Case No. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652

San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

APPLICATION BY BAR ASSOCIATIONS FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE LEGALITY OF STATUTES PERMITTING MARRIAGE ONLY BETWEEN HETEROSEXUAL COUPLES; AND AMICUS CURIAE BRIEF

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Beverly Hills Bar Association, Los Angeles County Bar Association, San Francisco Trial Lawyers Association, California Women Lawyers and Women Lawyers Association Of Los Angeles ("Bar Associations") request permission to file the attached Amicus Curiae Brief pursuant to California Rules of Court, rule 8.520 (f).

The Bar Associations comprise more than 32,000 attorneys licensed to practice law in California. Their membership is politically, economically, religiously, racially and culturally diverse, reflective of our society as a whole.

The Bar Associations seek leave to file the accompanying Amicus Curiae Brief because they believe that lawyer groups should take a stand when important constitutional rights are denied. This is such a case.

The Court has recognized that marriage is a fundamental right of free adults and the most socially productive and individually fulfilling relationship in our society. Yet California law allows marriage only between heterosexual couples; it precludes same-sex couples from marrying.

The Bar Associations believe this preclusion is unconstitutional for multiple reasons. They agree with the assertions, advanced by Respondents, that the right to marry a person of one's choice is a

fundamental constitutional right; that sexual orientation should be deemed a suspect class subject to strict scrutiny review; and that no legitimate state interest, much less any compelling state interest, justifies barring same-sex couples from marrying.

Rather than submitting a "me too" brief that simply reiterates what others have argued, the Bar Associations strive to add something new to the mix. The accompanying brief focuses on the rational basis test and its application in the face of California's public policy—pronounced in the Domestic Partner Rights and Responsibilities Act of 2003, Family Code sections 297, et seq. ["Domestic Partner Act"or "Act"]—expressly commanding that same-sex couples are the functional equivalent of heterosexual couples and must be treated equally with them. The attached brief demonstrates that no rational basis can be articulated—or even imagined—in support of the heterosexual-marriage limitation that is not contradicted by these express statutory directives.

The Bar Associations have read all briefs filed by the parties. They believe their proposed brief sheds additional light on the important issues presented and, if permission to file is granted, will help this Court decide the case.

For these reasons, the Bar Associations respectfully request permission to file the accompanying Amicus Curiae Brief.

DATED: September 26, 2007

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines
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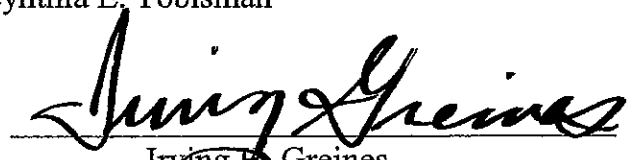
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

Marriage.

It holds a special place in our society. It is—and always has been—centrally rooted in our culture, value systems and way of life. It is idealized and encouraged. As this Court accurately observed, marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 684.)

Both this Court and the United States Supreme Court have held that marriage is "a fundamental right of free men." (*Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715; *Loving v. Virginia* (1967) 388 U.S. 1, 12 [right to marry is a "fundamental freedom" and "one of the 'basic civil rights of man [citations]'"].)[1/]

Notwithstanding the constitutional and societal significance of marriage, California only allows a man and woman to marry; same-sex partners cannot marry.[2/]

[1/] Some try to diminish the importance of marriage, claiming it is nothing more than a "title"—a name without legal or constitutional significance. This is nonsense, as our highest courts have held. The notion that marriage is meaningless is also contrary to substantive reality, the truth being that our legal system bestows numerous important benefits on married couples, benefits unavailable to those who are not married. (See Respondents' Supplemental Brief at pp. 1-17.) Let's not kid ourselves: If marriage bore significance only in name, then it would be impossible to explain why so many would be fighting so vigorously to make sure that same-sex couples are denied the right to marry.

[2/] Recently, both houses of the California Legislature passed legislation that, if signed by the Governor, would have permitted marriage (continued...)

