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10

11 SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO  
STATE OF CALIFORNIA

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

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4365

Case No.: CGC 04-428794

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

**DECLARATION OF MAGGIE  
GALLAGHER IN SUPPORT OF  
CCF'S MOTION FOR SUMMARY  
JUDGMENT**

17 )  
18 )  
19 Plaintiffs, )

20 vs. )

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

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

23 Defendants. )  
24 )

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1 On what basis can the law tell gay and lesbian people that other kinds of intimate or sexual  
2 relationships are somehow less worthy of public concern, attention, or benefits than same-sex  
3 marriages? A handful of gay and lesbian critiques of same-sex marriage raise this question.

4 3. Writing in the Albany Law Review, law professor and activist Paula Ettelbrook  
5 recently explained:

6 [M]arriage strategies alone are not consistent with the broader impact of  
7 discrimination that fueled our movement's early work to establish family equality.  
8 Even if marriage were allowed tomorrow here in New York, there would be many  
9 who for any number of reasons would not rush to the county clerk's office, but who  
10 nonetheless have viable, committed, mutually supportive relationships. These  
11 families should still receive family benefits and privileges for the same effort they put  
12 into sustaining their households. Our original goal was to remove marriage as the  
13 sole entry point for family benefits. Marriage strategies would narrow that door  
14 again.<sup>4</sup>

15 Or, as Nancy Polikoff, law professor at American University, wrote in 2003:

16 Marriage as we know it is a status unlike any other, conferring benefits and  
17 responsibilities unavailable to those in other close personal relationships. . . . I  
18 advocate here a more sweeping reform, incorporating recognition in every area of the  
19 law of the diversity of adult relationships characterized by emotional intimacy and  
20 economic interdependence. The law should no longer reward marriage above all  
21 other relationships.<sup>5</sup>

22 A similar argument was earlier made by Professor Martha Fineman, who in her book *The Neutered*  
23 *Mother*, argues that as long as marriage exists:

24 \_\_\_\_\_  
25 entitled to respect for their private lives. The State cannot demean their existence or control their  
26 destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process  
27 Clause gives them the full right to engage in their conduct without intervention of the government.”  
28 *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

4 Paula Ettelbrick, *Domestic Partnerships, Civil Unions, or Marriage: One Size Does Not*  
*Fit All*, 65 ALBANY L. REV. 905, 913 (2001).

5 Nancy D. Polikoff, *Conference on Marriage, Families, and Democracy: Ending Marriage*  
*as We Know It*, 32 HOFSTRA L. REV. 201, 201-202 (2003). Professor Polikoff goes on to state:  
Elsewhere I have argued for the abolition of marriage as a legal category, joining  
other distinguished legal scholars. . . . Although I continue to believe that ending the  
legal category of marriage would be the preferable family law reform, this Article,  
which advocates eliminating the unique role of marriage in law, would end marriage  
as we know it and is a more realistic endeavor.

*Id.* at 202, n.7.

1 [I]t will continue to occupy a privileged status and be posited as the ideal, defining  
2 other intimate entities as deviant. Instead of seeking to eliminate the stigma by  
3 analogizing more and more relationships to marriage, why not just abolish the  
category as a legal status and, in that way, render all sexual relationships equal with  
each other and all relationships equal with the sexual?<sup>6</sup>

4 4. Outside of the scholarly community, gays and lesbians have raised similar hard  
5 questions. One lesbian couple explained why they would not marry:

6 Those who have fought for gay marriage have made clear that, in the U.S., important  
7 benefits are tied to marital status. As the judges of the Massachusetts Supreme  
8 Judicial Court noted in the Goodridge decision, "Marriage provides an abundance of  
9 legal, financial, and social benefits." . . . But focusing on the right to marry  
10 perpetuates the idea that these rights ought to be linked to marriage. Were we to  
marry, we would be contributing to the perpetuation of a norm of "coupleddness" in  
our society. This preference for couples marginalizes those who are single, single  
parents, widowed, divorced, or otherwise living in non-traditional constellations.<sup>7</sup>

11 5. For the most part, however, this fundamental question about marriage law has been  
12 ignored in equal protection analyses: by what right does the law intrude in intimate relationships at  
13 all, either to burden and regulate, or to benefit and prefer? What is the legal justification for the state  
14 regulation of our most intimate private lives? Why do we have laws about marriage at all? These  
15 questions pose a particular challenge for advocates of same-sex marriage. According to Capitol  
16 University Law Professor Mark Strasser, writing in the DePaul Law Review, marriage is for "the  
17 promotion of stability, the limitation of the disorganized breakdown of relations, and the provision  
18 of a home for the production and rearing of children."<sup>8</sup> E.J. Graff, author, journalist, and same-sex  
19 marriage activist from Massachusetts writes: "Western marriage today is a home for the heart:  
20 entering, furnishing, and exiting that home is your business alone. Today's marriage-from whatever  
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22  
23

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24 <sup>6</sup> MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL*  
25 *FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230 (Routledge) (1995).

26 <sup>7</sup> Martha Ackelsburg & Judith Plaskow, *Why We Aren't Getting Married*, *THE*  
27 *WASHINGTON BLADE*, June 4, 2004, available at [http://www.washblade.com/2004/6-4/  
view/columns/why.cfm](http://www.washblade.com/2004/6-4/view/columns/why.cfm).

28 <sup>8</sup> Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 *DEPAUL L. REV.* 51, 74 (1998).

1 angle you look-is justified by the happiness of the pair."<sup>9</sup>

2         6.         This is circular reasoning that begs the question: how is society more stable because  
3 gay men having sex are setting up housekeeping together rather than meeting in bars? Or, if the goal  
4 is the orderly breakdown of relations, then as the American Law Institute asks, why don't we impose  
5 marital obligations upon every group of people sharing a common residence?<sup>10</sup> If the public rationale  
6 of marriage is the happiness of the individuals in them, as Graff asserts, the problem of "vertical"  
7 equal protection becomes even more urgent. How can the law deny other kinds of relationships their  
8 own vision of personal happiness? By what right do we tell people, who may desire polygamous,  
9 polyamorous, or open unions-or no union at all-that their vision of happiness is wrong or defective?  
10 How will the marriage of two men aid in "assuring support obligations and assigning responsibility  
11 for the care of children," (as Lenore Weitzman identified the key social goals furthered by  
12 marriage)?<sup>11</sup> No parental obligation will arise naturally out of the marriage. Each of the two men  
13 will have to, by some additional step, establish a parenting relationship with any children living in  
14 their home, either through adoption or the assertion of biological paternity.

15         7.         The same question of "vertical" equity arises in opposite-sex relationships. In both  
16 cases the government has to justify the regulation of intimacy according to a set model. One might  
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18         <sup>9</sup> As E.J. Graff stated:

19         Marriage . . . turned into a way to share and shore up one's dearest companion's  
20         well-being and inner fortunes. Marriage stopped being justified only by making  
21         babies-and became justified by enriching the couple's happiness and intimacy. The  
22         family . . . started to be seen as a careful and nurturing nest for the vulnerable young,  
23         a nest in which men and women are equally qualified to serve as financial protector  
24         or personal nurturer or both . . . Social order does remain one of marriage's key  
25         purposes: the legal institution attempts to apply a just social consensus to private  
26         disputes.

27         E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 251 (Beacon Press 2004) (1999).

28         <sup>10</sup> American Law Institute, *Principles of the Law of Family Dissolution* § 6.01 (2000) "For  
the purpose of defining relationships to which this Chapter applies, domestic partners are two  
persons of the same or opposite sex, not married to one another, who for a significant period of time  
share a primary residence and a life together as a couple." *Id.*

<sup>11</sup> Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L.  
REV. 1169, 1241-45 (1974).

1 pause and ask this related question: why is marriage a universal human institution? In all the wild  
2 variety of cultures human beings have created in every kind of economic and ecological niche, every  
3 known human society has something called marriage.<sup>12</sup> It does not always look very much like our  
4 own marriage tradition, which is deeply rooted in Judeo-Christian ideas. But even in societies that  
5 license same-sex relationships, marriage virtually always has something to do with bringing together  
6 a man and a woman who might make the baby, so that society gets the next generation it needs, and  
7 so that socially-valued children have both a mother and a father.<sup>13</sup>

8         8.       Here is my argument: the justification for legal preferences for marriage for couples  
9 attracted to the opposite sex rests on three assertions: sex makes babies; society needs babies; and  
10 children need mothers and fathers. Marriage is about uniting these three dimensions of human social  
11 life: creating the conditions under which sex between men and women can make babies safely, in  
12 which the fundamental interests of children in the care and protection of their own mother and father  
13 will be protected, and so that women receive the protections they need to compensate for the high  
14 and gendered (i.e., nonreciprocal) costs of childbearing.

15         9.       Each of these ideas is now contested in the public square and particularly, in the  
16 academy. This essay will examine the evidence for each proposition asking, in essence, are these  
17 statements still true? Together do they continue to constitute a rational legal justification for the  
18 regulation of intimacy?

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21         <sup>12</sup> As several commentators pointed out:

22         Marriage exists in virtually every known human society. . . . At least since the  
23         beginning of recorded history, in all the flourishing varieties of human cultures  
24         documented by anthropologists, marriage has been a universal human institution. As  
25         a virtually universal human idea, marriage is about the reproduction of children,  
26         families, and society. . . . marriage across societies is a publicly acknowledged and  
27         supported sexual union which creates kinship obligations and sharing of resources  
28         between men, women, and the children that their sexual union may produce.

26 WILLIAM J. DOHERTY, WILLIAM A. GALSTON, NORVAL D.GLENN, JOHN GOTTMAN  
27 ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL  
28 SCIENCES 8-9 (Institute for American Values) (2002).

<sup>13</sup> *Id.*

1 **DOES SEX MAKE BABIES?**

2 10. For most of American history, the relationship of marriage to procreation was  
3 axiomatic.<sup>14</sup> Marriage was society's sexual license par excellence. By authorizing, encouraging, and  
4 indeed requiring sex between a man and a woman,<sup>15</sup> marriage ensured the procreation of the human  
5 race as well as mutual support and the only lawful sexual satisfaction. By favoring marriage over  
6 other kinds of sexual unions, society discouraged out-of-wedlock births, and encouraged procreation  
7 within marriage. Is this still a legitimate justification for marriage? Does sex still make babies?  
8 Many scholars and other observers both right and left have concluded the answer is: no. Legalized  
9 contraception, they argue, makes traditional notions of marriage as a regulator of reproduction  
10 anachronistic at best, irrational at worst. As one legal scholar put it:

11 When in the 1960s, oral contraceptives became available, and a constitutional right  
12 to use them had been established by the Supreme Court in *Griswold v. Connecticut*,  
13 the courts retreated from this rhetoric, perhaps realizing that the survival of the  
14 species and of civilization did not depend on every sexual encounter having  
15 procreative potential. . . . The point here is that the conception of marriage as sexual,  
16 wherever found in the law, has outlived its usefulness. Unless and until we  
17 contemplate reestablishing meaningful legal penalties for fornication, the mere  
18 existence of marriage as a legal institution cannot realistically be looked upon as a  
19 means to control sex outside of marriage, and therefore control out-of-wedlock

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18 <sup>14</sup> See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that “[m]arriage and  
19 procreation are fundamental to the very existence and survival of the race.”)

