

SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination
Proceeding No. 4365

Case No. S _____

CITY AND COUNTY OF SAN
FRANCISCO,

First Appellate District
No. A110449

Plaintiff/Respondent,

Superior Court Case
No. 429539

vs.

(Consolidated for trial with
Woo v. Lockyer, Superior
Court Case No. 504038)

STATE OF CALIFORNIA,

Defendant/Appellant,

PETITION FOR REVIEW

The Honorable Richard A. Kramer
Superior Court for the City and County of San Francisco

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF ISSUES PRESENTED 1

WHY REVIEW SHOULD BE GRANTED..... 1

BACKGROUND 3

 A. San Francisco's Decision To Issue Marriage
 Licenses To Same-Sex Couples 3

 B. The Constitutional Challenge To The Marriage
 Laws 4

 C. The Trial Court's Ruling..... 6

 1. Strict scrutiny 6

 2. Rational basis 7

 D. The Court Of Appeal's Ruling..... 8

 1. The fundamental right to marry 8

 2. Gender discrimination 10

 3. Sexual orientation discrimination..... 11

 4. The right of privacy..... 13

 5. Rational basis review 14

 6. The role of the judiciary 16

 E. Petitions For Rehearing And Subsequent
 Modification 18

DISCUSSION 19

CONCLUSION..... 23

CERTIFICATE OF COMPLIANCE..... 24

TABLE OF AUTHORITIES

State Cases

<i>City and County of San Francisco v. State of California</i> No. CGC-04-429539	5, 6, 22
<i>Clinton v. State of California</i> No. CGC-04-429548	5, 6
<i>Hill v. Nat. Collegiate Athletic Assn.</i> (1994) 7 Cal.4th 1	14
<i>In re Marriage Cases</i> (2006) 143 Cal.App.4th 873	passim
<i>Lockyer v. City and County of San Francisco</i> (2004) 33 Cal. 4th 1055	passim
<i>McGlung v. Employment Development Dept.</i> (2004) 34 Cal.4th 467	22
<i>Morohoshi v. Pacific Home</i> (2004) 32 Cal.4th 482	13
<i>Nogues v. Douglass</i> (1857) 7 Cal. 65	22
<i>Perez v. Sharp</i> (1948) 32 Cal.2d 711	6, 7, 8, 10
<i>Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco</i> No. CPF-04-50943	passim
<i>Sail'er Inn, Inc. v. Kirby</i> (1971) 5 Cal.3d 1	11
<i>Thomasson v. Newsom</i> No. CGC-04-428794	passim
<i>Tyler v. County of Los Angeles</i> No. BS-088506	5, 6, 18, 21
<i>Woo v. State of California</i> No. CGC-04-504038	5, 6, 18

State Statutes & Codes

Fam. Code

§ 297.....7
§ 299.6.....7
§ 300.....5
§ 308.5.....5

Federal Cases

Board of Education v. Barnette
(1943) 319 U.S. 624.....17, 18

Brown v. Bd. of Education of Topeka
(1952) 347 U.S. 483.....7

Gonzales v. Thomas
(2006) ___ U.S. ___ [126 S.Ct. 1613].....12

Hernandez-Montiel v. I.N.S.
(9th Cir. 2000) 225 F.3d 108412

Lawrence v. Texas
(2003) 539 U.S. 538.....10

Perez and Loving v. Virginia
(1967) 388 U.S. 1.....9, 18

Romer v. Evans
(1996) 517 U.S. 620.....16

Smelt v. County of Orange
9th Cir. 2006) 447 F.2d 673.....21

Thomas v. Gonzales
(9th Cir. 2005) 409 F.3d 117712

Turner v. Safley
(1987) 482 U.S. 78.....9

Zablocki v. Redhail
(1978) 434 U.S. 374.....9

Rules

Cal. Rules of Court
rule 28(b)(1).....2

Other Authorities

Goodridge v. Dept. of Pub. Health
(2003) 440 Mass. 30920

Loving v. Commonwealth
(Va. 1966) 147 S.E.2d 78.....18

Other References

Governor's Veto Message to Assembly on Assem. Bill No. 849
(Sept. 29, 2005).....2, 15

Posner, Sex and Reason (1992)12

STATEMENT OF ISSUES PRESENTED

1. Does the exclusion of gay men and lesbians from marriage discriminate on the basis of sexual orientation in violation of the Equal Protection Clause of the California Constitution?

2. Does the exclusion of gay men and lesbians from marriage discriminate on the basis of gender in violation of the Equal Protection Clause of the California Constitution?

3. Does the exclusion of gay men and lesbians from marriage violate the fundamental right to marry the person of one's choice guaranteed by the California Constitution?