This discrimination directly violates the public policies expressly commanded by the Domestic Partner Act.[3/] The Act defines California public policy and its public welfare as requiring all of the following:

- Domestic partners and their survivors "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, . . . as are granted to and imposed upon spouses." (Fam. Code § 297.5, subds. (a), (c).)
- The Act "shall be construed liberally" so as to afford domestic partners "the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses." (Stats. 2003, ch. 421 § 15.)[4/]

[2/] (...continued)
between same-sex couples. (Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005.) The Governor vetoed the legislation, stating this was a matter pending before the courts and, therefore, enactment of the legislation would add "confusion" to the constitutional issues under review. (Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-2006 Reg. Sess.) pp. 3737-3738.) Last month, the Legislature once again passed legislation that would permit marriage between same-sex couples. (Assem. Bill No. 43 (2007-2008 Reg. Sess.).) The Governor has not yet signed or vetoed it.

[3/] These public policies are echoed in numerous other statutes that mandate equal treatment of gay, lesbian, bisexual and transgender couples, as well as of same-sex couples and their families. (See Petitioner City And County of San Francisco's Opening Brief On The Merits, pp. 15-16, 37-40.)

[4/] This language appears in the uncodified preamble to the Act. Such language has full statutory effect. (E.g., *Carter v. California Dept. of*
(continued...)

- The purposes of the Act are "to help California move closer to fulfilling the promises of inalienable rights, liberty and equality contained in Sections 1 and 7 of Article 7 of the California Constitution by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections and benefits . . ."; "to further the state's interest in promoting stable and lasting family relationships"; to "protect[] family members during life crises"; and to "protect[] Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises." (Stats. 2003, ch. 421, § 1.)
- "[M]any lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together." (Stats. 2003, ch. 421, § 1(b).)
- Giving same-sex couples the same rights as married couples furthers California's interests in "promoting family relationships and protecting family members during life crises." (*Ibid.*)

[4/] (...continued)
Veterans Affairs (2006) 38 Cal.4th 914, 925 ["An uncodified section is part of the statutory law"]; *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, 534 ["An uncodified portion of a statute is fully part of the statutory law of this state"].)

- The Act is intended to "reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution." (*Ibid.*)

These provisions permit only one conclusion: California public policy expressly commands equal treatment of same-sex and heterosexual couples; it expressly disclaims the existence of any rational or legally relevant difference between them that would permit continued discrimination. These provisions shape—we submit, conclusively—the outcome of rational-basis review in this case. They render impossible the articulation or conception of any rational basis for the same-sex marriage preclusion. Indeed, no rational basis may properly be presumed that fails to honor and enforce the statutory commands; or that perpetuates the very inequality that is expressly denounced by such commands.

These are not new concepts. This Court correctly recognized the identical point almost sixty years ago. Then, the Court was asked to determine the constitutionality of legislation that overtly created an arbitrary classification among notary publics. Holding the legislation unconstitutional, this Court declared: There is "no room for the presumption of constitutionality or for the presumption that the Legislature had a conceivably rational basis for the limitation . . . , or the presumption of constitutionality from the long existence of the statute without attack." (*Hollman v. Warren* (1948) 32 Cal.2d 351, 359.)

This is true here. There is no room for any presumption of constitutionality that would result in the nullification of California's expressly-articulated statutory public policy.

LEGAL DISCUSSION

A. Rational Basis Review: Where A Law Treats Two Groups Differently, There Must Be Cognizable Differences Between The Groups—Namely, Differences That Are Reasonably Related To The Law's Legitimate Public Purposes.

While the Bar Associations agree with Respondents that the limitation of marriage to heterosexual couples is subject to strict-scrutiny review, our discussion proceeds on the assumption that the rational-basis test applies. Obviously, if the limitation cannot pass rational-basis review (as we maintain it can't), it can never survive strict-scrutiny review. In fact, it fails both tests.

The California Constitution requires that each person be afforded equal protection of the laws. (Cal. Const., art. I, § 7, subd. (a).) While lawmakers may enact statutes that make classifications, those classifications must not be arbitrary. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659.) As we now discuss, to pass constitutional muster, a classification must serve a legitimate public purpose and must stem from differences that are reasonably related to the subject matter of the enactment.

This case, which implicates California's right to recognize and regulate marriage, involves the exercise of the State's police power.[5/]

[5/] "Civil marriage is created and regulated through exercise of the police power [citation]. 'Police power' (now more commonly termed the State's regulatory authority) is an old-fashioned term for the [State's] lawmaking authority . . . . In broad terms, it is the Legislature's power to (continued...)