20 <sup>15</sup> Failure to consummate a marriage (i.e., have sexual intercourse) traditionally made a  
21 marriage voidable. See Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*,  
22 102 COLUM. L. REV. 1089, 1103-07 (2002) (“The law considers sexual intercourse to be an  
23 implied term of the marriage contract and will grant an annulment when one party secretly intends  
24 not to consummate it.”); Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?* 14 NOTRE  
25 DAME J.L. ETHICS & PUB. POL’Y 729, 749 (2000) (“Physical defects and incapacities which  
26 render a party unable to consummate the marriage, existing at the time of the marriage, and which  
27 are incurable are, under most statutes, grounds for annulment.”). See also ALASKA STAT. §  
28 25.24.030 (Michie 2002); DEL. CODE ANN. tit. 13 § 506(a)(2) (1999); 750 ILL. COMP. STAT.  
§ 5/301(2) (West 1999); MINN. STAT. ANN. § 518.02(b) (West 1990); OHIO REV. CODE ANN.  
§ 3105.31(F) (Anderson 2003); WIS. STAT. ANN. § 767.03(2) (West 2003) (including inability or  
failure to consummate among grounds for annulment, though several also require nondisclosure of  
inability to consummate). Failure to have sexual relations was also considered grounds for divorce  
in many jurisdictions. Borten, *supra* note 15, at 1098 (“[M]any states list impotence as a ground for  
divorce.”) (citing MASS. ANN. LAWS ch. 208, 1 (Law. Co-op. 1994); MISS. CODE ANN. 93-5-1  
(1994); *Dolan v. Dolan*, 259 A.2d 32, 36 (Me. 1969)).

1 childbirth.<sup>16</sup>

2 Non-legal observers have come to similar a conclusion:

3 Today, though, sexual intercourse is delinked from procreation. Since the invention  
4 of the Pill some 40 years ago, human beings have for the first time been able to  
5 control reproduction with a very high degree of assurance . . . the causal relationships  
6 between sex, pregnancy and marriage were severed in a fundamental way . . . Sex,  
7 childbearing and marriage now have no necessary connection to one another, because  
8 the biological connection between sex and childbearing is controllable. The  
9 fundamental basis for marriage has thus been technologically obviated.<sup>17</sup>

10 11. Court cases creating same-sex marriage or marriage equivalents have held that  
11 marriage no longer has any intrinsic relationship to the making of babies. Observing that "many  
12 opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never  
13 intend to have children, and that others are incapable of having children,"<sup>18</sup> and again that "increasing  
14 numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques  
15 to conceive and raise children,"<sup>19</sup> the Vermont Supreme Court in 1999 rejected the state's assertion  
16 that marriage laws were intended to promote either children, or a connection between children and  
17 their biological parents.<sup>20</sup> The Massachusetts Supreme Judicial Court was even more dismissive:

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

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21 <sup>16</sup> *Borten, supra* note 15, at 1114-23

22 <sup>17</sup> Donald Sensing, "Save Marriage? It's Too Late: The Pill Made Same-Sex Nuptials  
23 Inevitable," THE OPINION JOURNAL (Wall Street Journal Onlin) March 15, 2004.

24 <sup>18</sup> *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999).

25 <sup>19</sup> *Id.*

26 <sup>20</sup> *Id.*

27 <sup>21</sup> *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 961, n.23 (Mass. 2003) (quoting  
28 portions of Justice Cordy's dissenting opinion).

1           12.     Are these analyses true? Is there no longer any rational relation between affirming  
2 marital sexual unions and preventing unmarried births?<sup>22</sup> Has contraceptive technology stripped sex  
3 of any intrinsic relationship to pregnancy, thus rendering the state's interest in encouraging men and  
4 women attracted to the opposite sex to get into marital unions, rather than other kinds of  
5 relationships, obsolete?

6           13.     Forty years after *Griswold v. Connecticut*,<sup>23</sup> we now have considerable social  
7 experience testing these propositions. Is there still a rational justification for marriage, on the  
8 grounds that, when men and women enter this kind of union, the possibility of out-of-wedlock births  
9 is minimized? Or has contraceptive technology rendered this formerly rational relation obsolete?  
10 Does sex still make babies? Yes. Sex between men and women continues to make babies on a  
11 regular basis, with or without the conscious intention of the participants. The longer men and women  
12 engage in non-marital sexual careers, the greater the risk of a non-marital pregnancy. Despite legal  
13 contraception, numerous studies have shown that unintended pregnancy is common, not rare.

14           14.     Consider these statistics from an analysis of the 1995 National Survey of Family  
15 Growth, based on a nationally representative sample of 10,847 women between the ages of 15 and  
16 44.<sup>24</sup> Almost a third of all births between 1990 and 1995 were unintended.<sup>25</sup> Fifty-six percent of  
17 births to unmarried women were unintended (as were 19 percent of births to married women and 39  
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20           <sup>22</sup> My own perspective on this question is somewhat biased. In the interests of full disclosure,  
21 let me state that I came of age in the middle of the sexual revolution (Yale, class of 1982), in which  
22 the claim that we had successfully severed sex and reproduction was repeatedly made to me and my  
23 peers. My own experience (I became an unwed mother at 22) as well as the experience of many of  
24 my peers lead me to investigate the scientific basis of this assertion. We may claim to have separated  
25 sex and reproduction, but unexpected pregnancy, even among highly competent and advantaged  
26 young women at elite institutions, nonetheless remains far from rare.

27           <sup>23</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

28           <sup>24</sup> J. ABMA, ET AL., FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH: NEW DATA FROM  
THE 1995 NATIONAL SURVEY OF FAMILY GROWTH (1997). NATIONAL CENTER FOR HEALTH  
STATISTICS. VITAL HEALTH STAT 23 (19).

<sup>25</sup> *Id.* at 25 (Table 14) (69 percent of births were "intended." The remaining 31 percent of  
births were either unwanted (9.1%) or mistimed (21.65%)).

1 percent of births to divorced women.)<sup>26</sup> Almost a third of births to married parents and three-fourths  
2 of births to unmarried couples were unintended by at least one of the parents.<sup>27</sup> About 17 million  
3 American women of childbearing age have already had an unintended birth.<sup>28</sup>

4 15. When considering the number of pregnancies (as opposed to births), the statistics are  
5 even more striking. Consider this data from a study in Family Planning Perspectives, published by  
6 the Alan Guttmacher Institute.<sup>29</sup> Excluding miscarriages, 49 percent of all pregnancies in 1994 were  
7 unintended.<sup>30</sup> Almost half of all women aged 15-44 had had at least one unplanned pregnancy in  
8 their lives.<sup>31</sup> By their late thirties, 60 percent of American women had had at least one unintended  
9 pregnancy.<sup>32</sup> Almost four in ten women aged 40-44 had had at least one unplanned birth.<sup>33</sup> Similarly  
10 a scholarly analysis of contraceptive failure rates in actual use concluded, "About three million  
11 pregnancies in the United States (48%) were unintended in 1994. Some 53 percent of these occurred  
12 among women who were using contraceptives."<sup>34</sup>

13 16. Contraceptive failure rates in the first year of use varied considerably among different  
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15 <sup>26</sup> *Id.*

16 <sup>27</sup> *Id.* at 28 (Table 17) (70.4 percent of births to married women were intended by both  
17 parents, compared to just 28 percent of births to unmarried mothers).

18 <sup>28</sup> Abma, et al, *supra* note 24, at 24 (Table 13).

19 <sup>29</sup> STANLEY K. HENSHAW, "UNINTENDED PREGNANCIES IN THE UNITED STATES," FAMILY  
20 PLANNING PERSPECTIVES 30(1): 24ff (1998).

21 <sup>30</sup> *Id.* at 26 (Table 1).

22 <sup>31</sup> *Id.* at 28 (Table 3) (finding 47.7% of women aged 15-44 had had at least one unintended  
23 pregnancy).

24 <sup>32</sup> *Id.* at 28 (Table 3) (finding 60.0% of women aged 35-39 had had at least one unintended  
25 pregnancy).

26 <sup>33</sup> HENSHAW, *supra* note 29 at 28 (Table 3) (finding 38.1% of women aged 40-44 had had  
27 at least one unplanned birth).

28 <sup>34</sup> HAISHAN FU, ET AL, "CONTRACEPTIVE FAILURE RATES: NEW ESTIMATES FROM THE 1995  
NATIONAL SURVEY OF FAMILY GROWTH," FAMILY PLANNING PERSPECTIVES 31(2): 56-63, 56  
(1999).

1 demographic groups but were never trivial: cohabiting adolescent women experience a failure rate  
2 of about 47 percent in the first year of contraceptive use, while the 12-month failure rate among  
3 married women age 30 and older was 8 percent.<sup>35</sup> Another analysis of the 1995 National Survey of  
4 Family Growth concluded:

5       The risk of failure during typical use of reversible contraceptives in the United States  
6       is not low-overall, 9 percent of women become pregnant within one year of starting  
7       use. The typical woman who uses reversible methods of contraception continuously  
8       from her 15th to her 45th birthday will experience 1.8 contraceptive failures.<sup>36</sup>

9       17.     *The typical woman who uses contraceptives continuously will experience almost two*  
10     *unintended pregnancies.*<sup>37</sup> Technology has not obviated the state's interest in encouraging men and  
11     women to enter marital sexual unions, as opposed to other kinds. Contraceptive technology lowers  
12     the odds of pregnancy, but never eliminates the risk, especially for people who engage in extended  
13     non-marital sexual careers.

14     18.     Without a legal, shared, public category called "marriage," neither law nor culture  
15     would be able to motivate young men and women to avoid pregnancy out of wedlock. This is one  
16     reason that, while contraceptives may lower the state's interest in absolutely forbidding non-marital  
17     sexual relations (given the high degree of intrusion on personal liberty involved), the existence of  
18     contraceptives does not eliminate the state's interest in preferring voluntary marital sexual unions  
19     between men and women to other kinds. Virtually every child born to a married couple will have a  
20     mother and a father already committed to caring for him or her. Most children conceived in sexual  
21     unions outside of marriage will not.

22     19.     Sex between men and women still makes babies. By creating a clear shared public  
23     category called "marriage" and preferring marital unions as the context for sex and childbearing, the

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24       <sup>35</sup> *Id.* at 56.

25       <sup>36</sup> JAMES TRUSSELL AND BARBARA VAUGHAN, "CONTRACEPTIVE FAILURE, METHOD-  
26     RELATED DISCONTINUATION AND RESUMPTION OF USE: RESULTS FROM THE 1995 NATIONAL SURVEY  
27     OF FAMILY GROWTH," FAMILY PLANNING PERSPECTIVES 31(2): 64ff (1999).

28       <sup>37</sup> *Id.* ("These high pregnancy rates do not reflect the inherent efficacy of methods when used  
correctly and consistently . . . but instead reflect imperfect use (because most reversible methods are  
difficult to use correctly.")).

1 law (a) informs young people of the importance of doing whatever is necessary to delay pregnancy  
2 until marriage (as well as enabling other stakeholders, such as family, friends, and faith communities,  
3 to communicate this message), and (b) creates a clear marker for when men and women have created  
4 the kind of unions where babies can be encouraged.

### 5 **DOES SOCIETY NEED BABIES?**

6 20. The second historic purpose of marriage is to encourage men and women to make the  
7 next generation. The idea that babies are a social good is, however, now widely contested. At the  
8 same time the widespread use of contraceptive technology helped spark a revolution in ideas about  
9 sex and marriage, another dramatic change in social perspective occurred: ominous warnings about  
10 a population explosion. High birthrates in the Fifties in developed countries, combined with  
11 dramatically lower rates of infant mortality throughout the world, sparked fears that too many babies  
12 might overwhelm our economic and ecological systems.<sup>38</sup> Does society still need babies? Or has the  
13 specter of overpopulation turned the tables on this state interest? Does the state still have a rational  
14 interest in encouraging marriage rooted in the need to encourage reproduction?

