



# CITY ATTORNEY DENNIS HERRERA

# NEWS RELEASE

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## **Herrera Files Opening Brief in City's Constitutional Challenge to Discriminatory State Marriage Laws**

### ***San Francisco Asserts Tangible, Intangible Harms from 'An Injustice That Has No Place in 21<sup>st</sup> Century California'***

SAN FRANCISCO (Sep. 2, 2004)—City Attorney Dennis Herrera today filed the opening brief in the City and County of San Francisco's constitutional challenge to discriminatory provisions of the state Family Code that restrict the institution of marriage to opposite-sex couples, a case that is expected to ultimately decide the issue of marriage rights for lesbian and gay couples in California.

Detailing a multitude of beneficial interests San Francisco holds in seeking a court order to compel state authorities to acknowledge the right of same-sex couples to marry, the City's brief argues that the California Constitution provides extensive protections for individual civil rights—frequently exceeding those enshrined in its federal counterpart—that render the continued exclusion of gay men and lesbians from marriage rights unsupportable under any standard of judicial scrutiny.

“With our opening brief today, San Francisco asserts the long-held principle that discrimination is not merely detrimental to the minority it singles out, but to the majority that would abide it,” Herrera said. “The fact is that without full recognition of gay and lesbian families through marriage, San Francisco is limited in its ability to protect the equal rights of its citizens, and harmed in ways tangible and otherwise by an injustice that has no place in 21<sup>st</sup> Century California. Together with the briefs filed in the companion civil action on behalf of twelve same-sex couples, Our Family Coalition, and Equality California, the Court today has the broadest, most convincing perspective possible on why the time has come to end discrimination that has too long denied the rights and responsibilities of marriage to gay and lesbian couples in California.”

[MORE]

At a City Hall press conference here today, Herrera was joined by National Center for Lesbian Rights Executive Director Kate Kendell and representatives of the twelve lesbian and gay couples who are plaintiffs in the case handled by NCLR, Lambda Legal, the ACLU of Northern California and the law firm of Heller Ehrman White & McAuliffe LLP.

The City's case is being handled by Chief Deputy City Attorney Therese M. Stewart and Deputy City Attorneys Sherri Sokeland Kaiser, Kathleen S. Morris, Wayne K. Snodgrass, Jim Emery, Julia M.C. Friedlander, Yvonne Mere, Gina M. Rocanova, Neli Palma and Philip Leider. The City's co-counsel from the law firm of Howard Rice Nemerovski Canady Falk & Rabkin include Bobbie J. Wilson, Pamela K. Fulmer, Amy E. Margolin, Sarah M King, Kevin H. Lewis, Ceide Zapparoni and Jeffrey T. Norberg.

The case is *City and County of San Francisco, v. State of California* (Judicial Council Coordination Proceeding No. 4365; San Francisco Superior Court Case No. 429-539, consolidated with case no. 504-038, before the Hon. Richard A. Kramer.

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COUNTY OF SAN FRANCISCO  
UNLIMITED CIVIL JURISDICTION

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

**CITY AND COUNTY OF SAN  
FRANCISCO**, a charter city and county,

Plaintiff/Petitioner,

vs.

**STATE OF CALIFORNIA**, et al.

Defendants/Respondents.

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JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. **4365**

Case No. **429-539**  
(Consolidated with Case No. 504-038)

**OPENING BRIEF IN SUPPORT OF  
CITY AND COUNTY OF SAN  
FRANCISCO'S CONSTITUTIONAL  
CHALLENGE TO MARRIAGE  
STATUTES**

Hearing Date: TBD  
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Place: 304

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## INTRODUCTION

This year, Massachusetts became the first state in the nation to allow same-sex couples to marry. It did so not because this was the will of the majority, but because its state constitution, with its promises of liberty and equality for all citizens, required it. (*Goodridge v. Department of Public Health* (2003) 440 Mass. 309.) As that Court reminded, "the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support." (*Id.* at 328 n.17.) The *Goodridge* Court also paid homage to a courageous decision of our state's Supreme Court, *Perez v. Sharp* (1948) 32 Cal.2d 711, the first case in the country to recognize a statutory ban on interracial marriage for what it was—unconstitutional—despite the widespread popular support at that time for continuing racial segregation.

In the wake of *Goodridge*, and on the foundation of *Perez* and *Lawrence v. Texas* (2003) 539 U.S. 558, a watershed constitutional decision acknowledging the fundamental liberty right of same-sex couples to their intimate relationships, this Court must now decide whether the California Constitution permits our state to provide civil marriage, with all of its tangible and intangible rights, protections and obligations, to one class of its citizens, namely heterosexuals and their families, while denying civil marriage to another class, namely lesbians and gay men and their families.

The City and County of San Francisco contends that this restriction on marriage is subject to strict judicial scrutiny because it intrudes on the rights to liberty, privacy, and equality that the California Constitution guarantees to us all. Article 1, Section 1 of our Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights," including "enjoying life and liberty" and "pursuing and obtaining safety, happiness and privacy." Section 7 provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws" and that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

1           These sacred principles are part of an enduring document of continuing vitality—one that  
2 derives meaning both from historical principles and current conditions. Thus, "the validity of [a]  
3 law [at the time it was enacted] does not resolve the issue of whether the law is constitutionally  
4 valid today." (*People v. Belous* (1969) 71 Cal. 954, 967.) Justice Kennedy's words, although  
5 written about the United States Constitution, are apt:

6                     Had those who drew and ratified the Due Process Clauses of the Fifth  
7 Amendment or the Fourteenth Amendment known the components of  
8 liberty in its manifold possibilities, they might have been more specific.  
9 They did not presume to have this insight. They knew times can blind us  
10 to certain truths and later generations can see that laws once thought  
11 necessary and proper in fact serve only to oppress. As the Constitution  
12 endures, persons in every generation can invoke its principles in their own  
13 search for greater freedom. (*Lawrence, supra*, 539 U.S. 558, 578-79.)

14           Regardless of whether the marriage ban was constitutional when adopted, it cannot now  
15 survive strict scrutiny, or even genuine rational basis review. The legislative history of Family  
16 Code Section 300, which explicitly added to the marriage statutes "one man and one woman" as  
17 sex-based eligibility requirements in 1977, reveals that it had but three purposes. First, it sought  
18 to preserve the tradition of limiting marriage to heterosexuals; second, the Legislature wished  
19 specifically to exclude lesbian and gay couples from all of the rights and benefits that flow from  
20 marriage; and third, it sought to limit the financial benefits marriage conveys to families with  
21 dependent wives and children. Of course, neither a tradition of exclusion nor a naked desire to  
22 continue excluding suffices as a legitimate state interest at any level of scrutiny. The first two  
23 justifications fall easily away. And as for the third, it rests on dated stereotypes and false  
24 assumptions, positing that marriage is primarily a financial institution to facilitate the support of  
25 women and children by men. That justification runs aground on a wealth of evidence and  
26 existing California public policy to the contrary.

27           The burden is squarely on the state to show why it thinks the Constitution permits it to  
28 limit access to one of the most vital legal and social institutions on the basis of sex and sexual  
orientation, no matter the cost to the rights of its citizens to their privacy, their liberty, and their  
freedom from invidious discrimination. No matter either the considerable costs this

1 discrimination imposes on local government and on the state itself. Nothing the state can say  
2 and nothing the state can do will meet this burden. The time for marriage equality has arrived.

### 3 **FACTUAL BACKGROUND**

#### 4 **A. Marriage Is A Unique And Valuable Social Institution.**

5 Civil marriage is a deeply meaningful institution to individuals, families, communities,  
6 and the state. Marriage brings with it not only a host of legal rights, privileges and obligations,  
7 but also a significant social and familial status. (Declaration of Nancy F. Cott ["Cott Dec."] ¶ 6;  
8 *see* Declaration of Helen Zia ["H. Zia Dec."] ¶¶ 3, 9, 11-15, 17; Declaration of Beilun Woo Zia  
9 ["B. Woo Zia Dec."] ¶¶ 3-5, 8-12; Declaration of Richard Park ["Park Dec."] ¶¶ 1, 4-8.)

10 For individuals, marriage represents a free choice to enter into a lifelong, committed and  
11 intimate relationship with a loved one. (Cott Dec. ¶ 50; Park Dec. ¶¶ 4-8; B. Woo Zia Dec. ¶ 4.)  
12 At its most simple and most powerful, marriage is the dividing line between friends and family.  
13 (B. Woo Zia Dec. ¶¶ 3, 5-6, 8, 10-12; H. Zia Dec. ¶¶ 3, 9, 12, 14.) Marriage, and only marriage,  
14 allows one person to form his or her own family bond with another, previously unrelated adult.  
15 Nothing else can substitute, either legally or socially, for this ability to create a family. (*See* H.  
16 Zia Dec. ¶¶ 5, 8-9, 12.)

17 The government rewards marriage with more than a thousand important legal rights,  
18 privileges, duties and benefits, such as immigration rights, tax benefits, property benefits,  
19 intestate succession rights, and social security and other survivors' benefits. (Cott Dec. ¶¶ 7, 10.)  
20 Marriage is important to—and so richly rewarded by—the state not because of the government's  
21 interest in the personal happiness of the spouses, but because it builds social order, creates stable  
22 households and ensures that spouses and children will receive support and care. (*Id.* ¶¶ 8, 10-  
23 11.) As Harvard historian Nancy Cott explains, "[m]arriage has a legitimacy that has been  
24 earned through many years of validation and institutionalization in law and society. Enhanced  
25 by government recognition for so long, legal marriage is a symbol of privilege. The idea that  
26 marriage is the happy ending, the ultimate reward, the sign of adult belonging, and the definitive  
27 expression of love and commitment is deeply ingrained in our society." (*Id.* ¶ 8.)

1           Beyond its importance for the spouses and the state, marriage is critically important to  
2 children. Marriage assures that both spouses will have rights and duties to protect their children.  
3 (*Id.* ¶¶ 11-13; Okun Dec. ¶¶ 6, 8, 10; Gattos Dec. ¶¶ 6, 9; Quenneville Dec. ¶ 3.). From the  
4 child’s perspective, the status of one's parents can have a profound effect on one's sense of self  
5 and understanding about the world. Children and teenagers confirm that marriage represents the  
6 most serious commitment a couple can make to each other and for their family. (Quenneville  
7 Dec. ¶ 4 ["I wanted my parents to get married because marriage is the way to show the highest  
8 form of love to someone."]; *id.* ¶ 6 ["Even though they've been together for a very long time,  
9 they seem less equal in other people's eyes because they are not married."]; *see also* H. Zia Dec.  
10 ¶ 13 [Nine-year-old child of declarant's friend said, "Now I won't be a bastard anymore" when  
11 his two moms married in San Francisco].) When the government denies access to marriage for  
12 same-sex couples, it essentially delegitimizes the children of such unions. (Zia Dec. ¶ 21.)

13           Marriage and the official status that accompanies it also validates a couple in the eyes of  
14 their parents and extended families. Marriage is universally recognized as an official and serious  
15 commitment, and as such can enhance understanding of and diminish discrimination against gay  
16 and lesbian couples from within their own families. Parents have an easier time understanding,  
17 explaining to others, and accepting their child's partner as family when that partnership is  
18 certified by marriage. (B. Woo Zia Dec. ¶¶ 5, 8, 11, 12 ["Now I tell people that all of my  
19 children are married. I introduce (my daughter's wife) Lia to my friends as 'my daughter' or 'my  
20 daughter-in-law.' I feel that Lia and her family are now truly our relatives."]; *see also* H. Zia  
21 Dec. ¶ 12.)

22           Many families, particularly those within non-majority ethnic or religious communities,  
23 place special cultural importance on marriage. Marriage allows a couple to participate in a  
24 family's tradition and benefit from its heritage in ways that may be culturally unique. (B. Woo  
25 Zia Dec. ¶¶ 3-6, 8, 10-12; H. Zia Dec. ¶¶ 3, 9, 12, 14-17.) Whether the importance of marriage  
26 in a family is rooted in ethnic or religious heritage, or simply in a tradition of strong marriages,  
27 those who so value marriage naturally want to continue this custom themselves and for their  
28

1 children. (Park Decl. ¶ 2, ¶ 4 ["While growing up, I had expected to marry someday and have  
2 children, as my parents and grandparents ... all had stable, enduring marriages."]; *id.* ¶ 7 ["I was  
3 delighted when my oldest son decided to marry because I hoped for him the same joy and deep,  
4 loving relationship that I have been lucky enough to have"].)

5 Marriage also gives a couple a new social status in the eyes of the community at large.  
6 (Okun Dec. ¶ 10 ["Without marriage there is this notion from people that there is a certain  
7 impermanence to your relationship even when you have kids. However, with marriage, people  
8 see you as more permanent. They see that you are a family."]; Manning Dec. ¶¶ 3, 15; Park Dec.  
9 ¶ 6; B. Woo Zia Dec. ¶¶ 4-5, 8, 11-12; H. Zia Dec. ¶¶ 12-13.)

10 **B. Civil Marriage Has Evolved Along With The American Understanding Of**  
11 **The Constitutional Guarantees Of Freedom And Equality.**

12 For all of these reasons, civil marriage is a cornerstone of American society. (Cott Dec.  
13 ¶ 14.) But for all of the recent debate about protecting the “institution” of civil marriage against  
14 incursions by gay men and lesbians, or even its “definition,” civil marriage has never been a  
15 static institution. Far from it. Historically, it has changed, sometimes dramatically, to reflect the  
16 changing needs, values and understanding of our evolving society. (*Id.* ¶¶ 17-51.) Marriage,  
17 like constitutional concepts of due process and equality, maintains its social relevance precisely  
18 because it is flexible, not fossilized.

