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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Coordination Proceeding Special Title (Rule 1550(b)) **MARRIAGE CASES** **CITY AND COUNTY OF SAN FRANCISCO, a charter city and county,** Plaintiff - Petitioner, **v.** **STATE OF CALIFORNIA, et al.,** Defendants - Respondents.	**JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365** Case No.: 429-539 (Consolidated with Case No. 504-038) **STATE OF CALIFORNIA DEFENDANTS' PRELIMINARY OPPOSITION TO PETITIONS FOR WRIT OF MANDATE FILED BY THE CITY AND COUNTY OF SAN FRANCISCO AND THE WOO PETITIONERS** Date: TBD Time: TBD Dept: 304 Judge: Richard A. Kramer Trial Date: Not Set

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INTRODUCTION

California is the first state in the nation to extend to same-sex couples, without judicial compulsion, substantially all the rights and benefits afforded to married couples under state law. Assembly Bill 205, the Domestic Partner Rights and Responsibility Act of 2003 (Domestic Partner Act or AB 205), broadly declares that registered domestic partners shall have the "same rights, protections, and benefits" as spouses. AB 205 dramatically expands on prior legislation ensuring rights and benefits to same sex couples, and additional legislation was signed this year by Governor Schwarzenegger.[1/] This legislative history confirms that California is dedicated to providing equal rights and benefits to same-sex couples.

Although federal law continues to deny same-sex couples, whether married or not, many federal rights and benefits available to traditional married couples, the California Legislature is powerless to change federal law. Within the Legislature's sphere of control, however, substantially all rights and benefits afforded to spouses have now been extended to registered domestic partners.[2/]

Despite California's commitment to equal rights, petitioners contend that California's efforts will never be legally sufficient until same-sex couples are allowed to marry, because marriage affords certain intangible benefits. Appellate courts in other states have addressed this question, however, and they have concluded (with only one exception) that a state may extend rights and benefits to same-sex couples while maintaining the traditional understanding of marriage, and that the determination of the appropriate balance is best left to the legislative process. (See, e.g., *Baker v. State of Vermont* (Vt. 1999) 744 A.2d 864, 886-887; see also *Castle v. State of Washington* (Wash. Super. Ct. Sept. 7, 2004) 2004 WL 1985215, *16; *Li v. State of Oregon* (Or. Super. Ct. Apr. 20, 2004) 2004 WL 1258167,*10; cf. *Opinions of the Justices to the Senate* (Mass. 2004) 802 N.E.2d 565, 572.)

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1. See AB 2208 [health plans and other insurance policies must offer same-sex couples the same benefits as married couples]; AB 2580 [providing certain technical amendments and clarifications for the domestic partner laws].

2. In addition to the Legislature's inability to modify federal law, the Legislature also lacks the power to unilaterally alter the California Constitution or state laws adopted by initiative. (See, e.g., Cal. Const., art. II, § 10; *Id.*, art. XVIII, § 4.) Aside from these limitations, the only difference in the rights and benefits afforded under AB 205 is that registered domestic partners must use the same taxpayer filing status they would use in filing federal tax returns.

While California has determined that it is appropriate to expand rights and benefits for same-sex couples, it has also determined, like almost every other state in the nation, that there is value in maintaining the common and traditional understanding of marriage. This understanding of marriage as between a man and a woman has long historical roots, and it is legitimate for California to respect this understanding as it extends virtually the same rights and benefits to same-sex couples. The State has a strong interest in valuing and maintaining its deeply-rooted history and traditions. California's effort to find a balance between affording rights and benefits to same-sex couples, while maintaining the common understanding of marriage, does not run afoul of the Constitution.

There is also value in recognizing the fundamental constitutional principle that in California, governmental power is inherent in the people. (Cal. Const., art. II, § 1.) Through the power of initiative, the people have the right to alter or reform California laws, including our Constitution. (Cal. Const., art. II, §§ 1, 8.) And there is value in recognizing that the legislative process (including the initiative process) is best suited to consider, through public input and debate, the complex societal implications and policy nuances implicated in the definition of marriage. It is legitimate for California to recognize the important role that the legislative and electoral process plays in determining the best way to extend rights and benefits to same-sex couples.

At the same time, certain alleged interests articulated in other jurisdictions and in public discourse in opposition to same-sex marriage are not asserted here because they are inconsistent with California's decision to afford substantially equivalent rights and benefits to same-sex couples. It has been suggested by some, for example, that same-sex relationships are less committed or stable than are opposite-sex relationships. But in AB 205 the California Legislature determined that "many lesbian, gay and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex." (AB 205, § 1(b).) It has also been suggested by certain advocates that same-sex couples would place children at risk. Once again, this assertion is inconsistent with California's determination to extend to registered domestic partners the "same rights, protections, and benefits" as spouses.

Petitioners fail in their burden to prove that California's marriage laws are constitutionally unsound. Their writ petition should be denied.

PROCEDURAL POSTURE OF THIS CASE

The Attorney General is filing this brief on behalf of the State defendants in response to the opening briefs filed by the petitioners in the *Woo* and *City and County of San Francisco* (*City or CCSF*) actions. The petitioners have filed declarations in support of their briefs, including expert declarations and declarations from persons testifying about the impact of the restrictions against same-sex marriage on themselves and their families. At present, the Attorney General does not intend to submit declarations responding to petitioners' declarations. The *Woo* and *CCSF* petitioners are making only facial constitutional challenges; they are not alleging that facially valid statutes are being applied in a constitutionally impermissible manner. (See *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510.) For this reason, the Attorney General believes that petitioners' claims, as presented in petitioners' opening briefs, can be resolved as a matter of law. Accordingly, the Attorney General is not submitting any materials, beyond the documents attached to the request for judicial notice accompanying this brief, to the Court at this time. Nonetheless, the Attorney General reserves the right to submit evidence at a later time if circumstances arise in the coordinated marriage cases that require such a submission.

THE HISTORY OF MARRIAGE AND DOMESTIC PARTNERSHIP IN CALIFORNIA

California has two distinct legal traditions relevant to the issue presented in this case. The first tradition is California's definition of marriage, which has always been understood as a union between one man and one woman. The second tradition is California's effort to prohibit discrimination against gay men and lesbians, and to extend rights and benefits to them. These traditions can constitutionally coexist to permit the State to afford equal rights and benefits to same-sex couples while still maintaining the commonly understood definition of marriage.

A. Throughout California's History, Marriage Has Been Understood As A Union Of One Man And One Woman.

It has been argued that California only recently defined marriage as a union between a man

and a woman, and that prior California law did not prohibit same-sex marriage.[3] But a review of the history of California's marriage laws shows that throughout California history, marriage has been understood to be a union between a man and a woman. Although statutes enacted or amended in recent years have made this understanding more explicit, "those statutory measures did not change existing law. Since the earliest days of statehood, California has recognized only opposite-sex marriages." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1128 ("*Lockyer v. CCSF*") (Kennard, J., concurring and dissenting) (citing *Mott v. Mott* (1890) 82 Cal. 413, 416).)

The 1872 California Civil Code, a modified version of Field's New York Draft Civil Code, contained several statutes pertaining to marriage. Civil Code section 55 provided that marriage was "a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary." (See State Defendants' Request For Judicial Notice ("RJN"), Exh. A.)[4] Section 56 of that Code provided: "Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage."[5] (Former Civ. Code, § 56.) The 1872 Civil Code further provided, in section 69, subdivision (4), that the county clerk must obtain the "the consent of the father, mother, or guardian," before solemnizing any marriage in which "the male be under the age of twenty-one, or the female under the age of eighteen years . . . ." (Former Civ. Code, § 69, subd. (4).) The 1872 Civil Code also contained a consanguinity provision forbidding marriages "between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews . . . ," and provisions governing annulment and remarriage that specifically referred to marriages between a "husband" and a "wife." (Former Civ. Code, §§ 59, 61, 82, 83.)

Although former Civil Code section 55 did not specify that marriage was limited to opposite-sex couples, the California Supreme Court held in 1890 that the legal relationship defined in section

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3. See CCSF Brief at p. 9:24-26; Woo Brief at p. 18:6-7.

4. The provisions of the 1872 Civil Code cited herein are attached as Exhibit A to the State's request for judicial notice submitted with this brief.

5. New York's Field Code provision, then relied upon as a model for many states, was identical except that the age for men was 14 and the age for women was 12. (RJN, Exh. B (Field Draft, N.Y. Civ. Code, § 36).)

55 "is one 'by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife.'" (*Mott v. Mott, supra*, 82 Cal. at p. 416 (quoting Bouvier's Law Dist., tit. Marriage).) In 1891, the Supreme Court reconfirmed this understanding in another case interpreting section 55:

> Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and his wife.

(*Kilburn v. Kilburn* (1891) 89 Cal.46, 50 (quoting Shelf. Mar. & Div. 1).)

Although California statutes governing marriage and family relations have undergone extensive changes since the Nineteenth Century to reflect the changes in our society, the understanding of marriage as a union between a man and a woman has endured. In 1969, the Legislature passed Senate Bill 252 (Grunsky), known as "The Family Law Act." While reforming the laws governing divorce,[6] the bill left many of the statutes governing marriage unchanged while recodifying them. Former Civil Code sections 55 and 56 were recodified as Civil Code sections 4100 and 4101. (See RJN, Exh. C (Stats. 1969, ch. 1608).) The Family Law Act also kept, in modified form, the consanguinity provisions and anti-bigamy provisions from the original Civil Code and other family-relations statutes that plainly incorporated the understanding that marriage is a relationship between one man and one woman.[7]

On July 7, 1971, the passage of the Twenty-Sixth Amendment to the United States Constitution lowered the minimum voting age to 18 years. (U.S. Const., 26th Amend.) The extension

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6. One of the principal reforms made by the Family Law Act was the elimination of the fault theory of divorce. (See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Husband and Wife, § 23, p. 38.)