To serve a legitimate public purpose, a statutory classification enacted pursuant to the police power must serve the public welfare—that is, it must encourage the health, safety or economic prosperity of the populace. (See, e.g., *McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595, 600 [police power permits government to enact reasonable regulation for the public welfare; that is, to protect the health, safety, or general welfare of society].) Stated otherwise, a classification cannot simply enshrine private bias, traditional morality or religious preference. (See *Lawrence v. Texas* (2003), 539 U.S. 558, 583, O'Connor, J., concurring ["Moral disapproval of a group cannot be a legitimate governmental interest"].)[6/]

Where a classification does not rationally serve the public welfare, it is not constitutional. (See, e.g., *Lockard v. City of Los Angeles* (1949) 33

[5/] (...continued)
enact rules to regulate conduct, to the extent that such laws are 'necessary to secure the health, safety, good order, comfort, or general welfare of the community [citations].'" (*Goodridge v. Dep't. of Pub. Health* (2003) 440 Mass. 309, 321-322, 798 N.E.2d 941, 954; see also *Perez v. Sharp* (1948) 32 Cal.2d 711, 736, Carter, J., concurring [noting that civil marriage is governed pursuant to the State's police powers]; cf. 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 976, p. 538 ["the police power is simply the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare"].)

[6/] See also *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 850 [moral objections "cannot control our decision" regarding abortion laws because "[o]ur obligation is to define the liberty of all, not to mandate our own moral code"]; *Romer v. Evans* (1996) 517 U.S. 620, 634 ["a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"]; cf. *Don Wilson Builders v. Superior Court* (1963) 220 Cal.App.2d 77, 104, Fourt, J., dissenting ["history teaches that a mixture of coercion, political expediency and whim and caprice are not among the elements which make up the proper administration of justice"].

Cal.2d 453, 461 [regulations that "have no reasonable relation to the public welfare" will be set aside by the courts]; *Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 783 [zoning ordinance void because it bore no reasonable relation to public welfare].) Indeed, "[w]hile the exercise of the police power is inherent in government and essential to its existence, it cannot be so used as to arbitrarily limit the rights of one class of people, and allow those same rights and privileges to a different class, where the public welfare does not demand or justify such a classification." (*Deese v. City of Lodi* (1937) 21 Cal.App.2d 631, 640; *Amezcua v. City of Pomona* (1985) 170 Cal.App.3d 305, 309-310 [courts nullify laws enacted under the police power when they "hav[e] no real or substantial relation to the public health, safety, morals or general welfare"].)

A statutory classification must also stem from "differences in situation related to the subject-matter of the legislation." (*Young v. Haines* (1986) 41 Cal.3d 883, 900.) This means that persons similarly situated with respect to the legitimate purpose of a statute must receive like treatment. (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 502; see also *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 515, Kennard J., concurring and dissenting [equal protection "forbid[s] 'governmental decisionmakers from treating differently persons who are in all *relevant respects* alike,' [citation]" emphasis added].)

As this Court has explained, the statutory classification must be "based upon reasonable differences between the included and excluded classes which have a rational connection with the subject-matter of the particular statute in question." (*Miller v. Union Bank & Trust Co.* (1936) 7 Cal.2d 31, 34.) Thus, in *Miller, supra,* 7 Cal.2d at pp. 34-36, this Court

invalidated a statute requiring a state bank (but not a national bank) to obtain a permit to issue securities. The statute was unconstitutional because the classification bore no relationship to the purpose of the statute: "Any differences that exist between the two types of banks have no connection whatever with their relative fitness to sell and issue certificates or securities. Such differences cannot, therefore, be made the basis of a constitutional classification in respect of matters which they do not touch or affect." (*Id.* at p. 36.) "[M]ere difference is not enough"; instead, to survive constitutional scrutiny, a classification "must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." (*Id.* at pp. 34-35.)[7]

In the present case, the classification permitting marriages between heterosexual couples but disallowing them between same-sex couples fails these tests. As we now show, it does so because California public policy, as articulated in the *express* commands of equality set forth in the Domestic

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[7] See also *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 223 [statute violated Constitution where it treated in-state and out-of-state prisoners differently; there were no relevant differences between the two types of prisoners with respect to the legitimate public purposes of the statute]; *Brown v. Merlo* (1973) 8 Cal.3d 855, 861 ["A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike [citations]"; held, statute permitting tort recovery for toll-paying passengers injured in vehicle collisions, but disallowing same recovery for non-paying passengers, was unconstitutional because classification bore no rational relationship to purposes of statute (protection of hospitality, prevention of collusive lawsuits)]; *Hollman v. Warren*, *supra*, 32 Cal.2d 351 [invalidating statute that allowed Governor to set number of notaries in all counties except San Francisco, where there could be no more than 222 notaries, because classification bore no rational relationship to statute authorizing commission of notaries].