19 As the California Supreme Court has explained in regard to the Constitution:

20 Constitutional concepts are not static. [Neither] the Due Process Clause  
21 [nor] the Equal Protection Clause is . . . shackled to the political theory of  
22 a particular era. In determining what lines are constitutionally  
23 discriminatory, we have never been confined to historic notions of  
24 equality, any more than we have restricted due process to a fixed  
25 catalogue of what was at a given time deemed to be the limits of  
26 fundamental rights. (*People v. Belous* (1969) 71 Cal.2d 954, 967 [internal  
27 quotation marks and citations omitted].)

28 So it is also with marriage. When this country was founded in 1776, marriage was an  
entirely different institution than it is today in a number of critical respects. Perhaps most  
strikingly, it was a primary vehicle of sex and race discrimination. Efforts to rid the marriage  
laws of sex and race discrimination were often difficult for the majority to accept—and resisted

1 as they were coming into being—on the ground that they would destroy the institution itself.  
2 (Cott Dec. ¶ 17.)

3 Women, once married, vanished into the authority of their husbands, losing all of their  
4 independent legal rights, including the right to hold property, sue or be sued, and in some cases,  
5 even the ability to commit a crime. (See generally Cott Dec. ¶¶ 27-37.) By marrying, women  
6 "consented" to physical "discipline"—including horsewhipping—at the hands of their husbands.  
7 (See *Joyner v. Joyner* (1862) 59 N.C. 322, 325.) Before 1979, husbands in California could rape  
8 their wives without legal consequence (see Cal. Penal Code § 262 [establishing crime of marital  
9 rape]), and for many decades, divorce was a near impossibility. (See Cott Dec. ¶¶ 38-39.) In  
10 that period of our country's history, it would have fundamentally changed society's  
11 understanding of marriage to afford women any of these rights.

12 Meanwhile slaves, deprived of all civil rights, had no legal right to marry at all. (See  
13 generally Cott Dec. ¶¶ 19-26.) Lacking access to marriage, they formed their family  
14 relationships by "jumping the broom," and those relationships had no protection when slave  
15 owners decided to separate spouses from each other or children from parents. Even as to free  
16 persons of African descent, as well as persons of other non-Caucasian races, intermarriage with  
17 Caucasians, known as miscegenation, was in most colonies (and subsequently states) prohibited.  
18 (*Id.*; see also *Perez v. Sharp* (1948) 32 Cal.2d 711, 747-48, 761.)

19 Had the institution of marriage not evolved along with advancing norms of freedom and  
20 legal equality, marriage would not be the social institution of vital importance that it remains  
21 today. (Cott Dec. ¶¶ 9-10.) But rather than remain frozen, marriage has steadily changed and  
22 adapted to evolving social standards. In the 1900's, for example, the centuries-old traditional  
23 notion that women had no legal individuality apart from their husbands began to clash with the  
24 realities of social developments of the time. (Cott Dec. ¶ 28-29.) As a result, coverture, the  
25 regime under which women lost their separate legal existence upon marriage, was rejected *even*  
26 *though it had provided the very definition of marriage for hundreds of years.* (Cott Dec. ¶ 29.)  
27 Thus, in the late 1800's, the California Supreme Court recognized both the right of a wife to sue  
28

1 her husband for a pre-marriage debt (*Wilson v. Wilson* (1868) 36 Cal. 447, 454), and the absolute  
2 right of a wife to use and dispose of her separate property without the consent of her husband  
3 (*Alexander v. Bouton* (1880) 55 Cal. 15, 19).

4 Now utterly unremarkable, these rulings were sea-change moments in the history of  
5 California marriage law and marked a radical departure from traditions that, once understood as  
6 noble and natural, had over time lost their social footing. (Cott Dec. ¶¶ 30-31.) In time, other  
7 incidents of this traditional concept of marriage passed away as well.<sup>1</sup>

8 The racial regulation of marriage also changed significantly over the years, reflecting an  
9 evolving American understanding of liberty and equality in relation to race and a growing  
10 realization that the ability to enter into marriage is a necessary precursor to full citizenship.  
11 Before emancipation, slaves lacked the legal capacity to consent to marriage because they were  
12 treated as property rather than persons under the law. (Cott Dec. ¶¶ 15, 19.) After liberation,  
13 many former slaves flocked to marry legally as an expression of their newly granted civil rights.  
14 (*Id.* ¶ 20.) Even then, however, the recognition of newly freed African Americans' right to marry  
15 each other did not confer marriage equality. (See *id.* ¶¶ 21-26.) Forty-one states prohibited  
16 marriage between a white person and a person defined as a "Negro" or "mulatto." (*Id.* ¶ 21.)  
17 Some, including California, also criminalized marriage between a white person and a Native  
18 American or Asian-American, on the grounds that it was perceived as contrary to what God  
19 dictated and promoted "corruption" of marriage. (*Id.*) California legislators opposed interracial  
20 marriage at the Legislature's first session in 1850, stating that "[n]egroes are socially inferior and  
21 have so been judicially recognized... [M]arriage between Caucasians and non-Caucasians is  
22 socially undesirable because of the physical disabilities of the latter . . ." (*Perez, supra*, 32  
23 Cal.2d at pp. 723, 727.)

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24  
25 <sup>1</sup> It took nearly a hundred more years for married women in California to be granted  
26 rights equal to their husbands in regard to the management and control of community property,  
27 which did not happen until 1975. (Cott Dec. ¶ 17.) Similarly, the laws granting husbands the  
28 authority to use violence against their wives and a "marital exemption" to the crime of rape were  
eventually eliminated.

1 Over time, this view was recognized as repugnant to our evolving constitutional  
2 conceptions of liberty and equality. (Cott Dec. ¶¶ 23-26.) The California Supreme Court was  
3 the first to recognize that restrictions on interracial marriages were unconstitutional. In 1948, the  
4 Court acknowledged that the right to marry is a "fundamental right" that is "essential to the  
5 orderly pursuit of happiness by free men." (*Perez, supra*, 32 Cal.2d at p. 714 [citation omitted];  
6 see also Cott Dec. ¶¶ 24-25.) Accordingly, the Court struck down laws forbidding interracial  
7 marriage, stating that California's marriage laws "must be free from oppressive discrimination to  
8 comply with the constitutional requirements of due process and equal protection of the laws."  
9 (*Id.* at p. 715.) It took nearly 20 more years, but eventually, the United States Supreme Court  
10 followed suit and struck down all remaining laws banning interracial marriage in *Loving v.*  
11 *Virginia* (1967) 388 U.S. 1, 12. As Professor Cott describes, "[a]ffirming that freedom of choice  
12 of one's partner was basic to the civil right to marry, the Court strengthened and validated the  
13 institution of marriage within society." (Cott. Dec. ¶ 26.) Today, virtually no one questions the  
14 legal right of individuals of different races to marry.

15 Over the last 30 years, courts have faced a similar upswell of challenges to the law's  
16 continuing refusal to permit members of same-sex couples to marry the person of their choice  
17 without regard to sex or sexual orientation. In the last eight years, Courts in Hawaii, Alaska,  
18 Vermont, Massachusetts, Oregon and Washington have all concluded that the exclusion of same-  
19 sex couples from marriage violates their respective state constitutions. (See *Baehr v. Lewin*  
20 (1993) 74 Hawaii 530; *Brause v. Bureau of Vital Statistics* (Alaska Super. Ct.) 1998 WL 88743  
21 [non pub. opn.]; *Baker v. State* (1999) 170 Vt. 194; *Goodridge v. Dep't of Public Health* (2003)  
22 440 Mass. 309; *Opinion of the Justices to the Senate* (2004) 440 Mass. 1201; *Li v. State* (Or. Cir.,  
23 April 20, 2004, No. 0403-03057) 2004 WL 1258167 [non pub. opn.]; *Andersen v. King County*  
24 (Wash. Super. Ct., Aug. 4, 2004, No. 04-2-04964-SEA) 2004 WL 1738447 [non pub. opn.]  
25 The New York Attorney General has recently opined that his state's marriage ban may well  
26 violate the New York Constitution as well. (2204 N.Y. Opn. Atty. Gen. No. 1, 2004 WL 551537  
27 [non pub. opn.]  
28

1 Courts and legislatures in many other countries have also taken decisive action to end  
2 marriage discrimination against same-sex couples. (Declaration of Roy Douglas Elliot ["Elliot  
3 Dec." ] ¶ 4.) Both Belgium and the Netherlands have removed gender-specific language from  
4 their family codes, granting full civil marriage rights to same-sex couples. (*Id.* ¶ 10.) A number  
5 of other countries, including Norway, Sweden, Denmark, Finland, Hungary, Luxembourg,  
6 Portugal, Iceland, the Czech Republic, Germany, France, South Africa, and New Zealand all  
7 grant to same-sex couples all or nearly all the same rights granted to different-sex married  
8 couples. (*Id.* ¶¶ 11, 17.) Many state and provincial governments have also granted marriage or  
9 quasi-marriage rights to same-sex couples, including the majority of Spanish regions, several  
10 Swiss cantons, three Australian provinces, and all of the individual Canadian provinces. (*Id.* ¶¶  
11 13, 19.) Legislation that would grant full civil marriage rights is currently pending in Sweden  
12 and Taiwan, and both are widely expected to pass. Similar legislation has been introduced in the  
13 United Kingdom and is expected in Spain and Canada. (*Id.* ¶¶ 7, 13.) A resolution that would  
14 guarantee gays and lesbians equal access to all fundamental rights, including the right to marry,  
15 has also been introduced before the United Nations, and has so far been endorsed by Austria,  
16 Belgium, Brazil, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece,  
17 Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden  
18 and the United Kingdom. (*Id.* ¶ 14.)

### 19 **C. California Still Prohibits Same-Sex Couples From Marrying.**

20 Despite the growing national and international recognition that excluding same-sex  
21 couples from the institution of marriage vitiates shared values of freedom and equality, the  
22 California Family Code still categorically prohibits same-sex couples from marrying. It  
23 provides: "Marriage is a personal relation arising out of a civil contract between a man and a  
24 woman, to which the consent of the parties capable of making that contract is necessary." (Fam.  
25 Code § 300.) By employing sex-based classifications ("a man and a woman") to grant the right  
26 to marry only to persons who wish to marry a person of the opposite sex, Section 300 denies the  
27 right to marry to those who wish to marry a person of the same sex. Thus, although Section 300  
28

1 classifies on the basis of sex, the burden of the law falls most heavily upon lesbians, gay men and  
2 their children.

3 The legislative history of Section 300 shows that it was specifically intended to attach a  
4 gender requirement to marriage. Prior to 1977, the Family Code defined marriage as "a personal  
5 relation arising out of a civil contract, to which the consent of the parties making that contract is  
6 necessary." (Fam. Code former § 4100 [predecessor to Section 300].) The purpose of the 1977  
7 amendment was to exclude gay and lesbian couples from marriage expressly. The Bill Digest  
8 prepared by the Assembly Committee on the Judiciary explained the reason for the legislation as  
9 follows:

10 Under existing law it is not clear whether partners of the same sex can get  
11 married. This bill clarifies the situation by providing that of the two  
12 partners to a marriage, once must be male and the other female. (San  
13 Francisco's Request for Judicial Notice ["RFJN"], Ex. E.)

13 The author of the legislation justified it by stating that "[m]arriage as a legal institution  
14 carries with it a number of special benefits," such as "special tax breaks, community property  
15 rights, mutual support obligations and intestate inheritance rights," and suggests that "[w]ithout  
16 exception, these special benefits were designed to meet situations where one spouse, typically  
17 the female, could not adequately provide for herself because she was engaged in raising  
18 children." (*Id.*) According to the author, "the legal benefits granted married couples were  
19 actually designed to accommodate motherhood" and the "real purpose" of marriage "is to protect  
20 the children," "even though in doing so we indirectly provide special protections for a financially  
21 dependent mother."<sup>2</sup> (*Id.*) The author further stated that providing the same benefits to  
22 "homosexual couples" would somehow result in a "windfall . . . except in those rare situations  
23 (perhaps not so rare among females) where they function as parents with at least one of the

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24  
25 <sup>2</sup> Attempting to explain why marriage rights are extended as well to "childless  
26 heterosexual couples," the author states that because "the disadvantages of raising children are  
27 not limited to the period of time it takes to raise them," "it would be impractical to limit the  
28 benefits of marriage to just those couples who are presently engaged in rearing children." (*Id.*)

partners devoting a significant period of his or her life to staying home and raising children."

*(Id.)*

Two of the other Family Code sections governing marriage also avert to sex, but they do not impose a sex-based limitation on marriages performed in California. Section 301 provides: "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage." This statute governs the age of consent, now set at 18 for both men and women. Prior versions of Section 301 had set different ages for males and females. (See Civil Code former § 56 (1872) ["Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage"], RFJN Ex. A.) To the extent that Section 301 continues to reference sex, that language is merely a holdover from a time when differentiating on the basis of sex served a statutory purpose. In any event, as Section 301 is silent as to whom an unmarried male and an unmarried female may marry, it does not create a legal barrier to marriages between persons of the same sex.

The third statute that references sex, Family Code Section 308.5, provides: "Only marriage between a man and a woman is valid or recognized in California." Section 308.5 is a recent addition to the Family Code that began as Proposition 22 on the March 2000 ballot. The historical context in which Proposition 22 was introduced, the language of the ballot pamphlet, and the codification of the initiative in relation to the section of the Family Code extending recognition to out-of-state marriages all indicate that Proposition 22 was intended to apply only to out-of-state marriages.<sup>3</sup> For this reason, Section 308.5 is irrelevant to marriages performed in California.

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<sup>3</sup> Proposition 22 was passed in the midst of an unprecedented national and international debate over marriage equality for same-sex couples, at a time when the prospect of a state or country ending such discrimination seemed to many to be imminent and inevitable. At that time, the law was clear that same-sex couples who married in another jurisdiction would be entitled to have their marriage recognized and treated as valid under Family Code Section 308.