7. See, *e.g.*, RJN, Exh. C (Stats. of 1969, ch. 1608 (Civ. Code, § 4400 [forbidding marriage between, *inter alia*, "brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews" as incestuous], § 4401 [bigamous marriages prohibited during the life of a "former husband or wife" unless former marriage is dissolved or spouses has been absent for five years], § 4213 ["[w]hen unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by a clergyman"], § 5101 [husband is head of family who chooses "any reasonable place or mode of living" and "the wife must conform thereto"], § 5131 ["[a] husband is not liable for his wife's support when she is living separate from him by agreement unless such support is stipulated in the agreement"], § 5132 ["[t]he wife must support the husband while they are living together out of her separate property when he has no separate property, and there is no community property or quasi-community property and he is unable, from infirmity, to support himself"]).

of the electoral franchise to 18 year-olds led the Legislature to pass Assembly Bill 2887 (Priolo), an omnibus bill lowering most statutory minimum ages to 18. (See RJN, Exh. D (Stats. 1971, ch. 1748).) AB 2887 amended subdivision (a) of former Civil Code section 4101, setting the uniform age requirement for marriage at 18, instead of 21 for men and 18 for women. (*Id.*, (Stats. 1971, ch. 1748, § 26).) Because the age requirement was uniform, the amended statute did not differentiate between men and women, but the legislative history of AB 2887 confirms that lowering the age of majority to 18 was the only purpose of the legislation.[8/] There was no intent to change the understanding of marriage or to authorize same-sex marriage. In fact, the enactment of AB 2887 left unchanged many statutes that continued to treat marriage as the union of one man and one woman,[9/] and the definition of marriage in Civil Code section 4100, which had been judicially interpreted as providing for a union of one man and one woman, was not amended by AB 2887.

In 1977, the County Clerks Association of California sponsored Assembly Bill 607 (Nestande). The legislation amended former Civil Code sections 4100 and 4101 to reaffirm that marriage was a contract between a man and a woman. The legislative history of AB 607 indicates that the County Clerks Association was concerned that the amendment of former Civil Code section 4101 by AB 2887 in 1971 had eliminated the reference to the genders of the persons being married, thus making the issue of whether same-sex couples could marry "vague and subject to controversy." (RJN, Exh. F (County Clerk's Assn. Resolution 77-1).) Today, section 4100 is recodified, without substantial change, as Family Code section 300, and the provisions of former section 4101 are found in Family Code sections 301, 302 and 304.

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8. On signing AB 2887, Governor Reagan stated: "The landmark legislation I am about to sign into law acknowledges the basic concept that those who enjoy the privileges of voting also should be expected to assume the responsibilities of full citizenship." (RJN, Exh. E (Gov. Reagan Statement on AB 2887 (Priolo), Dec. 14, 1971); see also RJN, Exh. E (Assem. Comm. on Jud. Analysis of AB 2887 (Priolo), July 12, 1971).)

9. See former Civil Code § 4213(a) ["[w]hen unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman"], § 4357 ["the superior court may order the husband or wife, or father or mother, as the case may be, to pay any amount that is necessary" to support the husband, wife or children], § 4400 [prohibiting marriages between "brothers and sisters of the half as well as the whole blood, and between uncles and nieces and aunts and nephews"], § 4401 [prohibiting marriage by a person "during the life of a former husband or wife of such person"], § 4425(b) [marriage voidable if "husband or wife" is living, marriage is in force, and husband or wife has not been absent for five years or more].

Proposition 22 was subsequently enacted by the People of California in the year 2000. That initiative added Family Code section 308.5, which provides that "[o]nly marriage between a man and a woman is valid or recognized in California." In *Knight v. Schwarzenegger* (Sac. Super. Ct., Sept. 8, 2004) 2004 WL 2011407 (RJN Exh. G), the Superior Court ruled that the "plain language of Family Code section 308.5 means that California cannot recognize a 'marriage' between same-sex partners that have taken place in another state, *and cannot enact law authorizing same-sex couples to enter 'marriage' in California unless first approved by the voters*." (*Id.*, at p. *6 [emphasis added].)

In their discussion of California's marriage laws, petitioners assume that same-sex marriage was legal – or was at least not against the law – until the enactment of AB 607 in 1977. This assumption is incorrect. While California did not have a statute expressly limiting marriage to opposite-sex couples until 1977, our statutes have consistently provided only for opposite-sex unions throughout state history and have been judicially interpreted in this manner. This conclusion is consistent with cases from other states, which have held that their statutory schemes bar same-sex marriage even in the absence of an explicit prohibition. In *Baker v. State, supra,* 744 A.2d 864, the Vermont Court cited "the plain and ordinary meaning of 'marriage' [as] the union of one man and one woman as husband and wife" and also noted the numerous Vermont statutes (including consanguinity and annulment statutes) that evidenced a consistent understanding and application. The Vermont Supreme Court concluded that the statutes "reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman." (*Id.*, at pp. 868-869.) The Massachusetts Supreme Judicial Court reached the same conclusion in *Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941, holding that Massachusetts statutes barred same-sex marriage (even though the term "marriage" was left undefined by the statutes) because of "the term's common law and quotidian meaning concerning the genders of the marriage partners."[10/] (*Id.*, at pp. 952-953.) California's statutory history before 1977 is comparable to the statutory history of these

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10. See also *Baehr v. Lewin* (Hawaii 1993) 852 P.2d 44, 60 [holding that Hawaiian law barred same-sex marriage because the provisions establishing a non-consanguinity requirement, an anti-bigamy requirement and a requirement that marriages between a "man" or a "woman" be performed by state-licensed persons or entities could be read to deny marital rights to same-sex couples]; *Li v. State of Oregon* (Ore. Cir. Ct., Apr. 20, 2004), 2004 WL 1258167, *3 [holding that Oregon statutes barred same-sex marriage even though they did not expressly limit marriage to opposite-sex couples].)

sister states.

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B. Even As California Has Maintained the Common Understanding Of Marriage, It Has Been A Leader In Extending Rights And Benefits To Gay Men And Lesbians.

More than twenty-five years before the United States Supreme Court issued its decision in *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, overturning *Bowers v. Hardwick* (1986) 478 U.S. 186, and holding that laws forbidding consensual sodomy are unconstitutional, California had already adopted such protections. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 785 [citing Stats.1975, ch. 71].) In fact, California's legal history demonstrates that it is a leader in affording rights and benefits to gay and lesbian individuals.[11/]

"Under California's early common law, enterprises which were affected with a public interest had a duty to provide service to all without discrimination." (*Curran v. Mount Diablo Council of the Boy Scouts of America* (1983) 147 Cal.App.3d 712, 726 [citation omitted].) This common law doctrine was codified in 1897 (*ibid.)*, and in 1951 it was applied to bar discrimination against homosexuals. (See also *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716, 718 [citing public accommodation law in setting aside suspension of liquor license for gay bar].) In 1959, the Unruh Civil Rights Act (Civil Code section 51) was enacted. The Unruh Civil Rights Act prohibits discrimination based on sexual orientation. (*Rulon v. Kulwitzsky* (1984) 153 Cal.App.3d 289, 292; *Curran v. Mount Diablo Council of the Boy Scouts of America, supra,* 147 Cal.App.3d at p. 734; *Hubert v. Williams* (1982) 133 Cal.App.3d.Supp. 1, 5.) California also guarantees that persons within the State have the right to be free from violence or threats of violence based on their sexual orientation. (See Civ. Code, §§ 51.7, 52.1; Pen. Code, § 422.6) And California's Fair Employment and Housing

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11. This summary of California's ongoing effort to provide rights and benefits to gays and lesbians contrasts with the contentions asserted by petitioners. The City and County of San Francisco (City or CCSF) submitted a declaration from a University of Chicago historian outlining a history of discrimination against gays and lesbians and opining that "[w]e continue to live with the legacy of the antigay measures enacted in the 1930s, 1940s, and 1950s, in the discriminatory laws still on the books, and in the popular history such laws expressed, perpetuated, and legitimized." (Declaration of George Chauncey, ¶ 27.) Although discriminatory conduct may not yet have been eliminated, California's efforts to prohibit such discrimination have been both aggressive and substantial.

Act provides that discrimination on the basis of sexual orientation is an unlawful employment practice. (Gov. Code, § 12940.)

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In addition, California has been a leader in extending equal rights to committed same-sex couples. In 1999, California created its first statewide domestic partnership registry with the enactment of AB 26. (Stats.1999, ch. 588.) AB 26 created a new Division within the California Family Code regarding domestic partnerships. (See Fam. Code, § 297 et seq.) AB 26 allowed two unmarried adults of the same-sex, or opposite-sex couples meeting age requirements and eligibility requirements for federal Social Security benefits, to register as domestic partners with the Secretary of State. (*Ibid.*)

The domestic partnership statutes were expanded in 2001 by AB 25 (Stats. 2001, ch. 893), which gave registered domestic partners many new legal rights.[12/] In 2002, rights and benefits for domestic partners were expanded again. Among other things, the Legislature enacted AB 2216, which established intestate succession rights for domestic partners. (Stats. 2002, ch. 447 [amending Prob.

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12. AB 25 created many new rights for domestic partners, including the right to use stepparent adoption procedures (Fam. Code, §§ 9000, 9002, 9004, 9005, as amended by Stats. 2001, ch. 893, §§ 5 - 8); the right to sue for wrongful death or infliction of emotional distress for the injury or death of a partner (Civ. Code, § 1714.01, as added by Stats. 2001, ch. 893, § 1, and Code Civ. Proc., § 377.60, as amended by Stats. 2001, ch. 893, § 2); the right to make medical decisions for an incapacitated partner (Prob. Code, § 4716, as added by Stats. 2001, ch. 893, § 49); the right to be treated as a dependent of a partner for purposes of group health and disability insurance (Health & Saf. Code, § 1374.58 and Ins. Code, § 10121.7, as added by Stats. 2001, ch. 893, §§ 10 & 11); the right to file for state disability benefits on behalf of a mentally disabled partner (Unemp. Ins. Code, § 2705.1, as amended by Stats. 2001, ch. 893, § 60); the right to be appointed a conservator for an incapacitated partner (Prob. Code, §§ 37 and 1813.1, as added by Stats. 2001, ch. 893, §§ 14 & 16.5 and Prob. Code, §§ 1460, 1811, 1812, 1820 - 1822, 1829, 1861, 1863, 1871, 1873 - 1874, 1891, 1895, 2111.5, 2212-2213, 2357, 2359, 2403, 2423, 2430, 2504, 2572, 2580, 2614.5, 2622, 2651, 2653, 2681 - 2682, 2687, 2700, 2803, 2805, as amended by Stats. 2001, ch. 893, §§ 14 - 16 & 17 - 48); the right to use sick leave to care for an ill partner or partner's child (Lab. Code, § 233, as amended by Stats. 2001, ch. 893, § 12); the right to use statutory form wills and be appointed as administrator of a partner's estate (Prob. Code, §§ 6240, 8461 - 8462, 8465, as amended by Stats. 2001, ch. 893, §§ 52 and 53); the right to receive unemployment benefits when moving to accompany a partner to a new job (Unemp. Ins. Code, §§ 1030, 1032, 1256, 2705.1, as amended by Stats. 2001, ch. 893, §§ 57 - 60); and the right to receive continued health insurance as a partner of a deceased state employee or retiree (Gov. Code, §§ 31780.2, as added by Stats. 2001, ch. 893, § 9.5, and Gov. Code, § 22871.2, as amended by Stats. 2001, ch. 893, § 9). The legislation also provided that the value of domestic partner health insurance coverage was not taxable as income by the state. (Rev. & Tax Code, § 17021.7, as added by Stats. 2001, ch. 893, § 56.)

