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12 SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO
13 STATE OF CALIFORNIA

14 Coordination Proceeding Special)
Title (Rule 1550(b)))
15 **MARRIAGE CASES**)

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. **4365**

Case No.: CGC 04-428794

16 RANDY THOMASSON and)
CAMPAIGN FOR CALIFORNIA)
17 FAMILIES)

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION OF ALL CAUSES
OF ACTION; MEMORANDUM OF
POINTS AND AUTHORITIES**

18)
19)
20 Plaintiffs,)

21 vs.)

Action Filed: February 13, 2004
Hearing Date: December 22, 2004
Hearing Time: 9:30 a.m.
Dept: 304
Judge: Richard A. Kramer

22 GAVIN NEWSOM, individually and)
in his official capacity as Mayor of the)
City and County of San Francisco, CA and)
23 NANCY ALFARO, in her official capacity)
as the San Francisco County Clerk,)
24)

25 Defendants.)
_____)

26 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

27 **PLEASE TAKE NOTICE THAT** on December 22, 2004, at 9:30 a.m., or as soon thereafter
28 as the Court may hear this matter, in Department 304 of the above-entitled Court, located at 400

1 McAllister Street, San Francisco, California, Plaintiff Campaign for California Families (“CCF”)
2 will and hereby does move this Court as follows:

- 3 (1) for an order granting summary judgment in favor of CCF, and for costs of suit
4 incurred and such other relief as may be just; or
- 5 (2) alternatively, if for any reason summary judgment cannot be had, for an order
6 adjudicating each of CCF’s individual causes of action contained in the Amended
7 Complaint in its favor, including the First Cause of Action seeking an order declaring
8 that California Family Code §§ 300, 301 and 308.5 are constitutional, the Second
9 Cause of Action seeking an order enjoining Defendants from marrying same-sex
10 couples, the Third Cause of Action seeking an alternative writ of mandate directing
11 Defendants to comply with California marriage laws, and that the final judgment in
12 this action shall, in addition to any such matters determined at trial, award judgment
13 as established by such adjudication in favor of CCF, and against Defendants.

14 This Motion is made pursuant to California Code of Civil Procedure section 437c and is
15 made on the grounds that:

- 16 (1) there is no triable issue as to any material fact and CCF is entitled to judgment as a
17 matter of law on all causes of action; and CCF is entitled to costs of suit incurred;
- 18 (2) there is no triable issue of any material fact as to the constitutionality of California’s
19 marriage laws and therefore CCF is entitled to adjudication of the first cause of
20 action in its favor as a matter of law;
- 21 (3) there is no triable issue of any material fact as to the constitutionality of California’s
22 marriage laws and therefore CCF is entitled to adjudication of the second cause of
23 action in its favor as a matter of law; and
- 24 (4) there is no triable issue of any material fact as to the obligation of Defendants to
25 comply with the marriage laws and therefore CCF is entitled to adjudication of the
26 third cause of action in its favor as a matter of law.

27 This Motion is based on this Notice of Motion; the concurrently filed Memorandum of Points
28 and Authorities in Support of Motion of Summary Judgment, or in the Alternative for Summary

1 Adjudication of All Causes of Action; Separate Statement of Undisputed Facts; CCF's Request for
2 Judicial Notice; Declaration of Maggie Gallagher, with exhibits thereto; Declaration of Alan
3 Chambers; Declaration of Randy Thomas; Declaration of Dr. A. Dean Byrd, with exhibits thereto;
4 the complete files and records in this action; matters of which judicial notice may be taken; any oral
5 argument that the Court may hear, and such other or further matters or evidence as CCF may submit
6 to the Court prior to its ruling on this Motion.

7 Dated: November 4, 2004

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Campaign for California Families (“CCF”) submits this Memorandum of Points and
3 Authorities in support of its Motion for Summary Judgment on all causes of action, or alternatively,
4 summary adjudication on each cause of action.

5 **I. INTRODUCTION**

6 Long before California began granting rights, and imposing obligations, on married couples,
7 the people of California recognized that marriage was defined as the union of one man and one
8 woman. Stated differently, California did not create marriage; it simply affirmed in its laws and
9 undertook to protect what has always been. While many years have passed since then, the
10 fundamental definition of marriage has not, and should not, change. What was true in the earliest
11 days of our nation is equally true today – marriage is comprised of one man and one woman – and
12 no constitutional or statutory enactments put in place have changed that definition.

13 Despite what some describe as substantial cultural and social changes that have occurred in
14 the last several years, the legislatures and electorates throughout the United States have steadfastly
15 maintained the traditional definition of marriage. Other courts have addressed the question of
16 whether marriage should be redefined to conform to some perceived cultural changes, but in only
17 one instance – *Goodridge* – has a court accepted that invitation. Moreover, without exception, every
18 legislature and every electorate that has considered the issue has upheld the definition of marriage
19 as between one man and one woman.¹ The same-sex couples in the Coordinated Marriage Cases
20 maintain that State guarantees of equal protection, due process, and privacy, require the State to
21 permit same-sex couples to marry. Those couples argue that the marriage laws discriminate on the

22
23 ¹ Since February 2004, the electorate of 13 states voted on proposed constitutional
24 amendments that would define marriage as the union of one man and one woman. Each of those
25 amendments passed by an overwhelming majority. One of those was in Oregon, where a trial court
26 had recently found the marriage laws unconstitutional, leaving to the legislature the remedy.
27 Additionally, in response to a 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*, 852 P.2d 44
28 (1993), which strongly suggested that following remand, the court would hold that same-sex couples
have a right to marry, the Hawaii electorate adopted in 2000 a constitutional amendment that
reserved to the legislature that power to define marriage as the union of one man and one woman.
Similarly, in response to a 1998 Alaska superior court decision, the electorate amended the
constitution to prohibit same-sex marriages.

1 basis of gender, on the basis of sexual orientation, and infringe on their fundamental right to marry.
2 However, courts have consistently rejected those arguments.

3 It bears emphasis at the outset that the State is entitled to pass “discriminatory” laws, as long
4 as it has an appropriate relation to the object of the legislation. “As a general rule, the state may place
5 persons in different classes and treat those classes differently so long as the classification and
6 treatment are not arbitrary and rest on some ground of difference having a rational relationship to
7 the object of the legislation.” *Holguin v. Flores*, 122 Cal. App.4th 428 (Cal. Ct. App. 2004). “Equal
8 protection analysis requires a reconciliation of the constitutional promise that no person shall be
9 denied equal protection of the laws with the practical reality that most legislation classifies for one
10 purpose or another, with resulting advance or disadvantage to various groups or persons.” *Flynt v.*
11 *California Gambling Control Commission*, 104 Cal. App.4th 1125, 1140 (Cal. Ct. App. 2002). The
12 question for this Court therefore is whether there is “any reasonable basis in fact to support the
13 legislative determination of the regulation’s wisdom and necessity?” *Terminal Plaza Corp. v. San*
14 *Francisco*, 177 Cal. App.3d 892, 907 (Cal. Ct. App. 1986). “As a general rule, such legislative
15 classifications are presumptively valid.” *Id.*

16 For example, last year a New Jersey Superior Court rejected arguments that the marriage laws
17 were unconstitutional, explaining that same-sex couples did *not* seek *similar* access to marriage, but
18 rather, to “alter the fundamental nature of marriage itself.” *Lewis v. Harris*, 2003 WL 23191114 (N.J.
19 Super. Ct. Nov. 5, 2003) (granting summary judgment in favor of state defendant). *See also Dean*
20 *v. D.C.*, 653 A.2d 307, 308 (D.C. App. 1995) (per curiam) (“same-sex marriages are legally and
21 factually -e.e., definitionally - impossible.”). *Lewis* is not an anomaly. Just two weeks ago, a New
22 York trial court rejected arguments by same-sex couples that the marriage laws violated state
23 guarantees of equal protection and due process. *See Shields v. Madigan*, no. 1458/04 (N.Y. Sup. Ct.
24 Rockland Co. Oct. 18, 2004). In August, a federal bankruptcy court in Washington upheld a
25 constitutional challenge to the federal Defense of Marriage Act (“DOMA”) by a same-sex couple
26 married in Canada, expressly rejecting many of the same arguments advanced by the petitioners in
27 the Coordinated Marriage Cases. *See In re Kandou*, No. 03-51312 (W.D. Bnkr. Wash. Aug. 17, 2004).
28 Last year, an Indiana Superior court also dismissed a constitutional challenge by a same-sex couple

1 to the marriage laws, expressly rejecting arguments that the marriage laws violated equal protection
2 and due process guarantees. *See Morrison v. Sadler*, 2003 WL 23119998 (Sup. Ct. Indiana May 7,
3 2003).

4 An Arizona Court of Appeals explained last year that although people in same-sex
5 relationships “may seek ‘autonomy’ to make ‘intimate and personal choices’ that reflect ‘one’s own
6 concept of existence, of meaning, of the universe, and of the mystery of human life’ free from
7 government compulsion,” that right does not include “the choice to enter a state-sanctioned, same-
8 sex marriage.” *Standhardt v. Superior Court of the State of Arizona*, 77 P.3d 451, 457 (Az. Ct. App.
9 2003) (cert. denied). “[N]ot all important decisions sounding in personal autonomy are protected
10 fundamental rights.” 77 P.3d at 459-60. In fact, even in the Vermont case of *Baker v. State of*
11 *Vermont*, 744 A.2d 864 (Vt. 1999), the court did *not* find require the state to permit same-sex
12 couples. Rather, under the Common Benefits Clause of the Vermont Constitution, same-sex couples
13 must be afforded the same legal rights that married couples enjoy under Vermont law. *Id.* at 867. *Cf.*
14 *Anderson v. King County*, 2004 WL 1738447 (Wash. Sup. Ct. Aug. 4, 2004) (concluding that
15 Washington’s marriage laws violate state constitution, but not prescribing a remedy).

16 The same-sex couples ask this Court to find the definition of marriage as the union of one
17 man and one woman an unconstitutional barrier to their ability to marry. Marriage, by definition
18 however, is a union between a man and a woman. Consequently, they do not seek removal of a
19 “barrier” but seek to fundamentally alter the very nature of the institution of marriage. That is why
20 courts have consistently rejected the argument that there is a fundamental right to same-sex marriage.
21 Even the *Goodridge* court declined to reach the issue, deciding the case under a purported rational
22 basis standard. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (Mass. 2003).

23 Similarly, courts have rejected the argument that the marriage laws are sex-based
24 discrimination. As explained by the Washington Court of Appeals, same-sex couples are “not denied
25 a marriage license because of their sex; rather, they are denied a marriage license because of the
26 nature of marriage itself.” *Singer v. Hara*, 522 P.2d 1187, 1196 (Ct. App. Wash. 1974). *See also*
27 *Shields*, at 7 (“the classification at issue here is not one based upon gender because both males and
28 females are similarly situated under the challenged statute in that they are authorized to marry only

1 persons of the opposite sex”).

2 As discussed below, California’s marriage laws are constitutional because the legislature and
3 the electorate have a rationale, indeed, compelling basis for defining marriage as the union of one
4 man and one woman. In addition, there simply is no fundamental right to same-sex marriage.
5 Therefore, this Court should grant CCF’s motion and declare the marriage laws constitutional.

6 **II. THE FUNDAMENTAL NATURE OF MARRIAGE IS THE UNION OF ONE MAN**
7 **AND ONE WOMAN.**

8 In *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), the Supreme Court rejected a constitutional
9 challenge to a federal statute denying franchise in federal territories to polygamists and recognized
10 the importance of marriage consisting of one man and one woman:

11 No legislation can be supported more wholesome and necessary in the founding of
12 a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States
13 of the Union, than that which seeks to establish it on the basis of the idea of the
14 family as consisting and springing from the union for life of *one man and one woman*
15 in the holy estate of matrimony; the sure foundation of all that is stable and noble in
16 our civilization.

17 Marriage is “the most important relation in life.” *Maynard v. Hill*, 125 U.S. 190, 205, (1888). It is
18 “the foundation of the family and of society, without which there would be neither civilization nor
19 progress.” *Id.* at 211. The right to marry, establish a home and raise children is a central part of the
20 liberty protected by the Due Process Clause. *Meyer v. Nebraska* 262 U.S. 390, 399 (1923). In *Skinner*
21 *v. Oklahoma*, 316 U.S. 535, 541(1942), the Supreme Court described marriage and procreation as
22 “fundamental to the very existence and survival of the race.”