(continued on next page)

1 Of course, to the extent that Sections 301 or 308.5 might be construed broadly to prohibit  
2 California marriages between persons of the same sex, they would be analytically indistinct from  
3 Section 300—and for that reason would suffer from the same constitutional infirmities.

4 **D. Respondent Rodrian, The State Registrar, Refuses To Issue Non-**  
5 **Discriminatory Marriage Licenses And To Register Marriages Between**  
6 **Persons Of The Same Sex.**

7 Respondent Michael Rodrian is the State Registrar of Vital Statistics. (See Defendants'  
8 Answer To Plaintiff City and County of San Francisco's First Amended Complaint And Petition  
9 For Writ Of Mandate ¶ 3, attached as Ex. A to Declaration of Sherri Sokeland Kaiser ["Kaiser  
10 Dec."].) The State Registrar is charged with providing instruction to and supervising local  
11 registrars; prescribing and furnishing vital statistics forms, including marriage license forms, for  
12 use by local registrars; and arranging and preserving all registered vital statistics licenses,  
13 including marriage licenses, in a comprehensive state index. (See Health & Saf. Code, §§ 10025  
14 et seq.) On the basis of the marriage restriction in the Family Code, Respondent has refused to  
15 issue gender-neutral marriage license application forms, has not instructed local registrars to  
16 administer the marriage laws without regard to sex, and has declined to register marriages  
17 performed in San Francisco between persons of the same sex. (See Kaiser Dec. Ex. B.)  
18

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19 (footnote continued from previous page)

20 Proposition 22 was introduced to prevent California from being required to defer to other  
21 jurisdictions on this question. The official ballot materials presented to voters focused on the  
22 alleged need to close a “legal loophole” permitting out-of-state judges to define California  
23 marriages. (See RJFN, Ex. B at pp. 50, 52) Supporters of the measure stated:

23 When people ask, “why is this necessary?” I say that even though  
24 California law already says only a man and a woman may marry, it also  
25 recognizes marriages from other states. However, judges in some of those  
26 states want to define marriage differently than we do. If they succeed,  
27 California may have to recognize new kinds of marriages. (*Id.* at p. 52.)

28 The Rebuttal to Argument Against Proposition 22 continued to stress this point: “THE TRUTH  
IS, *UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE  
CALIFORNIA TO RECOGNIZE ‘SAME-SEX MARRIAGES’ PERFORMED IN OTHER  
STATES.*” (*Id.* at p. 53 [capitalization and italics in original].)

1 The City now seeks a writ of mandate compelling Respondent to perform his duties  
2 without regard for the unconstitutional provisions in the Family Code that exclude same-sex  
3 couples from the institution of marriage.

#### 4 ARGUMENT

#### 5 **I. THE CITY IS BENEFICIALLY INTERESTED IN THE ISSUANCE OF A WRIT 6 OF MANDAMUS TO COMPEL RESPONDENT TO ACT IN ACCORDANCE 7 WITH THE CONSTITUTIONAL RIGHT OF SAME-SEX COUPLES TO 8 MARRY.**

9 California Code of Civil Procedure section 1085 authorizes this Court to issue a writ of  
10 mandamus to compel Respondent Rodrian to perform his statutory duty in accordance with  
11 constitutional requirements. Writs are available to require government agencies and officials to  
12 cure constitutional violations. (See, e.g., *Beaudreau v. Superior Court* (1975) 14 Cal.3d 448,  
13 465; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 24; *Sail'er Inn, Inc. v. Kirby*  
14 (1971) 5 Cal.3d 1, 22; *ACLU v. Board of Education* (1961) 55 Cal.2d 167, 182.)

15 A writ must issue where the petitioner shows (1) a clear and present duty on the part of  
16 the respondent and (2) a beneficial interest in the petitioner in the performance of that duty. (See  
17 Code Civ. Proc., §§ 1085, 1086; *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863.)<sup>4</sup> A  
18 petitioner has a "beneficial interest" if it has "some special interest to be served or some  
19 particular right to be preserved or protected over and above the interest held in common with the  
20 public at large." (*Sacramento County Fire Protection Dist. v. Sacramento County Assessment*  
21 *Appeals Bd. II* (1999) 75 Cal.App.4th 327, 331 [citation omitted].)

22 Here, the City has a beneficial interest in the State Registrar's performance of his duties  
23 free from discrimination against same-sex couples because Respondent's unconstitutional  
24 actions directly harm the City in tangible and intangible ways. (See, e.g., *Jefferson Union Sch.*  
25 *Dist. v. City Council* (1954) 129 Cal.App.2d 264, 267 [school district beneficially interested in

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26 <sup>4</sup> In the event that there are disputed issues of material fact, the petitioner may seek an  
27 evidentiary hearing. (See Code Civ. Proc. § 1090.) If subsequent filings on the constitutional  
28 issues reveal a disputed issue of material fact, the City reserves its right to seek an evidentiary  
hearing and to request that its declaratory judgment claim be set for trial simultaneously with the  
evidentiary proceeding on the writ.

1 annexation proceedings that would remove territory from its district and tax rolls]; *City of*  
2 *Roseville v. Tulley* (1942) 55 Cal.App.2d 601, 603-604 [city beneficially interested in writ to  
3 compel reimbursement of expenses approved by the city council]; see also *County of Los*  
4 *Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442 [considering county's petition for writ of mandate  
5 challenging statute that reallocated property taxes from local governments to schools on the basis  
6 that it would impair the county's discretionary control over local affairs and shift property tax  
7 revenue from local governments to schools].)

8         At a purely economic level, the City Controller estimates that the ban on same-sex  
9 marriage costs the City an estimated \$15.3 to \$19.6 million per year. (Declaration of Ed  
10 Harrington ["Harrington Dec."] ¶ 8, Exh. A.) The same-sex marriage ban forces the City to  
11 provide between \$13.2 and \$13.5 million worth of public health and social services to people  
12 who, if allowed to marry, would not need such services. (*Id.* ¶ 10.) The City's Department of  
13 Public Health bears the brunt of health care costs for the uninsured. (*Id.* ¶¶ 12-16.) Because  
14 same-sex couples cannot marry, some dependents cannot take advantage of employer-provided  
15 health insurance, leaving uninsured partners and dependant children with no other alternative  
16 than to draw upon the City's hospitals and clinics. (*Id.*) If same-sex couples were allowed to  
17 marry, the Department of Public Health would save an estimated \$12.9 million per year. (*Id.*  
18 ¶ 16.) The City's Department of Human Services likewise provides certain benefits, such as  
19 public assistance, using eligibility criteria that take into account spousal income. Were gays and  
20 lesbians permitted to marry, fewer people would qualify for the benefits and the Department  
21 could save an estimated \$300,000 to \$600,000 per year that it could redirect to the City's neediest  
22 residents. (*Id.* ¶ 11.)

23         Because gays and lesbians are not permitted to marry, the City also loses potential  
24 revenue estimated at \$2.1 to \$6.1 million per year. (*Id.* ¶ 17.) When couples get married, the  
25 City benefits through increased revenue from sales tax and from the hotel tax because of  
26 wedding-related purchases and honeymoons. (*Id.* ¶¶ 17, 20-25.) If same-sex couples had the  
27 ability to marry, there would be an increase in the number of such weddings for residents and  
28

1 non-residents. (*Id.* ¶¶ 20-21, 23.) The estimated increased sales tax revenue is nearly \$1 million  
2 from resident same-sex weddings and may range as high as \$1.9 million or more from non-  
3 resident same-sex weddings. (*Id.* ¶¶ 22, 24.) The projected increased hotel tax is \$600,000 to  
4 \$2.8 million per year. (*Id.* ¶ 25.) In addition to lost tax revenues, the ban on same-sex marriage  
5 causes the City to lose other, miscellaneous revenues that are more easily recovered from  
6 married debtors because marriage creates an additional responsible party. (*Id.* ¶¶ 18-19.) In  
7 particular, the City could increase its fee collections for hospital and ambulance bills and parking  
8 fines by between \$ 300,000 and \$500,000 annually. (*Id.* ¶¶ 18-19 & Ex. A.)

9         The Controller's findings regarding the impact of marriage discrimination on the City's  
10 fiscal health mirror analyses of the marriage ban's impact at the state and federal levels. The  
11 Congressional Budget Office has found that allowing same-sex marriage would reduce the  
12 federal deficit; and a recent analysis by UCLA's Williams Project reached a similar result as to  
13 the state of California. (See RFJN Ex. I ["The Potential Budgetary Impact of Recognizing Same-  
14 Sex Marriages," Congressional Budget Office, June 1, 2004]; see also RFJN Ex. J ["The Impact  
15 on California's Budget of Allowing Same-Sex Couples to Marry," UCLA Williams Project and  
16 University of Massachusetts at Amherst Institute for Gay and Lesbian Strategic Studies, May  
17 2004].)

18         The City also suffers a series of intangible injuries that give it a beneficial interest in the  
19 outcome of this proceeding. For many years, the City has consistently sought to protect gays and  
20 lesbians from discrimination. (Declaration of Cynthia G. Goldstein ["Goldstein Dec."] ¶¶ 4-40.)  
21 It has investigated and chronicled the profound impact that discrimination and disparate  
22 treatment has on gays and lesbians. (*Id.*) Nevertheless, without full recognition of gay and  
23 lesbian families through marriage, the City is limited in its ability to ensure that gays and  
24 lesbians obtain equal rights, a limitation that harms both gays and lesbians and the larger  
25 community. (*Id.* ¶¶ 41-43; see also, e.g., *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1279  
26 ["While injustice to any individual is intolerable under our system of justice, and denial of the  
27 rights of a cognizable group is unconstitutional, in the long run, the greatest threat of failure to  
28

1 guarantee the rights of gays and lesbians . . . is to the commonwealth"]; *Perez, supra*, 32 Cal.2d  
2 at p. 725 ["The effect of . . . prejudice upon any community is unquestionably detrimental both to  
3 the minority that is singled out for discrimination and to the dominant group that would  
4 perpetuate the prejudice".])

5 Moreover, the City has a keen interest in fulfilling its local duties as a clerk and registrar  
6 in a constitutional fashion. (See *Kaiser Dec. Ex. C* at ¶¶ 7, 14.) This, too, confers on the City a  
7 beneficial interest. (See *Central Delta Water Agency v. State Water Resources Control Board*  
8 (1993) 17 Cal.App.4th 621 ["a political subdivision of the state may challenge the  
9 constitutionality of a statute or regulation on behalf of its constituents where the constituents'  
10 rights under the challenged provision are 'inextricably bound up with' the subdivision's duties  
11 under its enabling statutes"]; *Santiago County Water District v. County of Orange* (1981) 118  
12 Cal.App.3d 818, 832 [water district beneficially interested because it was "the agency directly  
13 responsible for providing water to the proposed project and thus ha[d] a special interest in  
14 insuring that the EIR fully and adequately deal[t] with the delivery of water to the project".])

15 Finally, the City has no other plain, speedy or adequate remedy at law that can satisfy this  
16 interest other than a writ of mandate. (See *Lockyer v. City and County of San Francisco* (2004)  
17 17 Cal.Rptr.3d 225 [requiring the City to secure a court order declaring the marriage ban  
18 unconstitutional before it may cease withholding marriage licenses, solemnization and  
19 registration from same-sex couples who seek to marry].)

20 For all of these reasons, the City has a beneficial interest in the issuance of a writ  
21 compelling Respondent to perform his duties in a constitutional manner. Furthermore, as  
22 explained in detail below, Respondent has a clear duty under the California Constitution to issue  
23 marriage license forms that do not discriminate against same-sex couples and to register those  
24 couples' marriages.

1 **II. THE CALIFORNIA CONSTITUTION PROTECTS INDIVIDUAL CIVIL**  
2 **RIGHTS TO A DEGREE THAT MATCHES AND OFTEN EXCEEDS FEDERAL**  
3 **CONSTITUTIONAL GUARANTEES.**

4 The California Supreme Court has emphasized “the incontrovertible conclusion that the  
5 California Constitution is, and always has been, a document of independent force” which stands  
6 separate from the authority of the U.S. Constitution. (*Committee to Defend Reproductive Rights*  
7 *v. Myers* (1981) 29 Cal.3d 252, 261 [internal citation omitted].) In *Myers*, the Court struck down  
8 a law limiting Medi-Cal payments for abortions. (*Ibid.*) The Court stressed that, “[j]ust as the  
9 United States Supreme Court bears the ultimate judicial responsibility for determining matters of  
10 federal law, this court bears the ultimate judicial responsibility for resolving questions of state  
11 law, including the proper interpretation of provisions of the state Constitution.” (*Id.* at pp. 261-  
12 262.) The court underscored the importance of its role, stating that, “we cannot properly relegate  
13 our task to the judicial guardians of the federal Constitution, but instead must recognize our  
14 personal obligation to exercise independent legal judgment in ascertaining the meaning and  
15 application of the state constitutional provisions.” (*Id.* at p. 262.)

16 In 1972, California voters reaffirmed the independent force of the state Constitution,  
17 adopting Article I, section 24 of the California Constitution, which states that “the rights  
18 guaranteed by this Constitution are not dependent on those guaranteed by the United States  
19 Constitution.” (*Myers, supra*, 29 Cal.3d at p. 262 n.5.) The United States Supreme Court, too,  
20 has recognized the authority of a state to afford its citizens greater rights, as long as federally  
21 protected rights are respected. (See *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74,  
22 81.)