4. Does the exclusion of gay men and lesbians from marriage violate the fundamental right to privacy guaranteed by the California Constitution?

WHY REVIEW SHOULD BE GRANTED

In a published decision, the First District Court of Appeal, over a strong dissent,¹ held that the State of California may exclude gay men and lesbians from marriage. Repeatedly emphasizing the controversial nature of the issue and noting that many citizens have a strong desire to preserve the traditional understanding of marriage, the majority concluded: "The Legislature and the voters of this state have determined that 'marriage' in California is an institution reserved for opposite-sex couples, and it makes

¹ Although Justice Kline concurred and dissented, for convenience, this petition refers to his opinion as the dissent.

no difference whether we agree with their reasoning." (*In re Marriage Cases* (2006) 143 Cal.App.4th 873 (*Marriage Cases*) [p. 62].)²

This Court should review this decision "to settle an important question of law." (Cal. Rules of Court, rule 28(b)(1).) Same-sex couples in this state "have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1132 (*Lockyer*) (conc. opn. of Kennard, J.)) While the Court correctly deferred some of the constitutional issues presented in *Lockyer*, those issues have now been decided by two lower courts. Almost three years have passed since thousands of couples descended upon San Francisco, many waiting overnight in the rain for their first chance to participate in an official ceremony that places their relationships on the same legal footing as those of heterosexual couples. And just recently, the Governor vetoed legislation legalizing same-sex marriages in part because this Court will likely settle the matter. (Governor's Veto Message to Assembly on Assem. Bill No. 849 (Sept. 29, 2005) p. 1 (Governor's Veto Message), at <http://www.governor.ca.gov/govsite/pdf/vetoes_2005/AB_849_veto.pdf> [as of Nov. 13, 2006], attached as Exhibit D.) Those couples—along with the rest of California's gay men and lesbians and their families and children—therefore deserve a ruling from this Court on whether they are entitled to the full dignity and respect that the state-sanctioned institution of marriage confers.

² The point page references for the Official Report citations are currently unavailable. All point page references in the brackets therefore refer to the court's filed opinion which is attached as exhibit A.

BACKGROUND

A. San Francisco's Decision To Issue Marriage Licenses To Same-Sex Couples

On February 12, 2004, the City and County of San Francisco (City or San Francisco) began issuing marriage licenses to same-sex couples. In the ensuing days, thousands of gay men and lesbians rushed to City Hall to obtain licenses and exchange marriage vows, eager to seize the first opportunity in their lives to participate in officially-recognized wedding ceremonies in their home state. (San Francisco's Request for Judicial Notice (RFJN), Exh. A [Declaration of Nancy Alfaro filed in *Lockyer v. City and County of San Francisco*, No. S122923 (Alfaro Decl.) ¶¶ 5-8].) These couples came from all over California and waited in line overnight and outside in the rain. (*Ibid.* [Alfaro Decl. ¶ 5].)

In under three weeks, the City issued over 3,500 marriage licenses to same-sex couples. (RFJN, Exh. A [Alfaro Decl. ¶ 8].) Thousands more sought equal recognition of their relationships during this time but the City could not accommodate them all. Indeed, the Clerk's office was so overwhelmed by the volume of marriage license requests that it instituted an "appointment only" policy, requiring couples to sign up to obtain a license rather than wait in line. (*Ibid.* [Alfaro Decl. ¶ 6].) After announcing this policy, the Clerk's office received so many calls that the voicemail system for the entire City crashed. (*Ibid.* [Alfaro Decl. ¶ 7].) Within five days, every available appointment had been filled for the next two months. (*Ibid.*)

On February 13, 2004, two groups filed lawsuits to stop San Francisco from marrying same-sex couples. (*Thomasson v. Newsom*, No. CGC-04-428794 (*Thomasson*); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, No. CPF-04-50943

(*Proposition 22*.) The trial court denied their requests for a stay but issued an order requiring the City to show cause to be heard a few weeks later.

(*Lockyer, supra*, 33 Cal.4th at p. 1071.)

On February 27, 2004, the California Attorney General filed a petition for writ of mandate in this Court, challenging the City's authority to issue the licenses. (*Lockyer, supra*, 33 Cal.4th at p. 1072.) This Court granted the petition, holding that San Francisco officials "had no authority to refuse to perform their ministerial duty [to dispense marriage licenses] in conformity with the current California marriage statutes on the basis of their view that the statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional." (*Id.* at pp. 1104-1105.) This Court enjoined the City from issuing new licenses to same-sex couples and nullified the marriages that had already taken place. (*Id.* at p. 1118.)