15 21. Relatively few American elites appear aware of the dramatic change in the factual  
16 situation of developed countries around the world. Since the 1950s, many countries around the  
17 world, especially the industrialized democracies, have experienced a sustained drop in fertility rates  
18 that in many countries makes a population implosion imminent. According to American Enterprise  
19 Institute scholar Nicholas Eberstadt, 83 countries and territories encompassing 44 percent of the  
20 world's population are experiencing below-replacement fertility.<sup>39</sup> Demographers define "very low  
21 fertility" as a birthrate below 1.5 children.<sup>40</sup> Europe's total fertility rate (TFR) from 1995 to 2000 was  
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23 <sup>38</sup> See, e.g., PAUL R. EHRLICH. *THE POPULATION BOMB* (Ballantine Books 1971) (1968).

24 <sup>39</sup> Nicholas Eberstadt, *The New Trend: A Population Bust*, THE WASHINGTON POST, Mar. 18,  
25 2001, at B7 (excerpted from Eberstadt's article entitled *The Population Implosion* in the March/April  
26 2001 issue of FOREIGN POLICY).

27 <sup>40</sup> John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern*  
28 *Societies: A Search for Commonalities*, POPULATION STUDIES, 57(3) Nov. 2003 at 241, 241.  
"Lowest low fertility" is often defined as a total fertility rate of 1.3 or less. Hans-Peter Kohler, et al.,  
*The Emergence of Lowest-Low Fertility in Europe During the 1990's*, POPULATION AND

1 1.42 children per woman.<sup>41</sup> The UN's medium variant predicts it will rise to 1.84, the low variant  
2 that it will drop to 1.34 children per woman by year 2050.<sup>42</sup> In 2002, 28 nations experienced very  
3 low fertility including Switzerland (1.4), Germany (1.3); Austria (1.3); Italy (1.3); Spain (1.2);  
4 Greece (1.3); Japan (1.3), Russia (1.3); the Czech Republic (1.1); and most other Eastern European  
5 nations.<sup>43</sup>

6 22. In 2000, for the first time in human history there were more old people (age 60 or  
7 over) than children (ages 0-14) (19 percent versus 18 percent) in the developed countries of the  
8 world.<sup>44</sup> By 2050, the UN projects there will be twice as many elderly people as children (32 percent  
9 versus 16 percent).<sup>45</sup> Under the UN's "medium" projection, by the year 2050, the median aged  
10 person in Europe will be almost 48 years old.<sup>46</sup> It could get worse. In the former East Germany,  
11 women are now having less than one child each, on average, a level which if continued leads to the  
12  
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14 DEVELOPMENT REVIEW, 28(4) Dec. 2002 641-680, 641.

15  
16 <sup>41</sup> POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL  
17 AFFAIRS OF THE UNITED NATIONS SECRETARIAT (2003). WORLD POPULATION  
18 PROSPECTS: THE 2002 REVISION. HIGHLIGHTS. (New York: United Nations) (February 26,  
19 2003): 4 (Table 2). North America, by contrast has near-replacement level fertility at 2.01 children  
20 per woman. Id.

21 <sup>42</sup> *Id.*

22 <sup>43</sup> John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern*  
23 *Societies: A Search for Commonalities*, POPULATION STUDIES, 57(3) Nov. 2003 241, 242  
24 (Table 1).

25 <sup>44</sup> POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL  
26 AFFAIRS OF THE UNITED NATIONS SECRETARIAT (2003). WORLD POPULATION  
27 PROSPECTS: THE 2002 REVISION. HIGHLIGHTS. (New York: United Nations) (February 26,  
28 2003): 15.

<sup>45</sup> *Id.* Based on the medium variant, which assumes total fertility in developed nations will  
rise to a rate of 1.85 children per woman by the year 2050, while fertility rates in less developed  
countries continues to fall. Id. at 4 (Table 2).

<sup>46</sup> *Id.* at 15 (Table 9) (medium variant assumes European fertility rates will rise to 1.84 by the  
year 2050).

1 virtual extinction and/or replacement of the resident population in a few generations.<sup>47</sup>

2 23. How serious is the possibility of population decline? For a thought experiment,  
3 consider the effects of a total fertility rate of 1.0 babies per woman, close to what many European  
4 countries are now experiencing. At a total fertility rate of 1.0, every 100 people (50 women) in the  
5 first generation will have 50 children (the second generation). This second generation of 50 (25  
6 women) will in turn have 25 children. This third generation of 25 will then produce just 12.5  
7 children, shrinking the population by 87 percent in just four generations (once the older generations  
8 die off).<sup>48</sup>

9 24. Of course this is a radically simplified scenario. Immigrants and their progeny add  
10 to the native population. Progress in longevity means that the consequences of below-replacement  
11 fertility may take years to manifest. But over the long-term, the consequences of below-replacement  
12 fertility are clear. As early as 1982, Kingsley Davis and a colleague warned that if "women in  
13 industrial societies today are not motivated to achieve replacement fertility . . . the social order that  
14 gave rise to it will be replaced by another-either one that supports traditional sex roles or some new  
15 order that rewards women adequately for reproduction."<sup>49</sup>

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17 <sup>47</sup> RON LESTHAEGHE, EUROPE'S DEMOGRAPHIC ISSUES: FERTILITY,  
18 HOUSEHOLD FORMATION, AND REPLACEMENT MIGRATION, Paper presented to the  
19 Expert Group Meeting on Policy Responses to Population Ageing and Population Decline,  
20 Population Division, Dept of Economic and Social Affairs, United Nations in New York October  
16-18, 2000: 5 (Table 1).

21 <sup>48</sup> One review found that:

22 [A] TFR of 1.3 also implies an annual decline of the population size by 1.5 percent  
23 . . . . A TFR of 1.3 also implies a reduction of the birth cohort by 50 percent and a  
24 halving of the stable population size every 45 years. If the TFR declines further and  
persists at a level of 1.0, the annual rate of decline in the stable population rises to 2.4  
percent and the halving times of population size and birth cohorts are merely 29  
years.

25 See, e.g., Hans-Peter Kohler, et al., *The Emergence of Lowest-Low Fertility in Europe During the*  
26 *1990's*, POPULATION AND DEVELOPMENT REVIEW, 28(4) Dec. 2002 641,642.

27 <sup>49</sup> Kingsley Davis and Pietronella van der Oever, *Demographic Foundations of New Sex*  
28 *Roles*, POPULATION AND DEVELOPMENT REVIEW 8(3) Sept. 1982 495, 511. (quoted in John  
C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern Societies: A*  
*Search for Commonalities*, POPULATION STUDIES, 57(3) Nov. 2003 241, 244.)

1           25.     World leaders are beginning to notice. Russian President Putin sounded the alarm  
2 about population decline in his 2000 State of the Nation address, warning, "If the current trend  
3 persists, the nation's survival will be threatened."<sup>50</sup> In 2002, the Japanese Health Minister Chikara  
4 Sakaguchi warned that unless the nation's birthrates stop plunging, "the Japanese race will become  
5 extinct."<sup>51</sup> "Europe Has Every Right to Worry About Disappearing," is the headline over a Canadian  
6 university professor's op-ed:

7           Will Europe Disappear? the magazine cover bluntly asks. The question does not refer  
8 to rising waters caused by global warming . . . it refers to a current European  
9 obsession: depopulation. There will soon be fewer Europeans than there currently  
are. Moreover Europeans will matter much less than they have during the last 200  
years.<sup>52</sup>

10 A London expert warns, "The social and economic upheaval implied by depopulation on this scale  
11 would be immense. . . . Only in the last 15 years has a serious risk arisen that the population of  
12 Europe may not be reproducing itself."<sup>53</sup> Kojima Akira, a professor at Kyoto University in Japan  
13 warns:

14           I once heard one of my friends wonder whether the last Japanese will be a man or  
15 woman. We can no longer laugh at such a joke now that rapid depopulation is  
16 becoming a reality. The decline in the number of children and the aging population  
is not merely an economic problem. It is a serious problem that will force changes in  
the social and political frameworks.<sup>54</sup>

17 A scholar at the Center for Strategic and International Studies in Washington D.C. warns about the  
18 military implications:

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20           <sup>50</sup> ANATOLY ZOUBANOV, "POPULATION AGEING AND POPULATION DECLINE:  
21 GOVERNMENT VIEWS AND POLICIES," PAPER PRESENTED TO THE EXPERT GROUP  
22 MEETING ON POLICY RESPONSES TO POPULATION AGEING AND POPULATION  
DECLINE, POPULATION DIVISION, DEPT OF ECONOMIC AND SOCIAL AFFAIRS, United  
Nations in New York October 16-18, 2000: 4.

23           <sup>51</sup> Reuters, *Japanese Threatened with Extinction, Minister Says* (May 21 2002).

24           <sup>52</sup> John English, *Europe Has Every Right to Worry About Disappearing*, TORONTO STAR,  
25 September 1 2001 at A15.

26           <sup>53</sup> Tim Congdon, *The Ideas Exchange: Expert View-Babies Can Deliver Us From a Crisis*,  
27 INDEPENDENT ON SUNDAY (London), January 13, 2002 at Business page 2.

28           <sup>54</sup> Kojim Akira, *Depopulation in Japan*, JOURNAL OF JAPANESE TRADE AND  
INDUSTRY, September 1, 2002.

1 As NATO grows older, there will be fewer young people to fill military roles. The  
2 shrinking of the alliance's domestic work forces is now a demographic certainty, and  
3 the competition from the private sector will make military recruitment harder than  
4 ever before. Countries with manpower shortages may prove unwilling to commit to  
5 military confrontations... raising questions about the reliability or value of NATO  
6 alliance for the United States.<sup>55</sup>

7 A reporter notes:

8 No-one is entirely sure why so many women in this quaint, cobblestoned city south  
9 of Berlin stopped having babies 10 years ago. But it does not take a degree in  
10 sociology to see the effects of the rock-bottom birthrates. . . . Workers have begun  
11 to dismantle, piece by piece, dozens of vacant apartments, part of a plan to demolish  
12 5,000 units over the next decade.<sup>56</sup>

13 26. "Scotland's population decline has set off alarm bells in the corridors of power. . . .  
14 Economists warn continued slow growth and the falling population are feeding off each other to  
15 create an unstoppable dynamic of decline," warns another journalist.<sup>57</sup> The proportion of  
16 governments expressing concern that their birthrates were too low increased from 11 percent in 1993  
17 to 15 percent in 1999.<sup>58</sup> An even higher proportion (38 percent) of countries expressed major  
18 concern about a related demographic phenomenon-population aging-mostly developed countries in  
19 Europe with below replacement-level fertility.<sup>59</sup> In more developed regions, the proportion of  
20 governments who had policies aimed at increasing population growth rose from 16 percent in 1993  
21 to 23 percent in 1999.<sup>60</sup>

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22 <sup>55</sup> Craig Romm, *Will NATO be Defeated by Demography?*, THE SAN DIEGO  
23 UNION-TRIBUNE, October 4, 2002 at B7

24 <sup>56</sup> Thomas Fuller, *Low Birthrates Pose Challenge for Europe: The Depopulation Bomb*,  
25 INTERNATIONAL HERALD TRIBUNE, December 12, 2002 at 1.