23 Indeed, many of the provisions of the California Constitution have no analogue, or had no  
24 contemporaneous analogue, in the U.S. Constitution. Examples include the abolition of slavery  
25 in 1849 (Art. I, sec. 6), 16 years before the Thirteenth Amendment in 1865; suffrage for women  
26 in 1911 (Art. II, sec. 1), nine years before the Nineteenth Amendment in 1920; early  
27 constitutional bans on forms of sex discrimination (Art. IX, sec. 9; Art. XX, sec. 18), unmatched  
28 by any federal protection until the United States Supreme Court first struck down a sex-based

1 classification in 1971 (*Reed v. Reed* (1971) 404 U.S. 71); and the establishment of an explicit  
2 constitutional right to privacy in 1972 (Art. 1, sec. 1). Due process and equal protection rights  
3 also find an independent basis in the California Constitution. (See Sections III.B-D, *infra*.)

4 In addition to interpreting a state constitution that affords greater protections than its  
5 federal counterpart, the California Supreme Court has a long record of being among the first to  
6 recognize constitutional rights that are later acknowledged by the U.S. Supreme Court to reside  
7 in the federal constitution as well. Most important for present purposes, in 1948 the California  
8 Supreme Court ruled that the sections of the civil code banning interracial marriage were  
9 unconstitutional. (*Perez, supra*, 32 Cal.2d at pp. 732-733.) The Court held that these sections  
10 were “not only too vague and uncertain to be enforceable regulations of a fundamental right, but  
11 that they violate the equal protection of the laws clause of the United States Constitution by  
12 impairing the right of individuals to marry on the basis of race alone and by arbitrarily and  
13 unreasonably discriminating against certain racial groups.” (*Id.*) The United States Supreme  
14 Court would follow suit, but not for another 19 years. (*Loving, supra*, 388 U.S. at p. 12 [striking  
15 down Virginia's antimiscegenation law as violative of due process and equal protection].)

16 Similarly, in 1969, the California Supreme Court ruled that a woman had a right to an  
17 abortion based on the right to privacy that it read into the due process provision of the California  
18 constitution. (*People v. Belous* (1969) 71 Cal.2d 954, 963.) Four years later, the U.S. Supreme  
19 Court upheld a woman’s right to obtain an abortion based on the right to privacy it likewise  
20 found under the due process clause of the U.S. Constitution. (*Roe v. Wade* (1973) 410 U.S. 113,  
21 153; compare *Ballard v. Anderson* (1971) 4 Cal.3d 873, 881-883 [striking a parental consent  
22 requirement for a minor seeking an abortion as unconstitutional] with *Planned Parenthood of*  
23 *Central Missouri v. Danforth* (1976) 428 U.S. 52, 75 [doing the same five years later]; and  
24 compare *People v. Wheeler* (1978) 22 Cal.3d 258, 277 [holding unconstitutional the use of  
25 peremptory challenges based on race] with *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [reaching  
26 the same conclusion eight years later].)

1           Thus, in adjudicating the City's challenge to California's discriminatory marriage laws  
2 under the California Constitution, this Court does not merely apply those rights that are already  
3 identified under federal constitutional law. The California Constitution is a document of  
4 independent vitality with many protections that exceed (or often precede) those in its federal  
5 counterpart. Rather than being constrained by federal precedent, this Court may—and should—  
6 independently adjudicate petitioners' claims that the state may not constitutionally deny its  
7 citizens their right to marry the person of their choice regardless of their gender or sexual  
8 orientation.

9     **III. THE MARRIAGE BAN IS SUBJECT TO STRICT JUDICIAL SCRUTINY**  
10    **BECAUSE IT INTRUDES ON THE RIGHTS TO LIBERTY, PRIVACY AND**  
11    **EQUALITY THAT THE CONSTITUTION GUARANTEES TO EACH**  
12    **CALIFORNIAN.**

13           No fewer than four independent constitutional rights require this Court to subject the  
14 statutory marriage restriction to strict scrutiny, the most searching form of judicial review.

15     **A. By Subjecting Certain Laws To Strict Scrutiny, The Judiciary Protects**  
16     **Fundamental Rights From Legislative Encroachment And Citizens From**  
17     **Invidious Governmental Discrimination.**

18           Most statutes are presumed constitutional and will easily survive judicial review as long  
19 as they bear a rational relationship to a legitimate state interest. (*Bernardo v. Planned*  
20 *Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 365.) But for a small number  
21 of other laws, the opposite is true. (*Ibid.*) Because these laws restrict the exercise of  
22 fundamental rights or impose legal disabilities on the basis of inherently suspect classifications—  
23 that is, classifications that generally bear no relation to ability to perform in society yet which  
24 have been the subject of lasting social disfavor, such as race or sex—they are constitutionally  
25 suspect and the courts play a critical role in ensuring the burdened right or class is subject only to  
26 regulation that is necessary and narrowly tailored to serve a compelling government interest.  
27 (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 440; *Connerly v. State*  
28 *Personnel Bd.* (2001) 92 Cal.App.4<sup>th</sup> 16, 33 ["[J]udicial deference does not extend to laws that  
employ suspect classifications . . . [b]ecause suspect classifications are pernicious and are so  
rarely relevant to a legitimate governmental purpose ".]) In such cases, the courts have a

1 paramount duty to protect individual rights from undue legislative encroachment and to "smoke  
2 out" illegitimate uses of suspect classifications in lawmaking. (*City of Richmond v. J.A. Croson*  
3 *Co.* (1989) 488 U.S. 469, 493.) Precisely such a case is presented here.

4 **B. Strict Scrutiny Is Required Because The Marriage Ban Encroaches Upon**  
5 **The Fundamental Constitutional Liberty Right To Marry The Person Of**  
6 **One's Choice.**

7 Article I, Section 7(a) of the California Constitution states that "[a] person may not be  
8 deprived of life, liberty, or property without due process of law[.]" (Cal. Const., Art. I, § 7(a);  
9 *accord, id.*, Art. I, §15.) Like its federal counterpart, this clause ensures that the government  
10 does not impermissibly infringe individual liberties or subject individual to invidious and  
11 irrational legal restraints. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 719-20 [due process  
12 clause "protects individual liberty against certain government actions regardless of the fairness of  
13 the procedures used to implement them," and "provides heightened protection against  
14 government interference with certain fundamental rights and liberty interests"]; *accord, Kavanau*  
15 *v. Santa Monica Rent Control Board* (1997) 16 Cal.4<sup>th</sup> 761, 771.) The California courts interpret  
16 the California Constitution's due process guarantee in a manner similar to its federal counterpart.  
17 (See, e.g., *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367.)

18 **1. The Right To Marry Is A Fundamental Liberty.**

19 The Due Process Clause protects the right to marry as a fundamental liberty to which  
20 each Californian is entitled. (*Perez v. Sharp, supra*, 32 Cal.2d at pp. 714, 715 [marriage "is a  
21 fundamental right of free men," "as fundamental as the right to send one's child to a particular  
22 school or the right to have offspring"]; *Belous, supra*, 71 Cal.2d at pp. 954, 963 [explaining that  
23 California courts have repeatedly acknowledged a fundamental right to liberty in matters related  
24 to marriage]; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 [right to marriage  
25 "recognized as a fundamental, constitutionally protected interest[.]"]; *Boren v. Dep't of*  
26 *Employment Dev.* (1976) 59 Cal.App.3d 250, 259 ["[f]reedom of personal choice in matters of  
27 marriage and family life is one of the liberties protected by the due process clause"];  
28 *McCourtney v. Cory* (1981) 123 Cal.App.3d 431, 438 [referring to laws that violate the right to

1 marry as interfering with individual freedom].) This constitutionally protected fundamental right  
2 also enjoys a lengthy and distinguished pedigree in federal law. (See, e.g., *Washington v.*  
3 *Glucksberg* (1997) 521 U.S. 702, 720 ["In a long line of cases, we have held that . . . the 'liberty'  
4 specially protected by the Due Process Clause includes the right to marry"]; *Zablocki v. Redhail*  
5 (1978) 434 U.S. 374, 383, 387 [describing right to marry as "a fundamental liberty protected by  
6 the Due Process Clause" and holding freedom of choice in marriage relationship is fundamental];  
7 *Cleveland Bd. of Education v. LaFleur* (1974) 414 U.S. 632, 639 ["This Court has long  
8 recognized that freedom of personal choice in matters of marriage and family life is one of the  
9 liberties protected by the Due Process Clause"]; *Loving, supra*, 388 U.S. at p. 12 ["Under our  
10 Constitution, the freedom to marry or not marry . . . resides with the individual and cannot be  
11 infringed by the State"]; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [marriage and  
12 procreation involve "one of the basic civil rights of man" and "a basic liberty"]; *Meyer v.*  
13 *Nebraska* (1923) 262 U.S. 390, 399 [explaining that the substantive right to liberty in the Due  
14 Process Clause includes the individual right to marry].)

## 15                   2.       **The Right To Marry Includes The Right To Choose One's Own** 16                               **Spouse.**

17           In *Perez, supra*, the California Supreme Court struck down California's anti-  
18 miscegenation law, which prohibited marriages between persons of certain different racial  
19 backgrounds, as violative of due process. (32 Cal.2d at pp. 731-732.) The *Perez* Court  
20 emphasized that the "essence" of the liberty interest in marriage "is freedom to join in marriage  
21 *with the person of one's choice.*" (*Id.* at p. 718 [emphasis added].) Applying this principle to the  
22 anti-miscegenation laws, the Court explained one reason why such laws violate due process: "[a]  
23 member of any of those races may find himself barred by law from marrying the person of his  
24 choice and that person to him may be irreplaceable. Human beings are bereft of worth and  
25 dignity by a doctrine that would make them as interchangeable as trains." (*Id.* at p. 725.)

26           Indeed, the freedom to choose one's spouse is utterly fundamental to individual and social  
27 well-being. It "has long been recognized as one of the vital personal rights essential to the  
28 orderly pursuit of happiness by free men." (*Loving, supra*, 388 U.S. at p. 12 [holding that

1 prohibitions on interracial marriage violate substantive due process].) "[M]arriage is at once the  
2 most socially productive and individually fulfilling relationship that one can enjoy in the course  
3 of a lifetime." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275.) As the Massachusetts  
4 Supreme Court recently recognized in *Goodridge*, civil marriage "is a social institution of the  
5 highest importance," and "the decision whether and whom to marry is among life's momentous  
6 acts of self-definition":

7           Civil marriage anchors an ordered society by encouraging stable  
8           relationships over transient ones. It is central to the way the [state]  
9           identifies individuals, provides for the orderly distribution of property,  
10          ensures that children and adults are cared for and supported whenever  
11          possible from private rather than public funds . . . . Marriage also bestows  
12          enormous private and social advantages on those who choose to marry.  
13          Civil marriage is at once a deeply personal commitment to another human  
14          being and a highly public celebration of the ideals of mutuality,  
15          companionship, intimacy, fidelity, and family. . . . Because it fulfils  
16          yearnings for security, safe haven, and connection that express our  
17          common humanity, civil marriage is an esteemed institution . . .  
18          (*Goodridge, supra*, 440 Mass. at p. 322.)

19           "[C]hoices to enter into and maintain certain intimate human relationships must be  
20          secured against undue intrusion by the State because of the role of such relationships in  
21          safeguarding the individual freedom that is central to our constitutional scheme." (*Roberts v.*  
22          *U.S. Jaycees* (1984) 468 U.S. 609, 617-618.) "Protecting these relationships from unwarranted  
23          state interference therefore safeguards the ability independently to define one's identity that is  
24          central to any concept of liberty." (*Id.* at 619.) As the United States Supreme Court most  
25          recently emphasized in *Lawrence, supra*, 123 S.Ct. at p. 2481:

26           [O]ur laws and tradition afford constitutional protection to personal  
27           decisions relating to marriage, procreation, contraception, family  
28           relationships, child rearing, and education. . . . These matters, involving  
29           the most intimate and personal choices a person may make in a lifetime,  
30           choices central to personal dignity and autonomy, are central to the liberty  
31           protected by the Fourteenth Amendment. At the heart of liberty is the right  
32           to define one's own concept of existence, of meaning, of the universe, and  
33           of the mystery of human life. Beliefs about these matters could not define  
34           the attributes of personhood were they formed under compulsion of the  
35           State. [internal citations omitted]

1                   **3.       The Fundamental Right To Decide Whether And Whom To Marry**  
2                   **Extends To Each Of Us Without Exception.**

3                   This basic liberty to decide whether and whom to marry extends to *everyone*. (See  
4                   *Turner v. Safley* (1987) 482 U.S. 78 [prisoners still enjoy a fundamental right to marry despite  
5                   incarceration]; *Zablocki v. Redhail* (1978) 434 U.S. 374 [striking down a Wisconsin statute  
6                   denying marriage to parents in default on child support payments].) There is no constitutional  
7                   exception to liberty for gay and lesbian citizens. As the U.S. Supreme Court emphasized just last  
8                   term, the due process guarantees of individual liberty apply to persons in an intimate relationship  
9                   with a member of the same sex just as much as they do to members of a heterosexual couple.  
10                  Decisions as to marriage and other fundamentally personal matters "involv[e] the most intimate  
11                  and personal choices a person may make in a lifetime, choices central to personal dignity and  
12                  autonomy, [and] are central to the liberty protected by the Fourteenth Amendment .... *Persons in*  
13                  *a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons*  
14                  *do."* (*Lawrence, supra*, 123 S.Ct. at p. 2481-2482 [emphasis added].) Thus, an unmarried adult's  
15                  right to decide whether and whom to marry is a fundamental aspect of the liberty protected by  
16                  the due process clause without regard to whether that adult chooses to marry a person of the  
17                  same or the opposite sex.

18                  Because Section 300 imposes a restriction on marriage that injures the fundamental  
19                  liberty guaranteed to same-sex couples by the California Constitution, it is presumptively invalid.  
20                  To save it, if it can, the state would have to come forward with a compelling governmental  
21                  interest that the marriage ban is narrowly tailored to serve without trampling on any more  
22                  individual liberty than absolutely necessary.