The Attorney General also asked the Court to hold that the Family Code provisions limiting marriage to opposite-sex couples are constitutional. (*Lockyer, supra*, 33 Cal.4th at p. 1073.) The Court, however, declined to decide that question. (*Id.* at p. 1069.) Instead, it limited review to whether City officials exceeded their authority and stayed the lower court cases addressing that issue. The Court made clear that its stay would not "preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes." (*Id.* at pp. 1073-74.)

B. The Constitutional Challenge To The Marriage Laws

While the Attorney General's writ petition was pending in this Court, the City filed a lawsuit in San Francisco Superior Court challenging the

validity of Family Code sections 300³ and 308.5⁴—which limit marriage to unions between a man and a woman. (Respondent's Appendix [A110449] (RA) 1-7 [*City and County of San Francisco v. State of California*, No. CGC-04-429539] (CCSF).) The City contended these provisions (i) discriminate on the basis of sexual orientation in violation of California's Equal Protection Clause; (ii) discriminate on the basis of gender in violation of California's Equal Protection Clause; (iii) violate the liberty interests of same sex couples protected by California's Due Process Clause; and (iv) violate the constitutionally-protected privacy interests of same-sex couples. (RA 3-4.)

Subsequently, three groups of same-sex couples filed similar challenges to the marriage exclusion in San Francisco and Los Angeles. (*Woo v. State of California*, No. CGC-04-504038 (*Woo*); *Tyler v. County of Los Angeles*, No. BS-088506 (*Tyler*); *Clinton v. State of California*, No. CGC-04-429548 (*Clinton*).) These three actions, as well as the *Thomasson* and *Proposition 22* actions, were coordinated with the City's lawsuit and assigned to San Francisco Superior Court Judge Richard Kramer. (See Final Decision on Applications for Writ of Mandate, Motions for Summary

³ Family Code section 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." This provision was gender-neutral until 1977, when the Legislature inserted the phrase "between a man and a woman" to ensure that no same-sex couple could make even a colorable claim to marriage. (RA 98.)

⁴ Family Code section 308.5 provides: "Only marriage between a man and a woman is valid or recognized in California." This provision was adopted by initiative in March 2000 to prevent California from recognizing same-sex marriages performed out of state. (RA 89-92.)

Judgment, and Motions for Judgment on the Pleadings (Trial Court Ruling) at p. 2, attached as Exhibit C.)

C. The Trial Court's Ruling

The trial court ruled in favor of the City and the plaintiffs in *CCSF, Woo, Tyler, and Clinton*. It first held that California's marriage exclusion is subject to strict scrutiny because the exclusion discriminates based on gender and denies lesbians and gay men the fundamental right to marry the person of one's choice. The court then held that the exclusion does not survive strict scrutiny. Finally, it held that the exclusion bears no rational relation to a legitimate governmental purpose. Having held the marriage exclusion unconstitutional on these grounds, the court did not reach the City's sexual orientation discrimination and privacy claims. (See generally Trial Court Ruling.)

1. Strict scrutiny

The trial court first held that the marriage exclusion is subject to strict scrutiny because it discriminates on the basis of gender: "The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications." (Trial Court Ruling at p. 17.) Citing *Perez v. Sharp* (1948) 32 Cal.2d 711 (*Perez*)—which "rejected the argument that anti-miscegenation laws were not invidiously discriminatory because they applied equally to white people and black people in that neither could marry a member of the opposite race"—the court rejected the argument that the exclusion does not discriminate because it denies both women and men the right to marry someone of the same sex. (Trial Court Ruling at p. 17.)

Strict scrutiny is also required, the trial court held, because the marriage exclusion infringes on the fundamental right to marry the person

of one's choice. The court declined the State's invitation to wordsmith the right to marry into the "right to marry a person of the opposite sex." (Trial Court Ruling at p. 19). Instead, the court, as this Court did in *Perez*, recognized that there is a fundamental right to marry the person of one's choice, and found that no important social objective justified denying that right to same-sex couples. (Trial Court Ruling at pp. 20-23.)

2. Rational basis

The trial court also concluded that the marriage exclusion fails to satisfy rational basis scrutiny. First, it rejected the State's argument that preserving the traditional definition of marriage is itself a legitimate government purpose: "[A] statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time." (Trial Court Ruling at p. 7.)

Second, the court rejected the State's argument that excluding same-sex couples from marriage is justified because California, through domestic partnership statutes (Fam. Code, §§ 297-299.6), granted those couples most of the tangible rights marriage entails. The court noted that the argument smacked of "separate but equal," a concept rejected in *Brown v. Bd. of Education of Topeka* (1952) 347 U.S. 483 because it "'generates a feeling of inferiority as to [the excluded group's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'" (Trial Court Ruling at p. 9, quoting *Brown*, at p. 494.) The court recognized that the separate-but-equal argument is indefensible here, given the Legislature's explicit determination that there is no reason to deny same-sex couples the benefits opposite-sex couples enjoy. (Trial Court Ruling at p. 9.)

