SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))
IN RE MARRIAGE CASES

Case No. S147999

Judicial Council Coordination Proceeding No. 4365

First Appellate District
No. A110449
(Consolidated on appeal with case nos. A110540, A110451, A110463, A110651, A110652)

San Francisco Superior Court Case No. 429539
(Consolidated for trial with San Francisco Superior Court Case No. 429548)

PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

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INTRODUCTION

Amicus recognizes that the Court does not suffer from a paucity of briefing in these cases. Rather than reiterate the arguments of others, this brief offers for consideration alternative modes of independent state constitutional analysis that the Court might consider useful in resolving the difficult issues presented.

Most of the constitutional challenges that have been brought in other states to statutes which limit the status of marriage to persons of the opposite-sex have been analyzed using the familiar federal categories of "strict scrutiny" vs. "rational basis" as determined by the existence (or non-existence) of a "fundamental right" or "suspect class." Ultimately, either on the basis of a determination or an assumption that "strict scrutiny" is not required, analysis has focused upon whether the challenged legislation meets the "rational basis" test, and with the exception of Massachusetts, courts have applied a highly deferential version of that test to conclude in favor of constitutionality. (See Grodin, *Same-Sex Relationship and State Constitutional Analysis* (2007) 43 Williamette L.Rev. 235.) The Court of Appeal in this case followed a similar course of reasoning.

Amicus concurs in the view, advanced by Petitioners,[1] that if this Court were to apply the federal analysis it should conclude that the legislation challenged here must be subject to strict scrutiny.[2] But this Court is not bound to follow the federal analysis, and might find this case

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[1] For convenience, amicus refers to the City and County of San Francisco and the various same-sex couples in the coordinated cases as "Petitioners."

[2] Amicus also concurs with Petitioners that the legislation challenged here does not meet the rational basis test.

an appropriate opportunity to reframe the difficult issues that are presented, beginning with a recognition that the California Constitution contains relevant language that differs, in significant respects, from the language of the federal Constitution, and proceeding to consider the factors which call for a level of scrutiny more meaningful than mere rationality review.

ARGUMENT

I. THE CALIFORNIA CONSTITUTION CONTAINS RELEVANT LANGUAGE NOT FOUND IN THE FEDERAL CONSTITUTION THAT SUPPORTS PETITIONERS' CLAIMS.

That the California Constitution is a document of independent legal significance, giving rise in some contexts to protection of interests that may not be protected, or may not be protected to the same extent by the federal Constitution, is now well-established and requires no citation of authority. What may be useful, however, is to recall the ways in which the California Constitution differs from the federal Constitution, in text or through interpretation, that may be relevant to this case.

The interests that Petitioners assert in this case do not fall readily within established legal categories. Fundamentally, their claim alleges a right of access to a status created by the State – the status of marriage. Concomitantly, they seek relief from the consequences – social and psychological but nevertheless real and significant – from being excluded from that status on the basis of their sexual orientation. Implicated in their claims are both equality concerns and what might be termed dignity concerns; they seek to be treated the same as other groups not so excluded, and they seek the right to thrive as individuals and full-fledged members of the community without the opprobrium, or at least the social isolation, which unavoidably attaches to that exclusion. In that regard, their interests are analogous to those asserted, and rejected, in the United States Supreme

Court's infamous decision in *Plessy v. Ferguson* (1896) 163 U.S. 537, and the argument which some have advanced – that same-sex couples should be content with the legal consequences of marriage – bears a striking resemblance to the argument used in *Plessy* in opposition to the claim that being forced to sit in a separate though arguably equal railroad car branded them with a badge of inferiority: "If this be so," the court said, "it is not by reason of anything found in the [challenged] act, but solely because the colored race chooses to put that construction upon it." (*Plessy*, at p. 551.)[3]

The California Constitution contains a number of provisions which relate to these interests. Prior to 1974, the California Constitution lacked an explicit equal protection clause, but it did contain (and still contains) a number of provisions which this Court, prior to 1974, characterized as providing "generally equivalent but independent protections." (*Department of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 587.) These include a provision requiring laws of a general nature to have uniform application (formerly article I, section 11; now article IV, section 16(a)), a prohibition on "special legislation" (formerly article IV, section 25; now article IV, section 16(b)), and, since 1879, a provision declaring that "a citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens" (formerly article I, section 21; now article I, section 7(b)). Since 1974, this Court has analyzed equality claims principally in terms of the equal protection language. But Petitioners'