23                  **C.       Section 300 Also Triggers Strict Scrutiny Because It Violates The**  
24                  **Constitutional Right To Privacy.**

25                  Californians enjoy a right to privacy under the California Constitution that has no federal  
26                  equivalent. In 1972, the voters amended the California Constitution to include "privacy" as one  
27                  28

1 of the inalienable rights of its citizens. (Cal. Const., Art. I, sec. 1.)<sup>5</sup> This right includes "interests  
2 in making intimate personal decisions or conducting personal activities without observation,  
3 intrusion, or interference ('autonomy privacy')." (*Hill v. National Collegiate Athletic Ass'n*  
4 (1994) 7 Cal.4<sup>th</sup> 1, 35.) Indeed, the ballot pamphlet that accompanied the proposed California  
5 privacy amendment described the right of privacy in part as follows:

6           The right of privacy is the right to be left alone. It is a fundamental and  
7           compelling interest. It protects our homes, our families, our thoughts, our  
8           emotions, our expressions, our personalities, our freedom of communion,  
9           and our freedom to associate with the people we choose. . . .

10           \*\*\*\*\*

11           The right of privacy is an important American heritage and essential to the  
12           fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth  
13           Amendments to the U.S. Constitution. This right should be abridged only  
14           when there is a compelling public need. (RFJN Ex. G.)

15           A plaintiff alleging an invasion of privacy under section 1 must establish in the first  
16           instance that the challenged law "raises a genuine, nontrivial invasion of a protected privacy  
17           interest." (*American Academy of Pediatrics v. Lungren*, 16 Cal.4<sup>th</sup> 307, 331.) To aid in making  
18           this determination, a court should consider the following factors: (1) whether the interest  
19           asserted is a legally protected privacy interest, (2) whether the individuals affected have a  
20           reasonable expectation of privacy in the subject matter, and (3) whether the defendant's conduct  
21           constitutes a serious invasion of privacy. (*Id.* at p. 330 [noting factors announced in *Hill, supra*,  
22           7 Cal.4<sup>th</sup> at pp. 39-40].)

23           California's marriage ban denies to tens of thousands of Californians the right to marry  
24           the person they choose. It thus undeniably presents a significant intrusion on one of our most  
25           sacrosanct privacy interests, namely, the right to choose whom to marry. (*Ortiz v. Los Angeles*  
26           *Police Relief Ass'n, Inc.* (2002) 98 Cal.App.4<sup>th</sup> 1288, 1300-07.) As the United States Supreme  
27           Court has recognized, marriage invokes

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28           <sup>5</sup> Article 1, Section 1 of the California Constitution provides in relevant part that "*All people are by nature free and independent and have inalienable rights,*" including "*enjoying life and liberty*" and "*pursuing and obtaining safety, happiness and privacy.*" (Emphasis added.)

1 [a] right of privacy older than the Bill of Rights—older than our political  
2 parties, older than our school system. Marriage is a coming together for  
3 better or for worse, hopefully enduring, and intimate to the degree of being  
4 sacred. It is an association that promotes a way of life, not causes; a  
5 harmony in living, not political faiths; a bilateral loyalty, not commercial  
6 or social projects. Yet it is an association for as noble a purpose as any  
7 involved in our prior decisions. (*Griswold v. Connecticut* (1965) 381 U.S.  
8 479, 486.)

9 In *Ortiz, supra*, an employee of a non-profit organization that helped manage benefits for  
10 members of the Los Angeles Police Department was fired after she informed her employer that  
11 she intended to marry a prison inmate.<sup>6</sup> (98 Cal.App.4<sup>th</sup> at pp. 1294-1295.) Applying the *Hill*  
12 factors, the court held that (1) the right to marry is a constitutionally protected privacy interest,  
13 (2) the plaintiff had a reasonable expectation of privacy in selecting her spouse, and (3) by  
14 “veto[ing] her choice of spouses,” her employer had engaged in an invasion of privacy that was  
15 “‘serious’ in every sense of the word.” (*Id.* at pp. 1300-1307.)

16 Family Code Section 300, like the law at issue in *Ortiz*, operates to “veto” the “choice of  
17 spouses” of tens of thousands of Californians. Moreover, Section 300 constitutes an even more  
18 egregious invasion of personal autonomy than other laws struck down in *American Academy of*  
19 *Pediatrics v. Lungren* (1997) 16 Cal.4<sup>th</sup> 307, and *City of Santa Barbara v. Adamson* (1980) 27  
20 Cal.3d 123, because the Family Code provisions don’t “merely” *condition* the exercise of a  
21 fundamental right on the successful navigation of difficult procedural obstacles; rather, they  
22 altogether *prohibit* tens of thousands of people from exercising a clearly established fundamental  
23 right.

24 Where a “case involves an obvious invasion of an interest fundamental to personal  
25 autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual  
26 familial relationships, a ‘compelling interest’ must be present to overcome the vital privacy  
27 interest.” (*Lungren, supra*, 16 Cal.4<sup>th</sup> at 340 [quoting *Hill, supra*, 7 Cal.4<sup>th</sup> at p. 34] [applying  
28 strict scrutiny to law burdening right to abortion].) Strict scrutiny is particularly apt where, as

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<sup>6</sup> The California Constitution prohibits invasions of privacy not only by public actors, but also by private persons such as non-profit organizations. (See *Hill, supra*, 7 Cal.4<sup>th</sup> at p. 20.)

1 here: (1) the invasion of privacy is perpetrated by the state (*Ortiz, supra*, 98 Cal.App.4th at p.  
2 1308 [citing *Hill, supra*, 7 Cal.4th at p. 38]; (2) the state has monopoly control over “a vitally  
3 necessary item” (*id.* [citing *Hill, supra*, 7 Cal.4<sup>th</sup> at p. 39]); (3) that “ necessary item” is a core  
4 fundamental right, such as the right to marry (*id.* at p. 1311); and (4) the rule places “a flat  
5 prohibition on marriage that affects entire classes of individuals statewide.” (*Id.* at pp. 1308-  
6 1312 [describing the circumstances under which burden on right to marry would trigger strict  
7 scrutiny under article I, section 1].)

8 Accordingly, the marriage ban's invasion of the constitutional right to privacy  
9 independently triggers strict judicial scrutiny.

10 **D. The Marriage Statutes Are Independently Subject To Strict Scrutiny Under**  
11 **The Equal Protection Clause Because They Deny The Right To Marry Based**  
12 **On Sex.**

13 **1. The California Constitution Provides Even Greater Protections**  
14 **Against Sex Discrimination Than The Federal Constitution.**

15 Both the federal and state constitutions guarantee each person equal protection of the  
16 laws. Article I, section 7(a) of the California Constitution provides: "A person may not be . . .  
17 denied equal protection of the laws." The test for equal protection under the United States and  
18 California Constitutions is "generally equivalent" or "substantially the same," and guarantees that  
19 persons similarly situated shall be treated equally under the law. (*Dep't of Mental Hygiene v.*  
20 *Kirchner* (1965) 62 Cal.2d 586, 588; *Los Angeles v. Southern Cal. Telephone Co.* (1948) 32  
21 Cal.2d 378, 389; *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1114.)

22 Nonetheless, California's equal protection clause provides independent protections and  
23 broader rights under certain circumstances than the federal Constitution. (*Kirchner, supra*, 62  
24 Cal.2d at p. 588; *People v. Leung* (1992) 5 Cal.App.4th 482, 494.) As the California Supreme  
25 Court explained in *Serrano v. Priest* (1976) 18 Cal.3d 728, "our state equal protection  
26 provisions, while substantially the equivalent of the guarantees contained in the Fourteenth  
27 Amendment to the United States Constitution, are possessed of an independent vitality which, in  
28 a given case, may demand an analysis different from that which would obtain if only the federal  
standard were applicable." (*Id.* at p. 764 [internal quotation marks omitted].) Accordingly, in

1 *Serrano, supra*, the Court held that California's state-wide financing scheme for public schools  
2 violated state equal protection principles, even though the United States Supreme Court had  
3 approved a similar Texas scheme under federal equal protection standards. (*Id.* at pp. 765-766  
4 [strict scrutiny appropriate standard of review under California Constitution]; *compare San*  
5 *Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 18 [rational basis appropriate  
6 standard of review under federal Constitution].) In *Gay Law Students Assn. v. Pacific Telephone*  
7 *& Telegraph Co.* (1979) 24 Cal.3d 458, 474-475, the Court reaffirmed the greater reach of  
8 California's equal protection clause: "[A]lthough our court will carefully consider federal state  
9 action decisions with respect to the federal equal protection clause insofar as they are persuasive,  
10 we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards  
11 of our state equal protection clause." (*Id.* at p. 469.)

12 As an example of the "independent vitality" and enhanced protections under state equal  
13 protection law, the California Constitution requires the highest level of strict scrutiny for gender  
14 classifications, although the federal constitution requires only "heightened" intermediate  
15 scrutiny. To pass muster under California's equal protection clause, a sex-based classification  
16 must reflect the narrowest and least restrictive means for accomplishing a compelling state  
17 purpose. (*Arp v. Workers' Compensation Appeals Bd.* (1977) 19 Cal.3d 395, 400; *Sail'er Inn,*  
18 *Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-18; *compare Craig v. Boren* (1976) 429 U.S. 190, 197  
19 [gender classifications valid under Fourteenth Amendment if they are substantially related to  
20 achieving important governmental objectives].)

21 Classifications based on sex are considered "suspect" in California; hence, Family Code  
22 provisions that discriminate based on sex are subject to strict scrutiny under state equal  
23 protection analysis. (See, e.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37; *County of Los*  
24 *Angeles v. Patrick* (1992) 11 Cal.App.4th 1246, 1252.) "Because suspect classifications are  
25 pernicious and are so rarely relevant to a legitimate governmental purpose . . . , they may be  
26 upheld only if they are shown to be necessary for furtherance of a compelling state interest and  
27  
28

1 they address that interest through the least restrictive means available.” (*Connerly v. State*  
2 *Personnel Bd.* (2001) 92 Cal.App.4th 16, 33.)

## 3                   2.       Section 300 Impermissibly Classifies On The Basis Of Sex.

4           Section 300, in its restriction of marriage to "a man and a woman," facially classifies on  
5 the basis of sex. Some have argued, however, that the otherwise suspect sex-based classification  
6 should be overlooked as “benign” because the law treats both sexes equally. But the California  
7 and U.S. Supreme Courts both conclusively rejected just such arguments when they each struck  
8 down anti-miscegenation laws. (*Perez, supra*, 32 Cal.2d at p. 716; *Loving v. Virginia*, *supra*,  
9 388 U.S. at pp. 8-9.) Those laws facially classified people on the basis of race. (*Ibid.*) While  
10 they arguably treated different racial groups equally in restricting all groups' rights to interracial  
11 marriage, they did not treat *individuals* equally on the basis of race. (*Perez, supra*, 32 Cal.2d at  
12 p. 716 ["The decisive question . . . is not whether different races, each considered as a group, are  
13 equally treated. The right to marry is the right of individuals, not of racial groups".]) Under  
14 those race-based laws, a white person could marry a white person, but a black person could not.  
15 Just so here: though a man can marry a woman, a woman cannot. The *Perez* Court held that  
16 California's anti-miscegenation law was no less odious under the Equal Protection Clause for its  
17 "even-handed" race-based classifications. (*Id.* at p. 718.) Its reasoning applies equally here to  
18 render Section 300's facial sex-based classifications suspect. (See also *Loving, supra*, 388 U.S.  
19 at p. 9 ["[W]e deal with statutes containing racial classifications, and the fact of equal application  
20 does not immunize the statute"]; *Brause v. Bureau of Vital Statistics, supra*, 1998 WL 88743 at  
21 p. \*6 ["a sex-based classification can readily be demonstrated: if twins, one male and one  
22 female, both wished to marry a woman and otherwise met all of the Code's requirements, only  
23 gender prevents the twin sister from marrying under the present law"]; *Baker v. State of*  
24 *Vermont, supra*, 744 A.2d at p. 906 ["Dr. A and Dr. B both want to marry Ms. C, an X-ray  
25 technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a  
26 woman. . . . This is sex discrimination"] (conc. & dis. opn. of Johnson, J.); *Baehr v. Lewin*,

1 *supra*, 74 Hawaii at pp. 572, 580 [Hawaii's law restricting marriage to different-sex couples  
2 discriminated on the basis of sex and was subject to strict scrutiny].

3         Moreover, the sex-based classifications at the core of the marriage ban most assuredly are  
4 not benign. By limiting marriage to different-sex couples, the Family Code was written to  
5 preserve traditional gender roles. (*See Baker v. Vermont, supra*, 744 A.2d 864, 906 [“the sex-  
6 based classification contained in the marriage laws is . . . a vestige of sex-role stereotyping that  
7 applies to both men and women . . . .”] (conc. & dis. opn. of Johnson, J.)) Moreover, these  
8 gender stereotypes are intimately linked with gender discrimination and inequality, the very type  
9 of ill that the Equal Protection Clause is designed to eradicate. (*See id.* [different-sex  
10 classification “is still unlawful sex discrimination even it applies equally to men and women.”];  
11 see also Sunstein, C., *Homosexuality and the Constitution* (1994) 70 Ind. L.J. 1, 20-21 [“the  
12 prohibition on same-sex marriages, as part of the social and legal insistence on ‘two kinds,’ is as  
13 deeply connected with male supremacy as the prohibition on racial intermarriage is connected  
14 with White Supremacy.”]; Law, S., *Homosexuality and the Social Meaning of Gender*, (1988)  
15 Wisc. L. Rev. 187, 188, 209 [“the persistence of negative social and legal attitudes toward  
16 homosexuality can best be understood as preserving traditional concepts of masculinity and  
17 femininity as well as upholding the political, market and family structures premised on gender  
18 differentiation” and “[t]he social significance of gender is fabricated to systematically favor  
19 men.”].)