Finally, the trial court rejected as arbitrary a justification that the State did not advance but the *Thomasson* and *Proposition 22* plaintiffs did,

namely, that "the purpose of marriage is procreation and that limiting the institution to members of the opposite sex rationally would further that purpose." (Trial Court Ruling at p. 12.) According to the court, the marriage exclusion does not serve this alleged procreation purpose because other groups that have no ability to procreate—such as "persons beyond child-bearing age, infertile persons, and those who choose not to have children"—may still marry. (*Id.* at p. 22.)

D. The Court Of Appeal's Ruling⁵

The Court of Appeal unanimously affirmed the judgment in the *Thomasson* and *Proposition 22* cases but reversed in a 2-1 decision in the other four coordinated cases. (See generally *Marriage Cases, supra*, 143 Cal.App.4th 873.) The justices unanimously held that the plaintiffs in *Thomasson* and *Proposition 22* lacked standing—a holding the City does not ask this Court to review. (*Marriage Cases, supra*, 143 Cal.App.4th 873 [pp. 7-12].) The majority then held that the judiciary lacks authority to rule that the marriage exclusion violates the California Constitution in the other four cases.

1. The fundamental right to marry

The Court of Appeal first concluded that even though this Court in *Perez* recognized a fundamental right to marry the person of one's choice, same-sex couples should not enjoy that right:

Everyone has a fundamental right to "marriage," but, because of how this institution has been defined, this means only that everyone has a fundamental right to

⁵ President Justice McGuiness authored the majority opinion in which Justice Parilli joined. Justice Parilli also authored a separate concurring opinion. Justice Kline authored an opinion concurring in the majority's ruling on standing in the *Thomasson* and *Proposition 22* cases but otherwise dissenting.

enter a public union with an opposite-sex partner. That such a right is irrelevant to a lesbian or gay person does not mean the definition of the fundamental right can be expanded by the judicial branch beyond its traditional moorings. (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 28].)

The majority acknowledged that "[o]n the surface, the interracial marriage cases appear to provide compelling support for finding gays and lesbians have a fundamental right to marry their same-sex partners." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 31].) But it ultimately distinguished those cases invalidating laws banning interracial marriage—like *Perez* and *Loving v. Virginia* (1967) 388 U.S. 1 (*Loving*)—on the ground that they involved race "and race has long been recognized as a suspect classification." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 31].) The majority did not, however, explain how its holding squared with decisions holding that laws preventing persons who are not members of any suspect class from marrying unconstitutionally infringe on the fundamental right to marry. (See, e.g., *Turner v. Safley* (1987) 482 U.S. 78 [prisoners]; *Zablocki v. Redhail* (1978) 434 U.S. 374 [deadbeat dads].)

Instead, the majority observed that a contrary ruling would be new and "controversial." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 29].) It thus concluded that:

While same-sex relationships have undeniably gained greater societal and legal acceptance, the simple fact is that same-sex marriage has never existed before. The novelty of this interest, more than anything else, is what precludes its recognition as a constitutionally protected fundamental right. (*Ibid.* [p. 30].)

The dissent disagreed: "No court has ever suggested, and it would be absurd to think, that a class of persons who have never enjoyed a fundamental right available to others can, *for that reason*, continue to be denied it." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. & dis.

opn. of Kline, J.) [p. 15].) The dissent criticized the majority's insistence on defining the right at stake as the right to same-sex marriage, noting that it is inappropriate to define the right with reference to the person who seeks to exercise it. (*Ibid.* [p. 18], citing *Lawrence v. Texas* (2003) 539 U.S. 538, 567 ["To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward."].) According to the dissent, "[t]he crucial similarities between the ban on interracial marriage and that on same-sex marriage are that both involve state interference with the right to marry, a supposed state interest that rests heavily on the symbolic significance of marriage, and a restriction designed to preserve a traditional prejudice against a disfavored group." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [p. 16].)

2. Gender discrimination

The majority next concluded that the marriage exclusion does not discriminate based on gender: "The laws treat men and women exactly the same in that neither group is permitted to marry a person of the same gender." (*Marriage Cases, supra*, 143 Cal.App.4th 874 [p. 34].) Again, the majority acknowledged that this Court had rejected similar reasoning when it stated in *Perez* that " '[t]he right to marry is the right of individuals, not of racial groups,' " and therefore the question is " 'not whether different races, each considered as a group, are equally treated.' " (*Marriage Cases, supra*, 143 Cal.App.4th 874 [p. 36], quoting *Perez, supra*, 32 Cal.2d at p. 716.) But again, the majority distinguished *Perez* on the ground that it involved classifications based on race rather than gender. (*Marriage Cases, supra*, 143 Cal.App.4th 874 [p. 36].) In making this distinction, however, the majority did not explain why gender classifications—which, like racial

classifications, are subject to strict scrutiny under the California Constitution (see *ibid.* [p. 33])—should be treated differently in this case.