23 In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court recognized that
24 marriage is part of the fundamental right of privacy under the U.S. Constitution:

25 We deal with a right of privacy older than the Bill of Rights--older than our political
26 parties, older than our school system. Marriage is a coming together for better or for
27 worse, hopefully enduring, and intimate to the degree of being sacred. It is an
28 association that promotes a way of life, not causes; a harmony in living, not political
29 faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association
30 for as noble a purpose as any involved in our prior decisions." *Id.*, at 486.

31 Since *Griswold*, the court has consistently re-affirmed the fundamental importance of marriage. *See*,
32 *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978).

1 Same-sex marriage proponents often cite *Loving v. Virginia*, 388 U.S. 1 (1967) as authority
2 for redefining marriage. However, *Loving* was strictly a case addressing racial discrimination. The
3 Supreme Court left the longstanding definition of marriage intact. Citing *Skinner* and *Maynard*, the
4 Supreme Court affirmed that “Marriage is one of the 'basic civil rights of man,' fundamental to our
5 very existence and survival.” *Loving*, 388 U.S. at 12.

6 To deny this fundamental freedom on so unsupportable a basis as the racial
7 classifications embodied in these statutes, classifications so directly subversive of the
8 principle of equality at the heart of the Fourteenth Amendment, is surely to deprive
9 all the State's citizens of liberty without due process of law. The Fourteenth
10 Amendment requires that the freedom of choice to marry not be restricted by
11 invidious racial discriminations. *Id.*

12 The Court left the fundamental definition of marriage untouched and emphasized that it was
13 striking Virginia’s anti-miscegenation statute because “The fact that Virginia prohibits only
14 interracial marriages involving white persons demonstrates that the racial classifications must stand
15 on their own justification as measures designed to maintain White Supremacy.” *Loving*, 388 U.S.
16 at 11. At no point in the decision did the Court address the traditional definition of marriage or make
17 any overtures regarding a redefinition of marriage to include couplings other than of a man and a
18 woman.

19 As the Supreme Court of Minnesota stated: “*Loving* does indicate that not all state
20 restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in
21 commonsense and in a constitutional sense, there is a clear distinction between a marital restriction
22 based merely upon race and one based upon the fundamental difference in sex.” *Baker v. Nelson* 291
23 Minn. 310, 315(1971).

24 The Court ruling in *Lawrence v. Texas*, which found that engaging in consensual homosexual
25 relations between two consenting adults in the privacy of their homes was a protected privacy right,
26 cannot be read as authorizing redefinition of marriage. As Justice Anthony Kennedy stated, the
27 *Lawrence* case “does not involve whether the government must give formal recognition to any
28 relationship that homosexual persons seek to enter.” *Lawrence v. Texas*, 123 S.Ct. 2472, 2484
(2003). Justice Sandra Day O’Connor further clarified that the Court **was not** addressing the
traditional definition of marriage:

1 That this law as applied to private, consensual conduct is unconstitutional under the
2 Equal Protection Clause does not mean that other laws distinguishing between
3 heterosexuals and homosexuals would similarly fail under rational basis review.
4 Texas cannot assert any legitimate state interest here, such as national security or
5 **preserving the traditional institution of marriage**. Unlike the moral disapproval
of same-sex relations--the asserted state interest in this case--other reasons exist to
promote the institution of marriage beyond mere moral disapproval of an excluded
group.

6 *Lawrence*, 123 S.Ct. at 2487-2488 (O'Connor, J. concurring).

7 The traditional definition of marriage as between one man and one woman remains firmly
8 ensconced in Supreme Court precedent.

9 The traditional definition of marriage as between one man and one woman has been
10 consistently upheld by state appellate and supreme courts. The lone exception is the bare majority
11 of four justices on the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public*
12 *Health*, 440 Mass. 309 (2003). However, even those four justices noted that "Eliminating civil
13 marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable
14 families and would dismantle a vital organizing principle of our society. *Id.* at 342-343. Three
15 justices vigorously dissented to the decision. Similar attempts to redefine marriage by judges in
16 Alaska and Hawaii were halted when voters adopted constitutional amendments specifically
17 restricting marriage to one man and one woman. ALASKA CONST. art. 1, §25; HAW. CONST. art. 1,
18 §23.

19 Every other state court that has considered the question of same-sex marriage has steadfastly
20 upheld the definition of marriage as between one man and one woman. Even the Vermont Supreme
21 Court recognized that "marriage" must remain between one man and one woman when it held that
22 the Vermont Constitution required that same-sex couples be afforded the same benefits, but does not
23 require the state to issue marriage licenses to same-sex couples. *Baker v. State*, 170 Vt. 194 (1999).
24 "The evidence demonstrates a clear legislative assumption that marriage under our statutory scheme
25 consists of a union between a man and a woman. Accordingly, we reject plaintiffs' claim that they
26 were entitled to a license under the statutory scheme governing marriage." *Id.* at 204.

27 Similarly, the New York Supreme Court succinctly stated, "We conclude that New York does
28 not recognize or authorize same sex marriage," so the city clerk in question acted properly in

1 refusing to issue a license to two men. *Storrs v. Holcomb*, 168 Misc.2d 898, 900 (N.Y.Sup. 1996).

2 In *Matter of Estate of Cooper*, 149 Misc.2d 282, 287-288 (N.Y.Sur.,1990), the court held:

3 The state has a compelling interest in fostering the traditional institution of marriage
4 (whether based on self-preservation, procreation, or in nurturing and keeping alive
5 the concept of marriage and family as a basic fabric of our society), as old and as
6 fundamental as our entire civilization, which institution is deeply rooted and long
7 established in firm and rich societal values. The Legislature has chosen to restrict the
8 right to marry to people of the opposite sex, a classification which has a rational basis
9 and which does not offend the equal protection right of the Fourteenth Amendment
10 or due process. (*Baker v. Nelson*, supra.) In summary, the Court concludes that
11 marriage between homosexuals cannot be legalized under the Laws of the State of
12 New York and that such purported marriages do not give rise to any rights either
13 pursuant to or similar to those granted by EPTL 5-1.1. No constitutional rights have
14 been abrogated or violated in so holding.

15 The Arizona Court of Appeals has similarly held, “The history of the law's treatment of
16 marriage as an institution involving one man and one woman, together with recent, explicit
17 reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex
18 marriage is not a fundamental liberty interest protected by due process.” *Standhart v. Superior Court*,
19 206 Ariz. 276, 285 (Ct. App. 2003).

20 The D.C. Court of Appeals noted that in recognizing a fundamental right to marry, the
21 Supreme Court has only contemplated marriages between persons of opposite sexes. *Dean v. District*
22 *of Columbia*, 653 A.2d 307, 310 (D.C. 1995) “The question, then, is whether there is a constitutional
23 basis under the due process clause for saying that this recognized, fundamental right of heterosexual
24 couples to marry also extends to gay and lesbian couples. The answer, very simply, is “No.” *Id.*

25 The Ninth Circuit held that the purported “marriage” of a male citizen and male from
26 Australia did not qualify the alien as citizen’s spouse under the Immigration and Nationality Act.
27 *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert denied* 458 U.S. 1111 (1982). The *Adams*
28 court held that the citizen’s spouse must be of the opposite sex. “In effect, Congress has determined
that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is
because homosexual marriages never produce offspring, because they are not recognized in most,
if any, of the states, or because they violate traditional and often prevailing societal mores.” *Id.* at
1042-43.

In overturning a constitutional challenge similar to the challenge in this case, the Kentucky

1 Court of Appeals succinctly held that, “It appears to us that appellants are prevented from marrying,
2 not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue
3 them a license, but rather by their own incapability of entering into a marriage as that term is
4 defined.” *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973). “In substance, the
5 relationship proposed by the appellants does not authorize the issuance of a marriage license because
6 what they propose is not a marriage.” *Id.* at 590.

7 In *Baker v. Nelson*, 291 Minn. 310, 315(1971), the Minnesota Supreme Court held that the
8 state’s marriage statutes did not authorize marriage by persons of the same sex, and that the statutes
9 did not offend the First, Fifth, Eighth, Ninth or Fourteenth amendments to the Constitution.

10 The Superior Court of Pennsylvania found that same-sex couples could not contract a
11 common-law marriage, adding that, “We have no doubt that under our Marriage Law it is impossible
12 for two persons of the same sex to obtain a marriage license. *De Santo v. Barnsly*, 328 Pa.Super.
13 181, 189 (1984).

14 Similarly, the Washington Court of Appeals held that Washington’s marriage laws do not
15 authorize same-sex marriage. *Singer v. Hara*, 11 Wash.App. 247, 262-263 (1974). “There can be
16 no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude
17 same-sex relationships. Although, as appellants contend, other cultures may have fostered differing
18 definitions of marriage, marriage in this state, as elsewhere in the nation, has been deemed a private
19 relationship of a man and a woman (husband and wife) which involves 'interests of basic importance
20 in our society. *Id.*

21 The Ohio Court of Appeals has held that the legislature’s failure to amend the language in
22 OHIO REV.CODE §3101.01 was a clear indication of its intent to not change the traditional definition
23 of marriage. *In re Marriage License for Nash* 2003 WL 23097095, *3 (Ohio App. 2003).

24 The legislature amended R.C. 3101.01 four times without changing the relevant
25 language designating that only ‘male persons * * * and female persons * * * may be
26 joined in marriage.’ ‘A reenactment of legislation, without modification after judicial
27 interpretation, is further indication of [] implied legislative approval of such
28 interpretation.’ *Seeley v. Expert, Inc.*, (1971), 26 Ohio St.2d 61, 72-73, 269 N.E.2d
121.
Nash, 2003 WL 23097095, *7. Therefore, the *Nash* court said, the lower court did violate the
28 plaintiffs’ equal protection rights when it refused to issue a marriage license to the couple, which

1 consisted of a female and a female to “male” transsexual. *Id.*

2 Courts in Florida (*Kantaros v. Kantaras*, 2004 WL 1635003), Kansas (*In re Estate of*
3 *Gardiner*, 42 P.3d 120), and Texas (*Littleton v. Prange*, 9 S.W.3d 223) have similarly refused to
4 recognize same-sex marriage.

5 Examining the same arguments presented by the same-sex couples in the Coordinated
6 Marriage Cases, other state courts have refused to redefine marriage to include same-sex couples.
7 There is simply no precedent and no evidence to make such a change in California. *Cf. Coon v.*
8 *Joseph*, 192 Cal. App.3d 1269, 1278 (Cal. Ct. App. 1987) (“Legislative regulation of marital status
9 is warranted because the creation and enforcement of benefits incident to it involve complex
10 questions of public policy”); *Schmidt v. Retirement Bod. of San Francisco City and County*
11 *Employees*, 37 Cal. App.4th 1204, 1211 (Cal. Ct. App. 1995) (explaining that the policy of the state
12 in matters concerning marriage “is committed by the people to the Legislature; and whether such
13 policy is sound or not must be determined by the legislative, and not the judicial, branch of
14 government”).

15 **III. CALIFORNIA’S MARRIAGE LAWS DO NOT VIOLATE STATE GUARANTEES**
16 **OF EQUAL PROTECTION.**

17 “Equal protection analysis requires a reconciliation of the constitutional promise that no
18 person shall be denied equal protection of the laws with the practical reality that most legislation
19 classifies for one purpose or another, with resulting advance or disadvantage to various groups or
20 persons.” *Flynt v. California Gambling Control Commission*, 104 Cal. App.4th 1125, 1140 (Cal. Ct.
21 App. 2002). “As a general rule, such legislative classifications are presumptively valid.” *Id.* Where
22 the classification is not based on a suspect class, the state may place persons in different classes and
23 treat those classes differently so long as the classification and treatment are not arbitrary and rest on
24 some ground of difference having a rational relationship to the object of the legislation.” *Holguin*
25 *v. Flores*, 122 Cal. App.4th 428 (Cal. Ct. App. 2004). The question for the court under those
26 circumstances is whether there is “any reasonable basis in fact to support the legislative
27 determination of the regulation’s wisdom and necessity?” *Terminal Plaza Corp. v. San Francisco*,
28 177 Cal. App.3d 892, 907 (Cal. Ct. App. 1986).