26 <sup>57</sup> Tom Martin, *Focus: With a Falling Birthrates, Experts Warn of Crisis Ahead*, SUNDAY  
27 EXPRESS, Septebmer 28, 2003 at 21.

28 <sup>58</sup> ANATOLY ZOUBANOV, POPULATION AGEING AND POPULATION DECLINE:  
GOVERNMENT VIEWS AND POLICIES, paper presented to the Expert Group Meeting on Policy  
Responses to Population Ageing and Population Decline, Population Division, Dept of Economic  
and Social Affairs, *United Nations* in New York October 16-18, 2000 at 2.

<sup>59</sup> *Id.* at 2-3.

<sup>60</sup> *Id.* at 23 (Table 4). Note, however the proportion committed to maintaining current  
population levels dropped from almost 34 percent to just over 10 percent, and the proportion  
committed to no intervention on population increased from 48 percent to almost 65 percent,

1           27.     What are the consequences of low fertility rates? According to a paper presented at  
2 one recent UN conference, fertility levels of 1.5 to 1.8 children per woman constitute a  
3 strong dearth calling for deep revision of population policy . . . [H]igher risk of labor  
4 shortage and reduced capacity to integrate new immigrants; since the main engine of  
5 integration of foreigners is the school, this integration cannot happen if a minimal  
6 fertility is not realized among the resident population.<sup>61</sup>

6           28.     As fertility levels fall to 1.2 to 1.5 children per woman (the European average), the  
7 result is "[h]eavy and structural contraction, which digs a deep hole at the base of the pyramid  
8 and consequently compromises the future of the society at large . . . the resident population is  
9 progressively replaced by a continuous and bulky inflow of immigrants."<sup>62</sup> As fertility falls to less  
10 than 1.2 children per woman, as in Spain and Italy, the situation becomes an  
11 [e]xtreme case that is less and less rare, namely in Southern Europe and in the former  
12 Eastern bloc. A severe amputation of the base of the age pyramid is taking place  
13 under our eyes. . . . Acute and rapid aging process; deep and longlasting migratory  
14 dependency that could be unbearable or unmanageable. . . .<sup>63</sup>

14           29.     The familiar population explosion is replaced by a population implosion or

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16  
17 indicating the difficulties liberal democracies have in policies that appear to interfere with the private  
18 ordering of sexual and childbearing choices, as well as the financial pressures to reduce the cost of  
19 child allowances and other fertility subsidies. As populations age, political pressures to reduce  
20 support for children might also be expected to increase, since the UN estimates that elderly cost  
21 twice as much a child in terms of government and social supports, mostly due to high medical costs.  
22 UNITED NATIONS, REPLACEMENT MIGRATION: IS IT A SOLUTION TO DECLINING AND  
23 AGEING POPULATIONS? 93 (2000), *available at*: <http://www.un.org/esa/population/publications/migration/migration.htm> ("A number of researchers . . . report that when considering  
the public provision of programs or taking into account private non-medical expenses, public  
education expenses and medical care, the costs are roughly two and a half times greater to support  
an older person (aged 65 or older) than to support a young person (under 20 years of age).").

24           <sup>61</sup> JEAN-CLAUDE CHESNAIS, THE INVERSION OF THE AGE PYRAMID AND THE  
25 FUTURE POPULATION DECLINE IN FRANCE: IMPLICATIONS AND POLICY RESPONSES,  
26 Paper presented at the Expert Group Meeting on Policy Responses to Populating Ageing and  
Population Decline in New York October 16-18, 2000. Population Division, Department of  
Economic and Social Affairs, United Nations: 3.

27           <sup>62</sup> *Id.*

28           <sup>63</sup> *Id.*

1 "exponential decrease."<sup>64</sup> Financial consequences include "a growing transfer of resources for the  
2 elderly (pension and health care costs) to the detriment of younger workers," which can create a  
3 "feedback effect, creating a disincentive to fertility."<sup>65</sup> An older labor force "means more rigidity, less  
4 geographical and occupational mobility, smaller capacity to adapt to economic change; this could  
5 represent a threat to innovativeness which is so important in global competition."<sup>66</sup> Then there is  
6 "downward pressure on the value of assets" especially the housing market. "In a shrinking and  
7 greying population, the supply of vacant houses grows faster than the demand, thus reducing the  
8 prices . . . family capital could melt."<sup>67</sup>

9       30. In Italy, at current fertility levels (1.2 children per woman), the population will fall  
10 from 57.3 million in 2000 to 36.8 million in 2050.<sup>68</sup> Italy is already one of the "oldest" countries in  
11 the world.<sup>69</sup> In 1995, children under the age of 15 comprised just under 15 percent of the population;  
12 almost 4 percent of Italians were over age 80.<sup>70</sup> If current fertility rates continue, by 2050 there will  
13 be twice as many octogenarians as children in Italy.<sup>71</sup> There is no agreement on the causes of low  
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15       <sup>64</sup> *Id.* at 2.

16       <sup>65</sup> Chesnais, *supra* note 61, at 8.

17       <sup>66</sup> *Id.* at 10.

18       <sup>67</sup> *Id.*

19       <sup>68</sup> ANTONIO GOLINI, POSSIBLE RESPONSES TO POPULATION AGEING AND  
20 POPULATION DECLINE: THE CASE OF ITALY. Paper presented at the Expert Group Meeting  
21 on Policy Responses to Population Ageing and Population Decline in New York October 16-18,  
22 2000. Population Division, Department of Economic and Social Affairs, United Nations: 2.

23       <sup>69</sup> *Id.* at 2. "Italy has now become the "oldest" country in the world, recording the highest  
24 proportion of population aged 65 and over, and the lowest proportion of people aged under 15.

25       <sup>70</sup> RITA-MARIA TESTA, FEWER AND OLDER ITALIANS, MORE PROBLEMS?  
26 LOOKING FOR SOLUTIONS TO THE DEMOGRAPHIC QUESTION, Paper presented at the  
27 Expert Group Meeting on Policy Responses to Population Ageing and Population Decline in New  
28 York October 16-18, 2000. Population Division, Department of Economic and Social Affairs, United  
Nations: Table 1.

<sup>71</sup> *Id.* (predicting children to comprise 8.3 percent of the population, and octogenarians 15.7  
percent).

1 fertility, which are likely to be complex.<sup>72</sup> But the move away from preference for marriage, as well  
2 as a decline in the extent to which marriage is seen as a childbearing institution, play a clear role:

3 Low fertility can also be linked to the movement away from marriage, which many  
4 western European countries have experienced for the recent decades. Of course,  
5 marriage is no longer a pre-condition for childbearing in most of these populations,  
6 but it remains true that married couples have a higher fertility than non-married  
7 people, even those who live in a "marriage-like" cohabitation.<sup>73</sup>

8 31. Similarly another UN analysis focused on "the interaction of marital and reproductive  
9 behaviors resulting in below-replacement fertility":

10 The demographic transition from high to replacement fertility has consistently been  
11 associated with the implementation of reproductive choices within marital unions.  
12 Post-transitional developments have been driven mostly by transformations of  
13 partnership behavior. During the last decades of the twentieth century, the family as  
14 a social institution changed, obligation and commitment with regard to formal  
15 marriage eroded and new forms of partnership proliferated in many countries. The  
16 range of options for individuals expanded. These options consisted of a permanent  
17 or much more prolonged state of celibacy, and of partnership that did not assume  
18 formal contractual status and may or may not have involved childbearing. The  
19 diversification of partnership options relaxed obligations to previously strict social  
20 norms when choosing the path of union formation. Marriage and parenthood were  
21 starting to exist independently of each other. . . .<sup>74</sup>

22 32. Once the social, cultural, economic, and legal changes that produce population decline  
23 are in place, they become extremely difficult to reverse, especially in democratic societies. Children  
24

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25 <sup>72</sup> For a discussion of theories (and an introduction to the literature on causes of low-fertility),  
26 see John C. Caldwell and Thomas Schindlmayr, *Explanation of the Fertility Crisis in Modern  
27 Societies: A Search for Commonalities*, POPULATION STUDIES, 57(3):241-263 (2003).

28 <sup>73</sup> PATRICK FESTY, LOOKING FOR EUROPEAN DEMOGRAPHY, DESPERATELY?  
29 Paper presented at the Expert Group Meeting on Policy Responses to Population Ageing and  
30 Population Decline in New York October 16-18, 2000. Population Division, Department of  
31 Economic and Social Affairs, United Nations: 3. Patrick Festy also stated:

32 The countries with the highest TFRs, France and UK, are those in which low  
33 nuptiality has been compensated for by the rise of fertility out of marriage. In the  
34 countries with very low period fertility, the decline in marriages has been directly  
35 consequential for fertility, because marriage remains the place for childbearing,  
36 without any substitutes for it.

37 *Id.*

38 <sup>74</sup> Population Division, Department of Economic and Social Affairs, *United Nations  
39 Secretariat*, 2002. "Partnership and Reproductive Behavior in Low-Fertility Countries,"  
40 POPULATION NEWSLETTER 74 (December): 4 (emphasis added).

1 don't vote and older people do. Once a population has disconnected marriage and childbearing, and  
2 the norms supporting marriage as a procreative union have weakened or disappeared, there is little  
3 political leaders can do to improve the situation for young families without creating enormous  
4 resistance. Coming up with the necessary resources to keep pension promises becomes a central  
5 preoccupation. Even as Europe begins to dwindle, "European governments were for the most part  
6 ignoring the problem, 'In practical terms nothing has been done, or just very, very marginally,'" said  
7 Dr. Carlo De Benedetti, an Italian financier who created a foundation to study the effects of aging  
8 in Europe.<sup>75</sup>

9 33. Whatever the specific causes, the larger point remains: far from making marriage  
10 obsolete as a regulator of childbearing, widespread contraceptive technology (combined with  
11 profound economic changes associated with industrialization that make children an expense rather  
12 than an asset to families) may actually make more salient, not less, the traditional role of marriage  
13 in encouraging men and women to make the next generation that society needs. As Philip Longman  
14 points out, the levels of depopulation now projected for Japan rival the levels experienced by Europe  
15 during the Black Plague:<sup>76</sup>

16 [F]orecasts by the UN and other organizations show that, even in the absence of  
17 major wars or pandemics, the number of human beings on the planet could well start  
18 to decline within the lifetime of today's children. . . . Long before then, many nations  
19 will shrink in absolute size, and the average age of the world's citizens will shoot up  
20 dramatically. . . . No industrialized country still produces enough children to sustain  
21 its population over time, or to prevent rapid population aging. Germany could easily  
22 lose the equivalent of the current population of what was once East Germany over  
23 the next half-century. Russia's population is already contracting by three-quarters of  
24 a million a year. Japan's population, meanwhile, is expected to peak as early as 2005,  
25 and then to fall by as much as one-third over the next 50 years—a decline equivalent,  
26 the demographer Hideo Ibe has noted, to that experienced in medieval Europe during  
27 the plague.<sup>77</sup>

28 34. Relatively high birth rates in America (just below replacement level), coupled with

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25 <sup>75</sup> Thomas Fuller, *Low Birth Rates Pose Challenge for Europe: The Depopulation Bomb*,  
26 INTERNATIONAL HERALD TRIBUNE, December 12 2002 at 1.