3. Sexual orientation discrimination

The majority concluded that the marriage exclusion *does* discriminate on the basis of sexual orientation. (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 40].) It nonetheless declined to decide whether sexual orientation is a suspect classification. The majority first recited the test for determining whether a classification is "suspect": (1) is the classification based on an immutable trait? (2) does the classification bear no relation to a person's ability to perform or contribute to society? (3) does society stigmatize groups based on the classification? (*Ibid.* [p. 44], quoting *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18-19.) It then stated that "[w]hile the latter two requirements would seem to be readily satisfied in the case of gays and lesbians, the first is more controversial." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 47]) "Lacking guidance from our Supreme Court or decisions from our sister Courts of Appeal, and lacking even a finding from the trial court on the issue,"⁶ the majority "decline[d] to forge new ground in this case by declaring sexual orientation to be a

⁶ The majority initially stated that there was no evidence in the record on the factors that determine whether sexual orientation is a suspect class. On rehearing, the majority modified the opinion to state that there was no "clear factual record" on those issues. In fact, as the dissent pointed out, the City proffered evidence on all three factors. (Order Modifying Opinion and Denying Rehearing [No Change in Judgment] in *In re Marriage Cases* (2006) 143 Cal.App.4th 873 (Mod. Order) at p. 2, attached as Exhibit B.) The trial court never held an evidentiary hearing because it decided the case on issues of law and did not reach the sexual orientation discrimination claim.

suspect classification for purposes of equal protection analysis." (*Ibid.* [p. 45].)⁷

The dissent countered that sexual orientation is a suspect classification as a matter of law. With respect to the immutability factor—the only factor that the majority considered in doubt—the dissent cited the Ninth Circuit's holding that "[s]exual orientation and sexual identity are immutable" and "so fundamental to one's identity that a person should not be required to abandon them." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 36], quoting *Hernandez-Montiel v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084, 1093-1094, overruled on other grounds in *Thomas v. Gonzales* (9th Cir. 2005) 409 F.3d 1177, 1187, revd. on other grounds in *Gonzales v. Thomas* (2006) __ U.S. __ [126 S.Ct. 1613, 1615].) The dissent continued:

The proposition that homosexuality is not a freely elected characteristic also comports with common sense. "Given the personal and social disadvantages to which homosexuality subjects a person in our society, the idea that millions of young men and women have chosen it or will choose it in the same fashion in which they might choose a career or a place to live or a political party or even a religious faith seems preposterous." (Posner, *Sex and Reason* (1992) pp. 296-297.) (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 37].)

The dissent concluded (as the majority tacitly did) that the remaining two factors are satisfied as well.⁸ It noted that "state law clearly recognizes

⁷ The concurring opinion added: "[I]f being gay or lesbian is an immutable trait or biologically determined, then we must conclude classification based on that status which deprives such persons of legitimate rights is suspect." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. opn. of Parilli, J.) [p. 6].)

⁸ The dissent also acknowledged that the City created a substantial *factual* record on all three factors. (Mod. Order at p. 2.)

that sexual orientation is unrelated to an individual's ability to contribute to society." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 37] [citing statutes and case law prohibiting discrimination against gay men and lesbians in the workplace and case law holding that same-sex parents have the same rights and responsibilities as opposite-sex parents].) And it described the long history of discrimination against gay men and lesbians in our society, from the denial of custody of their children, to harassment and discrimination on the job, to treatment as "deviants" by the medical community, to the violence and brutality gay men and lesbians suffer at the hands of people unwilling to accept their differences. (*Ibid.* [pp. 39-40].) "The discrimination homosexuals suffer," the dissent stated, "is at least comparable to that visited on women, illegitimate children, and often aliens, all of whom are members of classes entitled to heightened protection." (*Ibid.* [pp. 40-41].) It concluded: "To say that the factors which determine whether a classification is suspect do not all apply to homosexuals requires us to deny as judges what we know as people."⁹ (*Ibid.* [p. 41].)