20         As Professor Cott explains, the sex distinction in section 300 is best understood as the last  
21 vestige of sex discrimination in marriage, a legal rule that is "entirely out of step with the gender  
22 neutral approach of contemporary marriage law." (Cott Dec. ¶ 51.) Traditional marriage laws  
23 and practice ascribed very different roles to men than to women. (*Id.* ¶ 27.) Upon marrying,  
24 men would become providers and heads-of-household, while women would become subservient  
25 extensions of their husbands. (*Id.* ¶ 27.) But over time, every state in the Union took "steps to  
26 transform marriage from an institution based on gender inequality and gender-based roles to one  
27 in which the gender of the spouse is immaterial to their legal obligations." (*Id.* ¶ 35.) In  
28

1 California, the law is now entirely gender-neutral in its assignment of marital obligations. Only  
2 the sex-based classifications for accessing marriage remain, devoid of purpose but rife with  
3 invidious discrimination. (*Id.* ¶¶ 35, 37.)

4 **E. The California Equal Protection Clause Likewise Requires Strict Judicial**  
5 **Scrutiny Because The Marriage Ban Discriminates On The Basis Of Sexual**  
6 **Orientation.**

7 **1. Section 300 Discriminates On The Basis Of Sexual Orientation.**

8 Section 300 discriminates against gay men and lesbians on the basis of their sexual  
9 orientation. To be sure, the statute does not contain the words "sexual orientation," nor does it  
10 make heterosexuality a prerequisite for a marriage license. But just as certainly, it has an  
11 intentionally discriminatory effect on the only people likely to seek to marry a person of the  
12 same sex, namely, lesbians and gay men.

13 Under the state constitution, as opposed to the federal constitution, the equal protection  
14 principle is offended not only by intentional (de jure) discrimination, but—as in the case of  
15 segregated schools where no intentional discrimination was shown—by de facto discrimination  
16 as well. (*Crawford v. Board of Education* (1976) 17 Cal.3d 280, 286.) While a discriminatory  
17 effect alone is not enough to render a statutory classification constitutionally suspect under  
18 federal law, the presumption that a statutory classification may have a non-discriminatory  
19 purpose fades away in the face of a discriminatory legislative intent. (*Personnel Administrator*  
20 *of Mass. v. Feeney* (1979) 442 U.S. 256, 272.)

21 Section 300 discriminates on the basis of sexual orientation under either test. That it has  
22 a disparate impact on gays and lesbians in its prohibition of marriage between same-sex couples  
23 is clear. But the legislative history of Section 300 reveals that this discriminatory effect was  
24 quite intentional: the main purpose of its sex-based classifications is to withhold from lesbians  
25 and gay men the right to marry. Notably, this section did not always specify that marriage must  
26 be between a man and a woman. (See Civ. Code former § 4100 (RFJN Ex. C).) The former  
27 statute was gender neutral, and from 1971 to 1977 several same-sex couples sought marriage  
28 licenses. (RFJN Ex. D.) Only to prevent these couples from marrying did the Legislature amend

1 the law. According to the Assembly Committee on the Judiciary, "the legal benefits granted  
2 married couples were actually designed to accommodate motherhood . . ." Why extend the  
3 same windfall to homosexual couples . . .?" (RFJN Ex. E.) The bill's sponsor, Assemblyman  
4 Bruce Nestande, was equally explicit in his aim of foreclosing gays and lesbians from marriage:  
5 "[W]hile homosexuals have been granted certain privileges enjoyed by all, it is my contention  
6 that they should not include any of the rights set out in the marriage code." (RFJN Ex. F.)

7 Thus, the marriage ban not only impermissibly classifies on the basis of sex, it also  
8 intentionally and in its effect discriminates on the basis of sexual orientation. For this  
9 independent reason, the marriage ban must be subjected to strict judicial scrutiny.

10 **2. Sexual Orientation Is A Suspect Classification Under The California**  
11 **Equal Protection Clause.**

12 In *Gay Law Students Association, supra*, 24 Cal.3d 458, the California Supreme Court  
13 expressly recognized that homosexuals are a protected class under our state's Equal Protection  
14 Clause. In the course of holding that a public utility cannot arbitrarily discriminate against gays  
15 and lesbians in its employment decisions, the Court broadly recognized that the struggle for gay  
16 rights bears "a close analogy to the continuing struggle for civil rights waged by blacks, women,  
17 and other minorities." (*Id.* at p. 488 [citations omitted]; see also *Smith v. Fair Employment and*  
18 *Housing Commission* (1996) 12 Cal.4th 1143, 1210 fn.7 (conc. & dis. opn. of Kennard, J.)  
19 [recognizing that "homosexual couples have been subject to a . . . continuing . . . history of  
20 discrimination"]; *Children's Hospital and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740,  
21 769 [noting that "suspect classifications, *such as race or sexual orientation*" require heightened  
22 scrutiny under the Equal Protection Clause] [emphasis added].)

23 Like sex and race, sexual orientation must be treated as a suspect classification under the  
24 California Equal Protection Clause. In *Sail'er Inn, supra*, 5 Cal.3d at pp. 18-19, the California  
25 Supreme Court set forth the analytical framework for determining when suspect class status is  
26 appropriate. In that case, the Court applied strict scrutiny to gender classifications because: (1)  
27 gender "is an immutable trait, a status into which the class members are locked by the accident of  
28

birth"; (2) a person's gender "frequently bears no relation to ability to perform or contribute to society"; and (3) gender bears a "stigma of inferiority and second class citizenship," in other words, a history of "severe legal and social disabilities." (*Ibid.*) These criteria apply as much to sexual orientation as they do to gender.<sup>7</sup>

**a. Sexual Orientation, Like Gender, Is Inherent To One's Very Identity.**

*First*, sexual orientation is as inherent a part of one's identity as is gender. Whether or not one could attempt to force a change in sexual orientation is irrelevant (just as it is irrelevant that persons can change their gender through extraordinary measures). The Ninth Circuit has recognized as much. (*Hernandez-Monteil v. I.N.S.* (9<sup>th</sup> Cir. 2000) 225 F.3d 1084, 1093 ["Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them. . . . Sexual identity is inherent to one's very identity as a person"].) Because sexual orientation is so fundamental to personal identity, the state should not apportion legal rights according to sexual orientation in the absence of a compelling state interest. Put simply, it causes harm for the government to condition a basic

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<sup>7</sup> Federal precedents also support suspect class status for homosexuals. In *High Tech Gays v. Defense Industrial Security Clearance Office* (N.D. Cal. 1987) 668 F.Supp. 1361, rev'd (9<sup>th</sup> Cir. 1990) 895 F.2d 563, the court carefully applied suspect class criteria to homosexuals and found strict scrutiny appropriate to classifications based on sexual orientation. "Lesbians and gay men have been the object of some of the deepest prejudice and hatred in American society." (*Id.* at p. 1369.) Unfounded and degrading stereotypes "reflect prejudice and antipathy against gay people, because they do not conform to the mainstream." (*Id.*) "The fact that a person is lesbian or gay bears no relation to the person's ability to contribute to society" (*Id.* at pp. 1369-1370.) Finally, "pervasive discrimination against gay people has seriously impaired their ability to gain a politically viable voice for their views instate and local legislatures and in Congress." (*Id.* at p. 1370.) The Ninth Circuit's reversal of Judge Henderson's opinion in *High Tech Gays* relies entirely on the now-discredited *Bowers v. Hardwick* (1986) 478, U.S. 186, rev'd *Lawrence v. Texas* (2003) 539 U.S. 558. (See *High Tech Gays, supra*, 895 F.2d at p. 571.) That reversal, accordingly, has no continuing persuasive weight. Earlier Ninth Circuit authority, prior to *Bowers*, had recognized that homosexuals are entitled to heightened protection under the (continued on next page)

right, such as marriage, on individuals' willingness or ability to change their sexual orientations. Any heterosexual person would immediately recognize that if California banned marriage between heterosexuals and permitted only marriages between gay men and lesbians. Rather than change their sexual orientation, most heterosexuals would instead forego the deep joy and myriad social and legal benefits of marriage. No one should have to face such a choice absent a compelling state interest that cannot be served in any other way.

**b. Sexual Orientation Bears No Relation To A Person's Ability To Perform Or Contribute To Society.**

*Second*, whatever one's sexual orientation, that orientation bears no relation to one's ability to contribute to society. (Declaration of Dr. Robert Galatzer-Levy ["Galatzer-Levy Dec."] ¶¶ 11-12.) The days when the medical and psychiatric establishments believed homosexuality to be a disease or a defect are now past. (*Id.* ¶¶ 3, 5; Declaration of George Chauncey [Chauncey Dec.] ¶ 11.) Thus, fully 25 years ago, the California Supreme Court recognized that workplace discrimination against gay men and lesbians was irrational because it constituted "arbitrary discrimination on grounds unrelated to a worker's qualifications." (*Gay Law Students, supra*, 24 Cal. 3d at pp. 474-475.)

**c. Sexual Orientation Bears A Stigma Of Inferiority And A History Of Discrimination.**

*Third* and finally, gays and lesbians undeniably have been subject to a long history of social discrimination that has infected lawmaking with bigotry. (*Lawrence v. Texas, supra*, 123 S.Ct. at pp. 2482-2485.) Under these circumstances, strict scrutiny is crucial because it supplies the tool courts need to distinguish between legitimate and illegitimate uses of sexual orientation-based classifications in lawmaking and ensure the equal protection rights of the affected class.

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(footnote continued from previous page)

Fourteenth Amendment. (*Hatheway v. Sect. of Army* (9<sup>th</sup> Cir. 1981) 641 F.2d 1376, 1382; *Beller* (continued on next page)

1 (*City of Richmond v. J.A. Croson Co.*, *supra*, 488 U.S. at p. 493.) In *People v. Garcia* (2000) 77  
2 Cal. App. 4<sup>th</sup> 1269, the court recognized that homosexuals "share a history of persecution  
3 comparable to that of blacks and women." (*Id.* at p. 1276; see also *id.* at p. 1279 [noting that  
4 homosexuals suffer "pernicious and sustained hostility," as well as "immediate and severe  
5 opprobrium" in society] [quoting *Rowland v. Mad River Local Sch. Dist.* (1985) 470 U.S. 1009,  
6 1014 (Brennan, J., dissenting from denial of certiorari)].)

7  
8       Indeed, the persecution suffered by gays and lesbians in the United States has been severe  
9 throughout the twentieth century. As University of Chicago historian George Chauncey details,  
10 beginning in the late nineteenth century, the medical community (and later, the federal  
11 government) labeled gays and lesbians "deviants," "degenerates," "sex criminals" and "perverts"  
12 (Chauncey Dec. ¶¶ 3, 7, 20); federal, state and local governments forced gay and lesbian  
13 employees out of the military and civilian employment (*Id.* ¶¶ 19-22); and the police harassed  
14 them in public and private gathering places (*Id.* ¶¶ 9-18). Persecution against gays and lesbians  
15 was particularly brutal in the aftermath of World War II, due in large part to the efforts of  
16 Senator Joseph McCarthy, whose Senate Committee announced that homosexuals, like  
17 communists, constituted "security risks." (*Id.* ¶ 20.) In 1953, President Eisenhower ordered the  
18 discharge of gay and lesbian employees from all federal employment; in fact, at the height of the  
19 McCarthy era, the U.S. State Department fired more homosexuals than communists. (*Id.* ¶ 21.)  
20 During the same period, gays and lesbians were also demonized as predatory deviants and child  
21 molesters. (*Id.* ¶¶ 24-26.)  
22  
23

24       This social hostility shares a number of commonalities with the discrimination suffered  
25 by racial minorities and women, including its claimed basis in religious teachings, and the truth-

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26 (footnote continued from previous page)  
27 *v. Middendorf* (9<sup>th</sup> Cir. 1980) 632 F.2d 788, 808-810.)  
28

1 distorting claim that equal treatment somehow confers "special rights" on the minority group at  
2 issue. With respect to religious justifications for discrimination, Professor Chauncey explains  
3 that historically,

4 [t]he defenders of the popular prejudice of any particular age, lacking any  
5 recognizably rational basis for the distinctions they draw, often resort to  
6 claiming they are endorsed by millennia of moral teaching. Many white  
7 Southerners once defended segregation by claiming that it was part of  
8 God's plan for humankind. In the 1960s, a Virginia judge upheld that  
9 state's law against interracial marriage in the lower-court proceeding in  
10 *Loving v. Virginia* by claiming that 'Almighty God created the races white,  
11 black, yellow, malay and red, and he placed them on separate continents.  
12 And but for the interference with his arrangement there would be no cause  
13 for such marriages. The fact that he separated the races shows that he did  
14 not intend for the races to mix.' (*Id.* ¶ 31.)

15 With respect to the "special rights" distortion, in 1964 opponents of a proposed open  
16 housing law in Detroit organized a successful voter initiative against it, arguing that such anti-  
17 discrimination measures would confer "special privileges" on African-Americans. (*Id.*)

18 Opponents of laws prohibiting discrimination on the basis of sexual orientation now often  
19 similarly (and absurdly) claim that such laws confer "special rights" on gay people. (*Id.*)

20 This sort of deep-rooted and irrational prejudice against homosexuals results in  
21 continuing political disabilities. As one United States Supreme Court Justice recently observed,  
22 in most states, discrimination against lesbians and gay men is "perfectly legal"; Congress has  
23 repeatedly rejected federal job protection for homosexuals; and social antipathy is enshrined in  
24 federal statutes (i.e., the Defense of Marriage Act and the military's Don't Ask, Don't Tell  
25 policy). (*Lawrence, supra*, 123 S.Ct. at p. 2497 [Scalia, J., dissenting].) Until it was struck  
26 down by the courts, Colorado voters had approved a state-wide initiative that prohibited local  
27 governments in Colorado from enacting antidiscrimination laws protecting homosexuals.