27 <sup>76</sup> Phillip Longman, *The Global Baby Bust*, FOREIGN AFFAIRS 83(3) May/June 2004 64,  
28 66.

<sup>77</sup> *Id.* at 65-66.

1 high levels of immigration, make the American experience, to date, considerably different than the  
2 European. But the underlying reality is true for all societies including America: high birth rates may  
3 not be better than lower birth rates; but societies that fail to reproduce do not survive. Every society  
4 needs an institution that encourages men and women to have children if they want them.

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

### 9 **DO CHILDREN NEED MOTHERS AND FATHERS?**

10 36. The final historic purpose of marriage is to encourage men and women to create a  
11 particular kind of family form: one where children have both their own mother and their own father  
12 in a single family. By making marriage a permanent sexual union based on the fidelity of both  
13 spouses, the state seeks to increase the likelihood that children will be raised in "intact" families.  
14 State preferences for marriage over other kinds of unions transmit a clear message to the next  
15 generation: the man and the woman who make the baby are supposed to stick around, take care of  
16 each other and their baby, too. As twelve family scholars pointed out recently:

17 Marriage exists in virtually every known human society. . . . At least since the  
18 beginning of recorded history, in all the flourishing varieties of human cultures  
19 documented by anthropologists, marriage has been a universal human institution. As  
20 a virtually universal human idea, marriage is about the reproduction of children,  
21 families, and society. . . . marriage across societies is a publicly acknowledged and  
22 supported sexual union which creates kinship obligations and sharing of resources  
23 between men, women, and the children that their sexual union may produce."<sup>78</sup>

24 37. I and others have written extensively on the social science evidence on the importance  
25 of intact, married biological parents elsewhere.<sup>79</sup> There is now an enormous body of social science  
26

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27 <sup>78</sup> WILLIAM J. DOHERTY, WILLIAM A. GALSTON, NORVAL D.GLENN, JOHN  
28 GOTTMAN ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM  
THE SOCIAL SCIENCES 8-9 (Institute for American Values) (2002)

<sup>79</sup> LINDA J. WAITE AND MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY  
MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY  
(Doubleday 2000); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage  
Law*, 62(3) LA L. REV. 773 (2002); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why*

1 evidence which supports the common wisdom of humanity that has created a broad, non-partisan  
2 scholarly consensus that family structure matters. In the last thirty years, thousands of studies  
3 evaluating the consequences of marriage have been conducted in various disciplines (e.g.,  
4 psychology, sociology, economics, and medicine). Twelve leading family scholars summarized the  
5 research literature this way: "Marriage is an important social good associated with an impressively  
6 broad array of positive outcomes for children and adults alike. . . . [W]hether American society  
7 succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public  
8 concern."<sup>80</sup>

9 38. Among their conclusions:

10 Marriage increases the likelihood that children enjoy warm, close relationships with parents.

11  
12 Cohabitation is not the functional equivalent of marriage.

13  
14 Children raised outside of intact married homes are more likely to divorce or become unwed  
15 parents themselves.

16  
17  
18 *and How Should the Law Support Marriage?* 18 N.D. J.L. ETHICS & PUBLIC POL'Y 225 (2004);  
19 Maggie Gallagher, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family*  
20 *Structure and the Best Interests of the Child*, MARGINS LAW REVIEW (forthcoming 2004);  
21 Maggie Gallagher & Joshua Baker, *Do Mothers and Fathers Matter?*, iMAPP Policy Brief (Feb. 27,  
22 2004), *available at* [www.marriagedebate.com](http://www.marriagedebate.com). *See also* WILLIAM J. DOHERTY, ET AL., WHY  
23 MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES  
24 (Institute for American Values 2002) at 6; Paul R. Amato and Alan Booth, A GENERATION AT  
25 RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (Harvard University Press 1997);  
26 SARAH MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT:  
27 WHAT HURTS, WHAT HELPS (HARVARD UNIVERSITY PRESS 1994); Kristin Anderson  
Moore, et al., 2002. "Marriage from a Child's Perspective: How Does Family Structure Affect  
Children and What Can We Do About It?", *Child Trends Research Brief*  
(Washington, D.C.: ChildTrends)(June):1 (*available at* [http://www.childtrends.org /PDF](http://www.childtrends.org/PDF/MarriageRB602.pdf)  
[/MarriageRB602.pdf](http://www.childtrends.org /PDF/MarriageRB602.pdf)); THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES, 2000.  
(New York: Institute for American Values), 11, *available at* [www.marriagemovement.org](http://www.marriagemovement.org).

28 <sup>80</sup> WILLIAM J. DOHERTY, ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE  
CONCLUSIONS FROM THE SOCIAL SCIENCES (Institute for American Values 2002) at 6.

1 Marriage reduces child poverty.

2  
3 Divorce increases the risk of school failure for children, and reduces the likelihood that they  
4 will graduate from college and achieve high status jobs.

5  
6 Children in intact married homes are healthier, on average, than children in other family  
7 forms.

8  
9 Babies born to married parents have sharply lower rates of infant mortality.

10  
11 Children from intact married homes have lower rates of substance abuse.

12  
13 Divorce increases rates of mental illness and distress in children, including the risk of  
14 suicide.

15  
16 Boys and young men from intact married homes are less likely to commit crimes.

17  
18 Married women are less likely to experience domestic violence than cohabiting and dating  
19 women.

20  
21 Children raised outside of intact marriages are more likely to be victims of both sexual and  
22 physical child abuse.<sup>81</sup>

23 39. They conclude,

24 Marriage is more than a private emotional relationship. It is also a social good. Not  
25 every person can or should marry. And not every child raised outside of marriage is  
26 damaged as a result. But communities where good-enough marriages are common  
27 have better outcomes for children, women, and men than do communities suffering  
28 from high rates of divorce, unmarried childbearing, and high-conflict or violent

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<sup>81</sup> *Id.*

1 marriages.<sup>82</sup>

2 40. Recent analyses by mainstream child research organizations confirm this consensus  
3 that family structure matters across ideological and partisan lines. For example, a *Child Trends*  
4 research brief summed up the scholarly consensus:

5 Research clearly demonstrates that family structure matters for children, and the  
6 family structure that helps the most is a family headed by two-biological parents in  
7 a low-conflict marriage. Children in single-parent families, children born to  
8 unmarried mothers, and children in stepfamilies or cohabiting relationships face  
9 higher risks of poor outcomes. . . . There is thus value for children in promoting  
10 strong, stable marriages between biological parents.<sup>83</sup>

11 41. An Urban Institute scholar concludes, "Even among the poor, material hardships were  
12 substantially lower among married couple families with children than among other families with  
13 children. . . . The marriage impacts were quite huge, generally higher than the effects of education.  
14 The impacts [of marriage] were particularly high among non-Hispanic black families."<sup>84</sup> A Centers  
15 for Disease Control report notes, "Marriage is associated with a variety of positive outcomes, and  
16 dissolution of marriage is associated with negative outcomes for men, women, and their children."<sup>85</sup>  
17 A Center for Law and Social Policy Brief concludes, "Research indicates that, on average, children  
18 who grow up in families with both their biological parents in a low-conflict marriage are better off  
19

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20 <sup>82</sup> *Id.* at 18.

21 <sup>83</sup> Kristin Anderson Moore, et al., 2002. "Marriage from a Child's Perspective: How Does  
22 Family Structure Affect Children and What Can We Do About It?", *Child Trends Research Brief*  
23 (Washington, D.C.: Child Trends) (June): 1 (available at <http://www.childtrends.org/PDF/MarriageRB602.pdf>). This research brief on family structure does not compare outcomes for children in  
24 same-sex couple households to children in other types of families.

25 <sup>84</sup> ROBERT I. LERMAN, IMPACTS OF MARITAL STATUS AND PARENTAL  
26 PRESENCE ON THE MATERIAL HARDSHIP OF FAMILIES WITH CHILDREN, The Urban  
27 Institute 2002 (Urban Institute Washington, D.C. )(July2002) at 27 (available at  
<http://www.urban.org/url.cfm?ID=410538>).

28 <sup>85</sup> MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, FIRST MARRIAGE  
DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES, CDC Advance Data no.  
323 (May 31, 2001 ), at 1

1 in a number of ways than children who grow up in single-, step-, or cohabiting-parent households."<sup>86</sup>

2 42. The social costs associated with alternative family forms have never been formally  
3 estimated at the national level, but are likely to be substantial. As one group of scholars and civic  
4 reformers noted:

5 Divorce and unmarried childbearing create substantial public costs, paid by  
6 taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child  
7 abuse, domestic violence, and poverty among both adults and children bring with  
8 them higher taxpayer costs in diverse forms: more welfare expenditures; increased  
remedial and special education expenses; higher day-care subsidies; additional  
child-support collection costs; a range of increased direct court administration costs  
incurred in regulating.<sup>87</sup>

9 43. While scholars continue to disagree about the size of the marital advantage and the  
10 mechanisms by which it is conferred,<sup>88</sup> the weight of social science evidence strongly supports the  
11 idea that family structure matters and that the family structure that is most protective of child  
12 well-being is the intact, biological, married family. This consensus is not of course a universal one.  
13 Both courts and advocates who favor same-sex marriage often argue that family structure is not very  
14 important or is unrelated to marriage. Testifying before Congress, Professor Judith Stacey argued:

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16 <sup>86</sup> Mary Parke, 2003. "Are Married Parents Really Better for Children? What Research Says  
17 About the Effects of Family Structure on Child Well-Being," *CLASP Policy Brief* no. 3 (Washington,  
18 D.C.: Center for Law and Social Policy) (May): 6. These are findings about the family structure  
debate in general. On the question of sexual orientation and parenting, the brief summarizes the  
social science this way:

19 Although the research on these families has limitations, the findings are consistent:  
20 children raised by same-sex parents are no more likely to exhibit poor outcomes than  
21 children raised by divorced heterosexual parents. Since many children raised by gay  
22 or lesbian parents have undergone the divorce of their parents, researchers have  
23 considered the most appropriate comparison group to be children of heterosexual  
24 divorced parents. Children of gay or lesbian parents do not look different from their  
counterparts raised in heterosexual divorced families regarding school performance,  
behavior problems, emotional problems, early pregnancy, or difficulties finding  
employment. However, as previously indicated, children of divorce are at higher risk  
for many of these problems than children of married parents.

25 *Id.* at 5.

26 <sup>87</sup> THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES, (Institute for  
27 American Values: New York:), 2000 at 11. Available at [www.marriagemovement.org](http://www.marriagemovement.org).

28 <sup>88</sup> See, e.g., E. MAVIS HEATHERINGTON & JOHN KELLY, FOR BETTER OR FOR  
WORSE-DIVORCE RECONSIDERED (W. W. Norton & Co. 2002)

1 The research shows that what places children at risk is not fatherlessness, but the  
2 absence of economic and social resources that a qualified second parent can provide,  
3 whether male or female. . . . Moreover, the research on children raised by lesbian and  
4 gay parents demonstrates that these children do as well if not better than children  
5 raised by heterosexual parents. Specifically, the research demonstrates that children  
6 of same-sex couples are as emotionally healthy and socially adjusted and at least as  
7 educationally and socially successful as children raised by heterosexual parents.<sup>89</sup>

8 44. However, as the *Child Trends* brief cited above indicates, current research finds that  
9 many forms of two-parent families (cohabiting and stepfamilies, for example) compare unfavorably  
10 with the intact, married biological family in terms of promoting child well-being.<sup>90</sup> Existing research  
11 on children raised by same-sex couples is preliminary, and many scholars have raised serious doubts  
12 about its reliability (at this stage) as a source of guidance for public policy.<sup>91</sup> Especially, I would  
13 argue, given the weight of evidence now existing in favor of married mothers and fathers for child  
14 well-being.