Code, §§ 6401, 6402].)[13/]

And last year, the piecemeal approach to enacting legislation to protect domestic partners and their families was replaced by AB 205, the California Domestic Partner Rights and Responsibilities Act of 2003[14/]. Effective January 1, 2005, AB 205 declares that registered domestic partners shall have the "same rights, protections, and benefits" as spouses. (Domestic Partner Act, § 4; Fam. Code, § 297.5, subd. (a), as added by Stats. 2003, ch. 421, § 4.) AB 205 gives domestic partners rights and obligations regarding financial support of partners and children, community property, child custody and visitation, and ownership and transfer of property. (Fam. Code, § 297.5, subds. (b)-(d), as added by Stats. 2003, ch. 421, § 4.) Nonetheless, in enacting AB 205, the Legislature was careful to clarify that in extending rights and benefits to same-sex couples, it was not changing the historical understanding of marriage in California:

> This act is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships, including, among other things, civil marriage, enforcement of palimony agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption.

(AB 205, Stats. 2003, ch. 421, § 1(c).)

AB 205 did not (and could not) modify the California Constitution or statutes adopted by the People through the power of initiative. (See Fam. Code, § 297.5, subds. (j), as added by Stats. 2003, ch. 421, § 4; see also Cal.Const., art. II, § 10(c); art. XVIII, § 4.) Nor could it modify federal law. (Fam. Code, § 297.5, subd. (g)(k), as added by Stats. 2003, ch. 421, § 4.) Because federal law

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13. The Legislature also enacted other legislation during the 2001/2002 time period that impacted the rights of domestic partners in California. SB 1049 provided that in San Mateo County, subject to the approval of the County Board of Supervisors, death benefits and a survivor's allowance may be payable to a county employee's surviving domestic partner. (Gov. Code, § 31780.2, as amended by Stats. 2001, ch. 893, § 9.5.) A year later, AB 2777 made these same benefits available in Los Angeles County, Santa Barbara County, and Marin County. (Gov. Code, § 31780.2, as amended by Stats. 2002, ch. 373, § 1.) SB 247 included domestic partners in the list of persons authorized to receive birth and death records of a registrant. (Health & Saf. Code, § 103526, as added by, Stats. 2002, ch. 914, § 3.) SB 1575 enabled domestic partners to draft wills for each other in the manner allowed for persons related by blood or marriage. (Prob. Code, § 21351, as amended by, Stats. 2002, ch. 412, § 1.) And SB 1661 included domestic partners within a new family temporary disability insurance program that provides up to six weeks of paid leave to workers who take time off to care for a seriously ill child, parent or domestic partner, or to bond with a new child. (Unemp. Ins. Code, § 3300, as added by, Stats. 2002, ch. 377, § 6.)

14. For the Court's convenience, a copy of AB 205 is attached hereto as Exhibit A.

does not recognize domestic partnerships, and defines marriage as a union between a man and a woman (1 U.S.C. § 7), many federal rights and benefits extended under federal law to married couples cannot be afforded by the State to domestic partners. These federal rights and benefits pertain to social security, medicare, federal housing and food stamp programs, income taxes, veterans' benefits, federal civilian and military benefits, the federal Family and Medical Leave Act, and other federal employment benefits. Nonetheless, to the extent California law relies on federal law in conferring any right or benefit to spouses, AB 205 provides that registered domestic partners shall be treated under state law as if the federal law recognizes domestic partners. (Fam. Code, § 297.5, subd. (e), as added by Stats. 2003, ch. 421, § 4.)

The State continues to extend rights and benefits to same-sex couples. On September 13, 2004, Governor Schwarzenegger signed AB 2208, which prohibits insurance providers from discriminating against registered domestic partners in insurance policies. (Health & Saf. Code, § 1374.58, as amended by Stats. 2004, ch. 488, § 2; Ins. Code, § 381.5, as added by Stats. 2004, ch. 488, § 3, and Ins. Code, § 10121.7, as amended by Stats. 2004, ch. 488, § 4.) The Governor also recently signed AB 2580, which made certain technical amendments and clarifications to the domestic partner laws.

Although the California Legislature is unable to modify federal law, and also cannot unilaterally amend the California Constitution or laws adopted by initiative, AB 205 will nonetheless confer all other rights and benefits enjoyed by married couples, except that registered domestic partners must continue to use the same taxpayer filing status they would use in filing federal tax returns. (Fam. Code, § 297.5, subd. (g).) This requirement permits the State to cross-verify information contained in federal tax filings. In short, California has extended more rights and benefits to same-sex couples, in the absence of judicial compulsion, than any other state in the nation.

TREATMENT OF SAME-SEX MARRIAGE UNDER FEDERAL LAW AND IN OTHER STATES

Only one state in the nation defines marriage to include same-sex couples. Federal law, and the laws of all other states, have maintained the common understanding of marriage.

The first reported case analyzing an alleged constitutional right to same-sex marriage was

decided in 1971. In *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, a unanimous Minnesota Supreme Court rejected a claim by two men that they had a constitutional right to marry. The court held that limiting the State's marriage statute to opposite-sex marriages did not violate either the equal protection or due process guarantees of the Fourteenth Amendment, the First Amendment, the Eighth Amendment, or the Ninth Amendment of the U.S. Constitution. The Minnesota court rejected the claim that the U.S. Supreme Court's decisions in *Skinner v. Oklahoma* (1942) 316 U.S. 535, *Griswold v. Connecticut* (1965) 381 U.S. 479, and *Loving v. Virginia* (1967) 388 U.S. 1, which recognized a fundamental right to marry and the right to marital privacy -- required that same-sex couples be afforded the same rights. (*Baker, supra,* 191 N.W.2d at p. 187.) Regarding the due process clause of the Fourteenth Amendment, the court held that the historic institution of marriage "manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation." (*Id.*, at p. 186.) The court further held that the "equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." (*Id.*, at p. 187.)

Plaintiffs appealed, invoking the U.S. Supreme Court's mandatory appellate jurisdiction, which has since been repealed. (*Baker v. Nelson* (1972) 409 U.S. 810; see also *Hicks v. Miranda* (1975) 422 U.S. 332, 344.) The Supreme Court summarily decided the case and dismissed the appeal "for want of a substantial federal question." (*Baker, supra*, 409 U.S. 810.)[15] The Supreme Court's dismissal was subsequently interpreted to be binding federal precedent by the Eighth Circuit in related litigation filed by *Baker* plaintiffs.[16]

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15. Summary dismissals by the Supreme Court "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." (*Mandel v. Bradley* (1977) 432 U.S. 173, 176.)

16. While the appeal to the Minnesota Supreme Court was pending in *Baker v. Nelson*, *supra*, the same plaintiffs obtained a marriage license from a county clerk and were married by a minister. (*McConnell v. Nooner* (8th Cir. 1976) 547 F.2d 54, 55.) Plaintiffs thereafter petitioned the Veterans Administration for increased educational benefits based upon their new marital status. (*Ibid.*) When the Veterans Administration denied the petition, plaintiffs thereafter filed suit in the United States District Court for the District of Minnesota, challenging the denial of the petition for increased benefits. (*Ibid.*) The District Court dismissed

In the years following *Baker v. Nelson*, legal actions were brought in several states by plaintiffs attempting to establish a right to same-sex marriage. In *Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588, two women who were denied a marriage license claimed that their constitutional rights were violated. The Kentucky Court of Appeal held that the meaning of marriage as a union between a man and woman was established long before the State issued marriage licenses, and the failure to extend marriage licenses to same-sex couples did not violate constitutional rights. (*Id.*, at p. 589.) In *Singer v. Hara* (Wash.Ct.App. 1974) 522 P.2d 1187, two men challenged the denial of a marriage license to same-sex couples, alleging that it violated the Washington Constitution's unique equal rights amendment and the federal Constitution's equal protection guarantee. The Washington Court of Appeal rejected the arguments. The court held that federal and California cases invalidating state miscegenation statutes did not apply to same-sex marriage, and that there was no equal protection violation because same-sex couples were not denied marriage licenses due to their sex, but rather due to the nature of marriage itself as being a union between a man and a woman. (*Id.*, at pp. 1195-1197.) The court also found important state interests in preserving the traditional definition of marriage and concluded that any changes to that definition should be legislative, not judicial. (*Ibid.*)

In *Dean v. District of Columbia* (D.C. Ct.App. 1995) 653 A.2d 307, the District of Columbia Court of Appeals examined whether a right to same-sex marriage existed under the federal Constitution. In *Dean*, two men challenged the District of Columbia's denial of a marriage license to them, arguing that it violated due process and equal protection. The court held that there was no constitutional basis under the due process clause for recognizing same-sex marriage since such a

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the complaint and the Eighth Circuit Court of Appeals affirmed, holding that "the Supreme Court's dismissal of the [*Baker v. Nelson*] appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on the lower federal courts." (*McConnell*, *supra*, 547 F.2d at pp. 55-56.)