28 (*Romer v. Evans* (1996) 517 U.S. 620.) Colorado's Amendment 2 was "inexplicable by anything  
but animus toward" homosexuals. (*Id.* at p. 632.) Likewise, a proposed anti-gay voter initiative  
in Riverside California had "the patent objective of fostering and furthering private  
discrimination." (*Citizens for Responsible Behavior v Superior Court* (1991) 1 Cal.App.4<sup>th</sup> 1013,  
1027.)

1 Even when the courts step in to enforce the basic constitutional rights of this unpopular  
2 minority from the discriminatory acts of the majority, gays and lesbians remain vulnerable to the  
3 whims of the majority. On several occasions, courts have stepped in (or threatened to step in) to  
4 protect gays and lesbians from unconstitutional discrimination, only to be overruled by  
5 amendments to their states' constitutions passed by a popular vote. (Chauncey Dec. ¶ 32.) Even  
6 Congress has taken the affirmative step of enacting legislation, the so-called Defense of Marriage  
7 Act, designed to prevent federal recognition of any same-sex marriage in the event the highest  
8 court of any State declares marriage discrimination to be unconstitutional. (*Id.*) It is difficult to  
9 imagine Congress going out of its way in this century to enshrine into federal law such a blatant  
10 refusal to honor the judicially recognized constitutional rights of any other American minority  
11 group.

12 For all of these reasons, gays and lesbians are entitled to suspect class status under the  
13 California Constitution.

#### 14 **IV. THE STATE CANNOT DEMONSTRATE THAT THE MARRIAGE BAN PASSES** 15 **STRICT SCRUTINY.**

16 Because the marriage ban injures four separate constitutionally protected rights—the  
17 right to liberty, privacy, and freedom from invidious discrimination on the basis of sex and  
18 sexual orientation—it is subject to strict judicial scrutiny for four wholly independent reasons.  
19 Since the marriage ban does not have even a rational basis, strict scrutiny is its death knell.

##### 20 **A. Strict Scrutiny Is A Two-Part Test That Requires The State To Demonstrate** 21 **That Legislation Was Designed To Further Compelling State Interests And** 22 **Is Necessary And Narrowly Tailored To Do So.**

23 When a law is subject to strict scrutiny under California's Constitution, "*the state* bears  
24 the burden of establishing not only that it has a *compelling* interest which justifies the law but  
25 that the distinctions drawn by the law are *necessary* to further its purpose." (*Warden v. State Bar*  
26 *of California* (1999) 21 Cal.4th 628, 641 [internal citation omitted].) The interest must be one  
27 that the Legislature *actually* intended to serve. In applying strict scrutiny, the courts will not  
28 engage in speculation about conceivable or plausible interests that may or could have motivated

1 the Legislature. (*American Academy of Pediatrics v. Lungren, supra*, 16 Cal. 4<sup>th</sup> at p. 358 & fn.  
2 33; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4<sup>th</sup> 16, 38.) Even laws that were  
3 intended to serve compelling interests must be "narrowly drawn," using the "least restrictive  
4 means to further the articulated interest." (*Sable Communications of Cal., Inc. v. F.C.C.* (1989)  
5 492 U.S. 115, 126; accord *Board of Supervisors v. Local Agency Formation Commission* (1992)  
6 3 Cal.4<sup>th</sup> 903, 913; *Griffiths v. Superior Court* (2002) 96 Cal.App.4<sup>th</sup> 757, 775.) This means the  
7 law must "target and eliminate no more than the exact source of the 'evil' it seeks to remedy."  
8 (*Frisby v. Schultz* (1988) 487 U.S. 474, 475.) Neither "administrative convenience nor 'outdated  
9 misconceptions' [nor] 'loose-fitting characterizations'" will suffice. (*Arp v. Workers'*  
10 *Compensation Appeals Board, supra*, 19 Cal.3d at p. 400 [citing *Craig v. Boren* (1976) 429 U.S.  
11 190, 197].) In other words, Section 300 must fall unless the state shows that the interests with  
12 which it *actually* was concerned "cannot be served by alternative means less intrusive on  
13 fundamental rights.'" (*American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4<sup>th</sup> at pp. 340-  
14 341 [quoting *White v. Davis* (1975) 13 Cal.3d 757, 772].)

15 **B. None Of The Actual Legislative Objectives Of The Marriage Ban Satisfy**  
16 **This Standard.**

17 As explained above (see Factual Background section C, *infra*), the legislative history of  
18 Family Code Section 300 reveals just three purposes. First, the statute was designed to preserve  
19 the tradition of limiting marriage to heterosexuals. (RFJN Ex. F (Nestande Press Release dated  
20 3/16/77 ["I feel that marriage must be between a man and a woman. Such a definition of the  
21 family unit is the 'essence of Western civilization'. . . . [The bill] is meant only to preserve the  
22 marriage laws for those of opposite sexes."]) Second, the Legislature wished specifically to  
23 exclude lesbian and gay couples from all of the rights and benefits that flow from marriage.  
24 (RFJN Ex. E [Bill Digest for 4/14/77 hearing, authored by Assemblyman Nestande, at pp. 1-2];  
25 see also RFJN Ex. D [Report of the Assembly Judiciary Committee on AB 607].) And third, the  
26 Legislature sought to limit the financial benefits marriage conveys to families with "financially  
27 dependent mother[s]" and children. (RFJN Ex. E.) None of these satisfies strict scrutiny.

1                   **1.       A Tradition Of Exclusion Cannot Be A Compelling State Interest As**  
2                   **A Matter Of Law.**

3                   It is by now well settled that it is unlawful for the state to discriminate against an entire  
4                   class of its citizens in the name of "tradition." As the California Supreme Court stated in *Perez*,  
5                   *supra*, decades ago:

6                               Careful examination of the arguments in support of the legislation in  
7                               question reveals that "there is absent the compelling justification which  
8                               would be needed to sustain discrimination of that nature." . . . Certainly  
9                               the fact alone that the discrimination has been sanctioned by the state for  
10                              many years does not supply such justification. (32 Cal.2d at p. 727  
11                              [citations omitted].)

12                   In another context, Justice Tobriner once stated, "no length of uncritical history or mindless  
13                   tradition may sanction a procedure when 'the unconstitutionality of the course pursued has . . .  
14                   been made clear.'" (*In re Anderson* (1968) 69 Cal.2d 613, 641 [quoting *Erie R.R. Co. v.*  
15                   *Tompkins* (1938) 304 U.S. 64, 77-78]; accord *Baker v. Vermont, supra*, 170 Vt. at p. 223 ["long  
16                   history of official intolerance of intimate same-sex relationships" did not justify ban on same-sex  
17                   marriage]; *People v. Greenleaf*, 2004 N.Y. Misc. LEXIS 1121, \*\*5-6 [non pub. opn.] ["Tradition  
18                   does not justify unconstitutional treatment. Slavery was also a tradition"].)

19                   Indeed, in *Lawrence v. Texas, supra*, the United States Supreme Court specifically  
20                   rejected "tradition" as even a rational basis for a law that discriminated against gay men and  
21                   lesbians:

22                               [T]he fact that the governing majority in a State has traditionally viewed a  
23                               particular practice as immoral is not a sufficient reason for upholding a  
24                               law prohibiting the practice; neither history nor tradition could save a law  
25                               prohibiting miscegenation from constitutional attack. (*Lawrence, supra*,  
26                               539 U.S. at pp. 577-578 [quoting Justice Stevens' dissent in *Bowers v.*  
27                               *Hardwick, supra*, 478 U.S. at p. 216, and adopting that analysis as  
28                               controlling].)

                  The City does not doubt that California's marriage ban protects a "traditional" view of  
marriage. But that rationale is entirely arbitrary and thus cannot satisfy any constitutional  
standard.

1                   **2.     Neither Is A Bare Desire To Exclude A Socially Disfavored Group**  
2                   **From The Receipt Of Legal Benefits A Compelling State Interest For**  
3                   **The Marriage Ban.**

4                   Like tradition, naked animus against gay men and lesbians is not even a rational basis for  
5 a law, let alone a compelling state interest. This question was definitively settled in *Romer v.*  
6 *Evans* (1996) 517 U.S. 620, where the United States Supreme Court unanimously struck down a  
7 state law that barred the state from extending any legal protections whatsoever to gay men and  
8 lesbians. In no uncertain terms, it reasoned,

9                   [.]aws of the kind now before us raise the inevitable inference that the  
10                  disadvantage imposed is born of animosity toward the class of persons  
11                  affected. '[.]f the constitutional conception of "equal protection of the  
12                  laws" means anything, it must at the very least mean that a bare . . . desire  
13                  to harm a politically unpopular group cannot constitute a legitimate  
14                  governmental interest' (*Id.* at p. 634 [quoting *Dep't of Agriculture v.*  
15                  *Moreno* (1973) 413 U.S. 528, 534] [ellipsis in original].)

16                  (Accord *Baker v. Vermont, supra*, 170 Vt. at p. 223 ["state action historically . . . motivated by  
17                  an animus against a class . . . cannot provide a legitimate basis for continued unequal application  
18                  of the law"].) If animus toward gay men and lesbians does not constitute a legitimate  
19                  government interest that can be used to justify a law under rational basis scrutiny, *a fortiori* it  
20                  cannot provide a "compelling" interest that can meet the more searching strict scrutiny standard.<sup>8</sup>

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21                  <sup>8</sup> California courts have also closely scrutinized the legitimacy of purpose  
22                  underlying legislative classifications for signs of animus. In *Parr v. Municipal Court*  
23                  (1971) 3 Cal.3d 861, the California Supreme Court, employing rational basis scrutiny,  
24                  invalidated a statute discriminating against "hippies" even though the statute did not  
25                  expressly mention that group. Reviewing the legislative history, the Court emphasized  
26                  that "we may not blind ourselves to official pronouncements of a hostile and  
27                  discriminatory purpose solely because the [legislation] employs facially neutral  
28                  language" (*id.* at p. 865) and, in terms directly applicable here, the Court frowned upon  
29                  legislation encouraging "discrimination against the members of a cultural minority whose  
30                  life style is disturbing to the majority." (*Id.* at p. 870.)

31                  When we take our seats on the bench we are not struck with blindness, and  
32                  forbidden to know as judges what we see as men; and where an ordinance,  
33                  though general in its terms, only operates upon a special race, sect or class,  
34                  it being universally understood that it is to be enforced only against that  
35                  race, sect or class, we may justly conclude that it was the intention of the  
36                  body adopting it that it should only have such operation, and treat it  
37                  accordingly." (*Id.* at p. 866 [quoting *Ho Ah Kow v. Nunan* (D. Cal. 1879)  
38                  12 Fed. Cas. No. 6,546 at p.252 (Opinion of Justice Stephen J. Field)].)

1                   **3. While Providing Resources To And Support For Dependents Could**  
2                   **Be A Compelling State Interest, The Marriage Ban Is Not Narrowly**  
3                   **Tailored To Serve That Interest.**

4                   Finally, while supporting dependent spouses and/or families with children could be a  
5                   compelling interest of the state, the marriage statute is based on unsupported assumptions and is  
6                   not narrowly tailored to serve those interests.

7                   First, the notion that only wives or women in heterosexual marriages can be dependent  
8                   spouses and that they are likely to be so in many or most families is both rooted in prejudicial  
9                   stereotypes about women's and men's roles in the family and society, and seriously outdated.  
10                  Indeed, only a minority of families in California meet the model of breadwinner husband and  
11                  dependent wife. Fully sixty-two percent of individuals in married couples are employed.  
12                  (Declaration of M.V. Lee Badgett ["Badgett Dec."] ¶ 12.) Further, the notion that lesbian and  
13                  gay families never have a dependent spouse is also inaccurate, particularly (though not  
14                  exclusively) where such families are raising children. In 29% percent of same-sex couples in  
15                  California, one person is employed while the other person is out of the labor force. (*Id.* ¶ 57.)  
16                  Moreover, same-sex parents as a group have fewer economic resources to provide for their  
17                  children than do married parents, partly as a result of the financial disadvantages that attach to  
18                  marriage discrimination. (*Id.* ¶ 17.)<sup>9</sup>

19                  Second, the idea that only heterosexual couples, and rarely or never gay and lesbian  
20                  couples, are desirous or capable of raising children is inaccurate. Many lesbian and gay couples  
21                  have and raise children, whether adopted or conceived through artificial insemination or  
22                  surrogacy. Thirty-two percent of same-sex couples are raising children in California, so that  
23                  approximately 70,500 children in the state are living in households headed by same-sex couples.  
24                  (*Id.* ¶ 15.) Indeed, the California Legislature has recognized this. (Fam. Code § 297, Note  
25                  [Operative Jan. 1, 2005].) California's current public policy recognizes the importance and value

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26                  <sup>9</sup> To take just a few examples, same-sex parents own homes at lower rates than married  
27                  parents; homes owned by same-sex parents are less valuable than those of their married  
28                  counterparts; and the household incomes of same-sex couples with children are on average  
                  \$10,000 to \$14,000 lower than married couples. (*Id.* ¶¶ 18-19.)

1 of encouraging and supporting lesbian and gay families, including the many such families who  
2 are raising children. (*Id.* [statute expanding domestic partner benefits enacted in recognition of  
3 fact that many same-sex couples "formed lasting, committed, and caring relationships," "share  
4 lives together, participate in their communities together, and . . . raise children and care for other  
5 dependent family members together" and for the purpose of "further[ing] California's interests in  
6 promoting family relationships and protecting family members during life crises, and . . .  
7 reduc[ing] discrimination on the bases of sex and sexual orientation".])