1 In *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1 (1974), the California Supreme
2 Court described the two principal standards or tests that generally have been applied in reviewing
3 classifications challenged under the equal protection clause of article 1, section 7 of the California
4 Constitution. “The first is the basic and conventional standard for reviewing economic and social
5 welfare legislation in which there is ‘discrimination’ or differentiation of treatment between classes
6 or individuals.” *Id.* at 16. Applying that standard, judicial restraint affords deference to the
7 discretionary act of a co-equal branch of government. The legislation is presumed constitutional and
8 will be upheld if there is a rational relationship between the challenged legislation and any
9 conceivable legitimate state purpose. *Id.* The burden of demonstrating the invalidity of a
10 classification under this standard falls upon the party who challenges the statute. *Id.* at 16-17.

11 A more stringent test is applied only in cases touching on fundamental interests or involving
12 suspect classifications. *D'Amico*, 11 Cal.3d at 17. Under the strict scrutiny standard, the State bears
13 the burden of establishing not only that it has a compelling interest that justifies the law, but that the
14 distinctions drawn by the law are necessary to further its purpose. *Id.* As discussed below, no
15 appellate court has applied the strict scrutiny standard in a case challenging the marriage laws as
16 unconstitutional.

17 Justice Holmes has explained that when a court is asked to judge the constitutionality of a
18 co-equal legislature, it is “the gravest and most delicate duty that the Court is called upon to
19 perform.” *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). The United States Supreme Court has
20 repeatedly recognized the serious constitutional and separate-of-powers concerns that arise in this
21 situation and therefore accords great weight to the legislative choices of Congress: “The Congress
22 is a coequal branch of government whose Members take the same oath we do to uphold the
23 Constitution of the United States. As Justice Frankfurter noted . . . we must have ‘due regard to the
24 fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who
25 also have taken the oath to observe the Constitution and who have the responsibility for carrying on
26 government.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1982).

27 **A. The Marriage Laws Do Not Discriminate on the Basis of Gender.**

28 California marriage laws do not contain a classification that limits marriage licenses on the

1 basis of gender. Both men and women have the same right under the statute to obtain a license to
2 marry someone of the opposite gender. Both men and women are subject to the same statutory
3 restriction; neither men nor women can obtain a license to marry someone of the same gender. Men
4 and women are subject to precisely the same treatment under the statute. As the Vermont Supreme
5 Court stated in rejecting the argument of gender-based discrimination: “[T]here is no discrete class
6 subject to differential treatment solely on the basis of sex; each sex is equally prohibited from
7 precisely the same conduct.” *Baker v. State*, 744 A.2d at 880 n.13. The great weight of authority in
8 the same-sex marriage case law finds no gender discrimination in the limitation of marriage to
9 opposite-sex couples. *See, e.g., Standhardt*, 77 P.3d at 58; *Lewis v. Harris*, 2003 WL 23191114 at
10 *20-21 (N.J. Super. Ct. Nov. 5, 2003); *Morrison v. Sadler*, 2003 WL 23119998 at *4-5 (Ind. Super.
11 Ct. May 7, 2003); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); *Jones v.*
12 *Hallahan*, 501 S.W.2d 588, 590 (Ky Ct. App. 1973); *Shields v. Madigan*, no. 1458/04 at 7 (N.Y.
13 Sup. Ct. Rockland Co. Oct. 18, 2004); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App.
14 1995). Even the majority opinion in *Goodridge* did not find gender discrimination, even though the
15 concurring judge wrote an opinion urging that the case be decided on those grounds. *Goodridge*, 798
16 N.E.2d at 971. Thus, although two of the earlier same-sex marriage decisions, one by an appellate
17 court, *Baehr v. Lewin*, 852 P.2d 44 (1993), and one by a trial court, *Brause v. Bureau of Vital*
18 *Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), did premise their holdings on gender
19 discrimination analysis, that analysis has been rejected in almost all subsequent decisions.²

20 Absent disparate treatment between the sexes, same-sex couples cannot demonstrate that the
21 marriage laws discriminate on the basis of gender. *See, e.g., Eckl v. Davis*, 51 Cal. App.3d 831, 847-
22 48 (Cal. Ct. App. 1975) (finding, and upholding, a sex-based classification where the law permitted
23 men but not women to sunbathe and swim with their breasts uncovered); *Gay Law Students Assoc.*
24 *v. Pacific Tel. and Telegraph Co.*, 24 Cal.3d 458, 490-91 (1979) (discrimination against
25

26 ² The only exception is *Li v. Oregon*, No. 0403-03057, at 9 (Oregon 4th Cir. Apr. 20, 2004),
27 in which the analysis is very cursory. Further, the underlying constitutional provision was not an
28 equal protection provision, but the Oregon Constitution’s privileges and immunities clause. *Id.* at
7.

1 homosexuals under Fair Employment Practice Act was not discrimination on the basis of sex); *Miller*
2 *v. California Commission on the Status of Women*, 151 Cal. App.3d 693, 699 (1984) (the use of
3 “gender-framed measures” in the commission study was “not a preference of women over men in
4 the application of public resources”); *Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 18 (Cal. 1971) (sex-based
5 discrimination where the “whole class” is relegated to an inferior legal status); *see also Personnel*
6 *Administrator v. Feeney*, 442 U.S. 256, 274 (1979). The marriage laws do not discriminate on the
7 basis of gender as they are gender-neutral and do not adversely impact one gender.

8 It bears emphasis that *Loving v. Virginia*, 388 U.S. 1 (1967) lends no support to the argument
9 that the marriage laws impermissibly discriminate on the basis of gender. In *Loving*, the plaintiffs
10 were an interracial married couple, who were criminally convicted of violating a Virginia statute that
11 made marriage between a White person and a Black person a crime. Although the spouses were
12 punished equally, the statute was not racially neutral. The Supreme Court found that the purpose of
13 the entire statutory scheme was “invidious racial discrimination.” *Id.* at 11. The Court noted that the
14 statute did not classify persons of different races equally. Rather, the statute “prohibits only
15 interracial marriages involving white persons,” which demonstrated that the statute was “designed
16 to maintain White Supremacy.” *Id.* In other words, it did *not* treat all races equally. Here, on the
17 other hand, both genders are treated alike. Consequently, *Loving* does not lend support to the
18 argument that the marriage laws discriminate on the basis of gender.

19 Because the marriage laws do not discriminate on the basis of gender, rational basis review
20 applies.

21 **B. The Marriage Laws Do Not Discriminate on the Basis of Sexual Orientation.**

22 The marriage laws do not discriminate on the basis of sexual orientation. The Application
23 for a Marriage License does *not* inquire into the applicant’s sexual orientation. Verified Amended
24 Complaint, Ex. 6. Rather, under California law, a marriage license can be issued to an unmarried
25 man and unmarried woman who is over the age of 18 and able to consent and consummate a
26 marriage. *See* Family Code §§ 300-302, 308.5. The marriage laws do *not* require the man and the
27 woman to state whether they are heterosexual, bisexual, gay or lesbian. Rather, the applicants need
28 only be a man and a woman. That the marriage laws do not discriminate on the basis of sexual

1 orientation (or sexual identity) is bolstered by the fact that sexual orientation is itself a movable
2 target – not subject to a precise definition.

3 For example, the premier researchers in human sexuality from Columbia University School
4 of Medicine note: “At clinical conferences one often hears . . . that homosexuality is fixed and
5 unmodifiable. Neither assertion is true. . . . The assertion that homosexuality is genetic is so
6 reductionist that it must be dismissed out of hand as general principle of psychology.” Declaration
7 of A. Dean Byrd, at 5, lines 5-8 (quoting Friedman, R.C. and Downey, J.I., 2002, *Sexual Orientation*
8 *and Psychoanalysis: Sexual Science and Clinical Practice*, New York: Columbia University Press,
9 p. 39). Reports in the Monitor on Psychology, the premier magazine of the American Psychological
10 Association offer similar supportive research. For example, Diamond (2000) from her research
11 concluded: “sexuality identity is far from fixed in women who aren’t exclusively heterosexual.”
12 Decl. of A. Dean Byrd, at 5, lines 11-15 (quoting Diamond, L.M., 2000, *Sexual Identity, Attractions,*
13 *and Behavior Among Sexual Minority Women Over a 2 Year Period*, DEVELOPMENTAL
14 PSYCHOLOGY, 36, (2), pp. 241-250; Murray, B., 2000, *Sexual Identity is Far From Fixed in Women*
15 *Who Aren’t Exclusively Heterosexual*, MONITOR ON PSYCHOLOGY, 31, 3, pp. 15)).

16 Dr. Satinover explains in his declaration that in a study entitled Lesbian Health, funded by
17 the National Institutes of Health and Centers for Disease Control and Prevention, and published by
18 the National Academies of Sciences, the committee wrote:

19 The committee spent a significant amount of time discussing how to define lesbian
20 sexual orientation. There is no standard definition of what constitutes a “lesbian.” .
21 . . . and only 15.3% of them stated all three dimensions of same-sex orientation . . .
22 views of sexual identity and sexual behavior can vary significantly across cultures
23 and among racial and ethnic groups, so it should not be assumed that a lesbian sexual
24 orientation or identity is the same for lesbians of different racial, ethnic, or cultural
25 backgrounds. . . . The committee strongly believes that there is no one “right” way
26 to define who is a lesbian “lesbian” should be defined to reflect the needs of
27 specific research studies, interventions, or programs of care.

28 Decl. of Dr. Satinover, at 8.³ The Lesbian Health study is consistent with other studies that caution
researchers into homosexuality to “avoid ‘assumptions that are patently false: that homosexuality

³ Dr. Satinover’s declaration accompanies the papers submitted on behalf of Proposition 22
Legal Defense and Education Fund.

1 is a uniform attribute across individuals, that it is stable over time, and that it can be easily
2 measured.” *Id.* (quoting Laumann, *et al*, *The Social Organization of Sexuality*, Chicago: University
3 of Chicago Press (1994) p. 344, also Table 9.15).⁴

4 Since sexual orientation cannot even be defined, this Court need not even reach the question
5 of whether a law that discriminates on the basis of sexual orientation is subject to rational basis or
6 strict scrutiny review.

7 **C. Even if This Court Determines that the Marriage Laws Discriminate on the**
8 **Basis of Sexual Orientation, the Proper Standard of Review is Rational Basis.**

9 In the same-sex marriage cases, the courts have consistently applied rational basis review,
10 rather than heightened scrutiny, to the sexual orientation classification involved. *See, e.g.*,
11 *Goodridge*, 798 N.E.2d at 961; *Baker v. State*, 744 A.2d at 878 n.10; *Standhardt*, 77 P.3d at 460-61;
12 *Lewis*, 2003 WL 23191114 at *21; *Singer v. Hara*, 522 P.2d at 1195; *In re Kandou*, No. 03-51312 at
13 22 (Bankr. W.D. Wash. Aug. 17, 2004); *Anderson v. King Co.*, 2004 WL 1738447 (Oregon Superior
14 Court Aug. 4, 2004); *Shields*, 1458/04 at 8 (N.Y. Sup. Ct. Rockland Co. Oct. 18, 2004).

15 Indeed, the only marriage case where heightened scrutiny has been applied is *Li v. Oregon*,
16 2004 WL 1258167, and there, the court was following the controlling precedent set in a non-
17 marriage case by an intermediate appellate court, *Tanner v. Oregon Health Sciences, Univ.*, 971 P.2d
18 435, 447 (Or. Ct. App. 1991), pet. for review denied, 994 P.2d 129 (Sup. Ct. Oregon 1999). *Tanner*
19 had adopted a new standard for suspect class identification; it found, *inter alia*, that homosexuals
20 were a suspect class because they had been subject to “adverse social or political stereotyping.” *Id.*
21 The Vermont Supreme Court, in *Baker*, criticized *Tanner*, because it found that the standard was too
22 imprecise, and provided neither predictability nor appropriate guidance to the courts. *Baker*, 744
23 A.2d at 878, n. 10. The *Tanner* approach has never been adopted by the Oregon Supreme Court, and,
24 most important, has *not* been adopted by California courts. Accordingly, *Li* is the sole same-sex
25 marriage case where a suspect class was found, and heightened scrutiny was applied.