Partner Act, compels equal treatment, not separate but almost-equal treatment.

B. As A Matter Of Express Statutory Mandate, The Limitation Permitting Only Heterosexual Couples To Marry Has No Rational Basis And Cannot Be Justified By Any Presumption Of Statutory Legitimacy.

As we have seen, marriage is entrenched in our history and society. It is favored because it advances multiple important public policy purposes: The policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society. [citation]" (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 275.) Marriage provides "evidence of mutual commitment and responsibility" and serves "practical interests" in providing "a readily verifiable method of proof for determining eligibility for services and benefits" and "minimiz[ing] any economic risk to third parties that extend such services and benefits." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 844-845, 847, 852, fn. 10.)[8/]

The factual reality is that *each and every* public purpose that supports allowing heterosexual couples to marry equally supports permitting same-sex couples to marry; and these same public purposes

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[8/] See also *Goodridge v. Dep't. of Pub. Health, supra,* 440 Mass. at p. 322, 798 N.E.2d at p. 954 [marriage "anchors an ordered society by encouraging stable relationships over transient ones [and]. . . . provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data"].

preclude denying the right to either. The legal reality is the same: The multiple statutory pronouncements that command equal treatment of heterosexual and same-sex couples, and that disclaim any relevant difference between them combine to direct that if marriage is to be recognized in California, it must be allowed between both types of couples.

1. The prohibition of marriage between same-sex couples bears no rational relation to the legitimate public purposes of California's marriage statutes; indeed, it is inconsistent with such purposes.

Marriage is allowed in California because marital unions "provid[e] an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society," and provide readily-verifiable "evidence of mutual commitment and responsibility." (*Elden v. Sheldon, supra,* 46 Cal.3d at p. 275; *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at pp. 844-845, 847, 852 fn. 10.)

These purposes are identical to the explicit goals of the Domestic Partner Act. This Court has expressly so declared: "[T]he practical considerations served by the policy favoring marriage are now also promoted by the Domestic Partner Act." (*Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 845; see also *ibid.* ["the Legislature has made it abundantly clear that an important goal of the Domestic Partner Act is to create substantial legal equality between domestic partners and spouses"].)

And, the Domestic Partner Act expressly so declares. Consider the following expressions of statutory purpose for allowing domestic partnerships:

- Domestic partnerships promote "stable and lasting family relationships . . . ." (Stats. 2003, ch. 421, § 1.)
- Domestic partnerships protect Californians "from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises." (Stats. 2003, ch. 421, § 1.)
- The Act "shall be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses." (Stats. 2003, ch. 421, § 15.)[9/]

9/ The only people eligible to form domestic partnerships are same-sex couples and heterosexual couples with at least one member over the age of 62. (Fam. Code, § 297.) Although the Act allows a narrow category of heterosexual couples to form domestic partnerships, the Legislature's extensive pronouncements regarding the discrimination experienced by same-sex couples and the necessity that such couples be afforded rights equal to those afforded to married heterosexual couples establish that a significant purpose of the Act was to create a separate track for same-sex couples who, by statute, cannot marry. (See, e.g., Stats. 2003, ch. 421, § 1 ["The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together. Many of these couples have sought to protect each other and their family members by registering as domestic partners with the State of California and, as a result, have received certain basic legal rights. Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family

(continued...)

Each of these statutorily-pronounced purposes is identical to those supporting marriage between heterosexuals. Since the interests advanced by domestic partnerships are identical to those advanced by marriage, there is simply no rational basis that can be conjured to support allowing marriage for heterosexual couples, while denying that status and honored place in society to same-sex couples. The purposes are identical and so, too, should be the status and corresponding rights. Our Constitution permits no other conclusion. (Cf. *Brown v. Board of Education* (1954) 347 U.S. 483, 495 ["separate but equal" is "inherently unequal"].)