8         Because it is blind to, or perhaps blatantly discounts, gay and lesbian families, Family  
9 Code Section 300 is both under- and over-inclusive in relation to its stated purpose of protecting  
10 children and dependent spouses. The law is underinclusive in that, if it wishes to promote the  
11 financial security of families and children, it does not include same-sex couples with children  
12 who have been adopted or conceived. (See, e.g., *Baker v. State of Vermont, supra*, 744 A.2d at  
13 pp. 881-882 [citing five sociological studies showing that “a significant number of children today  
14 are actually being raised by same-sex parents, and that increasing numbers of children are being  
15 conceived by such parents through a variety of assisted-reproductive techniques”]; *Sharon S. v.*  
16 *Superior Court* (2003) 31 Cal.4<sup>th</sup> 417, 442 [upholding the validity of popular adoption procedure  
17 used by thousands of gay and lesbian couples].) In short, a law narrowly tailored to promote the  
18 financial security of families and children must obviously include same-sex couples and their  
19 children.

20         Family Code Section 300 is also overinclusive in two respects. First, it provides the  
21 substantial financial benefits of marriage to different-sex married couples who, by choice or for  
22 other reasons, do not have or raise children. These couples are provided the financial benefits of  
23 marriage without incurring the responsibilities of child bearing or child rearing. Second, Family  
24 Code Section 300 benefits the individuals in an different-sex marriage who both work and both  
25 generate income—that is, marriages where there is no dependent spouse, regardless of the  
26 presence or absence of children. If the compelling state interest is indeed to reserve the financial  
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1 benefits of marriage to dependent spouses and children, then a statute that provides a financial  
2 windfall to families where both spouses work is not narrowly tailored.

3 Any number of less restrictive means would serve the state interest in achieving financial  
4 security for dependent spouses and children without violating the constitutional rights of same-  
5 sex couples. For example, the state could reduce the overall benefits to married couples while  
6 providing additional tax credits or other financial benefits directly to couples with dependent  
7 spouses and/or couples with children on the basis of their financial need, not on the basis of their  
8 sex or sexual orientation.

9 In sum, insofar as the marriage ban is intended to promote the financial stability of  
10 dependent spouses and children, the current law is a very poor fit, to say the least. It does not  
11 justify, by any measure, the significant burden on the right of all citizens under the California  
12 Constitution to marry someone of the same sex if they so choose.

13 **V. EVEN IF STRICT SCRUTINY DOES NOT APPLY, THE MARRIAGE BAN**  
14 **CANNOT SURVIVE CONSTITUTIONAL CHALLENGE BECAUSE IT HAS NO**  
15 **RATIONAL BASIS.**

16 **A. The Rational Basis Test Under The California Constitution Requires A**  
17 **“Serious Inquiry” Into The Fit Between The Discriminatory Classification**  
18 **And Real (Not Imagined) Legislative Goals.**

19 Even if the less stringent rational basis test applied to the marriage ban, the Court still  
20 would be required to engage in "a serious and genuine judicial inquiry into the correspondence  
21 between the classification and the legislative goals." (*Newland v. Board of Governors* (1977) 19  
22 Cal.3d 705, 711 [citation omitted].) As with strict scrutiny, the rational basis test employed by  
23 the California courts is not a theoretical or abstract game; purely hypothetical or post hoc  
24 interests proffered in support of the classification will not suffice, and the "statutory  
25 classifications [must] bear some substantial relationship to an actual, not 'constructive,'  
26 legislative purpose." (*Brown v. Merlo* (1973) 8 Cal.3d 855, 865 fn.7; see also *id.* ["Although by  
27 straining our imagination we could possibly derive a theoretically 'conceivable,' but totally  
28 unrealistic, state purpose that might support this classification scheme, we do not believe our  
constitutional adjudicatory function should be governed by such a highly fictional approach to

1 statutory purpose"]; *Warden, supra*, 21 Cal. 4th at 648 [explaining that the statutory  
2 classification must be rationally related to "realistically conceivable legislative purposes" and  
3 cannot be justified by "invent[ing] fictitious purposes that could not have been within the  
4 contemplation of the Legislature"] [citing *Fein v. Permanente Medical Group* (1985) 38 Cal.2d  
5 137 and *Cooper v. Bray* (1978) 21 Cal.3d 841].)

6 **B. The Purpose Of The Statutory Classification Must Be Legitimate And May  
7 Not Consist Of Simple Animus Or The Arbitrary Desire To Exclude.**

8 In *Citizens for Responsible Behavior, supra*, 1 Cal.App.4th 1013, the California Court of  
9 Appeal struck down a proposed local ordinance purporting to prohibit and repeal any enactment  
10 or policy conferring any of a host of enumerated rights on homosexuals and people with AIDS.  
11 (*Id.* at pp. 1019-1020.) Concluding that even under the deferential rational basis test the  
12 ordinance did not come close to passing constitutional muster, the Court observed:

13 [The ordinance] fails utterly to make any distinction between homosexuals  
14 based on actual conduct or deportment, tarring all homosexuals—male and  
15 female alike—with the same brush of bizarre practices, gross promiscuity,  
16 and willful exposure to probable disease. It purports to solve the  
17 perceived problems by driving away the perceived perpetrators as a class,  
18 'guilty' and 'innocent' alike. All that is lacking is a sack of stones for  
19 throwing. (*Id.* at p. 1031.)

20 Thus, regardless of the level of scrutiny applied, California law requires that "statutory  
21 classification[s] be related to *permissible* purposes." (*Parr, supra*, 3 Cal.3d at p. 864 (emphasis  
22 in original), and neither prejudice nor bare animus against gays and lesbians is a permissible  
23 purpose. As both the effect and legislative history of Family Code Section 300 make plain that  
24 its intent was to exclude gays and lesbians from the right to marry the partner of their choice, that  
25 purpose simply was not permissible.

26 **C. The Only Arguably Rational Basis Advanced In The Legislative History Of  
27 Section 300 Is Belied By The Facts And Existing California Public Policy To  
28 The Contrary.**

Not only is the desire to exclude gay men and lesbians insufficient as a matter of law to  
satisfy even the rational basis test, but no other purpose advanced in the legislative history of the  
statute is rationally related to that exclusion. Again, whatever may be said with regard to the  
rationality of the assumptions underlying Section 300 when they were employed, it is now

1 obvious that they are grossly inaccurate, irrational and based on invidious stereotypes and  
2 prejudices.

3 *First*, it is clearly not true that all or most heterosexuals have children. *Second*, a  
4 substantial part of the lesbian and gay population has children; nearly a third of the openly gay  
5 and lesbian couples in California are currently raising children. (Badgett Dec. ¶ 15.) Nor is it  
6 true that gay men and lesbians rarely or never stay at home to parent children whereas  
7 heterosexual women do so all the time; on the contrary, lesbian and gay couples who are parents  
8 are *more* likely than heterosexual couples who are parents to stay at home to raise children and  
9 are therefore more likely to be dependent on their spouses. (*Id.* ¶ 19.)

10 Thus, in all significant respects, gay and lesbian couples and parents are not merely  
11 similarly, but virtually identically situated to their heterosexual counterparts.<sup>10</sup> It is obvious that  
12 the State has an equal stake in ensuring those families—no less than its heterosexual families—  
13 are fully supported and afforded all of the benefits that flow from marriage. The "procreation"  
14 rationale does not amount to a rational basis for denying these benefits, particularly in light of  
15 the accompanying economic and social harms.<sup>11</sup>

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18 <sup>10</sup> Like heterosexuals, gay men and lesbians are of every race and ethnicity (Badgett Dec.  
19 ¶11), live in every county throughout the state (*id.* ¶10), are similar in family size to heterosexual  
20 families (on average two children) (*id.* ¶16), are gainfully employed and thus contribute to the  
21 state's economy (*id.* ¶ 12), accounting for education (and gender discrimination) have incomes  
22 similar to heterosexuals (*id.* ¶ 13), pay proportionately more taxes than their heterosexual  
23 counterparts (*id.* ¶ 21-23, 29-33), despite longstanding discrimination have served their country  
24 in similar numbers to heterosexuals (*id.* ¶¶ 14, 16), contribute in myriad ways to schools,  
25 churches and the communities in which they live. (Gallatzer-Levy Dec. ¶ 12; Fam. Code § 297  
26 Note (Stats. 2003 ch. 421).) If anything, the data shows that families with children headed by  
27 same-sex couples, by reason of discrimination or otherwise, have *greater* need for the supports  
28 provided by marriage than heterosexual families. (*See* Badgett Dec. ¶¶ 17-19).

<sup>11</sup> These harms include higher taxes, increased expenses for everything from legal  
services to insurance, and deprivation of important government and employee protections and  
benefits, such as social security, pensions and health insurance. (*Id.* ¶¶ 20-60.) The marriage  
ban also subjects both the parents and the children in families headed by same-sex couples to the  
deep emotional undermining and scarring that comes with second-class status. (H. Zia Dec. ¶¶  
13-17 ; B. Zia Dec. ¶¶ 7-13.)

1           Indeed, by defending the marriage ban, the state is ignoring its own determinations that  
2 expanding same-sex couples' rights and responsibilities strengthens families, and that condoning  
3 sexual-orientation discrimination harms children.

4           The Legislature hereby finds and declares that despite longstanding social  
5 and economic discrimination, many lesbian, gay, and bisexual  
6 Californians have formed lasting, committed, and caring relationships with  
7 persons of the same sex. These couples share lives together, participate in  
8 their communities together, *and many raise children and care for other*  
9 *dependent family members together.* . . . Expanding the rights and  
10 creating responsibilities of registered domestic partners *would further*  
11 *California's interests in promoting family relationships and protecting*  
12 *family members during life crises* . . . (Fam. Code § 297, Note [Operative  
13 Jan. 1, 2005] (emphasis added).)

14 In the face of these findings, the state cannot rationally contend that same-sex couples do not  
15 need the same rights and responsibilities to promote and protect their family relationships and  
16 their children as heterosexual couples.

17           The purported reasons for the marriage ban are particularly disingenuous in light of state  
18 policy allowing gay men and lesbians to become foster parents, caring for the state's most  
19 vulnerable youth. California's administrative regulations allow any adult to apply for a foster  
20 family home license or adoption agency license regardless of "actual or perceived sexual  
21 orientation." (Cal. Code Regs., tit. 22 § 89317 [foster family homes]; *id.* § 89002 [adoption  
22 agency].) Further, licensed foster family agencies must accept applications from adult applicants  
23 and evaluate those applications for certification without regard to sexual orientation. (*Id.* §  
24 88030.) And the Legislature has noted that "[f]oster children are harmed by discrimination  
25 based on . . . sexual orientation . . . whether that discrimination is directed at them or at their  
26 caregivers." (Assem. Bill No. 458 [2003 Reg. Sess.] § 1(a).) For this reason, state law requires  
27 that all persons engaged in providing care and service to foster children receive fair and equal  
28 access to all available programs, benefits, and services without regard to sexual orientation.  
(Welf. & Inst. Code § 16013.) Thus, the state has already recognized the opposite of what it now  
claims; namely, that same-sex couples and their children—no less than heterosexual families—  
need support and protection. By attempting to support the marriage ban, the state affirmatively

1 contradicts its own public policy acknowledging that discrimination is wrong and hurts  
2 children—the very persons it is purporting, via the marriage ban, to protect.<sup>12</sup>

3 The Massachusetts Supreme Court held in *Goodridge, supra*, that the prohibition against  
4 same-sex marriage is arbitrary and irrational for reasons that are fully applicable here.

5 Restricting marriage to different-sex couples "cannot plausibly further" the policy of protecting  
6 the welfare of children. Prohibiting same-sex couples from marrying ensures that such couples'  
7 children will lack the financial security and stability created by the marriage relationship and  
8 thus harms the welfare of children by "prevent[ing] children of same-sex couples from enjoying  
9 the immeasurable advantages that flow from the assurance of a stable family structure in which  
10 children will be reared, educated, and socialized." (440 Mass. at p. 335.)

11 As the Massachusetts high court held, "[t]he marriage ban works a deep and scarring  
12 hardship on a very real segment of the community for no rational reason," and exists only  
13 because of historically prevalent anti-homosexual prejudice. (*Id.* at p. 341.) That dubious  
14 historical pedigree does not entitle the prohibition to judicial approval. "[T]he Constitution  
15 cannot control such prejudices but neither can it tolerate them. Private biases may be outside the  
16 reach of the law, but the law cannot, directly or indirectly, give them effect." (*Id.* at p. 342  
17 [citing *Palmore v. Sidoti* (1984) 466 U.S. 429, 433].) As "a status-based enactment" based on  
18 anti-homosexual animus that does not rationally promote any legitimate interest, the prohibition  
19 against same-sex marriage "is a classification of persons undertaken for its own sake." (*Romer v.*  
20 *Evans, supra*, 517 U.S. at p. 635.) This Court must strike it down.

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23 <sup>12</sup> Indeed, because the state recognizes that discrimination on the basis of sexual  
24 orientation harms families and children, it requires that teachers include in their curriculum  
25 "human relations education, with the aim of fostering an appreciation of the diversity of  
26 California's populations and discouraging the development of discriminatory attitudes and  
27 practices." (Educ. Code §233(a)(2).) This diversity includes sexual orientation diversity. (See  
28 Educ. Code § 32228 ["It is also the intent of the Legislature that public schools have access to  
supplemental resources to combat bias on the basis of . . . sexual orientation"]; Educ. Code  
§44253.2(e) [defining "cultural diversity" as "[r]ecognizing and responding to behavior related to  
bias based on . . . sexual orientation"].)

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**CONCLUSION**

For all of these reasons, the state cannot justify its statutory law prohibiting same-sex couples from exercising the precious, constitutionally protected right to marry simply on the basis of their sex and sexual orientation. A writ of mandate must issue granting the requested relief.

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