26
27 ⁴ Dr. Satinover explains in his declaration, n.17, that the Laumann study is the largest and
28 most comprehensive probability-based study of sexuality ever undertaken in the United States. Its
data a conclusions are considered authoritative by everyone involved in sexuality research.

1 U.S. Supreme Court precedent also reflects that sexual orientation discrimination is subject
2 to rational basis review. In *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court
3 considered an equal protection challenge to an amendment to the Colorado constitution that
4 prohibited the grant of benefits and protections to gays and lesbians. The Court applied a rational
5 basis test in striking down the amendment on equal protection grounds.⁵ Justice O’Connor’s
6 concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003) indicated that rational basis review
7 was the proper standard to apply in determining the constitutionality of Texas’ anti-sodomy law.
8 Also relevant to this case is that Justice O’Connor cautioned that the Court’s decision

9 does not mean that other laws distinguishing between heterosexuals and homosexuals
10 would similarly fail rational basis review. Texas cannot assert any legitimate state
11 interest here, such as national security or *preserving the traditional institution of*
12 *marriage*. Unlike the moral disapproval of same-sex relations – the asserted state
13 interest in this case – other reasons exist to promote the institution of marriage
14 beyond mere moral disapproval of an excluded group.

15 *Lawrence*, 23 S. Ct. at 2487-88 (2003) (O’Connor, J, concurring) (emphasis added).

16 Under California law, sexual orientation discrimination is subject to rational basis review.
17 No California decision has squarely held that an equal protection challenge based on sexual
18 orientation discrimination is subject to strict scrutiny. *Cf. Hinman v. Dep’t of Personnel Admin.*, 167
19 Cal. App.3d 516 , 526 n.8 (Cal. Ct. App. 1985) (“we need not discuss whether sexual orientation
20 ought to be the basis of a suspect class requiring strict scrutiny under the equal protection clause.
21 *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 156 Cal. Rptr. 14, 595 P.2d
22 592, cited by plaintiffs, did not establish homosexuality as a suspect class”).

23 Nor should this Court entertain arguments that homosexuals should be defined as a suspect
24 class. In *Sail’er Inn, Inc. v. Kirby*, 5 Cal.3d 1 (1971) the Supreme Court articulated three factors that

25 ⁵ Federal equal protection cases are relevant to the analysis because the California Supreme
26 Court has observed that the equal protection guarantees under article I, section 7 of the California
27 Constitution are “substantially equivalent of the equal protection clause of the Fourteenth
28 Amendment” *Dep’t of Mental Hygiene v. Kirchner*, 62 Cal.2d 586, 588 (1965); *see also*
Manduley v. Superior Court, 27 Cal.4th 537, 572 (2002). Thus, even though the California equal
protection guarantee is construed independent from the federal guarantee, 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. *Id.*

1 underlie all suspect classifications: (1) “an immutable trait, a status into which the class members
2 are locked by the accident of birth”; (2) “stigma of inferiority and second class citizenship
3 associated” with the immutable trait; and (3) the whole class is relegated to an inferior legal status
4 without regard to the capabilities or characteristics of its individual members, preventing them from
5 sufficiently protecting themselves through the political process. *Id.* at 18-19. Sexual orientation
6 discrimination does not meet this criteria.⁶

7 1. ***Sexual Orientation is not an immutable characteristic.***

8 “Sexual orientation,” unlike gender or race is not “an immutable characteristic determined
9 solely by the accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1986). Gender and race
10 are readily identifiable physical characteristics that clearly set one person apart from another. By
11 contrast, sexual orientation has no readily identifiable physical characteristics, but is a status
12 determined as much by perception as by changeable sexual preferences. Although scientists have
13 studied homosexuality for many years, as discussed above, there is still no universally accepted
14 definition [of homosexuality] among clinicians and behavioral scientists. Scientists such as Simon
15 LeVay, who have attempted to find a genetic link to homosexuality, have been unable to do so.
16 Although same-sex marriage advocates often point to Mr. LeVay’s study as evidence of a genetic
17

18
19 ⁶ In *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir.
20 1990), the Ninth Circuit held that homosexuality does *not* meet the criteria for suspect classification.
21 *Id.* at 573. In particular, “[h]omosexuality is not an immutable characteristic; it is behavioral and
22 hence is fundamentally different from traits such as race, gender, or alienage” In that case, a
23 class action was brought challenging the Department of Defense policy of conducting expanded
24 investigation into backgrounds of all gay and lesbian applicants for secret and top secret security
25 clearances. The Ninth Circuit upheld the constitutionality of the policy under rational basis review.
26 Inexplicably, in 2000, the Ninth Circuit, in *Hernandez-Montiel v. Immigration and Naturalization*
27 *Service*, 225 F.3d 1084 found that sexual orientation is immutable. *Id.* at 1093. That panel of judges
28 offered no case law to support its decision, and failed to even address its contrary holding in *High*
Tech Gays. Judge Brunetti, who authored *High Tech Gays*, and who was the only judge that served
on both panels, wrote a separate special concurrence stating that while he agreed with the outcome,
he did *not* agree “with the broad reasoning and rationale used by the majority in reaching its
conclusion” that homosexuals constitute a “particular social group” for purposes of obtaining a
asylum. Because *High Tech Gays* dealt squarely with immutability in the context of an equal
protection analysis, it should be afforded more weight than *Hernandez*, which dealt with the question
of group status for asylum purposes. In any event, neither case is controlling authority on this Court.

1 link, Mr. LeVay himself stated that, “I did not prove that homosexuality is genetic, or find a genetic
2 cause for being gay. I didn’t show that gay men are born that way, the most common mistake people
3 make in interpreting my work.”⁷

4 Similarly, geneticist Dean Hammer, who was quoted as claiming to have found a gene that
5 formed the basis for homosexuality, refuted that claim and stated that “The pedigree study failed to
6 produce what we originally hoped to find: simple Medelian inheritance. In fact, we never found a
7 single family in which homosexuality was distributed in the obvious sort of pattern that Mendel
8 observed in his pea plants. . . . We knew also that genes were only part of the answer. We assumed
9 the environment also played a role in sexual orientation, as it does in most of not all behaviors.”⁸ The
10 “twin studies” by J. Michael Bailey and Richard C. Pillard compared male identical twins, fraternal
11 twins, nontwin brothers and adopted brothers. Messrs. Bailey and Pillard reported a coordinance rate
12 among homosexuality for identical twins at 52 percent, for fraternal twins at 22 percent, for
13 nonbiological brothers at 9 percent and adopted brothers at 11 percent.⁹ More refined studies have
14 shown that where one twin is homosexual, only 10 percent of the time the other twin is
15 homosexual.¹⁰ Since identical twins have identical genes, if homosexuality were a biological
16 condition, then if one identical twin were homosexual, his brother would be 100 percent of the time,
17 not 52 percent or 10 percent as the twins studies showed.¹¹ In short, there is no scientific evidence
18 that homosexuality is genetic, and therefore “immutable” for purposes of constitutional analysis.

19 Further evidence of the fact that homosexuality cannot be considered “immutable” is present

20
21 ⁷ See Byrd & Olsen, *Homosexuality: Innate and Immutable?*, 14 REGENT U. L. REV. 383
22 (2001-2002), at Byrd Decl., Ex. 3-33 (quoting David Nimmons, *Sex and the Brain*, DISCOVER, Mar.
1994, at 64-71)).

23 ⁸ Byrd, 14 REGENT U. L. REV. at 393, at Byrd Decl., Ex. 3-37 (quoting DEAN HAMER &
24 PETER COPELAND, *THE SCIENCE OF DESIRE* 104 (1994)).

25 ⁹ Byrd Decl., Ex. 3-34 (quoting Bailey & Pillard, *A Genetic Study of Male Sexual*
26 *Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991)).

27 ¹⁰ Byrd Decl., Ex. 3-36 (citing Whitehead & Whitehead, *My Genese Made Me Do It! A*
Scientific Look at Sexual Orientation 158-59 (1999)).

28 ¹¹ See Byrd Decl., Ex. 4-70-74; Byrd Decl., ¶¶10-11.

1 in a growing body of academic literature explaining that one's sexual preference is fluid and ever-
2 changing. The premier researchers in human sexuality from Columbia University School of
3 Medicine note: "At clinical conferences one often hears . . . that homosexuality is fixed and
4 unmodifiable. Neither assertion is true. . . . The assertion that homosexuality is genetic is so
5 reductionist that it must be dismissed out of hand as general principle of psychology." Byrd Decl.,
6 ¶10 (citing Friedman, R.C. and Downey, J.I., 2002, *Sexual Orientation and Psychoanalysis: Sexual*
7 *Science and Clinical Practice*, New York: Columbia University Press, p. 39). Reports in the Monitor
8 on Psychology, the premier magazine of the American Psychological Association offer similar
9 supportive research. For example, Diamond (2000) from her research concluded: "sexuality identity
10 is far from fixed in women who aren't exclusively heterosexual." Byrd Decl, ¶ 10 (citing Diamond,
11 L.M., 2000, *Sexual Identity, Attractions, and Behavior Among Sexual Minority Women Over a 2*
12 *Year Period*, DEVELOPMENTAL PSYCHOLOGY, 36, (2), pp. 241-250; Murray, B., 2000, *Sexual*
13 *Identity is Far From Fixed in Women Who Aren't Exclusively Heterosexual*, MONITOR ON
14 PSYCHOLOGY, 31, 3, pp. 15). Since "sexual orientation" is so fluid and has not been proven to be
15 genetically linked, it is wholly unlike race or gender, and cannot be categorized as an "immutable"
16 characteristic.

17 In fact, the personal stories like those of the declarants Alan Chambers and Randy Thomas
18 further demonstrate that sexual orientation is not immutable. Each of those men lived a homosexual
19 lifestyle for several years, only to re-orient their sexual orientation to that of heterosexuality. Mr.
20 Chambers is now President of Exodus International, an organization that for 28 years has helped
21 thousands of men and women to "find a life beyond homosexuality." Chambers, Decl, ¶ 24, lines
22 27-28; Thomas Decl., ¶ 16-17 (Exodus is comprised of more than 125 member ministries in 14
23 regions of North America).

24 **2. *Sexual Orientation Is Not A Suspect Class Because There Is No***
25 ***Evidence of Historic Prejudice***

26 As well as consisting of an "immutable characteristic," a "suspect class" must also bear a
27 stigma of inferiority and be unable to protect itself in the political process. *Sail'er Inn*, 5 Cal.3d at
28 18-19. *See also High Tech Gays*, 895 F.2d at 573. Women, for example, "have historically labored

1 under severe legal and social disabilities. Like black citizens, they were, for many years, denied the
2 right to vote” *Sail’er*, 5 Cal.3d at 19. Historical evidence of social, economic and political
3 prejudice of racial minorities was omnipresent in the early years of the nation, as reflected in the
4 adoption of three constitutional amendments (including equal protection under the Fourteenth
5 Amendment) to remedy past discrimination. Similarly, evidence of historic political, economic and
6 social prejudice against women led to adoption of the Nineteenth Amendment. In both cases, the
7 subject classes were powerless to protect their interests in the political process because they were
8 disenfranchised, and constitutional amendments were necessary to remedy the discrimination. There
9 is no such history for homosexuals, who are granted full rights of citizenship and who have proven
10 their ability to wield political power.

11 Similarly, there is no evidence that homosexuals have suffered the kind of economic
12 prejudice that plagued racial minorities and women. Before passage of the Civil Rights Act of 1964,
13 people of color and women were excluded from the economic marketplace and suffered severe
14 economic disadvantage as a direct result of employment discrimination. *See Sail’er*, 5 Cal.3d at 20
15 n. 17-19. By contrast, there is no proof of such economic disadvantage of homosexuals. Indeed, in
16 his dissent in *Romer v. Evans*, Supreme Court Justice Antonin Scalia noted that “[B]ecause those
17 who engage in homosexual conduct tend to reside in disproportionate numbers in certain
18 communities,...have high disposal income...and, of course, care about homosexual-rights issues
19 much more ardently than the public at large, they possess political power much greater than their
20 numbers, both locally and statewide.” *Romer v. Evans*, 517 U.S. 620, 645-46 (1996) (Scalia, J.,
21 dissenting).