As this Court has held, a statutory classification that treats two groups differently can only be justified by "differences in situation related to the subject-matter of the legislation. [citation]" (*Young v. Haines, supra*, 41 Cal.3d at p. 900.) Here, there are no such differences between same-sex and heterosexual couples.[10] Indeed, as we have demonstrated, California

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[9] (...continued)
relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution"]; see also Section B.1., *supra*, citing additional language from Stats. 2003, ch. 421, § 1.)

[10] The State has not even asserted that the different treatment between heterosexual and same-sex couples is justified by any functional difference between them. Rather, the State proffers only two reasons for the marriage limitation: "maintaining the traditional definition of marriage" and "deferring to the will of Californians." (Answer Brief Of State Of California And The Attorney General To Opening Briefs On The Merits, pp. 43-48.) Tradition and public will, however, cannot contravene constitutional right. (*Lucas v. Forty-Fourth General Assembly of Colorado* (1964) 377 U.S. 713, 736-737 ["A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be"]; *id.* at p. 736, fn. 29 ["No plebiscite can legalize an unjust discrimination
(continued...)

statutory law *affirmatively disclaims* the existence of any cognizable differences between the two types of couples. (Stats. 2003, ch. 421, §§ 1, 15.)[11/] In so doing, California statutory law makes explicit that the different treatment of same-sex and heterosexual couples is not supported by any constitutionally-cognizable rationale.

As a matter of law, mandated by express statutory proclamation, the different treatment of same-sex and heterosexual couples bears no rational relationship to the State's purposes for allowing marriages and is specifically countermanded by such purposes. As we now demonstrate, where a statutory scheme *disclaims* or *disproves* the existence of any possible rational relationship between a classification and a legitimate public purpose, the classification cannot stand.

[10/] (...continued)
[citation]"]; Respondents' Consolidated Reply Brief On The Merits, pp. 45-50.) Nor can they contravene expressly-articulated statutory public policy. Each reason advanced by the State is directly at odds with the Act's express commands that heterosexual and same-sex couples are functionally identical and must be treated equally.

[11/] The Act pronounces that "many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together." (Stats. 2003, c. 421, § 1(b).) Thus, "[e]xpanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises." (*Ibid.*)

2. The statutorily-expressed public policies commanding that same-sex couples are the same in all relevant respects to married spouses and must be given the same rights belie any purported rational basis that might be conceived for barring same-sex couples from marrying..

When conducting rational basis review, courts may generally presume that a statute is constitutional and "requir[e] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 597.) But this isn't always the case, and it cannot be the case here.

As this Court has held, some statutory classifications "leav[e] no room for the presumption of constitutionality or for the presumption that the Legislature had a conceivably rational basis for the [classification], or the presumption of constitutionality from the long existence of the statute without attack." (*Hollman v. Warren*, *supra*, 32 Cal.2d at p. 359 [legislation choosing "without reason to limit the number of notaries for one county, and one county only" was not entitled to presumption that the limitation was supported by a conceivable rational basis].)

This is exactly such a case. The express statutory pronouncements of public policy—proclaiming that domestic partners are the same in all relevant respects as married couples and must be treated equally with them—preclude imputing to the marriage exclusion any rational basis that directly contravenes, or is inconsistent with, such pronouncements.

As this Court recently declared, courts performing rational basis review must "declin[e] to 'invent[ ] fictitious purposes that could not have

been within the contemplation of the Legislature.' [citation]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.) The invention of such fictitious purposes here would directly conflict with California's statutorily-expressed policies.

What this means is that this Court, in examining the constitutionality of the marital limitation, cannot support it by any rationale that contradicts or is inconsistent with the following public-policy pronouncements contained in the Domestic Partner Act:

- Same-sex couples must be given every right that is afforded to married couples.
- Extending such rights is constitutionally compelled.
- Extending such rights advances the public welfare by "promoting family relationships and protecting family members during life crises."
- Domestic partners must receive "the full range of legal rights, protections and benefits" as California extends to spouses.
- "[M]any lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together." (Stats. 2003, ch. 421, § 1(b).)