In her concurring and dissenting opinion in *Lockyer v. CCSF* (2004) 33 Cal.4th 1055, Justice Kennard cited *Baker v. Nelson*, stating: "Indeed, there is a decision of the United States Supreme Court, binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution's guarantees of equal protection and due process of law." (*Id.*, at p. 1126.) Justice Kennard added: "The United States Supreme Court has not expressly overruled *Baker v. Nelson*, *supra*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, nor do any of its later decisions contain doctrinal developments that are necessarily incompatible with that decision." (*Id.*, at p. 1127.)

definition of marriage was not rooted in the Nation's history or traditions. (*Id.*, at pp. 331-333.) The court also held that recognizing the historical condition of marriage as constituting a union between

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a man and woman did not violate the principles of equal protection.[17] (*Id.*, at pp. 361-364 [concurring opinions of Judges Terry and Steadman].)

In *Baehr v. Lewin, supra,* 852 P.2d 44, the Hawaii Supreme Court, in a plurality opinion, rejected plaintiffs' privacy and due process challenges to the state's marriage laws, but found an equal protection violation. In that case several same-sex couples challenged Hawaii's laws limiting marriage to a man and woman, claiming that such laws violated the rights to privacy, due process and equal protection guaranteed by the Hawaii Constitution. The Hawaii Court rejected plaintiffs' privacy and due process claims, finding that there was no right to same-sex marriage rooted in the State's traditions and history such that the failure to recognize these marriages would violate the principles of ordered liberty. (*Id.*, at p. 57.) The court concluded, however, that banning same-sex marriage violated Hawaii's unique equal protection clause, which specifically prohibited discrimination based on a person's sex. (*Id.*, at p. 60.) The court held that limiting civil marriage to opposite-sex couples discriminated against same-sex couples on the basis of sex. (*Id.*, at p. 64.) Nonetheless, the court in *Baehr* did not require the state to recognize same-sex marriage. (*Id.*, at p. 67.) Instead, it remanded the case to the trial court to develop a factual record regarding whether there were sufficient state interests that justified barring same-sex civil marriage. (*Id.*, at p. 68.) The people of Hawaii amended their state constitution to bar same-sex marriage before the case was resolved. (Hawaii Const., art. I, § 26.)

In 1996 Congress passed and President Clinton signed the federal Defense of Marriage Act (DOMA). DOMA provides that no state shall be required to give effect to any act, record or judicial proceeding of any other state regarding same-sex marriage. (28 U.S.C. § 1738C.) DOMA also

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17. See also *Anonymous v. Anonymous* (N.Y. Super. Ct. 1971) 325 N.Y.S.2d 499, 500 ["[m]arriage is and always has been a contract between a man and a woman"]; *DeSanto v. Barnsley* (Pa. Super. Ct. 1984) 476 A.2d 952, 955 [no right to a same-sex common law marriage]; *In re Estate of Cooper* (N.Y. Super. Ct. 1990) 564 N.Y.S.2d 684, 685.

provides that for purposes of federal law, "marriage" means only a legal union between one man and one woman as husband and wife, and "spouse" refers only to a person of the opposite sex who is a husband or a wife. (1 U.S.C. § 7.)

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In 1998, an Alaska superior court held that same-sex couples had the right to enter into a civil marriage under the privacy and equal protection provisions of the Alaska Constitution. (*Brause v. Bureau of Vital Statistics* (Alaska Super. Ct. 1998) 1998 WL 88743.) *Brause* did not, however, determine whether there were state interests that justified a same-sex marriage ban, leaving that question for further litigation. While the litigation was pending, the Alaska Constitution was amended to prohibit same-sex marriages. (Alaska Const., art. I, § 25.)

The first case to extend the legal benefits associated with civil marriage to same-sex couples was *Baker v. State of Vermont, supra,* 744 A.2d 864. In *Baker*, the Vermont Supreme Court held that under the Common Benefits Clause of the Vermont Constitution, same-sex couples must be afforded the same legal rights that married opposite-sex couples enjoy under Vermont law. The court did not frame the issue as involving a right to same-sex marriage, but instead framed the issue as whether the state could exclude same-sex couples from the benefits and protections afforded to married couples. (*Id.,* at p. 867.) The court concluded that the State was required to provide rights and benefits to same-sex couples, but expressly stated that the State was not required to permit same-sex marriage. (*Id.*, at p. 867 ["We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so . . . ."].) Instead, the court left it to the Legislature to determine the manner in which rights and benefits would be provided to same-sex couples.

Other state courts have recently held that there is no constitutional right to same-sex marriage. In *Standhardt v. Superior Court* (Ariz.Ct.App. 2003) 77 P.3d 451, the Arizona Court of Appeals held that prohibiting same-sex marriage did not violate the due process or equal protection provisions of the federal or Arizona Constitutions or the state constitution's right to privacy. (*Id.,* at

pp. 460, 465.) The court concluded there was no deeply-rooted tradition to recognize same-sex unions that warranted triggering the due process or privacy protections, and that the U.S. Supreme Court's decision in *Lawrence v. Texas*, (2003) 123 S.Ct. 2472, did not require recognizing a federal constitutional right to same-sex marriage. (*Id.*, at p. 456.) Similarly, in *Lewis v. Harris* (N.J. Super. Ct. 2003) 2003 WL 23191114, the court held there is no right to same sex-marriage under the equal protection or privacy provisions of the New Jersey Constitution. And in *Morrison v. Sadler* (Ind. Super. Ct. 2003) 2003 WL 23119998, the court determined that limiting marriage to opposite-sex couples did not violate the United States or the Indiana Constitutions.

In addition, courts have rejected attempts to seek recognition of the laws of other states. (See, e.g., *Burns v. Burns* (Ga.Ct.App. 2002) 560 S.E.2d 47 [Georgia refuses to recognize Vermont civil union as marriage because marriage in Georgia is limited to a man and woman]; *Rosengarten v. Downes* (Conn.Ct.App. 2002) 802 A.2d 170 [Connecticut not required to recognize Vermont civil union where it contradicts state laws limiting marriage to a man and woman]; *In re Estate of Gardiner* (Kan. 2002) 42 P.3d 120 [Kansas refuses to recognize marriage between man and post-operative male-to-female transsexual because it was not a marriage between a biological man and woman].)

In 2004, the Supreme Judicial Court of Massachusetts became the first, and only, state high court to recognize a constitutional right to same-sex marriage. (*Goodridge v. Department of Public Health* (Mass. 2004) 802 N.E.2d 565.) The decision in *Goodridge* rested on the Massachusetts Constitution and the court split 4-3 on whether same-sex marriage was constitutionally required. The court again later split 4-3 in holding that civil unions having all the legal rights of civil marriage would not satisfy the requirements of the Massachusetts Constitution. (*Opinions of the Justices to the Senate, supra,* 802 N.E.2d 565.)

Trial courts in Oregon and Washington have also concluded that the failure to extend the legal rights associated with civil marriage to same-sex couples violated their respective state constitutions. Those decisions, however, left the appropriate remedy to their state Legislatures. (*Castle v. State of Washington, supra,* 2004 WL 1985215; *Li v. State of Oregon, supra,* 2004 WL 1258167; cf. *Anderson v. King County* (Wash. Sup. Ct. Aug. 4 2004) 2004 WL 1738447 [court concludes that Washington's marriage laws violate state constitution, but does not prescribe remedy

as case will be reviewed by Washington Supreme Court].)

Most recently, in *In re Kandu* (Bankr. W.D. Wash) 2004 WL 1854112, the United States Bankruptcy Court for the Western District of Washington held that certain provisions of the federal DOMA do not violate the Fifth or Tenth Amendments to the federal Constitution. The court held that (1) same-sex marriage is not a constitutionally-mandated fundamental right under the due process clause of the Fifth Amendment; (2) DOMA's prohibition on same-sex marriage is therefore reviewed under a rational basis, not a strict scrutiny standard of review; (3) DOMA's same-sex marriage prohibition does not single out men or women as a discrete class for unequal treatment under the equal protection component of the due process clause of the Fifth Amendment, and is therefore subject to rational basis review; (4) homosexuality is not a suspect or quasi-suspect class under the equal protection component of the due process clause of the Fifth Amendment, and is therefore subject to rational basis review; and (5) DOMA's same-sex marriage prohibition survives rational basis review. (*Id.*, at pp. 8-18.)

ARGUMENT

I.

CALIFORNIA'S MARRIAGE LAWS DO NOT VIOLATE EQUAL PROTECTION, BECAUSE IT IS RATIONAL FOR CALIFORNIA TO AFFORD RIGHTS TO SAME-SEX COUPLES WHILE MAINTAINING THE COMMON UNDERSTANDING OF MARRIAGE.

"Equal protection analysis requires a reconciliation of the constitutional promise that no person shall be denied equal protection of the laws with the practical reality that most legislation classifies for one purpose or another, with resulting advance or disadvantage to various groups or persons." (*Flynt v. California Gambling Control Commission* (2002) 104 Cal.App.4th 1125, 1140 (citation omitted).) "As a general rule, such legislative classifications are presumptively valid." (*Ibid.*) Statutes making classifications that are not based on suspect classes must be upheld as long as there exists a "rational relationship between the disparity of treatment and some legitimate governmental purpose." (*Ibid.*)

In *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, the California Supreme Court described the two principal standards or tests that generally have been applied in reviewing

classifications challenged under the equal protection clause of article I, section 7 of the California Constitution. "The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals." (*Id.*, at p. 16.) Applying this standard, judicial restraint affords deference to the discretionary act of a co-equal branch of government. The legislation is presumed constitutional and will be upheld if there is a rational relationship between the challenged legislation and any conceivable legitimate state purpose. (*Ibid.*) The burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it.*' (*Id.*, at pp. 16-17, italics in original.)

A more stringent test is applied in cases touching on fundamental interests or involving suspect classifications. (*D'Amico*, 11 Cal.3d at p. 17.) Applying this test, courts adopt "an attitude of active and critical analysis, subjecting the classifications to strict scrutiny." (*Id.*, at p. 17.) Under the strict scrutiny standard, the State bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose. (*Ibid.*)

No appellate court (other than the plurality opinion by two of the five Justices on the Hawaii Supreme Court in *Baehr v. Lewin, supra,* 852 P.2d 44) has applied heightened or strict scrutiny in the present context. Nonetheless, petitioners argue that the marriage statutes should be subject to strict scrutiny review because they discriminate both on the basis of sex and on the basis of sexual orientation. Petitioners do not acknowledge the contradiction inherent in their simultaneous characterization of the current marriage laws as "an outmoded vestige of the gendered history of marriage from which California law otherwise has evolved"[18/] and as intentional discrimination against gays and lesbians that allegedly began with an amendment to former Civil Code section 4100 in 1977 and continued with the passage of Proposition 22 in 2000. (CCSF Brief at p. 29:22-24; Woo Brief at pp. 18:6-7, 35:6.) Consequently, petitioners' briefs raise the question of whether petitioners believe that the current marriage restrictions constitute a historical aberration or a modern act of intentional

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18. Woo Brief at p. 31:1-2; see also CCSF Brief at p. 28:18-20 ["As Professor Cott explains, the sex distinction in section 300 is best understood as the last vestige of sex discrimination in marriage, a legal rule that is 'entirely out of step with the gender neutral approach of contemporary marriage law.'"].

discrimination.