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[3] Indeed, if evidence of the importance of the interests being asserted is needed, the briefs filed on behalf of those objecting to marriage between same-sex couples demonstrate, more eloquently than anything, that people on both sides of this issue care deeply and passionately about the status of "marriage." They obviously regard marriage as both unique and uniquely important to our society.

interests, insofar as they seek the same treatment as opposite-sex couples, fit comfortably within the language of these other clauses as well. The privileges and immunities clause seems particularly apt. As a simple textual matter, the State has chosen to grant the "privilege" of marital status to a class of citizens (those who wish to marry a person of the opposite-sex) which it has chosen to withhold from the class represented by Petitioners.

Nonetheless, the equality principle is only part of the legal equation, for it does not preclude different treatment of groups which are in fact different in some relevant respect, which is to say in some respect related to legitimate legislative goals. It is precisely at this point that difficulty emerges, however, because almost any classification can be said to be related, on some factual hypothesis, to some hypothetical legislative objective. Indeed, that is the thrust of the rational basis test in its most deferential form, and that is the rationale adopted by the various courts that have upheld bans on same-sex marriage, including the court below.

This deferential standard, which had its federal genesis in cases involving economic legislation, often leads to virtual abdication of any meaningful review. (See, e.g., *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483; *Kotch v. Board of River Port Pilot Commissioners* (1947) 330 U.S. 552.) In such cases, where legislation is typically the product of political compromise among roughly equivalent interest groups, such extreme deference may be warranted. But when the legislation implicates substantive claims that are either constitutionally protected or central to the notion of personhood, or when it serves as a vehicle for prejudice against traditionally disfavored individuals or groups, some more critical scrutiny of both the means and ends is required if judicial protection for individual rights within a majoritarian system is to have any meaning.

The provision of the California Constitution most relevant to the *substantive* claims at issue, apart from and in addition to the due process language of section 7 of article I, is the first section of that article, which provides in language unique to certain state constitutions: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I, § 1.)

The right to "privacy" under this section[4] embraces not only informational privacy but personal autonomy and what might be described as "personhood" as well. (See *Robbins v. Superior Court* (1985) 38 Cal.3d 199 [the right to make choices in matters involving living arrangements]; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123 [right of unrelated persons to live together in a household unit]; *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127 [the right to refuse medical treatment].) Of particular relevance to this case is *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252. *Myers* held that under the California Constitution, unlike the federal Constitution, while the State has no affirmative obligation to fund medical procedures for poor persons, it may not selectively fund them to the disadvantage of women seeking an abortion. (See *id.* at p. 296.) Same-sex couples are in a similar position. There may be no constitutional obligation on the part of the State to place

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[4] While the United States Supreme Court has developed doctrine protecting the right of privacy under the federal Constitution, it has done so under the rubric of substantive due process, there being in the federal Constitution no language comparable to article I, section 1 of the California Constitution.

its imprimatur on the marital relationship, and to that extent this case is different from one in which the state seeks to punish private activity. (Cf. *Lawrence v. Texas* (2003) 539 U.S. 558.) But marriage is an established legal status, and withholding that status from same-sex couples raises questions of constitutional dimension closely analogous to the questions that were raised when the state refused to allow marriage between persons of different races. (See *Perez v. Sharp* (1948) 32 Cal.2d 711; *Loving v. Virginia* (1967) 388 U.S. 1.) There, as here, the plaintiffs were not complaining of a direct interference by the state with the exercise of a constitutionally protected right, but rather were seeking access to a system which the state had created.

The right to "happiness" has received less judicial attention (Cal. Const., art. I, § 1), but the constitutional command that "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise" (Cal. Const., art. I, § 26) requires that it not be ignored. This provision, added to the California Constitution in 1870 in response to California Supreme Court decisions finding certain provisions of the state Constitution to be nonjusticiable, represents "an admonition placed in the highest of laws in this state, that its requirements are not meaningless, but that what is said is what is meant, in brief, 'we mean what we say.' Such is the declaration and command of the highest sovereignty among us, the people of this State . . . ." (*In re Maguire* (1881) 57 Cal. 604, 609.)