22 Far from being a “discrete and insular” minority relatively powerless to protect their interests,
23 homosexuals are a powerful political force who enjoy greater economic prosperity than similarly
24 situated heterosexuals and who have not faced the historic political and economic disadvantages
25 faced by those who have been deemed “suspect classes” for equal protection purposes.

26 //

27

28

1 **IV. THE STATE HAS A RATIONAL BASIS FOR LIMITING MARRIAGE TO THE**
2 **UNION OF ONE MAN AND ONE WOMAN.**

3 Rational basis review, “a paradigm of judicial restraint,” does not provide “a license for
4 courts to judge the wisdom, fairness, or logic of legislative choices.” *F.C.C. v. Beach*
5 *Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (citation omitted). The question is simply
6 whether the challenged legislation is rationally related to a legitimate state interest. *Heller v. Doe*,
7 509 U.S. 312, 320 (1993). Under this deferential standard, a legislative classification “is accorded
8 a strong presumption of validity,” and “must be upheld against equal protection challenge if there
9 is any reasonably conceivable state of facts that could provide a rational basis for the classification.”
10 *Id.* at 319-20. This holds true “even if the law seems unwise or works to the disadvantage of a
11 particular group, or if the rationale for it seems tenuous.” *Romer v. Evans*, 517 U.S. 620, 632 (1996).
12 Moreover, a state has “no obligation to produce evidence to sustain the rationality of a statutory
13 classification.” *Heller*, 509 U.S. at 320. Rather, the “burden is on the one attacking the legislative
14 arrangement to negative every conceivable basis which might support it, whether or not the basis has
15 a foundation in the record.” *Id.* at 320-31 (citation omitted).

16 As the *Kandu* court explained in rejecting the constitutional challenge to DOMA,
17 the test is not whether Congress’ rationale for enacting DOMA is persuasive, but
18 whether it satisfies a minimal threshold of rationality. The review afforded under this
19 rational basis standard is very deferential to the legislature, and does not permit this
20 Court to interject or substitute its own personal views of DOMA or same-sex
21 marriage. . . . [T]he creation of new and unique rights is more properly reserved for
22 the people through the legislative process. . . . This Court’s personal view that
23 children raised by same-sex couples enjoy benefits possibly different, but equal, to
those raised by opposite-sex couples, is not relevant to the Court’s ultimate decision.
It is within the province of Congress, not the courts, to weigh the evidence and
legislate on such issues, unless it can be established that the legislation is not
rationally related to a legitimate governmental end. . . . [T]his Court cannot say that
DOMA’s limitation of marriage to one man and one woman is not wholly irrelevant
to the achievement of the government’s interest.

24 *In re Kandu*, at 26-27. California courts apply the same standard. *See Holguin v. Flores*, 122 Cal.
25 App.4th 428 (Cal. Ct. App. 2004); *Children’s Hospital and Medical Center v. Bonta*, 97 Cal.
26 App.4th 740 (2002) (provisions of California Constitution guaranteeing equal protection, set forth
27 in article I, section 7, are “substantially the equivalent of the equal protection clause of the
28 Fourteenth Amendment”).

1 It bears emphasis that preserving the institution of marriage is, in a word, rational, even
2 compelling. In her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), where the
3 Supreme Court found Texas’ sodomy statute unconstitutional under the Equal Protection Clause as
4 applied to private, consensual conduct between two adults, Justice O’Connor wrote that the Court’s
5 decision

6 does not mean that other laws distinguishing between heterosexuals and homosexuals
7 would similarly fail rational basis review. Texas cannot assert any legitimate state
8 interest here, such as national security or *preserving the traditional institution of*
9 *marriage*. Unlike the moral disapproval of same-sex relations – the asserted state
10 interest in this case – other reasons exist to promote the institution of marriage
11 beyond mere moral disapproval of an excluded group.

12 *Lawrence*, 23 S. Ct. at 2487-88 (2003) (O’Connor, J, concurring) (emphasis added).

13 The Arizona Court of Appeals aptly described the rationality of restricting marriage to one
14 man and one woman in *Standhart v. Superior Court*, 206 Ariz. 276, 287-88 (2003):

15 Likewise, although some same-sex couples also raise children, exclusion of these
16 couples from the marriage relationship does not defeat the reasonableness of the link
17 between opposite-sex marriage, procreation, and child-rearing. Indisputably, the only
18 sexual relationship capable of producing children is one between a man and a
19 woman. The State could reasonably decide that by encouraging opposite-sex couples
20 to marry, thereby assuming legal and financial obligations, the children born from
21 such relationships will have better opportunities to be nurtured and raised by two
22 parents within long-term, committed relationships, which society has traditionally
23 viewed as advantageous for children. Because same-sex couples cannot by
24 themselves procreate, the State could also reasonably decide that sanctioning same-
25 sex marriages would do little to advance the State's interest in ensuring responsible
26 procreation within committed, long-term relationships.

27 Similarly, in *Shields v. Madigan*, the N.Y. Supreme Court, Rockland County explained that
28 “[a]pplying the rational basis test, this court concludes that preserving the institution of marriage for
opposite sex couples serves the valid purpose of preserving the historic institution of marriage as the
union of one man and one woman, which, in turn, uniquely fosters procreation. . . . Accordingly,
given that petitioners have not negated ‘every conceivable basis which might support’ the marriage
statute, their equal protection challenge fails.”

 Finally, it bears emphasis that to uphold the marriage laws under a rational basis standard,
the court need not accept as true each of the arguments advanced below, but merely, must merely
find that the Legislature could have rationally concluded, based on the types of arguments advanced
below, that there are legitimate reasons for limiting marriage to the union of one man and one

1 woman.¹²

2 **A. Marriage Is Distinct From Other Personal Relationships, Uniquely**
3 **Contributing to the Continuing Well-being of Men and Women, of**
4 **Children, And of Society and the State.**

5 Adults have many kinds of close personal relationships that are highly valued and respected.
6 Among these varied and diverse relationships, marriage is the one kind of relationship that gives rise
7 to extensive state involvement. Why does government burden marriage with regulations as well as
8 surround it with benefits? The answer to this question bears not only upon the present litigation, but
9 upon the continued vitality of any marriage law or regulation.

10 1. ***Marriage regulates sexual relationships between the sexes, providing a context in***
11 ***which procreation may be embraced.***

12 Marriage is a universal human institution. Virtually every known human society has some
13 form of marriage. *See* Gallagher, Decl., at 6, lines 22-28 (“Marriage exists in virtually every known
14 human society. . . . At least since the beginning of recorded history, in all the flourishing varieties
15 of human cultures documented by anthropologists, marriage has been a universal human institution.
16 As a virtually universal human idea, marriage is about the reproduction of children, families, and
17 society. . . . [M]arriage across societies is a publicly acknowledged and supported sexual union
18 which creates kinship obligations and sharing of resources between men, women, and the children
19 that their sexual union may produce.”). While the structure of marriage in a particular culture varies
20 considerably, it always has something to do with creating a public (not private) sexual union between
21 a man and woman so that socially-valued children have both a mother and a father, and so that
22 society has the next generation it needs. *See* Gallagher, Decl, at 6, lines 1-6.

23 Why does the marriage idea arise again and again in widely varying societies? Because
24 sexual relationships between men and women create children. Every society must find some way to
25 regulate these relationships, to channel the sexual and reproductive energies of men and women
26 attracted to the opposite sex into the kind of sexual union where (a) childbearing is acceptable

27
28 ¹² The arguments set forth in this section of the brief are drawn in large part from the
declaration of Maggie Gallagher.

1 because (b) children and society’s interests are protected. The law presumes that a marriage will
2 produce children, regulating and affording benefits on the basis of that presumption. *Id.* at 6, lines
3 8-14. That childbearing opportunities inherent in the male/female marital union are occasionally
4 unrealized (i.e., exceptions to the general pattern) does nothing to undermine the basis for the rule
5 of recognition of the special status of traditional marriage. By affirming a particular kind of
6 relationship as the social ideal, the state attempts to both discourage unmarried childbearing and to
7 encourage sufficient childbearing within marriage to reproduce the population. As three dissenting
8 justices in *Goodridge v. Dept. of Public Health* wrote, “the reasons justifying the civil marriage laws
9 are inextricably linked to the fact that human sexual intercourse between a man and a woman
10 frequently results in pregnancy and childbirth.” *Goodridge*, 798 N.E.2d 941, 979, n.1 (Mass. 2003)
11 (Sosman, J. dissenting). Other courts and legal scholars agree that the link between marriage,
12 procreation and childrearing remains an important governmental interest today.

13 Some suggest that marriage and procreation have been delinked in recent decades as the
14 widespread use of contraceptives, high out-of-wedlock birth rates, and court decisions such as
15 *Griswold v. Connecticut*, 381 U.S. 479 (1965) have produced a society in which procreation is
16 neither limited to or necessary for marriage. In fact, in *Goodridge*, the court acknowledged the
17 historical link between marriage, procreation and childrearing, yet rejected any ongoing connection,
18 stating:

19 It is hardly surprising that civil marriage developed historically as a means to regulate
20 heterosexual conduct and to promote child rearing, because until very recently
21 unassisted heterosexual relations were the only means short of adoption by which
22 children could come into the world, and the absence of widely available and effective
23 contraceptives made the link between heterosexual sex and procreation very strong
indeed . . . But it is circular reasoning, not analysis, to maintain that marriage must
remain a heterosexual institution because that is what it historically has been. As one
dissent acknowledges, in “the modern age,” “heterosexual intercourse, procreation,
and child care are not necessarily conjoined.”

24 *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941, 961, n.23 (Mass. 2003) (quoting portions of
25 Justice Cordy’s dissenting opinion).

26 Is it really true that there is no surviving relationship between “heterosexual intercourse,
27 procreation, and child care”? *Id.* Despite the widespread availability and use of contraceptives over
28 the past forty years, recent reports indicate that almost a third of all births between 1990 and 1995

1 were unintended, including 56% of all births to unmarried women. In contrast, just 19% of births
2 to married women were unintended. *See* Gallagher Decl., at 9, lines 14-17. The number of
3 unintended pregnancies (as opposed to births) is even higher. According to a study by the Alan
4 Guttmacher Institute, 49% of all pregnancies in 1994 were unintended. *See* Gallagher Decl. at 10,
5 lines 6-12 (citing Stanley K Henshaw, Unintended Pregnancies in the United States, 30 Family
6 Planning Perspectives at 26 (1998)). By their late 30's, 60 percent of American women have had at
7 least one unintended pregnancy. *Id.*

8 Whatever the theoretical impact of contraception, heterosexual sex continues to produce
9 children, with significant impact for the government. The availability of contraceptives has done
10 little to reduce the impact of out-of-wedlock births, and cannot be seen to reduce the state's interest
11 in encouraging men and women to enter marital unions. *See* Gallagher Decl., at 9, lines 12-13; at 10,
12 lines 4-12; at 11, lines 1-20. It is thus reasonable for, and indeed incumbent upon, government to
13 urge men and women in a sexual relationship to accept both the recognition and regulation of
14 marriage. As one scholar stated, "Society has compelling interests in protecting the social institution
15 that has best furthered social interests in procreation, in maintaining the clear social identity of that
16 institution, and in preserving the linkage that institution forges among sex, procreation, and child
17 rearing." Lynn D. Wardle, "*Multiply and Replenish*": *Considering Same Sex Marriage in Light of*
18 *State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 at 784 (2001). The
19 dissenting justices in *Goodridge* echoed this theme, "Paramount among its many important
20 functions, the institution of marriage has systematically provided for the regulation of heterosexual
21 behavior, brought order to the resulting procreation, and ensured a stable family structure in which
22 children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 995.