15 45. Norms attaching marriage and childbearing have certainly weakened, and this fact  
16 has been used to argue that there is no longer any rational relation between marriage and family  
17 structure. In *Goodridge*, for example, the court argued that by allowing gays and lesbians as well as  
18 single mothers to adopt, the state legislature had already decided that family structure was not  
19 important to children:

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20 <sup>89</sup> WHAT IS NEEDED TO DEFEND THE BIPARTISAN DEFENSE OF MARRIAGE ACT  
21 OF 1996?: HEARING BEFORE THE SUBCOMM. ON THE CONSTITUTION, CIVIL RIGHTS  
22 AND PROPERTY RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 108th Cong.,  
23 (2003) (written statement of Prof. Judith Stacey, Ph.D., Department of Sociology, New York  
24 University).

25 <sup>90</sup> Kristin Anderson Moore, et al., 2002. "Marriage from a Child's Perspective: How Does  
26 Family Structure Affect Children and What Can We Do About It?", *Child Trends Research Brief*  
27 (Washington, D.C.: Child Trends) (June): 1 (*available at* [http://www.childtrends.org/PDF/Marriage  
28 RB602.pdf](http://www.childtrends.org/PDF/Marriage_RB602.pdf)). This research brief on family structure does not compare outcomes for children in  
29 same-sex couple households to children in other types of families.

30 <sup>91</sup> *See, e.g.*, Diana Baumrind, 1995. "Commentary on Sexual Orientation: Research and  
31 Social Policy Implications," *Developmental Psychology* 31 (No. 1): 130; Affidavit of Stephen Lowell  
32 Nock, *Halpern v. Attorney General of Canada*, No. 684/00 (Ont. Sup. Ct. of Justice); Robert Lerner  
33 & Althea K. Nagai, 2001. *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*  
34 (Washington, D.C.: Marriage Law Project). For a summary of the existing research see Maggie  
35 Gallagher & Joshua Baker, *Do Mothers and Fathers Matter?*, iMAPP Policy Brief (Feb. 27, 2004),  
36 *available at* [www.marriage Debate.com](http://www.marriage Debate.com).

1 [T]he Commonwealth affirmatively facilitates bringing children into a family  
2 regardless of whether the intended parent is married or unmarried, whether the child  
3 is adopted or born into a family, whether assistive technology was used to conceive  
4 the child, and whether the parent or her partner is heterosexual, homosexual, or  
5 bisexual. . . . Protecting the welfare of children is a paramount State policy.  
6 Restricting marriage to opposite-sex couples, however, cannot plausibly further this  
7 policy. "The demographic changes of the past century make it difficult to speak of  
8 an average American family. The composition of families varies greatly from  
9 household to household." Massachusetts has responded supportively to "the changing  
10 realities of the American family," and has moved vigorously to strengthen the  
11 modern family in its many variations.<sup>92</sup>

12 46. But adoption is the way the law helps cope with needs of children who, by definition,  
13 do not have the ideal situation, where not even one parent is able or willing to care for them. Under  
14 these circumstances, the state legislature may well be rationally concerned about getting any parent  
15 at all for a child rather than keeping children in foster care in hopes of obtaining a theoretical "ideal"  
16 family form. Such a legislative choice does not at all suggest a decision by the state legislature that  
17 family structure does not matter for children. The existence of children in many family forms may  
18 well justify widening efforts to help children in nonmarital families. But do they render legal  
19 preferences for marriage as the only generally reliable way to give children the love and care of both  
20 their mom and dad irrational or discriminatory? No.

#### 21 **LEGAL JUSTIFICATIONS FOR THE REGULATION OF INTIMACY**

22 47. By what right does the government intrude on the deeply personal realm of intimacy?  
23 What is the public purpose involved in creating marriage laws preferring certain kinds of  
24 relationships (e.g., faithful, opposite-sex couples, committed to permanence) over other visions of  
25 what love and care should be?

26 48. Legal preferences for marriage are justified by the underlying purposes of marriage:  
27 to regulate the sexual relationships that produce children in order to (a) discourage men and women  
28 from having children in fragmented families and (b) encourage the creation of children under the  
29 conditions in which they are most likely to flourish, and pose the least burdens to the community.  
30 Sex still makes babies, society needs babies, and babies still need mothers and fathers.

31 49. By affirming and preferring marriage, the law is directing young men and women

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32 <sup>92</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962-63 (Mass. 2003) (quoting *Troxel*  
33 *v. Granville*, 530 U.S. 57, 63-64 (2000)) (internal citations omitted).

1 sexually attracted to opposite sex into the kind of sexual unions where (a) children can be  
2 encouraged; (b) children will have mothers and fathers; and (c) women will not be handicapped by  
3 the enormous burdens of parenting alone. The more men and women who are married, the fewer  
4 non-marital births. The more stable marriages are, the safer men and women feel about having  
5 children, and the more likely that "accidental" children will be protected.

6 50. If this analysis is correct, it is not clear what the parallel or comparable state interest  
7 in regulating gay and lesbian relationships that is sufficient to justify the intrusion on private  
8 decisions about intimacy, might be.

9 Executed on October \_\_, 2004, at \_\_\_\_\_.

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

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13 \_\_\_\_\_  
14 Maggie Gallagher.  
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11 SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO  
STATE OF CALIFORNIA

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

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4365

Case No.: CGC 04-428794

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

**DECLARATION OF ALAN  
CHAMBERS IN SUPPORT OF  
CCF'S MOTION FOR SUMMARY  
JUDGMENT**

17 )  
18 )  
19 Plaintiffs, )

20 vs. )

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

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

23 Defendants. )  
24 )

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1 **DECLARATION OF ALAN CHAMBERS**

2 1. I am the President of Exodus International, headquartered in Orlando, Florida  
3 (www.exodus-international.org).

4 2. I began a successful transformation from homosexuality to heterosexuality in 1991.  
5 My testimony is set forth in the remaining paragraphs.

6 **Early Childhood**

7 3. My memory is such that I remember specific events that occurred from the age of one.  
8 I have almost total recall from age two to present. That said, recalling my earliest memories, I always  
9 felt "different." Different came to mean a lot of things, but mostly I felt different from those I should  
10 have been most similar to: my dad, my brothers and my same-sex peers. They all seemed to possess  
11 qualities, interests and feelings that I didn't.

12 4. These differences became a point of contention as I got older. Others noticed and  
13 teased me for not participating in sports, for not being "one of the guys," and for being "one of the  
14 girls." I was most at home with my mom, sisters and girl friends - being a boy wasn't something I  
15 wanted or understood.

16 5. The teasing I experienced, mostly from my same sex peers and father, only alienated  
17 me further from all things male. I wanted nothing to do with the reality of being a boy or a man; I  
18 did crave good male attention and affirmation, however, which led me to "dream" about it. At first  
19 my "dreams" were of my being accepted by guys, but they quickly turned into my wishing I was a  
20 girl so that guys would really like me - not sexually as I was just a kid and didn't understand this  
21 component yet. I knew that boys liked girls, and I wanted boys to like me.

22 6. A teenage boy molested me when I was 9 years old. For the first time a popular,  
23 good-looking guy liked me, or so I thought. I didn't like what he was doing, per se, but he was  
24 paying attention to me. My innocence was stolen and my craving for simple camaraderie was  
25 hijacked and confused with sex.

26 **Middle School/High School/College**

27 7. As I grew up, went through puberty and into early adulthood, my sexual attractions  
28

1 became exclusively homosexual, though I did experience crushes on girls. However, the strength  
2 of what I felt for guys could not be matched. They possessed something I had to have, and my desire  
3 for them was almost emotionally cannibalistic. I would see a guy that I wanted to look like, act like,  
4 and be liked by, and my sexual fantasy satisfied that longing.

5 8. The older I became, the less "fantasy" sufficed. I had some sexual encounters in  
6 middle and high school, but went full force into a homosexual lifestyle during college. My activities  
7 ranged from sexually anonymous to emotionally committed. I was a sexual addict, as was every  
8 other homosexual person I was involved with from my friends to my partners - homosexual life was  
9 all about sex.

### 10 Change

11 9. I grew up conflicted over my sexuality. I never wanted or chose to have same-sex  
12 attractions. Like every other gay person I met, I wanted to change. The difference for me was I  
13 heard about the possibility and decided to act on it.

14 10. My faith absolutely guided me and took first priority. I had experienced enough of  
15 the emptiness of gay life to know I wanted more than a life of sexual encounters and excess. I tried  
16 gay church, but it was the same as everything else, only with the added twist of trying to force myself  
17 to believe God liked what I was doing.

18 11. In 1991, I heard about Exodus International, an organization that had been around  
19 since 1976, and had witnessed tens of thousands of men and women find freedom from  
20 homosexuality. This organization was biblically based, which was important to me. In the fall of  
21 1991, I called the local Exodus ministry in Orlando, and my journey began.

22 12. Transformation seemed impossible, immeasurable and improbable. But, the  
23 alternative was even less appealing. I did not want to go back to what I had experienced in gay life  
24 - the hopelessness, instability, and superficial existence I had almost come to accept.

25 13. At the local Exodus ministry, I found depth, honesty, and empathy. I found people  
26 who didn't accept that homosexuality just happened and that one had to "go with it." I found people  
27 who took the time to research, dissect, and get to the bottom of things that might have been at the  
28 root of their same-sex struggles. Ultimately, I found security. In a setting with other seemingly gay

1 men I was able to, for the first time in my life, connect on a level deeper than physical and sexual  
2 attraction. For me, the major benefit of this group was the camaraderie that I was looking for in  
3 childhood, but on a more adult level.

4 14. For the first time ever, I was able to establish friendships with guys that didn't cause  
5 me to "want" them inappropriately, and those relationships never ended with us in bed doing  
6 something that didn't end up satisfying the ache anyway. Of course, this didn't miraculously cure my  
7 inappropriate sexual addiction, but it did begin to. I learned, through experience, that my desire for  
8 men was at its core a desire for friendship, acceptance and affirmation - not a true emotional,  
9 physical and sexual compatibility like heterosexuality. Homosexuality was an immature and selfish  
10 drive meant only to satisfy one's own desires and needs, not a mutual relationship based on meeting  
11 each other's needs.

## 12 **Heterosexuality**

13 15. I quickly learned that opposite of homosexuality wasn't heterosexuality, and that  
14 simply not engaging homosexually wouldn't "cure" or "fix" me; ceasing all homosexual behavior  
15 didn't make me straight.

16 16. Homosexuality took a lifetime to develop. I discovered that heterosexuality was  
17 developed also, but only did so as the psychological stages of development, essential for every  
18 human, were successfully gone through. Funny, I learned about this in high school psych class, but  
19 it seemed no one paid much attention to the validity of this.

20 17. My process into heterosexuality was difficult to persevere, but successful as I did.  
21 I recognized that I didn't feel like a man and didn't perceive myself that way. I was, at best, a man  
22 that would always be less than other men, or, at worst, a woman trapped in a man's body. I had to  
23 change my thinking.