4. The right of privacy

The majority next concluded that the marriage exclusion does not violate the constitutionally-protected interest of gay men and lesbians in

⁹ If this Court grants review, agrees with the Court of Appeal that the suspect classification question cannot be reached without additional factual findings, and decides the remaining constitutional issues in favor of the State, then a remand for a trial on the suspect classification factors will be warranted. However, the possibility of a trial on these factors is *not* a reason for this Court to deny review now, because the Court of Appeal's rulings on the remaining issues may become the law of the case, potentially precluding Supreme Court review of those rulings at a later date. (*See, e.g., Morohoshi v. Pacific Home* (2004) 32 Cal.4th 482, 491-492.)

"autonomy privacy," i.e., "in making intimate personal decisions or conducting personal activities without observation, intrusion or interference." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35.) The majority recognized that "matters related to marriage, family and sex" are central to this right and that the right to marry one's chosen partner is "virtually synonymous" with the right to privacy. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [pp. 46-47], internal quotations omitted.) Nonetheless, the majority concluded that because gay men and lesbians "have never enjoyed such a right before," the marriage exclusion does not "intrude upon" their privacy. (*Ibid.* [p. 48], italics omitted.)

The dissent disagreed:

The marital relationship is within the zone of autonomy protected by the right of privacy not just because of the profound nature of the attachment and commitment that marriage represents, the material benefits it provides, and the social ordering it furthers, but also because the decision to marry represents one of the most self-defining decisions an individual can make. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [p. 8].)

If laws prohibiting marriage by interracial couples, irresponsible parents, and prison inmates run afoul of this constitutional protection, "so too must the absolute ban at issue in this case, because there is nothing about same-sex couples that makes them less able to partake of the attributes of marriage that are constitutionally significant." (*Ibid.* [p. 14].)

5. Rational basis review

Having held that the marriage exclusion is not subject to strict scrutiny, the majority applied the rational basis test. Concluding that the exclusion is rationally related to a legitimate government interest, the majority held that the exclusion meets the test.

First, the majority held that the State has a legitimate interest in "preserving the traditional definition of marriage." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 52].) "Marriage," the majority stated, "is a social institution of profound significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature." (*Ibid.* [p. 59]; see also *ibid.* [p. 2].) Responding to the argument that domestic partnership laws can never put gay men and lesbians on equal legal footing with those who enjoy the right to marry, the majority stated: "If the Domestic Partner Act does not go far enough" in remedying the unequal treatment, "the Legislature can amend the law, but it is not for the court to implement this change."¹⁰ (*Ibid.* [p. 55].)

Second, the majority held that the marriage exclusion serves the state's interest in "carrying out the will of its citizens." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 60].) It stated: "The Legislature and the voters of this state have determined that 'marriage' in California is an institution reserved for opposite-sex couples, and it makes no difference whether we agree with their reasoning." (*Ibid.* [p. 62].) "Respect for the considered judgment of the Legislature and the voters," the majority continued, "is especially warranted where the issue is so controversial and divisive as is the question whether gays and lesbians should be permitted to marry their same-sex partners." (*Ibid.*)

¹⁰ Ironically, the Governor vetoed legislation approving same-sex marriages in part because the issue was being determined by the courts. (Governor's Veto Message, *supra*, at p. 1.)

The majority, however, rejected the "procreation rationale" offered by the plaintiffs in *Thomasson* and *Proposition 22*.¹¹ According to the majority, not only did the Attorney General expressly disavow that rationale, "[m]any same-sex couples in California are raising children, and our state's public policy supports providing equal rights and protections to such families." (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 60, fn. 33].)

By contrast, the dissent concluded that the marriage exclusion fails rational basis review. Like the Colorado constitutional amendment banning laws protecting gay men and lesbians from discrimination struck down in *Romer v. Evans* (1996) 517 U.S. 620, 633, the marriage exclusion "singles out a defined group to completely exclude from a crucial social institution, without basis in any characteristic of the group that distinguishes it for any relevant purpose." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 49].) The dissent recognized that "[j]udicial deference to the importance the state or many of its citizens attach to a traditional bias against homosexuals is fundamentally at war with judicial responsibility to protect the constitutional rights of traditionally disfavored minorities." (*Ibid.* [p. 47].)

6. The role of the judiciary

In upholding the marriage exclusion, the majority did not simply hold that the marriage exclusion is constitutional; it concluded that the judiciary lacks the power to decide otherwise.

¹¹ Although the Court correctly ruled that these groups lack standing, it recognized that in conducting rational basis review it need not limit itself to justifications put forth by the parties.

We do not presume to hold same-sex marriage will never enjoy the same constitutional protection as is accorded to opposite-sex marriage. . . . Californians' evolving notions of equality may eventually lead to the recognition of a right to same-sex marriage and its ultimate status as a constitutionally guaranteed right. However, these developments are still in their infancy, and the courts may not compel the change respondents seek. (*Marriage Cases, supra*, 143 Cal.App.4th 873 [p. 33]; see also *ibid.* [pp. 2, 55, 59, 62].)