Indeed, as early as 1857, this Court observed of article I, section 1: "It was not lightly incorporated into the Constitution of this State as one of the political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of

enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen." (*Billings v. Hall* (1857) 7 Cal. 1, 5.) More recently this Court has recognized that article I, section 1, confirms the right "not only to privacy, but to pursue happiness and enjoy liberty." (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 163.)

Concededly, the right to happiness, like the right to liberty, is not capable of precise definition, either by courts or by philosophers, and standing alone may not provide a certain or reliable basis for judicial intervention. Familiar interpretive principles[5] require, however, that it ought not be viewed in isolation, but in the context of companion rights explicitly protected in article I, section 1, including "enjoying and defending life and liberty . . . and pursuing safety, happiness, and privacy." Viewed collectively, this language reinforces the proposition that the California Constitution takes seriously and protects personal autonomy, personhood, and the right to arrange one's social, romantic, and personal living arrangements as one pleases, so long as those arrangements do not impinge on the rights of others. (See Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety* (1997) 25 Hastings Const. L.Q. 1.)

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[5] The principle of *noscitur a sociis* advises that words are not to be viewed in isolation, but in the light of their context. (See, e.g., *Rossi v. Brown* (1995) 9 Cal.4th 688, 720 [" 'In construing the provisions of the Constitution each must be "read in the context of the other provisions," ' " quoting *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1093]; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249 [must construe constitutional language in context]; *San Diego County Water Authority v. Metropolitan Water District of Southern California* (2004) 117 Cal.App.4th 13, 25.)

II. THE MARRIAGE STATUTES WHICH CONFINE THE STATUS OF MARRIAGE TO PERSONS OF THE OPPOSITE-SEX REQUIRE MORE THAN RATIONALITY REVIEW UNDER THE CALIFORNIA CONSTITUTION.

There is nothing magical in the federal "fundamental rights/suspect class" terminology. It does not stem from any constitutional language, and is in no way binding upon state courts in the application of their own state constitutions. It may be useful terminology in many contexts – arguably in this context as well – and it has often been relied upon by this Court. But it ought not be allowed to obscure what is truly at stake, and that is the identification of those circumstances in which the virtually blind deference that characterizes the rational basis test deserves to be rejected.

The interest that couples have in acquiring the status of marriage may appropriately be characterized as a "fundamental right," but even without that characterization it is undeniably an interest of great importance, central to the lives of most people, and implicating strong state constitutional claims of autonomy and the right to happiness. And, regardless of whether lesbians and gay men meet some abstract definition of "suspect class," they have undeniably been and continue to be the subject of discrimination. Moreover, there is no basis in logic or policy for those circumstances to be considered and evaluated in isolation from one another. The constitutional significance or practical importance of the interest at stake is logically a factor to be considered along with an evaluation of the need for judicial protection of that interest arising out of the risk that popular passion or prejudice has played a role in the legislation under examination. The totality of circumstances requires that the Court subject the reasons advanced in support of the legislation to critical examination. The substantive principles and the equality principles invoked on behalf of Petitioners are not separate and distinct categories;

rather, it is both in combination which support a more meaningful level of scrutiny than that afforded by the court below. There remains the question how that level of scrutiny is to be defined.

III. WITH OR WITHOUT "STRICT SCRUTINY" AS DEFINED BY FEDERAL LAW, THE COURT SHOULD SUBJECT THE REASONS ADVANCED IN SUPPORT OF THE MARRIAGE STATUTES TO CRITICAL EXAMINATION.

A variety of tests have been brought to bear by federal and state courts in cases in which some more meaningful level of judicial review is considered appropriate. The most stringent of these is so-called "strict scrutiny," which requires that the classification be supported by a showing that it serves a "compelling governmental interest" through means which are "narrowly tailored" to that interest. The United States Supreme Court, and some state courts, have in some cases brought to bear an "intermediate" level of scrutiny, which requires that the classification "substantially" serve "important governmental interests" or (more recently in the case of sex classifications) that the classification be supported by "exceedingly persuasive justification." These standards and their potential application to this case are thoroughly explored in other briefs before the Court.