Petitioners also take an inconsistent view of the object of the marriage laws. Petitioners do not explain how the laws can both discriminate against all people based on their genders (and regardless of sexual orientation)[19] and also discriminate against that portion of the populace consisting of gay men and lesbians based only upon their sexual orientation. While the State believes that the marriage laws do not discriminate on either basis, petitioners' assertion of both positions only illustrates the basic weakness of both arguments: that our marriage laws neither discriminate against everyone based on gender classifications nor discriminate against gays and lesbians based on their sexual orientations.

A. The Marriage Statutes Do Not Classify Based On Gender, And Challenges To Those Statutes Are Accordingly Subject To Rational Basis Review.

The marriage statutes are not subject to strict scrutiny because they are not classifications based on sex. In rejecting the argument that Vermont marriage statutes constituted sex discrimination, the Vermont Supreme Court observed in *Baker v. State of Vermont, supra,* 744 A.2d at p. 864: "All of the seminal sex-discrimination decisions . . . have invalidated statutes that single out men or women as a discrete class for unequal treatment." (*Id.*, at p. 880, fn. 13 [citing U.S. Supreme Court sex-discrimination cases].) "The difficulty here is that the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex." (*Ibid.*)

Petitioners' claim that the marriage statutes constitute gender discrimination should be rejected for the reason expressed by the Vermont Court. California's marriage statutes do not favor one gender over another, and such disparate treatment is needed to show that a statute discriminates on the basis of gender. (See *Reece v. Alcoholic Beverage Control Appeals Board* (1977) 64

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19. The petitioners compare the marriage laws to now-repealed laws that discriminated against women, comparing them to laws that prevented women from owning property, voting, entering into contracts, and suing their husbands for rape. (Woo Brief at p. 32:2-3.) Petitioners also argue that the marriage laws were "written to preserve traditional gender roles." (CCSF Brief at p. 28:2-3.) However, petitioners presumably are not contending that restrictions against same-sex marriage do not also allegedly discriminate against men in general or more specifically against the male petitioners in the *Woo* action. Thus, the State assumes for purposes of this brief that petitioners allege that the marriage laws discriminate on the basis of gender against all persons, not just women.

Cal.App.3d 675 [holding that a regulation barring "spouses" of employees of law enforcement agencies from holding alcoholic beverage licenses did not violate equal protection because the class of spouses affected by the regulation included both men and women]; *Miller v. California Commission on the Status of Women* (1984) 151 Cal.App.3d 693, 699 [rejecting equal protection to state

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commission created to study the status of women because the mere use of "gender-framed measures" was "not a preference of women over men in the application of public resources"].)

Nonetheless, petitioners make three arguments why the marriage laws constitute gender discrimination. First, petitioners cite cases for the proposition that classifications based on sex are considered suspect and receive strict scrutiny under California law. Although the State agrees that classifications based on sex are suspect and that they receive strict scrutiny under our Constitution, the cases cited by petitioners all involve situations and statutes where the gender preferences were clear.[20/] None of the California cases cited by the petitioners establish that gender discrimination can occur where a statutory scheme like the marriage laws treats men and women in identical fashion.[21/]

Second, petitioners cite the arguments that were employed, unsuccessfully, for the proposition that anti-miscegenation statutes were not discriminatory, and petitioners then use those

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20. See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 20 [holding that statute preventing women from tending bar except when they were licensees, wives of licensees, or sole shareholders in corporation holding the license constituted gender discrimination]; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37 [holding that price discounts offered to women but not men violated the Unruh Act because "public policy in California mandates the *equal* treatment of men and women."]; *Arp v. Workers' Compensation Appeals* Board (1977) 19 Cal.3d 395, 407 [holding that workers' compensation law provision that conclusively presumed that all widows were dependent on their husbands for purpose of survivor benefits but did not extend that presumption to widowers violated equal protection].

21. A very recent case from the Court of Appeal rejected a sex discrimination claim similar to the one that petitioners advance here. In *Holguin v. Flores* (Sept. 15, 2004), ___ Cal.App.4th ____, 2004 WL 2051166, the unmarried male cohabitant of a woman who was killed in a car accident asserted that the state law allowing registered domestic partners (limited to same sex couples or couples in which one member is at least 62 years old and eligible for Social Security benefits) to sue for wrongful death but not unmarried cohabitants constituted gender and age discrimination in violation of equal protection. (*Id.*, at p. *5.) The Court of Appeal held that strict scrutiny was not required because the statute discriminated against the plaintiff not based on his sex or age but based on his marital status. (*Id.*, at p. *6.) If petitioners' view of what constitutes gender discrimination were the law, the Court of Appeal would have concluded that the domestic partner law discriminates on the basis of gender because, if the plaintiff had been a woman, he could have formed a domestic partnership with the decedent and thereby obtained a wrongful death award.

arguments to compare the marriage statutes to the anti-miscegenation statutes. The comparison is not apt. In both *Perez v. Sharp* (1948) 32 Cal.2d 711 and *Loving v. Virginia* (1967) 388 U.S. 1, the government-defendants argued that the anti-miscegenation statutes "d[id] not constitute an invidious discrimination based on race" because they "punish[ed] equally" both white people and people of color who participated in interracial marriages. (*Loving, supra*, 388 U.S. at p. 8; see also *Perez, supra*, 32 Cal.2d at p. 716.) In *Loving*, the U.S. Supreme Court stated: "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all individual racial discriminations . . . ." (*Loving, supra*, 388 U.S. at p. 8.) In *Perez,* the California Supreme Court rejected this argument, reasoning that "[t]he right to marry is the right of individuals, not racial groups." (*Perez, supra*, 32 Cal.2d at p. 716.)

As several courts have observed, however, the patently discriminatory miscegenation statutes are not comparable to statutes limiting marriage to opposite-sex unions. In striking down anti-miscegenation statutes, courts had "little difficulty looking behind the superficial neutrality . . . to hold that its real purpose was to maintain the pernicious doctrine of white supremacy." (*Baker v. State of Vermont, supra*, 744 A.2d at p. 880, fn. 13.) By contrast, the limitation of marriage to opposite-sex unions is not patent discrimination, especially when, as California has done, the State prohibits discrimination and provides substantially equivalent rights and benefits through an alternative scheme. Rather, such a definition is simply reflective of our society's common and historic understanding of marriage. (See *Baker v. Nelson*, *supra,* 191 N.W.2d 185, 187 [rejecting analogy between anti-miscegenation statutes and restriction against same-sex marriage]; *Singer v. Hara, supra,* 522 P.2d 1187, 1191 [rejecting the analogy because "[t]he operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."]; *Lewis v. Harris* (N.J. Super. Ct. 2003) 2003 WL 23191114, *21-*22 [rejecting comparison between statutes prohibiting interracial marriage and marriage statutes, which merely reflect "the universally held legal definition of marriage"].) This understanding has been consistent throughout California history. (*Lockyer v. CCSF*, *supra,* 33 Cal.4th 1055, 1128 (Kennard, J., concurring and dissenting) (*citation omitted*).)

Significantly, petitioners cannot cite any majority opinion of any appellate court in support

of their argument. The closest they come to appellate authority for their position is the Hawaii Supreme Court's 1993 opinion in *Baehr v. Lewin*, *supra,* 852 P.2d 44, but this opinion was only a plurality decision.[22/] It should be noted, however, that this analysis was specifically rejected in the Vermont case and not adopted by the Massachusetts Court in *Goodridge v. Department of Public Health,* which applied a rational basis review despite the urging of a concurring justice to find that the statutes were sex discrimination. (See *Goodridge v. Dep't of Public Health, supra,* 798 N.E.2d at p. 961 [majority opinion declining to consider arguments in favor of strict scrutiny]; see also *Id.*, at p. 971 (Greaney, J., concurring) [arguing that marriage statutes were sex discrimination].) This trend toward rejecting the argument that marriage restrictions constitute sex discrimination reflects the absence of evidence showing that "the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy." (*Baker v. State of Vermont, supra,* 744 A.2d at p. 887.)

Third, petitioners attempt to justify heightened scrutiny by contending that the marriage laws were designed to discriminate on the basis of gender. Petitioners claim that "the Family Code was written to preserve gender roles"[23/] and that restrictions against same-sex marriage are the "last vestige of sex discrimination in marriage." (CCSF Brief at pp. 28:2-3, 18-20.) Petitioners try to link these restrictions to the legal disabilities that women suffered at common law, where they lacked even a separate legal existence from their husbands. (Woo Brief at p. 31:5-17.) Petitioners' argument is not relevant to the issue before this Court. Unlike the legal limitations that formerly prevented women

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22. The *Baehr* opinion cited by petitioners was only the opinion of two justices of the five-member Hawai'i Supreme Court. (See *Baehr, supra,* 852 P.2d at p. 48, fn. *, 68-70.) Besides the *Baehr* plurality, petitioners can cite only trial court opinions in Oregon and Alaska, a concurring opinion in the Massachusetts case, and the concurrence and dissent in the Vermont case. (Woo Brief at pp. 29:9-30:15 & fns. 19, 21; CCSF Brief at [. 27:4-28.)