Similarly, Justice Parilli stated in her concurring opinion: "The inequities of the current parallel institutions should not continue if one group of citizens is being denied state privileges and protections attendant to marriage because they were created with a sexual orientation different from the majority, if we are to remain faithful to our Constitution." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. opn. of Parilli, J.) [p. 6].) Nonetheless, "[i]f respect for the rule of law is to be maintained, courts must accept and abide by their limited powers." (*Ibid.*)

The dissent disagreed: "We are not being asked to redefine marriage, but simply to say that the Legislature cannot define it in a way that violates the Constitution." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [pp. 28-29].) Quoting this Court in *Lockyer*, the dissent observed that the regulation of marriage is within the province of the Legislature " 'except as the same may be restricted by the Constitution.' " (*Ibid.*, quoting *Lockyer, supra*, 33 Cal.4th at p. 1074).)

What Justice Jackson said in [*Board of Education v. Barnette* (1943) 319 U.S. 624, 638], about the Bill of Rights, can also be said about the inalienable rights protected under article 1, section 1 of the California Constitution: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*Marriage*

Cases, supra, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [pp. 29-30], quoting *Barnette*, at p. 638.)

Finally, the dissent pointed out that the majority's reasoning was strikingly similar to the reasoning of the Virginia Supreme Court repudiated in *Loving*. (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [pp. 32-33], citing *Loving v. Commonwealth* (Va. 1966) 147 S.E.2d 78, 82 ["Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate"].) "[T]he federal marriage cases," the dissent concluded, "fully respect the legislative responsibility to define marriage; they stand only for the settled proposition that a definition repugnant to the Constitution is void, and it is the special duty of the judicial branch to say so when this is the case." (*Marriage Cases, supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 34].)

E. Petitions For Rehearing And Subsequent Modification

The City filed a petition for rehearing, asking the Court of Appeal to correct an erroneous statement in the opinion with respect to the record. According to the petition, the majority mistakenly stated that there was no evidence in the record on the factors pertaining to whether classifications based on sexual orientation are suspect. (San Francisco's Petition for Rehearing at p. 1.) The plaintiffs in *Woo* and *Tyler* and certain interveners in the *Thomasson* and *Proposition 22* cases also filed petitions for hearing. (See *Woo* Petition for Rehearing; *Tyler* Petition for Rehearing; *Thomasson* Petition for Rehearing; *Proposition 22* Petition for Rehearing.)

The Court of Appeal denied rehearing but modified its opinion. It modified the majority opinion to state that "no clear factual record was developed addressing the three suspect classification factors" and replaced

the word "evidence" with the words "lower court findings" in another sentence.¹² (Mod. Order at p. 1.) It also modified the dissent by adding the following footnote:

The majority's statement that 'no clear factual record was developed [in the trial court] addressing the three suspect classification factors' [citation] is inaccurate. Although the trial court did not hold an evidentiary hearing and found it unnecessary to determine the issue, the City proffered declarations addressing each of the three factors. With respect to immutability—the only one of the factors the majority questions—these declarations state that homosexuality is not a mental illness, that attempts to change an individual's sexuality have not been demonstrated empirically to be effective or safe, and that such interventions can be harmful psychologically. The state presented no evidence to the contrary, although other parties submitted declarations taking an opposing view. (Mod. Order at p. 2.)

DISCUSSION

The question whether the marriage exclusion violates the constitutional rights of gay men and lesbians is of tremendous importance throughout California. Gay and lesbian couples and their families have waited a long time to partake in the validation that marriage alone can provide. (See *Lockyer, supra*, 33 Cal.4th at p. 1132 (conc. opn. of Kennard, J.)) The state sanctioned institution of marriage is highly esteemed by our society in a way that other relationships are not and may never be. Marriage "fulfills yearnings for security, safe haven and connection that express our common humanity, . . . and the decision whether and whom to marry is among life's momentous acts of self-definition." (*Goodridge v. Dept. of Pub. Health* (2003) 440 Mass. 309,

¹² As explained in footnote seven, the need to remand this action for a trial on the suspect classification factors if this Court agrees with the Court of Appeal does not support the denial of review. (See *ante*, at p. 13, fn. 7.)

322.) Denying gay men and lesbians the right to choose whether and whom to marry not only deprives them of the "full protection of the laws" but "exclude[s] them from the full range of human experience." (*Id.* at p. 326.)

