's lesbian and gay couples face a stalemate between the legislative and executive branches.[4]

Third, there likewise is no authority for the proposition that this Court should defer to supposed popular opinion in determining whether a challenged law violates the California Constitution.. Rather, the role of the courts is "to protect the rights of individuals and minorities . . . *against* the power of numbers." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141, italics added [citing *Hurtado v. California* (1884) 110 U.S. 516, 536]; see also *Parr v. Municipal Court* (1971) 3 Cal.3d 861, 870 ["Constitutional questions are not determined by a consensus of current public opinion."].) Contrary to the arguments of some amici, the courts' exercise of this protective role is an integral part of the democratic process and ensures its integrity. "The separation of powers doctrine articulates a basic philosophy of our constitutional system of government . . . . [T]he most fundamental [protection] lies in the power of the courts . . . to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 964, fn. 3.)

Finally, the arguments of these amici miss the mark in another important respect. Contrary to their representations, there is no longer overwhelming public support for the marriage exclusion in California. As noted above, the California Legislature has *twice* voted to eliminate the

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[4] As Professor Eskridge notes, "California's judiciary has traditionally played a key role, *reversing the burden of inertia* when the political process is unable (for reasons of gridlock or lingering prejudice) to deliver full equality to a traditionally disadvantaged minority that has earned its rightful place in civil society." (Br. of Prof. Eskridge at p. 3, italics in original.) Both factors cited by Professor Eskridge are present here.

marriage ban. In recent polling only 46% of likely California voters oppose allowing same-sex couples to marry.[5]

Nationwide, every state legislator who has voted for legislation to permit same-sex couples to marry and who has run for reelection has won.[6] And as demonstrated by the amici in this case, those who support the right of lesbian and gay couples to marry include municipalities, bar associations, professional associations, child welfare experts, constitutional and family law scholars, civil rights advocates, and hundreds of religious leaders and organizations. Unmistakably, these trends point to growing public recognition that lesbian and gay couples "share the values of their parents and their neighbors" and are qualified to take on the responsibilities of marriage. (Br. of Prof. Eskridge at p. 36.)

As this Court has noted, "courts have been instrumental . . . in the quest for equality." (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000)

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[5] See Baldassare, Public Policy Institute of California (Sept. 2006) Californians and the Future: PPIC Statewide Survey, p. 29 (47% favor allowing same-sex couples to marry, 46% oppose, and 7% are undecided); Binder (Final Results Sept. 6 2007) California Voter Survey, p. 1 (42% favor allowing same-sex couples to marry, 40% oppose, and 18% are undecided). This data shows a significant increase in support for permitting same-sex couples to marry in a relatively short period of time. In 2000, 61.4% of those who voted cast ballots in favor of. Proposition 22. (Prop. 22, Gen. Elec. (Mar. 7, 2000); Cal. Sec. of State, State Ballot Measures Statewide Return (June 2, 2000) <http://primary2000.sos.ca.gov/returns/prop/00.htm> [last visited Nov. 10, 2007].) Many of those voters may have been concerned primarily about whether another state's decision to permit same-sex couples to marry could be determinative of whether California would recognize such marriages. (See Respondents' Consolidated Opening Br. at pp. 79-85.)

[6] (See Freedom to Marry (Oct. 2007) Pro-Marriage Incumbents and Candidates Win Elections <http://www.freedomtomarry.org/images/pdfs/promarriage_incumbents_and_candidates_win_elections.pdf> [last visited Nov. 10, 2007].)

24 Cal.4th 537, 545.) Conversely, as history has shown, when courts place their imprimatur upon official discrimination, the damaging consequences – both for society and for the affected group – can be profound and often lasting. (See, e.g., *Bradwell v. State* (1872) 83 U.S. 130 [upholding denial of law licenses to women]; *Plessy v. Ferguson* (1896) 163 U.S. 537 [upholding racial segregation in railroad cars]; *Buck v. Bell* (1927) 274 U.S. 200 [upholding law mandating forced sterilization of people with disabilities]; *Bowers v. Hardwick* (1986) 478 U.S. 186 [upholding law criminalizing same-sex intimacy]; *People v. Hall* (1854) 4 Cal. 399 [construing statute to preclude Chinese persons from testifying against "white" persons on the ground that ruling otherwise "would admit them to all the equal rights of citizenship"].)