23. This statement appears to have been made in error. The Family Code was created by 1992 legislation, (see Note foll. Fam. Code, § 1 (West 1994) [citing Stats. 1992, ch. 162]) and the laws that petitioners cite as evidence of the family law's former sex discrimination all appear to have been repealed before 1992. Rather, petitioners appear to be asserting that California's former domestic relations laws, many of which were originally enacted in the late nineteenth and early twentieth centuries, were established to preserve traditional gender roles in which women were subservient to men.

from voting, selling property, entering into contracts, or prosecuting their husbands for rape (Woo Brief at p. 32:2-3), the definition of marriage as an opposite-sex union is not intended to diminish women or reduce their rights, or to reduce the rights of men (to whom it equally applies, unlike the other examples of sexually discriminatory laws cited by petitioners). While petitioners assert that marriage under current law is a vestige of the sexually discriminatory laws that formerly applied in California, a more reasonable perspective is that the centuries-old understanding of marriage as a male-female union is simply the core of the institution after the layers of sexually-discriminatory family laws that previously applied to it have been peeled away and discarded.[24/]

Because petitioners' claim that the marriage laws constitute sex discrimination lacks support either in the laws themselves or in any evidence, this Court should follow the majority of courts from other states that have considered this issue and apply rational basis review to petitioners' equal protection challenges.

B. The Marriage Statutes Do Not Classify Based On Sexual Orientation, But Even If This Court Should Hold Otherwise, Rational Basis Review Would Be Required.

Petitioners also argue that Family Code section 300 discriminates on the basis of sexual orientation and that this Court should therefore apply strict scrutiny to the statutes, even though no reported California decision has ever applied strict scrutiny to a sexual orientation classification. Petitioners' contentions should be rejected.

1. Family Code Section 300 Does Not Discriminate Based On Sexual Orientation.

Petitioners contend that Family Code section 300 discriminates on the basis of sexual orientation, but they disagree on exactly *how* that discrimination occurs. While the *Woo* petitioners contend that section 300 discriminates "[b]y its terms" on the basis of sexual orientation (Woo Brief

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24. The Vermont Supreme Court focused on the weakness of attempting to prove sex discrimination with the kind of evidence that petitioners present to this Court, stating: "It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender role confusion. That evidence is not before us. Accordingly, we are not persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause [of the Vermont Constitution]." (*Baker, supra*, 744 A.2d at p. 880, fn. 13.)

at pp. 32:12-33:1), the City properly admits that the alleged sexual orientation discrimination is not expressed in the text of that statute. (CCSF Brief at p. 29:5-8.) This concession is only proper because, as the City admits, the statute does not make any specific reference to sexual orientation "nor does it make heterosexuality a prerequisite for a marriage license." (*Id.*, at p. 29:5-6.)

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Petitioners also assert that section 300 discriminates because it was allegedly enacted for the purpose of discriminating on the basis of sexual orientation. This is a misreading of the legislative history of California's marriage statutes. As explained at length above, California has limited marriage to opposite-sex unions throughout its history. (*Lockyer v. CCSF, supra,* 33 Cal.4th 1055, 1128 (Kennard, J., concurring and dissenting).) This limitation was recognized in the 1872 Civil Code and was recognized in case law.[25/] The 1977 legislation amending former Civil Code sections 4100 and 4101 (now Family Code sections 300, 301, 302 and 304) was only intended to clarify long-existing law.

The *Woo* petitioners misread the Supreme Court's decision in *Lockyer v. CCSF, supra*, 33 Cal.4th 1055, to state that "the California Supreme Court recently noted . . . [that] the [L]egislature's purpose in adopting the 'different-sex' rule was precisely to exclude lesbian and gay couples from marriage." (Woo Brief at p. 33:1-4.) The *Woo* petitioners thus suggest that the Supreme Court has already determined that section 300 constitutes sexual orientation discrimination. (*Ibid.*) This conclusion is incorrect. The Court was only examining the legislative history of the 1977 legislation for the purpose of determining whether Mayor Newsom had authority to authorize same-sex marriages. In answering that question in the negative, the Court quoted a legislative analysis of the bill, which stated that "[t]he purpose of the bill is to prohibit persons of the same sex from entering lawful marriage." (*Lockyer v. CCSF, supra*, 33 Cal.4th at p. 1076, fn. 11 (quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.), as amended May 23, 1977, p.1).) The Supreme Court did not characterize the bill as sexual orientation discrimination. Moreover, since the Supreme Court was only considering whether Mayor Newsom's actions were authorized, it had no reason to give further examination to the legislative history, which reveals that the 1977 legislation was

25. *Mott v. Mott, supra*, 82 Cal. at p. 416; *Kilburn v. Kilburn, supra*, 89 Cal. at p. 50.

only intended to clarify longstanding law, not to discriminate against any class of persons.

Family Code section 300 does not expressly discriminate based on sexual orientation and the claims that it was intended to discriminate on that basis are founded upon a misreading of the legislative history. Accordingly, this Court should reject petitioners' claim that Family Code section 300 constitutes sexual orientation discrimination.

2. No California Court Has Applied Strict Scrutiny To A Classification Based On Sexual Orientation.

Petitioners further contend that the marriage statutes must be subject to strict scrutiny if they are found to discriminate on the basis of sexual orientation. A review of the cases cited by petitioners, however, demonstrates that no California judicial decision supports their position. In *Gay Law Students Association v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, the California Supreme Court held that a cause of action is stated when it is alleged that a public utility had an employment policy of discriminating against homosexuals, but that decision "did not establish homosexuality as a suspect class . . . ." (*Hinman v. Department of Personnel Administration* (1985) 167 Cal.App.3d 516, 526, fn. 8.) The remaining California Court of Appeal cases cited by petitioners likewise do not establish that sexual orientation discrimination receives strict judicial scrutiny.[26/]

Leading U.S. Supreme Court precedents in this area have not held that sexual orientation

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26. In holding that a proposed local ordinance pertaining to homosexuality and AIDS violated equal protection under a rational basis test, the Court of Appeal in *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, deliberately chose not to determine whether a higher standard of review could apply to sexual orientation claims. (*Id.*, at p. 1026, fn. 8.) The decision in *Children's Hospital and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, involved an equal protection challenge by out-of-state hospitals to Department of Health Services regulations governing reimbursement rates for treatment of Medi-Cal patients. (*Id.*, at p. 747.) In its discussion, the Court of Appeal stated that because "the differential treatment of in-state and out-of-state enterprises does not relate to any fundamental interests, such as the right to vote, or suspect classifications, such as race or sexual orientation, the question is whether there is a rational basis for the different treatment." (*Id.*, at p. 769.) However, the reference to sexual orientation was dicta. The Court of Appeal's decision in *Holmes v. California National Guard* (2001) 90 Cal.App.4th 297, contains no discussion of whether strict scrutiny or rational basis review should apply. It bears noting, however, that the Ninth Circuit's held in a related case by the same plaintiff that "[h]omosexuals do not constitute a suspect or quasi-suspect class," thus requiring the application of rational basis review to a challenge to the military's "don't ask/don't tell" policy. (*Holmes v. California Army National Guard* (9th Cir. 1997) 124 F.3d 1126, 1132.)

discrimination is subject to strict scrutiny.[27] In *Romer v. Evans* (1996) 517 U.S. 620, the United States Supreme Court considered an equal protection challenge to an amendment to the Colorado Constitution that prohibited legislative, executive or judicial actions designed to protect gays and lesbians from discrimination. (*Id.*, at p. 625.) The Court employed the rational basis test in striking down that amendment on equal protection grounds.[28] (*Id.*, at p. 632 [Amendment 2 "lacks a rational relationship to legitimate state interests."].) In 2003, the U.S. Supreme Court's decision in *Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, cited with favor that portion of the *Romer* decision's applying a rational basis approach in its opinion striking down a Texas law barring homosexual sodomy on due process grounds.[29] (*Id.*, at p. 2482 (citing *Romer, supra*, 517 U.S. at p. 634).)

The apparent reluctance of the U.S. Supreme Court and the California courts to apply strict scrutiny to laws held to discriminate against gays and lesbians should counsel this Court to apply a rational basis examination to the marriage laws if it finds that they discriminate on sexual orientation grounds.

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27. *CCSF* claims that federal precedents support a finding of suspect class for homosexuals. (CCSF Brief at p. 30, fn. 7.) However, it relies mainly on a reversed federal district court case, *High Tech Gays v. Defense Industrial Security Center* (N.D. Cal. 1987) 668 F.Supp. 1361, rev'd (9th Cir. 1990) 895 F.2d 563. Upon reversal in that case, the Ninth Circuit held that classifications based on homosexuality were not entitled to heightened scrutiny. (*Id.*, at p. 572.) *CCSF* also cites two cases from the early 1980s, but neither case applied strict scrutiny. (*Hatheway v. Sec. of Army* (9th Cir. 1981) 641 F.2d 1376, 1382; *Beller v. Middlendorf* (9th Cir. 1980) 632 F.2d 788, 808-810.) These citations thus show the absence of federal precedents applying strict scrutiny to sexual orientation claims.

28. Federal equal protection cases are relevant to the analysis of petitioners' claims under the equal protection provision of the California Constitution. The California Supreme Court has observed that the equal protection provisions of the California Constitution "'have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution.'" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 572 [citation omitted].) Consequently, although the California Constitution is construed independently from the United States Constitution, the California Supreme Court has followed federal equal protection analysis in analyzing California constitutional claims that are analogous to claims made under the U.S. Constitution. (*Ibid.*) Thus, this Court should follow the Supreme Court's *Romer* decision in applying rational basis review to petitioners' claims of sexual orientation discrimination.

29. Justice O'Connor wrote a separate concurrence in which she opined that the Texas law should be struck down on equal protection grounds. (*Lawrence v. Texas, supra,* 123 S.Ct. at pp. 2484-2488) (O'Connor, J., concurring).) Justice O'Connor indicated that she would have applied rational basis review to the equal protection claim. (*Id.*, at pp. 2487-2488.)

C. It Is Not Irrational For California To Afford Rights And Benefits To Same-Sex Couples While Maintaining The Common Understanding Of Marriage.

Under the rational basis standard of review, courts presume the statute is constitutional and will uphold it if there is rationale basis for it to enactment. (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 907-908.) Petitioners bear the burden of proving that California's definition of marriage is not rationally related to any conceivable legitimate state interest. (*Ameri-Medical Corporation v. Workers' Compensation Appeals Board* (1996) 42 Cal.App.4th 1260, 1283.) As the California Supreme Court explained, the rational basis test has "never been interpreted to mean that we may properly strike down a statute simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with a problem." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163.)