Some justices, and numerous commentators, have questioned whether the traditional categorical approach is desirable, and indeed whether it adequately explains the case law. They point to cases in which the United States Supreme Court has purported to rely upon rationality review to strike down legislation which would clearly pass muster under a deferential standard. (See, e.g., *U.S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528; *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432.) Indeed, there have been times when a majority of the court seemed poised to move in a different direction.

In *Cleburne*, a concurring opinion by Justice Stevens, joined by Chief Justice Burger, insisted that the case law reflected not fixed categories, but rather "a continuum of judicial responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' on the other." (*Cleburne*, *supra*, 473 U.S. at p. 450 (conc. opn. of Stevens, J.).) A separate concurring opinion by Justice Marshall, joined by Justices Brennan and Blackmun, argued against the categorical approach in favor of an approach that recognizes "evolving principles of equality" as justifying "more searching judicial inquiry." (*Id.* at pp. 466, 470 (conc. opn. of Marshall, J.).)

The United States Supreme Court's more recent decisions involving lesbians and gay men reflect a similar blurring of categorical lines. In *Romer v. Evans* (1996) 517 U.S. 620, the court struck down, on equal protection grounds, an amendment to the Colorado Constitution which precluded the adoption of any law that protected "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationship" from discrimination. While declining to characterize the law as burdening a fundamental right or targeting a suspect class, and purporting to apply rational basis review, the court found the amendment invalid because it "has the peculiar property of imposing a broad and undifferentiated disability on a single named group," and because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . ." (*Id.* at pp. 623, 632.) And in *Lawrence v. Texas*, the United States Supreme Court, without expressly identifying either a fundamental right or suspect class, relied upon substantive due process principles to invalidate a Texas

law making homosexual sodomy a crime, finding that the law "furthers no legitimate state interest." (*Lawrence*, *supra*, 539 U.S. at p. 578.)

Whether or not the traditional federal categories of analysis have been implicitly modified, it is in any event clear that state courts are in no way bound to follow the lead of the federal courts in determining the appropriate level of judicial scrutiny. And some state courts have displayed reasoned independence in adopting variations on the federal model. In fact, claims by same-sex couples to the benefits of marriage has provided stimulus for that development.

In *Baker v. State* (Vt. 1999) 744 A.2d 864, same-sex couples sued for a declaration that they were statutorily and constitutionally entitled to be issued a marriage license. The Vermont Supreme Court, without passing upon that issue, chose instead to address the question whether the State of Vermont could constitutionally exclude those couples from the "benefits and protections that its laws provide to opposite-sex married couples." Relying upon the "Common Benefits" clause of the Vermont Constitution, the court held that it could not. While acknowledging that on occasion Vermont courts had applied the Common Benefits Clause as if it had the same content, and was subject to the same interpretive methodology, as the Equal Protection Clause of the Fourteenth Amendment, including the federal rational-basis/strict scrutiny tests, the court pointed to other state precedent which supported a "more stringent test" than the deferential rational basis test would afford. (*Baker*, at p. 873.) After a careful exploration of the history of the Common Benefits Clause, the court concluded that proper analysis should identify the "part of the community" disadvantaged by the law, and inquire whether exclusion of that part of the community from the benefits and protections of the challenged law "is

reasonably necessary to accomplish the State's claimed objectives" (*Baker*, at p. 878), or (as the test is stated in the next paragraph) "whether the omission . . . bears a reasonable and just relation to the government purpose," taking into account "the significance of the benefits" and "whether the classification is significantly underinclusive or overinclusive" (*id.* at pp. 878-879). Considering a variety of sources bearing upon the factual predicates for the State's asserted objectives, the court concluded that Vermont's law failed the applicable test. (*Id.* at p. 886.)

In *Alaska Civil Liberties Union v. State* (Alaska 2005) 122 P.3d 781, the Alaska Supreme Court reached a similar conclusion in an action brought by same-sex couples employed by the state and local governments, claiming a state constitutional right to domestic partner benefits equivalent to the benefits enjoyed by married couples. The challenge was brought under article 1, section 2 of the Alaska Constitution, which provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Prior case law had characterized this language as more protective than the federal Equal Protection Clause, and had established a "sliding scale" analysis for the evaluation of claims under that guarantee. (*State of Alaska v. Ostrovsky* (Alaska 1983) 667 P.2d 1184, 1192-1193.) That analysis called, initially, for a determination as to "what weight should be afforded the constitutional interest impaired by the challenged enactment" – a factor then used to determine the level of the burden on the state to justify its legislation, ranging from a showing that the objective was "legitimate" to a showing of "compelling state interest." (*Alaska Civil Liberties Union*, at p. 789.) Finally, the court would examine the relationship between the state's objectives and the means used to obtain them insisting, again based on the weight of the interest asserted by the