II. THE MARRIAGE RESTRICTION DISCRIMINATES BASED ON SEXUAL ORIENTATION AND MUST BE SUBJECTED TO HEIGHTENED SCRUTINY FOR THAT REASON.

A. The Marriage Restriction Discriminates Based On Sexual Orientation.

Some amici erroneously argue that the marriage restriction does not discriminate based on sexual orientation because a gay man is free to marry a woman and a lesbian is free to marry a man.[7] That argument ignores that the meaning of sexual orientation is defined in terms of a person's attraction to, and desire for intimacy with, a person of a particular sex. A statute limiting one's choice of partner for intimate relations to a particular sex discriminates based on sexual orientation even without using the terms

[7] See Brief of Professor Douglas W. Kmiec, et al. at p. 8 (hereafter Prof. Kmiec, et al.); Br. of Knights of Columbus at pp. 14-16; Brief of Professor James Q. Wilson, et al. at p. 49 (hereafter Prof. Wilson, et al.).

sexual orientation, gay, lesbian, homosexual, or heterosexual. (*Lawrence v. Texas* (2003) 539 U.S. 558 (hereafter *Lawrence*).)[8]

As California courts have made clear, a law targeting a characteristic that is obviously a proxy for a protected category discriminates on the basis of that protected category. For example, in *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 533 (hereafter *Johnson Controls*), the Court of Appeal held that an employer discriminated on the basis of sex by excluding only employees capable of becoming pregnant from certain jobs. The Court explained that such a policy did not merely have a disparate impact on women, but also facially discriminated based on sex:

> at issue is not a rule, standard, or criterion which might disproportionately exclude members of a protected class, but rather a determinative, if conceptually "neutral," trait or condition . . . which, if it excludes anyone, can only exclude members of a protected class. In such a case, it is pure

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[8] As Amici American Psychological Association, et al. explain:

> [S]exual orientation is always defined in relational terms and necessarily involves relationships with other individuals. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them, relative to each other. Indeed, it is by acting – or desiring to act – with another person that individuals express their heterosexuality, homosexuality, or bisexuality. . . . Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. . . .
>
> Consequently, sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one's sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.

(Br. of American Psychological Assn., et al. at pp. 7-8.)

> sophistry to argue there is any distinction between an "adverse impact" on the class . . . and "disparate treatment" of that class. The neutral trait or condition is but a proxy for membership in the protected class itself.

(*Johnson Controls*, *supra*, at p. 541, fn. 7.) Similarly, barring same-sex couples from marriage "does not merely have a 'greater impact' on lesbian and gay couples; it excludes 100 percent of them from entering marriage." (Opn. p. 39, fn. 23.) By any reasonable measure, the statutory exclusion of same-sex couples from marriage is a facial classification based on sexual orientation.[9]

Some amici deny even that the marriage restriction has a legally cognizable disparate impact on lesbians and gay men because, they claim, the marriage law was not enacted with a discriminatory purpose. (Br. of Knights of Columbus at pp. 16-20; see also Br. of Prof. Kmiec, et al. at pp. 7-8 [arguing that "any claimed impact or disparity flows from gays and lesbians themselves"].) Respondents have shown in prior briefing that the Legislature's purpose in amending Family Code section 300 in 1977 was to exclude lesbian and gay couples from marriage, and that the purpose of Proposition 22, as expressed in the measure's ballot materials, was to prevent recognition of marriages of lesbian and gay couples entered in other

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[9] In addition to violating equal protection, requiring lesbians and gay men either to marry a person of the other sex or to forego marriage imposes an unconstitutional condition that also violates the fundamental right to autonomy recognized in *Lawrence*, *supra*, 539 U.S. at p. 574 (explaining that "persons in a homosexual relationship" are entitled to seek "autonomy . . . just as heterosexual persons do" in "intimate and personal choices" central to "personal dignity," such as those relating to sexual intimacy, procreation, family relationships and child-rearing). (See also Br. of Equal Justice Society at pp. 22-23 (hereafter Equal Justice Society); Br. of American Psychological Assn., et al. at pp. 6-7, 14-18; Br. of Anti-Defamation League, et al. at pp. 4-6 (hereafter Anti-Defamation League, et al.).)