Petitioners fail to carry their burden of proof. As discussed extensively in the introduction to this brief, it is not irrational for California to afford substantially all rights and benefits to same-sex couples while maintaining the common and traditional understanding of marriage. Nor is it irrational for California to recognize that the legislative process is best suited to consider, through public input and debate, the complex societal ramifications and policy nuances implicated in the definition of marriage.[30/]

Aside from the limitations imposed by federal law, the California Constitution and laws adopted by initiative, California has afforded registered domestic partners all rights and benefits enjoyed by married couples, except that registered domestic partners must continue to use the same taxpayer filing status they would use in filing federal tax returns. (Fam. Code § 297.5, subd. (g).) And even this exception is legitimate, because it permits the State to cross-verify information contained in federal tax filings. (See *City of San Jose v. Donohue* (1975) 51 Cal.App.3d 40, 45 [administrative

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30. As mentioned above, certain arguments advanced in other jurisdictions in support of particular state interests have not been advanced by the Attorney General in this case because they are not supported by California law. To the extent evidence is offered by other parties, proposed intervenors or amici in support of alleged state interests not advanced in this brief, such evidence should not be admitted unless it is clearly material and relevant to the constitutional issues presented in this case, and also clearly supported by California laws affording substantially all rights, benefits and obligations to registered domestic partners while maintaining the traditional understanding of marriage. (See, e.g., AB 205, § 1(b).)

convenience and expense are sufficient justifications for treating some taxpayers differently than others].)

Because California has extended to same-sex couples substantially all the state-law rights and benefits available to married couples, petitioners instead focus on the alleged public perception of domestic partnership. They argue that domestic partnership does not have the same meaning as marriage, but that is precisely why California's marriage laws survive this constitutional challenge. Marriage certainly has a meaning that is deeply-rooted in our history and traditions. As will be seen in this brief, the deeply-rooted meaning of marriage establishes that there is no fundamental right to same-sex marriage. And because of that deeply-rooted meaning, California has an interest in maintaining the common and traditional understanding of marriage.

The balance drawn by the legislative process, by which California affords substantially all state rights and benefits to same-sex couples while maintaining the common understanding of marriage, should not be redrawn by this Court. It is not the Court's role to define marriage. "The fact that the line could be drawn differently is a matter for legislative, rather than judicial, consideration, as long as plausible reasons exist for placement of the current line." (*Standhardt, supra,* 77 P.3d at p. 463, *citing Fed. Communications Comm'n v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313-14.) A perfect fit is not required under the rational basis test, and courts will not overturn a statute merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (Cf. *People v. Maciel* (2003) 113 Cal.App.4th 679, 684 [mathematical precision in the language of a penal statute is not a *sine qua non* of constitutionality].)

As mentioned above, no appellate court (other than the plurality opinion by two of the five Justices on the Hawaii Supreme Court) has applied heightened or strict scrutiny in this context. Nonetheless, even if this court were to conclude that a higher level of scrutiny was somehow appropriate, California's marriage laws would still survive because the State has a compelling interest in affording rights and benefits to same-sex couples while maintaining the deeply-rooted understanding of marriage. It is well-settled that the definition and regulation of marriage is solely within the province of the Legislature (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 99), and that "[t]he state has a vital interest in the institution of marriage and plenary power to fix the conditions under which the

marital status may be created or terminated." (*Ibid.*) There is also no doubt that the State can impose limits on the right to marry. (See, e.g., Family Code §§ 2200 *et seq.* [void and voidable marriages].) Because the common definition of marriage as between a man and a woman is so deeply rooted in our history, culture and understanding, the State has a compelling interest in maintaining that definition, while at the same time extending to same-sex couples virtually all state rights and benefits afforded to married couples. California also has a compelling interest in *recognizing* the role that the legislative process plays in striking the appropriate balance in this regard, and in considering, through public input

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and debate, the complex societal ramifications and policy nuances implicated in the definition of marriage.

Under the circumstances, plaintiffs fail in their burden to prove that California's marriage laws are constitutionally unsound. Their writ petition should be denied.[31]

II.

DUE PROCESS IS NOT INFRINGED BY CALIFORNIA'S MARRIAGE LAWS, BECAUSE UNLIKE TRADITIONAL MARRIAGE, SAME-SEX MARRIAGE IS NOT DEEPLY ROOTED IN CALIFORNIA'S HISTORY AND TRADITIONS.

Like the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 7(a) of the California Constitution provides, in relevant part, that a person may not be deprived of life, liberty or property without due process of law. (Cal. Const., art. I, § 7(a).) "Substantive due process prohibits governmental interference with a person's right to life, liberty, or property by unreasonable or arbitrary legislation." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.)

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31. In addition to equal protection, article I, section 7, subdivision (b) of the California Constitution also provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens . . . ." (Cal. Const., art I, § 7(b).) The privileges and immunities clause was pled in the Woo petitioners' third amended petition for writ of mandate and complaint for declaratory and injunctive relief, but it does not appear that they argued the point in their opening brief on the merits. The City and County of San Francisco did not plead the privileges and immunities clause and did not brief the issue. In any event, the California privileges and immunities clause is analyzed the same as equal protection. (*People v. Houseman* (1984) 163 Cal.App.3d Supp. 43, 52 - 53.) Significantly, the courts in other states that have addressed a privileges and immunities challenge to marriage laws have determined that it is enough to afford rights and benefits to same-sex couples, and have declined to order same-sex marriage as a remedy. (*Li v. State of Oregon, supra,* 2004 WL 1258167, at p. *8; *Anderson v. King County, supra,* 2004 WL 1738447, at p. *12.)

The first step under due process analysis is to determine whether a fundamental right is implicated. Rights are considered fundamental only if they are deeply-rooted and firmly entrenched in our State's history and tradition, and are implicit in the State's concept of ordered liberty. (*Dawn D. v. Superior Court (Jerry K.)* (1998) 17 Cal. 4th 932, 940; cf. *Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721; see also *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 19 [original intent of framers of the California due process clause is "the pivotal factor" in construing its terms]; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 261 ["the safeguards

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guaranteed by the California Constitution [are interpreted] in a manner consistent with the governing principles of California law"].)[32/]

The common understanding of marriage as between a man and a woman pre-dates the founding of this State or Nation, and is deeply rooted in our history and traditions. Hence, courts have held that marriage is a fundamental right. (*Perez v. Sharp, supra,* 32 Cal.2d at p.714; *Loving v. Virginia, supra,* 388 U.S. 1.) But in each instance, those courts were presented with circumstances involving marriage between a man and a woman. There is simply no deeply-rooted tradition of same-sex marriage in California or in any other state.[33/] (See *Welch v. State of California* (2000) 83 Cal.App.4th 1374, 1378 ["[i]n California, a lawful marriage requires the consent of a man and a woman ...."]; *Baehr v. Lewin, supra*, 852 P.2d at p. 57 [same-sex marriage is not rooted in the history of Hawaii and thus is not protected by Hawaii's due process clause]; *Dean v. District of Columbia, supra*, 653 A.3d at p. 333 [right to same-sex marriage is not rooted in Nation's history or tradition, thus no federal due process right implicated]; *In re Kandu, supra,* 2004 WL 1854112, at p. *9.) There

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32. While the protections of the California Constitution are independent of those found in the United States Constitution, California courts interpret the California Constitution's due process guarantee in a manner similar to its federal counterpart. (See *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 366.) Thus, the federal test for determining which liberty interests fall within the scope of state substantive due process applies.

33. The California Supreme Court has long recognized that marriage is a question of public policy largely within the State's discretion. (See *Kelsey v. Miller* (1928) 203 Cal. 61, 91.) "Unquestionably, the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated, as well as the effect of an attempted creation of that status." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 728.)

is simply nothing in our history or traditions that warrants finding a due process right to same sex-marriage under the California Constitution.

If a fundamental right is defined as an interest that is deeply-rooted in our history and traditions, then courts cannot ignore that history or tradition in expanding such rights. Nonetheless, as petitioners point out, nuances in fundamental rights could never be addressed by the courts if there was no flexibility in this rule. As the trial court noted in *Anderson v. King County*, *supra,* 2004 WL 1738447, at p. *5, there was no deeply-rooted tradition of interracial marriage prior to the decision in *Loving v. Virginia*, *supra,* 388 U.S. 1, and no deeply-rooted tradition of inmate marriage prior to the decision in *Turner v. Safley* (1987) 482 U.S. 78. But while those cases offered a nuanced expansion of the traditional scope of marriage, they were still anchored in the deeply-rooted and historic understanding of marriage as a union between a man and a woman. (*Standhardt v. Superior Court*, *supra,* 77 P.3d at p. 458; *Singer v. Hara, supra*, 522 P.2d at p. 1192, fn. 8 [expressly rejecting application of *Loving* and *Perez* to same-sex marriage].) There is historical and cultural precedent for this, as even Shakespeare apparently recognized interracial unions as being marriages. (See *Othello, the Moor of Venice* [17th century story of Othello, "the Moor," married to "the fair" Desdemona]; www.allshakespeare.com/othello [noting interracial nature of the marriage in *Othello*].) In contrast, requiring a right to marry someone of the same sex would not constitute a nuanced expansion of the traditional understanding of marriage, but instead would usurp the role of the legislative process by redefining marriage in a way contrary to California's history and traditions.

Courts in other states have concluded that there is no fundamental right to same-sex marriage. (See, e.g., *Baehr, supra,* 852 P.2d at pp. 44, 57 [same-sex marriage is not a fundamental right]; *Standhardt*, *supra,* 77 P.3d at p. 459 [same-sex marriage is not a fundamental right, because it is not deeply rooted in history and tradition]; *Dean, supra*, A.2d at p. 331 [same]; cf. *Goodridge, supra*, 798 N.E.2d at p. 961.) Because same-sex marriage is not a fundamental right, a rational basis standard of review applies. (*People v. Gallegos* (1997) 54 Cal.App.4th 252, 262-263.) And in applying a rational basis test, every federal and state court that has analyzed this issue (with the exception of the split decision by the Massachusetts Supreme Judicial Court), has determined that the due process clause does not mandate same-sex marriage. (See, e.g., *In re Estate of Cooper* (N.Y.

Super. Ct. 1990) 564 N.Y.S.2d 684, 685; *Adams v. Howerton* (C.D. Cal. 1980) 486 F.Supp. 1119, 1124-1125; *Jones v. Hallahan, supra*, 501 S.W.2d 588, 590; *Baker v. Nelson* (1971) 191 N.W.2d 185, 186-187.)