23 Numerous courts have also recognized that the state purpose of furthering procreation where
24 both parents are present to raise the child is at least rational, if not compelling. *Adams v. Howerton*,
25 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd* 673 F.2d 1036 (9th Cir. 1982) ("state has a
26 compelling interest in encouraging and fostering procreation of the race"); *Dean v. District of*
27 *Columbia*, 653 A.2d 307, 337 (D.C. 1995) (finding that this "central purpose . . . provides the kind
28 of rational basis . . . permitting limitation of marriage to heterosexual couples"); *Baker v. Nelson*,

1 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed for want of a substantial federal question, 409
2 U.S. 810 (1972) (“The institution of marriage as a union of man and woman, uniquely involving
3 the procreation and rearing of children within a family, is as old as the book of Genesis”).

4 Even the United States Supreme Court has recently supported this justification, describing
5 two “important governmental objectives” which reinforce the link between marriage and procreation.
6 The first interest articulated by the Supreme Court in *Nguyen v. I.N.S.*, 533 U.S. 53 (2001), is the role
7 of marriage in “assuring that a biological parentchild relationship exists.” While admittedly less than
8 perfect, marriage is the most reliable indicator (absent intrusive genetic testing) of a biological tie
9 between parent and child. With the legal presumption of paternity under both California and federal
10 law, together with the marital expectations of monogamy and fidelity, marriage provides a basis for
11 the legal and factual assumption that a married man is the father of his wife’s child. Extending the
12 definition of marriage to include same-sex couples would not only fail to advance this “important
13 governmental interest,” but would actively undermine the signaling function of marriage with respect
14 to any real connection between marriage and biological parenting.¹³

15 The second important governmental interest articulated by the Supreme Court “is the
16 determination to ensure that the child and citizen parent have some demonstrated opportunity to
17 develop a relationship that consists of real, everyday ties providing a connection between child and
18 citizen parent.” *Nguyen v. I.N.S.*, 533 U.S. 53, 54 (2001). As the Supreme Court noted, this
19 connection between mother and child is inherent in birth, but the connection between father and
20 child is more tenuous. More than any other relationship, marriage connects fathers to their children,
21 both in a legal sense and also in terms of the “real, everyday ties” that give meaning to parent-child
22 relationships. Conversely, children raised by same-sex couples are denied the opportunity to develop
23 “real, everyday ties” with at least one of their biological parents. In this way, same-sex marriages
24 “generally do not advance the social interest in responsible procreation; rather, they impair the

25
26 ¹³ A state’s desire to protect the biological relationship between parents and children does not
27 require a state to outlaw adoptions or otherwise to prevent parents from raising children to whom
28 they are not biologically related. It does, however, allow the state to express a preference for
biological parents “whom our society . . . [has] always presumed to be the preferred and primary
custodians of their minor children.” *Reno v. Flores*, 507 U.S. 292, 310 (1993).

1 integrity of the institution that has best been able to further the social interests in responsible
2 procreation.” Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same Sex Marriage in Light*
3 *of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 797 (2001).

4 Justice Sandra Day O’Connor described “preserving the traditional institution of marriage”
5 itself as a “legitimate state interest” in her recent opinion joining the United States Supreme Court’s
6 decision striking down anti-sodomy laws in *Lawrence v. Texas*, 123 S.Ct. 2472, 2487-88 (2003)
7 (O’Connor, J., concurring). Though seldom given serious thought today, in *Skinner v. Oklahoma*,
8 the Supreme Court described procreation itself as an important governmental interest central to our
9 understanding of marriage, stating that “marriage and procreation are fundamental to the very
10 existence and survival of the race.” *Skinner*, 316 U.S. 535, 541 (1942). In a generation conditioned
11 by fears of a “population explosion,” Americans tend to dismiss the importance of such an interest,
12 yet many nations face a real threat from population aging and decline over the next fifty years. *See*
13 *Gallagher Decl.*, at 13-21 (detailing the long-term negative consequences of the low fertility rates
14 in developed nations).

15 While there is no agreement on the causes of low fertility, which are likely to be complex,
16 *see Gallagher Decl.*, at 19, line 1, the move away from preferences for marriage, as well as a decline
17 in the extent to which marriage is seen as a childbearing institution, play a clear role:

18 Low fertility can also be linked to the movement away from marriage, which many
19 western European countries have experienced for the recent decades. Of course,
20 marriage is no longer a pre-condition for childbearing in most of these populations,
but it remains true that married couples have a higher fertility than non-married
people, even those who live in a “marriage-like” cohabitation.

21 *See Gallagher Decl.*, at 19, lines 3-5; *see also Stanley Kurtz, The End of Marriage in Scandinavia,*
22 *THE WEEKLY STANDARD* (Feb. 2, 2004).

23 Similarly another UN analysis focused on “the interaction of marital and reproductive
24 behaviors resulting in below-replacement fertility”:

25 The demographic transition from high to replacement fertility has consistently been
26 associated with the implementation of reproductive choices within marital unions.
27 Post-transitional developments have been driven mostly by transformations of
partnership behavior.

28 *See Gallagher Decl.*, at 19, lines 8-14. Whatever the specific causes, the larger point remains: far

1 from making marriage obsolete as a regulator of childbearing, widespread contraceptive and abortion
2 rights may actually make more salient, not less, the traditional role of marriage in encouraging men
3 and women to make the next generation that society needs.

4 The more legal, cultural, and technological choice individuals have about whether or not to
5 have children, the more need there is for a social institution that encourages men and women to have
6 babies together, and creates the conditions under which those children are likely to get the best care.

7 ***2. Judicial decisions requiring extension of domestic partner benefits and***
8 ***authorizing second-parent adoptions do not undermine the State's compelling***
9 ***interest in marriage and do not affect the Legislature's constitutional power to***
10 ***define and protect marriage uniquely.***

11 In recent years, the California legislature have extended substantial protections and benefits
12 to same-sex couples. Whatever the independent merits of such policies may be, they cannot be read
13 as a constitutional mandate to redefine marriage. Each of these policies is intended to address
14 financial and intangible needs of couples who have chosen an alternative family form. Such
15 administrative (or even legislative) policies, however, are not inconsistent with state laws preferring
16 marriage as the ideal structure for producing and raising the next generation..

17 The State's obvious concern for the well-being of gay and lesbian couples undermines the
18 suggestion that marriage laws are rooted in animus against homosexuals. Public policy is often faced
19 with a tension between promoting an ideal and providing for real-life needs. The recognition and
20 protection of the needs of alternative families is not, and should not be construed as, a repudiation
21 of the marriage ideal.

22 Similarly, the ability of same-sex couples to adopt does nothing to undermine the
23 Legislature's normative judgment about the nature and function of marriage as the union of one man
24 and one woman. Unlike marriage, adoption does not exist to affirm a social ideal, or to widen the
25 choice of adults in establishing family relationships. Adoption (like foster care) exists in law to give
26 homes to children whose biological parents are unable or unwilling to meet their obligations as
27 parents. Where a child's own biological parents are either unwilling or unable to adequately care
28 for the child, family courts have the responsibility to identify the next best alternative for that child.

1 When a child has only one parent, the state may decide it is in the child’s best interest to give him
2 a second parent, even if those parents are not married. But in that case, the child has already been
3 deprived of his or her own married mother and father, and the state is making judgments about what,
4 given this absence, is in the child’s best interests. Such decisions are modeled after the natural family
5 structure – hence children are adopted by individuals and couples, not by parental trios or quartets,
6 and children living with their own mother and father do not gain additional parents by adoption.

7 Marriage is the state’s ideal way of providing children with mothers and fathers. Adoption
8 is the way we provide for the best interests of children who to have been denied that ideal. The
9 decision to permit same-sex adoption in California does nothing to undermine the independent
10 judgment of the legislature with respect to marriage.

11 **B. Marriage promotes optimal child rearing, fosters our obligations to and**
12 **devotion for children, helps minimize the number of fatherless or motherless**
13 **households, and helps protect the most vulnerable members of**
14 **society—especially young children and their caregivers.**

15 Marriage is a key social institution, intimately involved with how committed we as a society
16 are to two key ideas: that children need mothers and fathers and that marriage is the main way that
17 we create stable, loving mother-father families for children. To date, we know very little about the
18 outcomes of children raised in unisex households, justifying (if not strongly urging) cautious,
19 incremental steps in the legal recognition and sanction of such households. In light of the state’s
20 obvious concern and attentiveness to this important issue, this Court should not interfere with the
21 reasoned approach which has been adopted by the Legislature and the electorate. *See, e.g.,* Rekers
22 & Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343 (2001-
23 2002) (demonstrating that current existing studies on homosexual parenting are methodologically
24 flawed); Affidavit of Steven Nock (included in Appendix of Non-California Authorities), at 44, ¶
25 130.

26 **1. *The social science consensus recognizes that married mothers and fathers are***
27 ***most likely to provide the optimal environment for child well-being.***

28 Forty years of social experimentation has led to a broad consensus across ideological lines

1 that family structure matters for child wellbeing. All things being equal, children do better when their
2 own mothers and fathers get and stay married. Not just any two adults can provide these same
3 benefits. Both adults and children are better off living in communities where more children are raised
4 by their own married mother and father. *See* Gallagher Decl., at 21, line 22. Both adults and children
5 live longer, have higher rates of physical health and lower rates of mental illness, experience poverty,
6 crime, and domestic abuse less often, and have warmer relationships, on average, when their mothers
7 and fathers get and stay married. *See* Maggie Gallagher, *What is Marriage For? The Public Purposes*
8 *of Marriage Law*, 62 La. L.Rev. 773 (2002).

9 Recent reports from several mainstream child welfare and research organizations illustrate
10 this consensus. A recent *Child Trends* research brief summed up the scholarly consensus:

11 Research clearly demonstrates that family structure matters for children, and the
12 family structure that helps the most is a family headed by two biological parents in
13 a low-conflict marriage. Children in single-parent families, children born to
14 unmarried mothers, and children in stepfamilies or cohabiting relationships face
higher risks of poor outcomes. . . . There is thus value for children in promoting
strong, stable marriages between biological parents.

15 *See* Gallagher Decl., at 24, lines 5-8 (quoting Kristin Anderson Moore, et al., “Marriage from a
16 Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?”
17 *Child Trends Research Brief* (Washington, D.C., Child Trends) (June 2002) at 1 (available at
18 <http://www.childtrends.org/PDF/MarriageRB602.pdf>)).

19 With a broad research consensus showing that children are best served when raised in a
20 family “with both their biological parents in a low-conflict marriage,” the state has a legitimate
21 interest in recognizing and promoting unions which can provide this environment for a child.

22 **2. *Very little is known regarding the outcomes of children raised in unisex***
23 ***households, justifying legislative caution.***

24 Despite frequent claims that children raised by two parents of the same sex do as well as
25 children raised by a mother and father, social scientists have begun to note significant limitations in
26 the body of research supporting such claims. Perhaps the most thorough critique was prepared by
27 Steven Nock, a sociologist at the University of Virginia, who was asked to review several hundred
28 studies as an expert for the Attorney General of Canada in *Halpern et al. v. Attorney General of*

1 *Canada*, Case No. 684/00 (Ont. Super. Ct. of Justice 2000). After reviewing the studies, Professor
2 Nock concluded:

3 Through this analysis I draw my conclusions that 1) all of the articles I reviewed
4 contained at least one fatal flaw of design or execution; and 2) not a single one of
5 those studies was conducted according to general accepted standards of scientific
6 research.