As the Act specifically commands, each of these statutory pronouncements must be "construed liberally" so as to afford domestic partners "the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their

children, to third parties and to the state, as the laws of California extend to and impose upon spouses." (Stats. 2003, ch. 421, § 15.) Considered singly and together, the statutory pronouncements foreclose any possible presumption or conception of a legitimate rationale that would support denying marriage—one of our society's most fundamental and important rights—to same-sex couples.

C. Proposition 22 Does Not Alter The Constitutional Principles That Preclude Any Rational-Basis Justification For The Limitation Of Marriage To Heterosexual Couples.

We anticipate the proponents of the marriage exclusion will argue that Proposition 22 stands outside the analysis advanced above. It doesn't.

Proposition 22 added Family Code section 308.5, which states: "Only marriage between a man and a woman is valid or recognized in California." At most, this language simply restates and perpetuates the classification—and the discrimination—between same-sex and heterosexual couples.[12/] It does not answer whether that classification is constitutional. Nor does it negate existing statutory law set forth in the Domestic Partner Act defining heterosexual and same-sex couples as functional equivalents and commanding that they receive equal treatment.

12/ The language first limiting marriage to heterosexual couples was added to the Family Code in 1977. (Stats. 1977, ch. 339, § 1, p. 1295 [adding requirement of different gender to marry].) Prior to that amendment, the marriage statute was gender neutral. (Former Civ.Code, § 4100 [marriage "is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary"].)

A classification cannot constitutionally be justified by referring to the classification itself. That a classification is enacted by the electorate, rather than the Legislature, does not render it constitutional. Nor does it alter the constitutional analysis. It still must undergo constitutional scrutiny. And where, as here, express statutory language *precludes* the existence of any possible rational basis for the classification, it cannot survive.

CONCLUSION

There is something seriously amiss in California.

What's amiss is that despite explicit statutory commands that heterosexual and same-sex couples must be treated equally because they are functionally identical in society, same-sex couples are not allowed to marry. It is time for this discrimination to end.

The discrimination is unconstitutional. It denies same-sex couples a fundamental right that is central to our society's fabric. It does so without support of any rationale that is consistent with California public policy, as expressly pronounced by our statutes.

By proclaiming that equal treatment is required and by disclaiming the existence of any conceivably relevant difference between same-sex and heterosexual couples, California statutory law has put to rest any possibility that the marriage exclusion is animated by any legitimate public policy.

The marriage exclusion cannot survive rational basis review. As a result, the Court should strike the gender limitation from the marriage laws.

DATED: September 26, 2007

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines
Cynthia E. Tobisman

By: 
Irving H. Greines

By: 
Cynthia E. Tobisman

Attorneys for Amici Curiae,
Beverly Hills Bar Association, Los Angeles County Bar Association, California Women Lawyers, Women Lawyers Association Of Los Angeles, San Francisco Trial Lawyers Association

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I certify that this APPLICATION BY BAR ASSOCIATIONS FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE LEGALITY OF STATUTES PERMITTING MARRIAGE ONLY BETWEEN HETEROSEXUAL COUPLES; AND AMICUS CURIAE BRIEF is proportionately spaced. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 4477 words.

DATED: September 26, 2007

Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5700 Wilshire Boulevard, Suite 375, Los Angeles, California 90036.

On September 26, 2007, I served the foregoing document described as:

APPLICATION BY BAR ASSOCIATIONS FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE LEGALITY OF STATUTES PERMITTING MARRIAGE ONLY BETWEEN HETEROSEXUAL COUPLES; AND AMICUS CURIAE BRIEF on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Envelope - by placing () the original **(X)** a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

() **By Federal Express:** I caused such envelope to be delivered by Federal Express delivery service to the offices of the addressee.

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Executed on September 26, 2007, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Leslie Juarez

SERVICE LIST

City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Woo, et al. v. California, et al.
San Francisco Superior Court Case No. CPF-04-504038
Court of Appeal Case No. A110451

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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
Court of Appeal Case No. A110450

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Clinton, et al. v. California, et al.
San Francisco Superior Court Case No. 429548
Court of Appeal Case No. A110463

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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Campaign for California Families v. Newsom, et al.
San Francisco Superior Court Case No. CGC 04-428794
Court of Appeal Case No. A110652

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Courtesy Copy to:

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