24 18. Thankfully, an older heterosexual man (I was 20, he was 35) at my church befriended  
25 me - he took it upon himself to mentor me. This man listened to me, affirmed me, hugged me  
26 appropriately, and treated me (despite my past) as his equal - like a man. He was kind of a father  
27 figure to me, and I relied on him for a time. I began to notice as time went on that I needed him less,  
28 and that my confidence grew in my ability to be a man even when I wasn't with him.

1           19.     This confidence led me to build friendships with other men my age. As I did, I grew  
2 even more confident and secure in my masculine identity. I noticed that the more healthy friendships  
3 I developed, the more normal I felt and even became. Where I once only developed deep friendships  
4 with girls, I was now friends with only healthy heterosexual guys.

5           20.     Several years into this process, I began to want more than just friendships with guys;  
6 I also wanted a friendship with a girl, but not the same kind of friendship I had with them before, and  
7 not necessarily like the kind I had with guys currently. So, I looked for what I wanted - tried a few  
8 times to develop this "new" type of relationship, but struck out.

9           21.     In 1996, I was sitting in a room with about 50 other singles at a Bible study when a  
10 girl walked in that caught my eye. I didn't lust after her or want to date her, but I did want to get to  
11 know her. She was beautiful, obviously a lot of fun, and smart. I tried to get to know her, but she  
12 didn't give me the time of day. I tried harder, to no avail.

13          22.     To make a long story short, we eventually became friends, then exclusive friends, and  
14 then started dating. Today, she is my wife. Now, I skipped a lot - but the fact is, in the last few  
15 paragraphs, I just described the normal stages of psychological development for healthy sexuality.  
16 For a boy, it is key that the dad models sameness and security enough to send the boy into peer  
17 relationships. When a boy is secure in his gender and with his identity as a male, then he develops  
18 into puberty where he becomes attracted to the object of his curiosity - to what is different in every  
19 way: girls.

20          23.     For boys that develop same-sex attractions, this development goes awry in one, and  
21 sometimes all, stages. Heterosexuality is the norm and the best, because that is how we were  
22 created. Same-sex relationships are critical, but not as a means for sexual or emotionally exclusive  
23 relationships. Heterosexual monogamous relationships have no equal.

#### 24 **Exodus International**

25          24.     In 2001, I became the President of Exodus. Today, our mission is proclaiming to,  
26 educating and impacting the world with the truth that freedom from homosexuality is possible. We  
27 have, over the past 28 years, witnessed hundreds of thousands of men and women find a life beyond  
28 homosexuality; children and teens, when caught early enough, may be spared from a life of gender

1 identity confusion.

2           25. We are on the forefront, together with organizations like The National Association  
3 for the Research and Therapy of Homosexuality (www.narth.com), of being able to not only help  
4 those affected by unwanted homosexuality, and to help steer kids back onto a healthy path of  
5 sexuality, but also to prevent homosexuality through parental education.

6           Executed on November \_\_, 2004, at Orlando, Florida.

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

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Alan Chambers

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**DECLARATION OF RANDY  
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22 City and County of San Francisco, CA and )  
NANCY ALFARO, in her official capacity )  
as the San Francisco County Clerk, )

23 Defendants. )  
24 )

1 **DECLARATION OF RANDY THOMAS**

2 1. I am the Membership Director of Exodus International, headquartered in Orlando,  
3 Florida (www.exodus-international.org).

4 2. I began a successful transformation from homosexuality to heterosexuality in 1992.  
5 My testimony is set forth in the remaining paragraphs.

6 **Reflecting on My School-Aged Years**

7 3. It was about 4:00 a.m. on January 1, 1990. I was reeking of alcohol and had just been  
8 violently sick in the bathroom. When I managed to stagger to my feet, I looked in the mirror. My face  
9 was pale, my eyes lifeless. I heard a voice in my head: "This is what you will look like when you  
10 die." I began to wail, and my soul cried out, "Why?" This experience was the culmination of a  
11 lifetime of asking "Why?" Why had my life been so painful? Why was I even alive? I had suffered  
12 through drug overdoses, abuse and "worry-free" homosexual sex. Why wasn't life bringing me  
13 genuine satisfaction? The inner pain had started early in my life.

14 4. At the age of five, I promised my mother that I would care for her, in light of the  
15 abuse that we all suffered from my father. If he would not care for her, then I would. As I grew older,  
16 the pain intensified. I didn't fit in with other boys, but I craved attention from them to replace what  
17 I was missing from my father. When an older man would smile at me, my heart would leap with joy.  
18 At age ten, I began to sexualize this desire to be close to males but my same-sex longings only led  
19 to further confusion.

20 5. By 16, I had started drinking and had my first homosexual experience. When I walked  
21 into my first gay nightclub, I was ecstatic. People were friendly, fun--and just like me! By the age  
22 of 18, I was dating men and making frequent trips to the local gay bars. When I finally "came out"  
23 to my family, I was thrown out of the house with nowhere to go but the gay community. A drag  
24 queen took me in for a while, and gave me a place to stay.

25 6. Ironically, my first sense of belonging, safety and identity came through the gay  
26 community. I believed with my whole heart that I was born homosexual and I never thought about  
27

1 changing my sexual desires or behavior; I knew I could only be happy as a homosexual. However,  
2 as I spent more and more time "escaping" the pain in my life through sex and alcohol, I began to  
3 realize how bad my life was becoming.

#### 4 **The Process of Change**

5         7. I didn't know God but, amazingly, He began to work in my life. A former co-worker  
6 invited me to a Bible study. I attended, and met a man who had left homosexuality. He told me about  
7 his upcoming marriage and the changes in his life. At first, I wasn't interested, but a few days later,  
8 I realized that my life was empty, except for the pain. For the first time I honestly prayed, "God,  
9 please help me." An aunt gave me a change to "start over" and a month later, I left Nashville and  
10 hopped a bus to her home in Dallas. Immediately I found the best gay bars and drugs available,  
11 which led me to the night of New Year's 1990. That night I hit bottom. My soul cried out and God  
12 lifted His eyes to me once again. Then I met a woman at work who became one of my best friends.  
13 Steffany didn't care that I was gay. She talked about acceptance and unconditional love. She invited  
14 me to a twelve-step program dance and I had such a good time that I didn't even miss drinking.

15         8. For the next 17 months, I stopped drinking. Through my sobriety and an improved  
16 position at work, I felt as if I was on my way to a fulfilling gay life. I couldn't see that my vanity and  
17 pride would eventually cause me to fall back into alcoholism. During my relapse, I lost touch with  
18 Steffany. She had become a Christian and when I began the 12-step program meetings again in  
19 March 1992, all she could talk about was Jesus. She had changed from a carefree, wild girl to a calm,  
20 reflective, peace-filled woman. I asked her about homosexuality and was angered by her initial  
21 response: "I believe it's a sin." Then she continued, "But God would not call it a sin if there wasn't  
22 something better." She went on to tell me how one of my past lovers had recommitted his life to  
23 Christ and was getting married to a woman. It was then that I decided to take a serious look at God.  
24 Homosexuality aside, I could see my innate sinfulness. I realized that I needed Jesus and in May  
25 1992, I accepted Him as my Savior. After visiting Steffany's church several times, I knelt next to my  
26 couch at home and buried my face into my hands.

1           9.       "God," I prayed, "forgive me my sin and I accept Jesus as Lord. Please be my Lord  
2 and Savior." I started crying and when I opened my eyes, I sensed Him standing right there beside  
3 me. I felt different inside. I was overwhelmed at the richness of God's love for me. I did not  
4 understand the Bible's viewpoint on homosexuality, but I knew God would make Himself known  
5 to me and prove His Word to be true. Then the Holy Spirit started revealing things to me. One day  
6 while I was praying, I thought of the first man with whom I fell in love. I had given Ron everything,  
7 my whole being. I realized that Jesus wanted to be Lord of my life and He was jealously grieved over  
8 my submission to homosexuality. He also grieved over the pain and destruction that we were causing  
9 both Him and ourselves.

10           10.       When I experienced how much God knew me and loved me in spite of my past, I  
11 realized that He was not the hateful, tyrannical God that I had imagined. My heart changed. Suddenly  
12 I was overwhelmed by the depth of His love for me. Next, the Holy Spirit explained the passage of  
13 Scripture that I disliked the most, Leviticus 18:20, "When one man lies with another as with a  
14 woman, it is an abomination before the Lord." God showed me that the abomination is not the two  
15 men; it is the act they are committing. God hates the act of homosexuality because it separates us  
16 from Him. Homosexuality is a destructive way to meet our God-given needs for masculine  
17 affirmation. (Only a year after our relationship ended, Ron died from complications due to AIDS.)

18           11.       In July 1992, I heard about Living Hope, an Exodus-affiliated ministry in Arlington,  
19 Texas, from the worship leader at my church. I began attending support group meetings, where I met  
20 people who loved me and told me the truth about Christ's redemptive power for homosexuals. God  
21 helped me to discover the roots of homosexuality in my life and how to meet the legitimate needs  
22 I had with the help of the Body of Christ, other friends and family. It was difficult at first. I would  
23 have felt more comfortable on Mars than in a church group! I didn't understand Christian culture;  
24 the gay community was all I had known. I had to deal with fear and grief as everything changed in  
25 my life.

26           12.       Over the next four years as I participated in a local Vineyard church, I learned a lot.  
27  
28

1 Scott Musick, who was director at Living Hope at that time, was a mentor to me, and he taught me  
2 about forming healthy relationships. I started volunteering at another local church and eventually  
3 began sharing my testimony. Within the "safe haven" of the Body of Christ, I encountered the  
4 wonderful nature and nurturing of God. I learned that I was not gay or ex-gay. I was Randy, a man  
5 of God, a peer among brothers and sisters who were seeking Christ's will.

6 13. A major part of my healing from inappropriate sexual ties came one day when I made  
7 a list of all the inappropriate sexual partners in my past. One by one I lifted up these people to God  
8 and asked Him to forgive me, break any spiritual ties and bless them with the knowledge of His Son.  
9 Afterward I felt so clean. I was reminded again that day that I could go to God with any problem or  
10 sin.

11 14. About three years into my healing process, I went out to dinner a few times with a  
12 friend who was overcoming lesbianism, just so we could talk about our lives. One time she told me,  
13 "Randy, you are a good man. I completely respect you as a man." I was speechless. I had heard those  
14 exact words from men before, but this conversation deeply moved me. God showed me the blessing  
15 of the feminine. Slowly I was developing an appreciation for the opposite sex.

16 15. Today I am at peace. The Lord is defining me and I am learning more of how to love  
17 and seek Him. I have learned to call Him my Father and trust that His Word is true. My life had not  
18 been easy since becoming a Christian. But, in Christ, my life now has real depth and genuine  
19 contentment. No longer do I have to ask "Why?" Through Jesus Christ, I have found the answers to  
20 my deepest questions.

## 21 **Exodus International**

22 16. I joined the staff of Exodus in June 2002, and currently serve as Membership  
23 Director. Exodus is comprised of more than 125 member ministries located in 14 regions of North  
24 America. We have a team of Regional Representatives that oversee and guide Exodus member  
25 ministries, supervise the application process for ministries, churches and therapists wanting join the  
26 Exodus network and provide training and networking opportunities which helps the Exodus network  
27

1 remain one of the most credible influential organizations in the world related to the topic of  
2 homosexuality. I have had the opportunity to speak at workshops at several Universities, and also  
3 have testified before the Massachusetts State Legislature Judiciary Committee concerning same-sex  
4 marriage.