6 Nock Aff. ¶ 3, *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. of Justice).

7 A 1995 review expressed similar concerns, as prominent Berkeley sociologist Diana
8 Baumrind reviewed various parenting studies, including the work of Charlotte Patterson and David
9 Flaks. *See* Gallagher Decl., at 26, lines 25-28 (citing Diana Baumrind, Commentary on Sexual
10 Orientation: Research and Social Policy Implications, 31(1) *Developmental Psychology* 130 (1995)).
11 In her review, Professor Baumrind evaluated, among other things, the claim that children of
12 homosexual parents suffered no adverse outcomes and were no more likely to develop a homosexual
13 sexual orientation than were children not raised in such homes. Gallagher Decl., at 26, line 25-28.
14 Baumrind found problems with the research she reviewed including the use of small, selfselected
15 convenience samples, reliance on self-report instruments, and biased study populations consisting
16 of disproportionately privileged, educated, and well-off parents. *Id.* Due to these flaws, Baumrind
17 questioned the conclusions on both “theoretical and empirical grounds.” *Id.*

18 Three of the *Goodridge* court’s seven members addressed concerns about the lack of such
19 evidence.

20 Conspicuously absent from the court’s opinion today is any acknowledgment that the
21 attempts at scientific study of the ramifications of raising children in same-sex couple
22 households are themselves in their infancy and have so far produced inconclusive and
23 conflicting results. Notwithstanding our belief that gender and sexual orientation of
24 parents should not matter to the success of the child rearing venture, studies to date
25 reveal that there are still some observable differences between children raised by
26 opposite-sex couples and children raised by same-sex couples. . . . Even in the
27 absence of bias or political agenda behind the various studies of children raised by
28 same-sex couples, the most neutral and strict application of scientific principles to
this field would be constrained by the limited period of observation that has been
available. Gay and lesbian couples living together openly, and official recognition
of them as their children’s sole parents, comprise a very recent phenomenon, and the
recency of that phenomenon has not yet permitted any study of how those children
fare as adults and at best minimal study of how they fare during their adolescent
years. The Legislature can rationally view the state of the scientific evidence as
unsettled on the critical question it now faces: are families headed by same-sex
parents equally successful in rearing children from infancy to adulthood as families

1 headed by parents of opposite sexes? Our belief that children raised by same-sex
2 couples should fare the same as children raised in traditional families is just that: a
3 passionately held but utterly untested belief. The Legislature is not required to share
that belief but may, as the creator of the institution of civil marriage, wish to see the
proof before making a fundamental alteration to that institution.

4 *Id.* at 979-80 (Sosman, J., dissenting).

5 **C. Marriage Secures the Basic Unit of Society; It Fosters Civic Virtue, Democracy,**
6 **Social Order, and Liberty by Allowing Individuals to Flourish in the Most**
7 **Important of Life’s Mediating Institutions.**

8 The idea that marriage is somehow closely linked with the future of a civilization has long
9 been recognized in the American legal system. Justice Holmes observed that “some form of
10 permanent association between the sexes” is one of the rudimentary characteristics of civilization.
11 Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

12 In 1888, the U.S. Supreme Court described marriage as “the foundation of the family and of
13 society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S.
14 190, 211 (1888). In *Skinner v. Oklahoma*, the Court acknowledged that marriage “and procreation
15 are fundamental to the very existence and survival of the race.” *Skinner v. Oklahoma*, 316 U.S. 535,
16 541 (1942). In *Reynolds v. United States*, the Court acknowledged that the legal redefinition of
17 marriage (in the context of polygamy) would significantly impact the social structure of the nation,
18 emphasizing the authority of the legislature to choose one form of marriage over another: “there
19 cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate
20 scope of the power of every civil government to determine whether polygamy or monogamy shall
21 be the law of social life under its dominion.” *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

22 The cultural significance of redefining marriage is not limited to the context of polygamy.
23 Throughout the history of Western civilization, and certainly since the founding of the United States
24 more than 200 years ago, the marriage-based familial structure has provided the basis of civil society,
25 as parents infuse their own children with the education, values and training necessary for continued
26 self-government. Marriage is a normative social institution. Marriage is not primarily a way of
27 expressing approval for infinite variety of human affectional or sexual ties; it consists, by definition,
28 of isolating and preferring certain types of unions over others. By socially defining and supporting

1 a particular kind of sexual union, the state defines for its young –as it is constitutionally entitled to
2 do - what the preferred relationship is and what purposes it serves.

3 **D. Redefining Marriage Will Cut off the Rational Connection Between Marriage**
4 **and Many of the Public Goods Which Marriage Currently Provides.**

5 Once we acknowledge the gravity of the marriage crisis we now face, and the importance of
6 marriage as a social institution, the single most important question on unisex marriage becomes: will
7 this legal transformation strengthen or weaken marriage as a social institution? Marriage is not just
8 a legal construct; it is socially and culturally a child-rearing institution, the place where having
9 children and creating families is actually encouraged, rather than merely tolerated.

10 **1. *Redefining marriage will undermine the message that mothers and fathers both***
11 ***matter to their children.***

12 In endorsing same-sex marriage, law and government will be making a powerful statement:
13 our government no longer believes children deserve mothers and fathers. Two fathers or two mothers
14 are not only just as good as a mother and a father, they are just the same. The government promotion
15 of this idea will likely have some effect even on people who are currently married, who have been
16 raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and
17 government, will certainly have a dramatic effect as the next generation’s attitudes toward marriage,
18 childbearing, and the importance of mothers and fathers are formed. If two mothers are just the same
19 as a mother and a father, for example, why can’t a single mother and her mother do just as well as
20 a married mom and dad? Why are dads relevant at all?

21 Two ideas are in conflict here: one is that children deserve mothers and fathers and that
22 adults have an obligation to at least try to conduct their sexual lives to give children this important
23 protection. That is the marriage idea.

24 The other idea is that adult interests in sexual liberty are more important than “imposing” or
25 preferring any one family form, even for the benefit of children: all family forms must be treated
26 identically by law if adults are to be truly free to make intimate choices. This latter idea is at the heart
27 of the idea that same-sex marriage is a civil right. And it is the core idea that must be rejected if the
28 state’s interest in marriage is to be sustained.

1 **2. *Personal commitments to love, self-expression, self-realization, or longterm***
2 ***relationships cannot alone justify the state's involvement in marriage.***

3 Marriage is separated from other kinds of relationships by law and government as well as
4 society because it is not merely a private, individual good, but a public, common good. Even people
5 who do not marry depend on a healthy marriage culture in order to carry society into the next
6 generation.

7 While many courts continue to articulate this public understanding of the reasons for state
8 involvement in marriage, *see, e.g., Standhardt v. Super. Ct. of Arizona*, 77 P.3d 451 (Ariz. Ct. App.
9 2003); *Morrison v. Sadler*, 2003 WL23119998 (Ind. Super. May 7, 2003), *appeal pending* Ind. Ct.
10 App. No. 49A02-0305-CV-447, those seeking to redefine marriage to include same-sex marriage,
11 articulate a private conception of marriage as an individual right to (a) express certain emotions or
12 values and (b) acquire certain legal benefits. These two competing visions of the purposes of
13 marriage lead the law in dramatically opposing directions.

14 If marriage is an essentially private, intimate, emotional relationship created by two people
15 to enhance their own personal well-being, it is wrong, as well as counterproductive for the state to
16 favor certain kinds of intimate relations over others. Marriage has a legal form but no specific
17 content. Each person has the right to express socially his or her own preferred inner vision of family,
18 sexuality and intimacy, on an equal basis. There is no reason, therefore, to withhold these benefits
19 from any couple, cohabiting, same-sex, or other, who wishes to claim them on behalf of themselves
20 or (especially) their dependents. From this perspective, marriage is no longer a social institution
21 regulated by law in order to support important public objectives, but is reduced to an emotionally
22 laden ceremony which confers various legal benefits. As one family scholar has stated:

23 There are many problems with this vision of marriage and its relationship to law. It
24 reduces marriage to a creature of the state. By emphasizing the rights of adults, it
25 intrinsically devalues the interest of children and the community in marriage. By
26 reducing marriage to an individual right, it undermines the very norms of
27 commitment it rhetorically upholds. It logically calls into question the notion of
family law itself. If the purpose of marriage and family law is to affirm neutrally the
multiplicity of adult emotional choices, because individual declarations of intimacy
are sacred matters in which the state has no right to interfere, then the question
becomes: why do we have laws about marriage at all?

28 Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support*

1 *Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 231 (2004).

2 The alternative vision of the nature of marriage and its relationship to law understands
3 marriage as not merely a civil right or a private commitment, but a social institution. Marriage arises
4 in every known society out of the need to manage the biological reality that sex between men and
5 women produces children, together with the twin social realities that societies need babies in order
6 to survive, and babies need mothers and fathers. In every complex society governed by law, marriage
7 exists as a public legal act and not merely a private romantic declaration or religious rite. While
8 marriage systems differ, marriage across societies is a “publicly acknowledged and supported sexual
9 union which creates kinship obligations and sharing of resources between men, women, and the
10 children that their sexual union may produce.” William J. Doherty, et al., *Why Marriage Matters:
11 Twenty-One Conclusions from the Social Sciences* 8-9 (New York, Institute for American Values
12 2002). *See also* Gallagher Decl., at 4, lines 11-20.

13 Many same-sex couples, like opposite sex couples, prefer other kinds of relationships to the
14 exclusive, permanent coupling known as marriage. They may prefer to live as couples, but not
15 sexually exclusively or not (presumptively) permanently. They may find intimacy and dependency
16 needs are better met (for them) in threesomes or in group living. A woman may prefer to live
17 intimately with and raise children with her sister, not a sexual partner. Why aren't a mother and
18 grandmother living together and raising children together eligible for marriage benefits?

19 If marriage is to be redefined to include same-sex couples, what justification does the state
20 have in preferring and offering benefits only to those who choose same-sex “marriages” over those
21 who choose other forms of intimate relationships? Intimacy alone, or dependency alone, cannot
22 support limiting marriage to sexual twosomes. Many intimate and dependent relationships (both
23 same-sex and opposite-sex) may be socially valued yet not legally recognized.

24 In seeking to have the court redefine marriage to include both same-sex and opposite-sex
25 couples, the same-sex couples must present a theory of marriage which would justify recognition
26 (and regulation) of relationships between same-sex and opposite-sex couples, while excluding other
27 intimate and dependent relationships. It simply cannot be done. Absent such a theory, the argument
28 becomes *not* an argument for same-sex marriage, but an argument for the abolition of marriage as

1 a legal status and the extension of its benefits to all intimate and dependent relations.¹⁴ There must
2 be some rational reason for offering a special legal status to people who live in exclusive couples
3 rather than in other intimate relations. What is it?

4 In Massachusetts, the Supreme Judicial Court failed to produce such a theory, stating only
5 that marriage is about “encouraging stable relationships over transient ones,” “identif[ying]
6 individuals,” “provid[ing] for the orderly distribution of property,” “ensur[ing] that children and
7 adults are cared for and supported whenever possible from private rather than public funds,” and
8 “track[ing] important epidemiological and demographic data.” *Goodridge v. Dept. of Publ. Health*,
9 798 N.E.2d 941, 954 (Mass. 2003). When such interests comprise the whole of a state’s interest in
10 marriage, the state is left with precious little justification for laws limiting polygamy and endogamy.
11 Arguably, larger family groups (of 3 or more adults) would provide an even stronger private support
12 network than the two-adult model. Marriage between close relatives would minimize the number of
13 legal heirs, potentially minimizing disputes over property distribution upon death. At minimum,
14 there is nothing inherent in polygamous or endogamous relationships which makes such unions less
15 worthy of state recognition under such criteria.

16 Ultimately, there is no principled basis for recognizing a legality of same-sex marriage
17 without simultaneously providing a basis for the legality of consensual polygamy and endogamy. A
18 “right to sexual autonomy,” for example, is a legal concept that knows no natural boundary and may
19 legitimate undesirable conduct as well. In fact, every argument for same-sex marriage is an argument
20 that supports polygamy.”

21 In sum, the Legislature could have rationally concluded that marriage is society’s way of
22 recognizing that the sexual union of a man and a woman is unique, and that government needs to
23 regulate this union for the benefit of society and its children, or that despite the personal fulfillment
24

25 ¹⁴ In fact, Nancy Polikoff, law professor at American University, wrote in 2003: “I advocate
26 here a more sweeping reform, incorporating recognition in every area of the law of the diversity of
27 adult relationships characterized by emotional intimacy and economic interdependence. The law
28 should no longer reward marriage above all other relationships.” See Gallagher Decl., at 3, lines 12-
15 (quoting Nancy D. Polikoff, *Conference on Marriage, Families, and Democracy: Ending
Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 201-202 (2003).

1 of intimate adult relationships, marriage laws are not primarily about adult needs for approbation and
2 support, but about the well-being of children and society. As a result, the marriage laws should be
3 declared constitutional.