As discussed above, it is not irrational for California to extend substantially all rights and benefits to same-sex couples while maintaining the common and traditional understanding of marriage. Nor is it irrational for California to recognize that the legislative process is best suited to consider, through public input and debate, the complex societal ramifications and policy nuances implicated in the definition of marriage.

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Petitioners argue that due process is violated because they have a fundamental right to choose a committed life partner. California agrees that the ability to choose one's own committed life partner is an intimate and important decision. In fact, the State dignifies this choice by conferring wide-ranging rights, benefits, and obligations through its domestic-partnership program. Not only does California not interfere with its citizens' ability to enter into committed same-sex relationships, it bestows upon those relationships rights that are substantially equivalent to the rights afforded to married couples. Thus, the due process question is not whether same-sex couples have a fundamental right to have their relationships officially recognized by the State, but instead whether due process is offended when California affords registered domestic partners substantially equivalent rights and benefits while maintaining the deeply-rooted and historic understanding of marriage. Because this question turns on California's history and tradition of marriage as between a man and a woman, the answer must be that due process is not violated by the legislative effort to balance these competing interests.

But as mentioned in the discussion of equal protection above, even if this court were to conclude that a higher level of scrutiny was somehow appropriate, California's marriage laws would still survive because the State has a compelling interest in affording rights and benefits to same-sex couples while maintaining its understanding of marriage. The State has a "vital" interest in the institution of marriage. (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 99.) Because the common definition of marriage as between a man and a woman is so engrained in our history, culture and

understanding, the State has a compelling interest in maintaining that definition, while at the same time extending to same-sex couples virtually all state rights and benefits afforded to married couples.

Petitioners fail in their burden to prove a due process violation.

III.

CALIFORNIA'S MARRIAGE LAWS DO NOT VIOLATE THE RIGHT TO PRIVACY, ASSOCIATION OR EXPRESSION.

Petitioners contend that the marriage laws violate their right to privacy and the related rights of freedom of expression and freedom of association. Both claims lack merit.

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A. Petitioners' Privacy Claim Lacks Merit Because Petitioners Do Not Have A Legally Cognizable Privacy Interest That Has Been Invaded.

Petitioners' privacy argument is that restrictions against same-sex marriage affect their right to "mak[e] intimate personal decisions or [to] conduct[] personal activities without observation, intrusion or interference," which is referred to as the right of "autonomy privacy."[34/] (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35.) Article I, section 1 of the California Constitution guarantees the right of privacy to state citizens. A plaintiff alleging a violation of the right to privacy under the California Constitution "must establish each of the following [elements]: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill, supra,* 7 Cal.4th at p. 39-40.) Petitioners fail to establish a violation of the constitutional right to privacy.

The privacy provision of our Constitution "was not intended 'to create any unbridled right of personal freedom of action that may be vindicated in lawsuit against either government agencies or private persons or entities.'" (*Liebert v. Transworld Systems* (1995) 32 Cal.App.4th 1693, 1701 [affirming order sustaining demurrer to privacy claim based on alleged termination due to sexual orientation] (citation omitted).) "Whether a legally recognized privacy interest is present in a given

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34. The right to privacy also encompasses a right to "informational privacy," which has been defined as the interest in precluding the dissemination or misuse of sensitive and confidential information. (*Hill, supra,* 7 Cal.4th at p. 35.) Petitioners, however, do not claim that the marriage statutes implicate their rights to informational privacy.

case is a question of law to be decided by the court." (*Hill, supra,* 7 Cal.4th at p. 40.) The framers of the constitutional privacy provision intended to protect those privacy rights that were recognized in the common law and protected by the federal Constitution. (*Id.*, at p. 16 ["at the time of the Privacy Initiative there were two distinct and well-established legal sources of privacy rights – the federal Constitution . . . and common law and statutory provisions . . . ."].) The constitutional right to privacy "is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California." (*Ibid.*) Thus, the voters' intent determines the scope of the privacy provision. Petitioners have not shown, nor could they show, that a right to same-sex marriage

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was recognized as falling within the ambit of privacy rights that should be constitutionally protected at the time the privacy provision was added to the state Constitution in 1972.[35/]

Nor have petitioners shown that a fundamental right to same-sex marriage exists today that would be protected by the right of autonomy privacy. As explained in the discussion of petitioners' due process claims, there is no fundamental right to same-sex marriage under our Constitution. Applying this same analysis, several courts, including the Hawaii Supreme Court, have denied claims that restrictions against same-sex marriage violate a right to privacy. (See *Baehr v. Lewin, supra*, 852 P.2d at p. 57 [holding that "the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right of privacy or otherwise"]; *Standhardt v. Superior Court, supra*, 77 P.3d at p. 460 [holding that Arizona's constitutional right to privacy was not violated because of the lack of a fundamental right to same-sex marriage]; *Lewis v. Harris*, *supra*, 2003 WL 23191114, *13 [no right to same sex-marriage under the privacy provision of the New Jersey Constitution].

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35. See *Baker v. Nelson, supra*, 191 N.W.2d at p. 185; *Jones v. Hallahan, supra*, 501 S.W.2d at p. 588; *Singer v. Hara, supra*, 522 P.2d at p. 1187. Moreover, the Privacy Initiative was not intended to provide constitutional protection to every conceivable claim for privacy. (*Hill, supra*, 7 Cal.4th at p. 37 ["[n]ot every action which has some impact on personal privacy invokes the protections of our Constitution"]; J. Clark Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepp. L. Rev 327, 440 ["There is no indication that *all* aspects of home life, *all* aspects of family, and *all* rights of association are protected by the privacy clause."].)

The City suggests that *Ortiz v. Los Angeles Police Relief Ass'n, Inc.* (2002) 98 Cal.App.4th 1288, requires that the right to same-sex marriage be recognized as protected by the right to privacy. The City's reliance on *Ortiz* is misplaced. In that case, a female employee of a non-profit organization that managed benefits for retired officers of the Los Angeles Police Department was terminated after she informed her employer that she intended to marry a male prison inmate. (*Id.*, at p. 1297.) The employer was concerned that the female employee's involvement with the male inmate could result in the disclosure of confidential information regarding police officers to the inmate. (*Ibid.*) In affirming the trial court's judgment sustaining the employer's demurrer, the *Ortiz* court stated that the right to marry was a legally protected privacy interest. (*Id.*, at p. 1304.) The court held that this right

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was not violated by the employer's policy because the policy was rationally related to the employer's legitimate interest. (*Id.*, at p. 1312.)

Ortiz is distinguishable from this action because the case involved an opposite-sex couple, and the court's decision was grounded on the traditional understanding of marriage as involving one man and one woman. (*Id.*, at p. 1303 [relying on *Loving v. Virginia* and *Perez v. Sharp*, among other cases, for proposition that the right to marriage is fundamental].) *Ortiz* does not suggest that a right to marriage is absolute or always required under the constitutional right to privacy. Moreover, the plaintiff in *Ortiz* could not state a claim under the constitutional right of privacy because the employer's policy was supported by a rational basis. (*Id.*, at p. 1312.) Thus, *Ortiz* does not support petitioners' contention that their privacy claims are subject to strict scrutiny.

In addition, California's marriage laws do not constitute an *invasion* of privacy. Actionable violations of privacy "must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill, supra*, 7 Cal.4th at p. 37.) As demonstrated, there is no social norm recognizing same-sex marriage. At the same time, the Legislature has enacted domestic partnership legislation that provides substantially all of the state rights and benefits provided by civil marriage.

For these reasons, California's marriage laws do not violate the California Constitution's right to privacy.

B. The Marriage Statutes Do Not Prevent Petitioners From Expressing Themselves Or Associating With Anyone They Choose.

The marriage statutes likewise do not violate petitioners' rights of freedom of expression or association. The essence of the freedom-of-expression argument, advanced by the *Woo* petitioners, is that marriage serves as a vehicle through which people publicly express their commitment to each other. Since gay men and lesbians are not allowed to marry, petitioners assert, they are unable to engage in this form of expression. (Woo Brief at pp.35:15-38:9.) Petitioners, however, cannot cite any legal authority that supports their novel claim.[36/]

The marriage laws do not forbid petitioners from associating with anyone, individually or in groups. (See *Nieto v. City of Los Angeles* (1982) 138 Cal.App.3d 464, 468 [statute denying plaintiff standing to sue city for wrongful death of fiancé did not violate plaintiff's right to freely associate with persons of her choice].)

The City also suggests that failure to recognize same-sex marriage implicates the right to free association protected by the right to privacy, and cites *Lawrence v. Texas* (2003) 123 S.Ct. 2472 for the proposition that gay men and lesbians have a liberty interest in association for intimate relations. (City Brief at p. 22:1-6.) However, the U.S. Supreme Court made clear that it was not making any determination on the constitutionality of same-sex marriage in *Lawrence v. Texas*. In response to Justice Scalia's claim in dissent that *Lawrence* opened the door for same-sex marriage, the Court expressly stated that "the present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Id.*, at p. 2484.) Thus, *Lawrence* does not require finding a right to same-sex marriage under the rubric of the right to free association. (*Standhardt v. Superior Court, supra*, 77 P.3d at p. 457 [*Lawrence* did not "intend by its comments to address same-sex marriages," and "we reject [the] contention that *Lawrence* establishes

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36. Petitioners' argument is reminiscent of a position rejected by the California Supreme Court in *Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, *cert. denied*, __ U.S. __, 2004 WL 2050815 (Oct. 4, 2004.) In that case, a religiously-affiliated employer contended that a state law requiring it to provide health coverage for prescription contraceptives constituted compelled speech. (*Id.*, at p. 540.) The Court stated: "Catholic Charities' compliance with a law regulating health care benefits is not speech. The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them." (*Id.*, at p. 558.) In this case, California's marriage laws do not compel petitioners to speak and do not prevent them from expressing themselves.

entry in same-sex marriages as a fundamental right."].)

Accordingly, petitioners fail to establish that California's marriage laws violate the constitutional right to freedom of expression or association.

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CONCLUSION

California's effort to extend rights and benefits to same-sex couples, while maintaining the common understanding of marriage, does not run afoul of the Constitution. The petitions for writ of mandate should be denied in their entirety.

Dated: October 8, 2004

Respectfully submitted,

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