5 17. Today, our mission is proclaiming to, educating and impacting the world with the  
6 truth that freedom from homosexuality is possible. We have, over the past 28 years, witnessed  
7 hundreds of thousands of men and women find a life beyond homosexuality; children and teens,  
8 when caught early enough, may be spared from a life of gender identity confusion.

9 25. We are on the forefront, together with organizations like The National Association  
10 for the Research and Therapy of Homosexuality ([www.narth.com](http://www.narth.com)), of being able to not only help  
11 those affected by unwanted homosexuality, and to help steer kids back onto a healthy path of  
12 sexuality, but also to prevent homosexuality through parental education.

13 Executed on November \_\_, 2004, at Orlando, Florida.

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

16  
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18 \_\_\_\_\_  
19 Randy Thomas  
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10

11 SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO  
STATE OF CALIFORNIA

12 Coordination Proceeding Special )  
13 Title (Rule 1550(b)) )  
14 **MARRIAGE CASES** )  
15 RANDY THOMASSON and )  
CAMPAIGN FOR CALIFORNIA )  
16 FAMILIES )  
17 )  
18 )  
19 Plaintiffs, )  
20 vs. )  
21 GAVIN NEWSOM, individually and )  
in his official capacity as Mayor of the )  
City and County of San Francisco, CA and )  
22 NANCY ALFARO, in her official capacity )  
as the San Francisco County Clerk, )  
23 )  
24 Defendants. )

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4365

Case No.: CGC 04-428794

**DECLARATION OF A. DEAN BYRD  
IN SUPPORT OF CCF'S MOTION  
FOR SUMMARY JUDGMENT**

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

1 **DECLARATION OF A. DEAN BYRD**

2 1. I am a Clinical Professor, University of Utah School of Medicine with appointments  
3 in the Department of Family and Preventive Medicine and in Department of Psychiatry. I also hold  
4 an adjunct clinical appointment in the Department of Family Studies, also at the University of Utah.  
5 I am the President of the Thrasher Research Fund, which provides grants for research relating to  
6 children’s diseases. I am a member of the American Psychological Association, the Utah  
7 Psychological Association (where I currently serve on the Governing Board). I am also a member  
8 of NARTH (National Association for Research and Therapy of Homosexuality) where I previously  
9 served as vice-president and currently serve as member of the Scientific Advisory Board. NARTH  
10 has a membership which is approaching 2000 psychiatrists, psychologists and other mental health  
11 professionals. I hold a doctoral degree in psychology from Brigham Young University, a post  
12 doctoral degree in Child and Family Psychology from Virginia Commonwealth University and  
13 Medical College of Virginia, a post doctoral degree in Behavioral Medicine from Loyola University,  
14 a master’s degree in Public Health from the University of Utah’s School of Medicine as well as a  
15 master’s degree in Business Administration from the University of Phoenix. I have authored more  
16 than 100 publications, including books, peer-reviewed journal articles, book chapters and Opinion  
17 Editorials, many of which address issues of human sexuality.

18 2. In 2000, I co-authored, with Drs. Joseph Nicolosi and Richard W. Potts, a report,  
19 published in PSYCHOLOGICAL REPORTS, “Beliefs and Practices of Therapists Who Practice Sexual  
20 Reorientation Psychotherapy.” A copy of that Report is attached as Exhibit 1. In the Report, we  
21 present the results of a survey of 206 psychotherapists who practice sexual therapy.<sup>1</sup> Of those 206,  
22 187 therapists said they believed homosexuality is a development disorder and that the 1973 decision  
23 by the American Psychiatric Association to “depathologize” homosexuality was politically motivated  
24 and unscientific. The therapists believe that the majority of dissatisfied homosexually oriented clients

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25  
26 <sup>1</sup> Sexual therapy offers an individual, who desires to change his sexual orientation, to  
27 diminish, through therapy, their homosexuality and develop their heterosexual potential. *See also*  
28 Dean A. Byrd, *A Meta-Analytic Review of Treatment of Homosexuality*, PSYCHOLOGICAL REPORTS,  
2002, pp. 1139-1152, attached hereto as Exhibit 2.

1 who seek therapy benefit from it, experiencing both changes in their sexual orientation and  
2 improved psychological functioning. The Report concludes that those who persist in providing re-  
3 orientation therapy do so because they believe it is an effective and ethical treatment option for their  
4 clients.

5 3. The purpose of the Report was to portray the results of a survey about beliefs and  
6 practices of therapists of various training who practice sexual therapy. The results of the survey may  
7 be helpful to psychotherapists and mental health professionals who are seeking to examine carefully  
8 the varied viewpoints about what constitutes an appropriate therapeutic response to homosexuality.  
9 Our findings give insight into why some therapists persist in providing therapy to clients in the face  
10 of intense professional opposition to the practice. The survey also gives insight into the potential  
11 outcomes of therapy from the perspective of these psychotherapists. We asked the therapists the  
12 following questions: (1) whether they think therapy is helpful to their clients, (2) what types of  
13 changes in sexual orientation their clients have reported through participation in therapy, (3) what  
14 types of emotional and psychological changes their clients have reported through participation in  
15 therapy, (4) how they approach therapy, and (5) what are their beliefs about homosexuality.<sup>2</sup>

16 4. In conclusion, we found that the majority of the therapists reject currently prevailing  
17 views of homosexuality; namely, that it is genetically determined or “inborn,” a normal variation of  
18 human sexual orientation, and immutable or unchangeable. Instead, they hold to the view that  
19 homosexuality is a combination of “nature” and “nurture,” and subject to change.<sup>3</sup> Although these  
20 views are unpopular and not widely accepted in the “mainstream” mental health professions, these  
21 therapists believe that there is considerable theoretical and empirical support for their views. It  
22 appears the therapists in our survey hold to their views because they believe that such views are  
23

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24  
25 <sup>2</sup> Eighty-nine (39%) of the therapists said that at one time in their life they had experienced  
26 sexual-identity confusion. Fifty-five (26.7%) of the therapists reported that at one time they  
perceived their own sexual orientation as partly homosexual.

27 <sup>3</sup> Thirty-eight (18%) of the therapists reported that more than 90% of their male homosexual  
28 clients had described a “significant decrease in unwanted homosexual thoughts, feelings, and  
behaviors” during therapy.

1 ethically and scientifically warranted.

2 5. In the 2001-2002 Volume of Regent University Law Review, 14 REGENT U. L. REV.  
3 383, I co-authored an article entitled “Homosexuality: Innate and Immutable?” A copy of the Article  
4 is attached as Exhibit 3. The Article examines the status of science in answering the question of  
5 whether being homosexually oriented is a choice, or whether there is a “gay gene.” The Article  
6 discusses how homosexuality has in the very short span of about twenty-five years evolved from an  
7 outcast practice to one that is promoted by some to constitute normality. Finally, the consequences  
8 of homosexuality are addressed, through examination of various statistics and their implications.

9 6. The Article begins with a critical review of three main studies that activists claim  
10 proves there is a “gay gene,” demonstrating that in some cases, the authors of those studies  
11 themselves admit that they could not prove homosexuality is genetic.<sup>4</sup>

12 7. The Article highlights the fact that while all behavior has connections with an  
13 individual’s personal biology, it is not necessarily dependent on them. A favorite analogy of Dr.  
14 Satinover, a long-time researcher in this area, is that of a basketball player. No one can say that  
15 genetics do not play a role in the success of almost all National Basketball Association stars. Traits  
16 such as height, hand-eye coordination and reflex speed are highly important to a basketball player.  
17 Yet, just because a man is six feet nine inches tall and has very fast reflexes and incredible shooting  
18 accuracy does not mean that he must play in the NBA. He could go on to be a runner, perhaps, or  
19 even a researcher, and ignore the genetic traits. The genetic traits do not determine whether a person  
20 will use the traits he or she has been given.

21 8. The Article also devotes substantial discussion to the factors that cause  
22 homosexuality, as well as the physical, mental and social risks associated with homosexuality.

23 9. Finally, the Article revisits the results of the 2000 report on re-orientation therapy.  
24 Although the popular perception of homosexuality has been that, at least in homosexual men,

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26 <sup>4</sup> Simon LeVay, for example, explains that “It is important to stress what I didn’t find. I did  
27 not prove that homosexuality is genetic, or find a genetic cause for being gay. I didn’t show that gay  
28 men are born that way, the most common mistake people make in interpreting my work.” 14 REGENT  
U. L. REV. at 388 (quoting Simon LeVay, QUEER SCIENCE 6 (1996)).

1 homosexuality is caused by biological factors, the most current and best scientific evidence appears  
2 to show that at most, homosexuality is only influenced by biology in a predisposing way. What the  
3 evidence demonstrates is that “No one has to stay homosexual or lesbian, in orientation or behavior,  
4 if he or she doesn’t want to and informed support is available.”<sup>5</sup>

5 10. In fact, most scientists, even those who favor gay rights, reject the argument that  
6 homosexuality is innate and immutable. The premier researchers in human sexuality from Columbia  
7 University School of Medicine note: “At clinical conferences one often hears . . . that homosexuality  
8 is fixed and unmodifiable. Neither assertion is true. . . . The assertion that homosexuality is genetic  
9 is so reductionist that it must be dismissed out of hand as general principle of psychology.”  
10 (Friedman, R.C. and Downey, J.I., 2002, *Sexual Orientation and Psychoanalysis: Sexual Science*  
11 *and Clinical Practice*, New York: Columbia University Press, p. 39). Reports in the *Monitor on*  
12 *Psychology*, the premier magazine of the American Psychological Association offer similar  
13 supportive research. For example, Diamond (2000) from her research concluded: “sexuality identity  
14 is far from fixed in women who aren’t exclusively heterosexual.” (Diamond, L.M., 2000, *Sexual*  
15 *Identity, Attractions, and Behavior Among Sexual Minority Women Over a 2 Year Period*,  
16 *DEVELOPMENTAL PSYCHOLOGY*, 36, (2), pp. 241-250; Murray, B., 2000, *Sexual Identity is Far From*  
17 *Fixed in Women Who Aren’t Exclusively Heterosexual*, *MONITOR ON PSYCHOLOGY*, 31, 3, pp. 15).  
18 Dr. Ellen Scheter’s research, also reported in a recent publication of the American Psychological  
19 Association, provides additional support. (Greer, M., *Labels May Oversimplify Women’s Sexual*  
20 *Identity, Experiences*, *MONITOR ON PSYCHOLOGY*, 2004, 35, 9, p. 28).<sup>6</sup>

21 11. More importantly, the fluidity of homosexuality has found scientific support in the  
22 research conducted by Robert L. Spitzer, who ironically was the Columbia University psychiatrist  
23 who lead the charge to remove homosexuality from the psychiatric diagnostic manual in 1973

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26 <sup>5</sup> 14 REGENT U.L. REV. at 422 (quoting NEIL WHITEHEAD & BRIAN WHITEHEAD, MY  
27 GAY GENES MADE ME DO IT! A SCIENTIFIC LOOK AT SEXUAL ORIENTATION 9 (1999).

28 <sup>6</sup> See A. Dean Byrd, Shirley E. Cox & Jeffrey W. Robinson, *The Innate-Immutable Argument*  
*Finds No Basis in Science*, May 17, 2001, a copy of which is attached as Exhibit 4.

1 (ARCHIVES OF SEXUAL BEHAVIOR, 2003, 32, 45, pp. 403-417, a copy of which is attached as Exhibit  
2 5).

3 Executed on November \_\_, 2004, at \_\_\_\_\_.

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

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8 A. Dean Byrd  
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