This became evident in February 2004, when thousands of Californians poured into the City and walked the steps of City Hall. From the Clerk's Office inside City Hall to Van Ness Avenue, they stood in line and waited anxiously—some throughout the night in wind and rain—for something that had long eluded them. Their presence, excitement, anxiety, and anticipation bespoke the yearning described in *Goodridge*. Their longing then was palpable, and it has not subsided. They hunger for equal treatment under our state's law and for the respect and honor their relationships deserve and that only marriage can confer.

The parties have now litigated the issues deferred in *Lockyer* in two lower courts. In the meantime, thousands of same-sex couples who tried to get married in San Francisco continue to wait for a definitive ruling on their claim for the same recognition and dignity that the State bestows on married heterosexual couples. The time has come for this Court to provide this ruling.

Indeed, this issue affects not only the thousands of people who came to City Hall in 2004, but also the hundreds of thousands of gay men and lesbians in California as well as their children and families. It also affects government officials in places like San Francisco, who are presently forced to deny marriage licenses to same-sex couples despite a committed belief that they are violating the rights of those couples by doing so.

Concededly, there is presently no conflict among the Courts of Appeal as to the constitutionality of the marriage exclusion. But if the Judicial Council had thought that the issue should be addressed by multiple

courts, it would have allowed the *Tyler* case, then pending in Los Angeles, to proceed separately. Instead, the Council coordinated that case with the five San Francisco cases. Furthermore, if this Court were to deny review, it is unlikely that subsequent litigation would advance the issues further than they have already been advanced in these cases. Given their pressing importance, the constitutional issues presented here should not "percolate" any further in the lower courts.

Indeed, the federal courts have already abstained from deciding federal constitutional challenges to California's marriage exclusion based on the assumption that the state constitutional challenges raised in these cases "would ultimately reach and be decided by the California Supreme Court." (See *Smelt v. County of Orange* (9th Cir. 2006) 447 F.2d 673, 676, 678, fn. 13, 678-682.) As the Ninth Circuit recognized, this Court's resolution of the state constitutional issues may obviate the need for federal courts to decide whether the exclusion violates the federal Constitution. (*Id.* at 681.)

Likewise, the other branches of California government have deferred their consideration of the propriety of the marriage exclusion pending a decision by this Court. Indeed, the Governor vetoed legislation that would have legalized same-sex marriages in part because the constitutionality of the marriage exclusion "will likely be decided by" this Court. (Governor's Veto Message, *supra*, at p. 1.)

The State itself has stated twice before that these issues are of great statewide importance and should be resolved by this Court. In *Lockyer*, the State urged this Court to decide the underlying constitutional issues right away: "[A] definitive resolution by this Court of the fundamental constitutional questions involved would provide much-needed certainty and

guidance to lower courts and the public." (RFJN, Exh. B [Original Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief; Request for Immediate Cease and Desist Order and/or Stay of Proceedings, *Lockyer v. City and County of San Francisco*, No. S122923, filed February 27, 2004 at p. 4].) And after the trial court issued its decision in these cases, the State again urged this Court to decide the issues: "These cases present issues of great public importance that require prompt resolution by this Court." (RFJN, Exh. C [Petition to Transfer Appeals, *City and County of San Francisco v. State of California, et al.*, No. S135207, filed July 1, 2005 (Transfer Pet.) at p. 4].) "Same-sex couples should be given a prompt determination as to whether they can marry," the State contended, "and should not have to put their lives and affairs on hold indefinitely while this matter works its way through several levels of court proceedings." (*Ibid.* [Transfer Pet. at p. 6].)

In short, this is the major civil rights issue of our time. And this Court should have the final word.

Finally, the Court may wish to address the debate between the majority and dissent over the role of the judiciary in deciding controversial, constitutional issues. As this Court has long recognized, "[t]he judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct." (*Nogues v. Douglass* (1857) 7 Cal. 65, 70; see also *McGlung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469.) The City respectfully submits that if the marriage exclusion is to be upheld, it must be based on a

substantive constitutional rationale rather than deference to tradition and political will. If, as the City believes, there is no defensible substantive rationale, the marriage exclusion must be struck down.

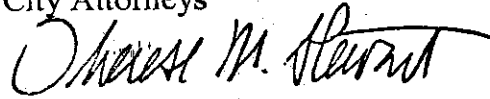
CONCLUSION

Based on the foregoing, the City respectfully requests that this Court grant its Petition for Review.

Dated: November 13, 2006

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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 6,562 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 November 13, 2006.

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I, MONICA QUATTRIN, 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. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, California, 94102.

On November 13, 2006, I served the attached:

PETITION FOR REVIEW

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

and served the named document in the manner 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 at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. 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 office(s) of the addressee(s).

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

Executed November 13, 2006, at San Francisco, California.



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consolidated with
Woo v. Lockyer
San Francisco Superior Court Case No. CPF-04-504038

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