4 **V. CALIFORNIA’S MARRIAGE LAWS DO NOT VIOLATE STATE GUARANTEES**
5 **OF DUE PROCESS.**

6 **A. There is No Fundamental Right to Same-Sex Marriage.**

7 The federal and state Constitutions guarantee that no state shall deprive any person of life,
8 liberty or property without due process of law. *In re Marilyn H.*, 5 Cal.4th 295, 306 (1993).
9 Substantive due process forbids the government from infringing certain fundamental liberty interests
10 unless the infringement is narrowly tailored to serve a compelling state interest. *Dawn D. v. Superior*
11 *Court of Riverside*, 17 Cal.4th 932, 939-40 (1998). As the California Supreme Court explained in
12 *Dawn D.*, the U.S. Supreme Court has

13 always been reluctant to expand the concept of substantive due process because
14 guideposts for responsible decisionmaking in this unchartered area are scarce and
15 open-ended. by extending constitutional protection to an asserted right or liberty
16 interest, we, to a great extent, place the matter outside the arena of public debate and
legislative action. We must therefore exercise the utmost care whenever we are asked
to break new ground in this field, lest the liberty protected by the Due Process Clause
be subtly transformed into the policy preferences of the members of this Court.

17 *Dawn D.*, 17 Cal.4th at 939 (quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

18 The California adopted the following methodology of the U.S. Supreme Court in deciding
19 whether an asserted interest is a fundamental liberty interest protected by due process.

20 First, the court must make a “careful description of the asserted fundamental liberty
21 interest.” This “careful description” is concrete and particularized, rather than
22 abstract and general; thus in *Washington v. Glucksberg*, a case addressing a state
23 statute forbidding assisted suicide, the high court rejected the view the interest in
question was “whether there is a liberty interest in determining the time and manner
of one’s death” or a “liberty to choose how to die.”

24 *Dawn D.*, 17 Cal.4th at 940. The California Supreme Court went on to explain that the *Glucksberg*
25 Court “formulated the interest more specifically as ‘whether the liberty specially protected by the Due
26 Process Clause includes a right to commit suicide which itself includes a right to assistance in doing
27 so.’” *Id.*

28 Once the court makes a “concrete and particularized” description of the asserted liberty

1 interest, the court must determine whether that interest is “one of our fundamental rights and
2 liberties.” *Id.* at 940. Central to this determination is “whether the asserted interest finds support in
3 our history, our traditions, and the conscience of our people.” *Id.* Only if a court decides the asserted
4 liberty interest is a fundamental interest protected by the due process clause does it weigh the state’s
5 countervailing interest, to determine whether the latter is sufficiently compelling to justify the state’s
6 infringement of the liberty interest. *Id.*

7 Applying this standard, this Court cannot find that there is a fundamental right to same-sex
8 marriage. Significantly, in defining the asserted liberty interest in *concrete* and *particularized* terms,
9 this Court must find that the asserted liberty interest is the right to same-sex marriage. There can be
10 no question that there is no support in the history, traditions or conscience of the people to same-sex
11 marriage.

12 The United States first characterized the right of marriage as fundamental in *Skinner v.*
13 *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). In *Skinner*, the petitioner challenged an
14 Oklahoma statute that allowed the state to sterilize habitual criminals without their consent. While
15 the Court held that the legislation ran afoul of the equal protection clause, the Court focused on the
16 fundamental right to marry. In striking down the statute, the Court held, “we are dealing with
17 legislation that involves one of the basic civil rights.” 316 U.S. at 541. The Court noted that marriage
18 was “fundamental to the very existence and survival of the race.” *Id.* At the time it was decided,
19 marriage was clearly defined as the union of one man and one woman. Thus, finding that the
20 relationship between married persons (a man and a woman) was fundamental to the very existence
21 and survival of the race, the Court struck down the statute on equal protection grounds. *Id.* at 543.

22 In 1967, the Supreme Court decided *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, an
23 interracial couple who was convicted of violating Virginia’s miscegenation laws challenged the
24 statutory scheme on both equal protection and due process grounds. 388 U.S. at 2. The Court held,
25 among other things, that the law had arbitrarily deprived the couple of a fundamental liberty
26 protected by the Due Process Clause, the freedom to marry. The Court held that “the freedom to
27 marry or not marry, a person of another race resides with the individual and cannot be infringed by
28 the State.” *Id.* at 12. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court once again recognized

1 the fundamental right to marry. In that case, the plaintiff was indigent and in arrears of his support
2 obligations of his daughter. He was denied a marriage license by the state until he paid all
3 outstanding child support obligations. The Court held that the statute burdened the fundamental right
4 to marry, which in that case concerned a marriage between a man and a woman.

5 The United States Constitution has never been interpreted to guarantee same-sex couples the
6 right to marry. In fact, a Due Process challenge to a same-sex marriage ban under the federal
7 constitution was rejected in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). In *Dean*, two
8 homosexual men appealed from an order of the court rejecting their complaint for an injunction to
9 require that the clerk issue them a marriage license. While recognizing that the freedom to marry has
10 long been recognized as one of the vital personal rights, the court concluded that same-sex marriage
11 was not a fundamental right protected by the Due Process clause.

12 The question, then, is whether there is a constitutional basis under the due process
13 clause for saying that this recognized fundamental right of heterosexual couples to
14 marry also extends to gay and lesbian couples. The answer, very simply is No. Even
15 without a reference to *Hardwick's* constitutional approval of statutes criminalizing
consensual sodomy, we cannot say that same-sex marriage is deeply rooted in this
Nation's history and tradition.

16 *Dean*, 653 A.2d at 333; *see also Lawrence*, 123 S. Ct. at 2486 (applying rational basis standard);
17 *Lewis v. Harris*, 2003 WL 2319114, at *7 (N.J. Super. Ct. Nov. 5, 2003).

18 The Arizona Court of Appeals further explained that “[a]lthough same-sex relationships are
19 more open and have garnered greater social acceptance in recent years, same-sex marriages are
20 neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the
21 concept of ordered liberty.” *Standhardt*, 77 P.3d at 459. While “a homosexual person’s choice of life
22 partner is an intimate and important decision . . . not all important decisions sounding in personal
23 autonomy are protected fundamental rights. . . . The history of the law’s treatment of marriage as an
24 institution involving one man and one woman, together with recent, explicit reaffirmations of that
25 view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a
26 fundamental liberty interest protected by due process.” *Standhardt*, 77 P.3d at 459-60 (“same-sex
27 marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they
28 implicit in the concept of ordered liberty”); *see also Lewis*, 2003 WL 2319114, at *15 (same);

1 *Dean*, 653 A.2d at 333; *Baehr v Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Jones v. Hallahan*, 501
2 S.W.2d 588, 590 (Ky. 1973) (finding no constitutional sanction or protection of the right of marriage
3 between persons of the same sex); *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971) (marriage has
4 always been a union of a man and a woman and that “the due process clause . . . is not a charter for
5 restructuring ‘fundamental understandings by judicial legislation.’”); *Shields v. Madigan*, 1458/04,
6 at 8 (“[s]ame-sex marriage is not a fundamental right protected by the due process clause of the New
7 York State Constitution.”).¹⁵

8 The right to marry has always been understood in law and tradition to apply only to opposite-
9 sex couples. In fact, no state Legislature has ever defined marriage to include a same-sex union. “A
10 change in that basic understanding would not lift a restriction on the right, but would work a
11 fundamental transformation of marriage into an arrangement that could never have been within the
12 intent of the Framers of the . . . Constitution. Significantly, such a change would contradict the
13 established and universally accepted legal precept that marriage is the union of people of different
14 genders.” *Lewis*, 2003 WL 23191114, at *13. Without question, the concept of two individuals of
15 the same sex entering into a state sanctioned marriage was inconceivable to the vast majority of
16 people, including gay men and lesbians, until well into the latter half of the twentieth century.

17 Moreover, as explained by the Arizona Court of Appeals in 2003,

18 Implicit in *Loving* and predecessor opinions is the notion that marriage, often linked
19 to procreation, is a union forged between one man and one woman. Thus, while
20 *Loving* expanded the traditional scope of the fundamental right to marry by granting
21 interracial couples unrestricted access to the state-sanctioned marriage institution,
22 that decision was anchored to the concept of marriage as a union involving persons
of the opposite sex. In contrast, recognizing a right to marry someone of the same sex
would not expand the established right to marry, but would redefine the legal
meaning of “marriage.”

23
24 ¹⁵ *Lawrence v. Texas* does not change the analysis. The *Lawrence* Court there specifically
25 held that the case did *not* involve giving “formal recognition to any relationship that homosexual
26 persons seek to enter.” 123 S. Ct. 2472, 2484. Decisions after *Lawrence* have applied a limiting
27 construction to the case. *See, e.g., Lofton v. Kearney*, 358 F.3d 804 (11th Cir. 2004) (upholding
28 Florida’s ban on same-sex adoption, specifically rejected plaintiffs’ claim that *Lawrence* “identified
a hitherto unarticulated fundamental right to private sexual intimacy” which somehow prohibited
the State from prohibiting same-sex adoption); *Kansas v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004)
(limiting *Lawrence* to its facts – “all adults may legally engage in private consensual sexual practices
common to a homosexual lifestyle”).

1 *Standhardt v. Superior Court*, 77 P.3d 451, 458 (Ariz. Ct. App. 2003), *pet. for review denied* (May
2 25, 2004).

3 Nor can it be argued that the asserted right to same-sex marriage finds support in the
4 conscience of the California electorate. Significantly, in 2000, the voters passed Proposition 22,
5 which defined marriage within the state as the union of a man and a woman, and prohibited the state
6 from recognizing same-sex marriages from other jurisdictions.

7 Because same-sex marriage is not a fundamental right, rational basis review applies, which,
8 as discussed above, leads to the conclusion that the marriage laws are constitutional.

9 **B. The Marriage Laws Do Not Invade on Any Legally Cognizable Privacy Interest.**

10 Article I, section 1 of the California Constitution guarantees the right of privacy to its
11 citizens. The California Supreme Court has explained that a plaintiff alleging a violation of the right
12 to privacy under the California Constitution “must establish each of the following: (1) a legally
13 protected privacy interest; (2) a reasonable expectation of privacy under the circumstances and (3)
14 conduct by defendant constituting a serious invasion of privacy.” *Hill v. National Collegiate Athletic*
15 *Assn.*, 7 Cal.4th 1, 39-40 (1994). The framers of the privacy provision sought to protect those privacy
16 rights that were recognized in common law and protected by the federal constitution. *Hill*, 7 Cal.4th
17 at 40. The constitutional right to privacy “is to be interpreted and applied in a manner consistent with
18 the probably intent of the body enacting it: the voters of the State of California.” *Id.* at 16. There
19 simply is no right to same-sex marriage that falls within the ambit of privacy rights that should be
20 constitutionally protected at the time the privacy provision was added to the state Constitution in
21 1972. Indeed, contemporary court cases on the issue of same-sex marriage demonstrate this fact. *See*
22 *Baker v. Nelson*, 191 N.W.2d at 185; *Jones v. Hallahan*, 501 S.W.2d at 588; *Singer v. Hara*, 522
23 P.2d at 1187.

24 In addition, as discussed above, there is no fundamental right to privacy that would be
25 protected by the right of privacy. For that reason, other courts that have addressed the issue have
26 denied claims that the marriage laws violate a right to privacy. *See, e.g., Standhardt*, 77 P.3d at 460;

1 *Lewis*, 2003 WL 23191114, at *13.¹⁶

2 **VI. CONCLUSION**

3 Wherefore, CCF requests that this Court grant its motion for summary judgment, or
4 alternatively, for summary adjudication, declaring the marriage laws constitutional.

5 Dated: November 4, 2004

Respectfully submitted,

6
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24
25 ¹⁶ Nor does *Lawrence v. Texas* change the analysis. While that case gave certain protections
26 to private, consensual sexual conduct between two people, it specifically did not reach the question
27 of the constitutionality of same-sex marriage. The California marriage laws in no way infringe on
28 any right that exists for two people of the same-sex to engage in sexual contact, or in any way
infringe on any right that exists for two people of the same-sex to enter into a committed
relationship. Indeed, by virtue of AB 205, as of January 1, 2005, same-sex couples will be granted
all but one of the state rights and benefits of marriage – the ability to file a joint tax return.