plaintiffs, upon a means-end "fit" ranging from a "substantial relationship between means and ends" at the low end of the scale to a showing that there exists no less restrictive alternative. (*Alaska Pac. Assurance Co. v. Brown* (Alaska 1984) 687 P.2d 264, 269). The court concluded that the exclusion of same-sex couples from benefits accorded married opposite-sex couples failed to satisfy the "substantial relationship" test and was therefore unconstitutional. (*Alaska Civil Liberties Union*, at p. 794.)

The Supreme Court of New Jersey has adopted a similar sliding scale approach. Article 1, paragraph 1 of that state's constitution declares, in language similar to that of the California Constitution, that "all persons have certain . . . unalienable rights" including "enjoying and defending life and property . . . and of pursuing and obtaining safety and happiness." Reading that provision to contain an equal protection principle, New Jersey courts have departed from federal precedent by insisting that there be a "real and substantial relationship" between the differential treatment created by a particular classification and the State's articulated interest in the classification, and that this inquiry entails a balancing of the "nature of the affected right, the extent to which the government relationship intrudes upon it, and the public need for the restriction." (E.g., *Greenberg v. Kimmelman* (N.J.Sup.Ct. 1985) 494 A.2d 294, 302.) In its recent decision in *Lewis v. Harris* (N.J. 2005) 908 A.2d 196, which held that same-sex couples have a state constitutional right to the legal attributes of marriage (but stopping short of a holding that they have a right to marriage per se), the New Jersey Supreme Court found it unnecessary to engage in that sort of balancing, because the state had advanced no reason for denying same-sex couples the tangible benefits of marriage other than a desire to be in

conformity with the majority of states, and that was not a sufficient justification. (*Id.* at pp. 220-221.)

CONCLUSION

There is ample support for the conclusion that California's exclusion of same-sex couples from the status of marriage should be subjected to strict scrutiny under the state Constitution's equal protection and due process provisions, either on the grounds that lesbian and gay couples constitute a suspect class, or that a fundamental right is implicated, or both. There is also ample support for the conclusion that this exclusion does not satisfy rationality review. But there are other state constitutional provisions, and alternative modes of analysis exemplified by decisions of both the United States Supreme Court and courts in other states, which cast light on the nature of the constitutional claim in this case and on the appropriate level of scrutiny. While the alternative modes of analysis vary, they all have in common acceptance of the proposition that lies at the core of this brief's argument: that where the state acts in such a way as to deprive a class of persons the opportunity to obtain the kind of personal fulfillment that other citizens enjoy, and where there is reason to believe that the interests asserted by the deprived class may not be adequately protected by the majoritarian process, courts have an obligation to engage in a meaningful inquiry into the justifications asserted in support of the state's action. Such an inquiry, in this case, should lead to the Court's sustaining the position of Petitioners.

Dated: September 26, 2007

JOSEPH R. GRODIN

By: ______________________
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,145 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 26, 2007.

JOSEPH R. GRODIN

By: ______________________
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PROOF OF SERVICE

I, JOSEPH R. GRODIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. My address is 2926 Avalon Avenue, Berkeley, California 94705.

On September 26, 2007, I served:

PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

on the interested parties in said action, by placing a true copy thereof in sealed envelopes addressed as follows:

ATTACHED SERVICE LIST

and served the named document on the parties as set forth on the attached list in the manners indicated below:

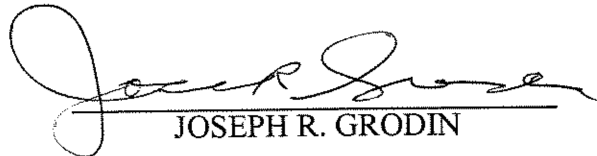
☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them for collection and mailing with the United States Postal Service. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the offices of the addressees.

☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelopes and caused such envelopes to be delivered by hand at the above locations by a professional messenger service.

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

Executed September 26, 2007, at Berkeley, California.



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