Case No. S147999

IN THE SUPREME COURT
OF
THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE

NOS. A110449, A110450, A110451, A110463, A110651, A110652

SAN FRANCISCO SUPERIOR COURT
NOS. JCCP4365, 429539, 429548, 504038
LOS ANGELES SUPERIOR COURT NO. BC088506

Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF CONSTITUTIONAL LAW PAMELA S. KARLAN, PAUL BREST, ALAN E. BROWNSTEIN, WILLIAM COHEN, DAVID B. CRUZ, MARY L. DUDZIAK, SUSAN R. ESTRICH, DAVID FAIGMAN, PHILIP B. FRICKEY, RONALD R. GARET, KENNETH L. KARST, GOODWIN LIU, LAWRENCE C. MARSHALL RADKIHA RAO, KATHLEEN M. SULLIVAN, JONATHAN D. VARAT, AND ADAM WINKLER IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 8.520, amici curiae hereby respectfully apply for leave to file an amicus curiae brief in support of the individuals, organizations, and local governments challenging the marriage exclusion (hereafter respondents.)

Amici are the following professors of constitutional law at law schools in the State of California:[1]

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Amici are authors of several of the leading casebooks on constitutional law and authors of many other scholarly works related to the issues before this Court. Several amici have participated in the litigation of cases involving the rights of gay people, including *Bowers v. Hardwick* (1986) 478 U.S. 186, *Romer v. Evans* (1996) 517 U.S. 620, and *Lawrence v. Texas* (2003) 539 U.S. 558.

Amici have widely varying perspectives on many constitutional issues, but agree that well-accepted constitutional principles afford a narrow basis for ruling in favor of the parties challenging the marriage exclusion in this case. Amici thus have a substantial interest in the issue

before this Court, and believe that their expertise can help the Court assess more fully the merits of respondents' position.

Amici recognize that the parties in this case rely solely on California, rather than federal, constitutional law, and urge this Court to do so. And amici note that California's Constitution has often been construed to provide broader protection than its federal counterpart, *see Committee to Defend Reproductive Rights v. Myers*(1981) 29 Cal. 3d 252, 261 n.4 (citing cases). In this brief, however, amici rely upon their expertise in federal constitutional law to illustrate their arguments because this Court's analytic methodology for interpreting the California Constitution so often parallels analysis by courts construing the federal Constitution.

SUMMARY OF ARGUMENT

Many who support the position of the State and the Governor in this case suggest that this Court would exceed the boundaries of its power if it were to declare the exclusion of same-sex couples from marriage unconstitutional. These dark warnings are without foundation. Since nearly the beginning of the Republic, courts have understood, in Chief Justice John Marshall's words, that when "it is a Constitution we are expounding," judicial interpretation may and indeed often must take into account changed social circumstances and cultural understandings. Indeed, under the State's and the Governor's static view of constitutional interpretation, the Supreme Court could not have desegregated public schools or held women fit to serve in positions traditionally held only by men. Thus a decision in favor of the challengers in this case would be well within the bounds of ordinary constitutional jurisprudence.

Nor need a decision in favor of the challengers involve the creation of any new right or protected class. Such arguments are made eloquently by respondents and need not be repeated here. But amici respectfully suggest that there is another narrower path to a similar conclusion. In a long line of cases, both federal and state, equal protection has been held to impose a contingent obligation on government: even if a state need not create a privilege in the first place, some such privileges are so important that once created they must be distributed even-handedly. Under such decisions, discrimination that would be otherwise permissible has been invalidated when it impinges upon the right to vote, the right to appeal, or the right to speak in a non-traditional forum. The same principle has been used to invalidate discrimination with respect to marriage and divorce – even when drawn along lines that are not otherwise a suspect or quasi-

suspect classification. This modest approach to equal protection is sufficient to decide this case in favor of the challengers.

ARGUMENT

I. Constitutional Interpretation Appropriately Takes Into Account Changes in Social Circumstances and Cultural Understandings

The State and the Governor defend the current refusal to permit same-sex couples to marry essentially on the grounds of tradition. They claim that marriage has "[f]rom the beginning of California's statehood" meant a union between a man and a woman, Governor's Answer Brief at 1, and thus that continued restriction should be immune from constitutional attack. That argument presupposes a particular vision of constitutional interpretation: one in which courts ask simply how a constitutional provision would have been understood at some time in the past and then apply that understanding in a fixed fashion for all time.

But that vision misrepresents the actual practice of constitutional interpretation, which has never rested on a static understanding of what a constitution forbids or requires. At least since *McCulloch v. Maryland* (1819) 17 U.S. 316, American courts have understood that, when it is "*a constitution* [they] are expounding," *id.* at 407 (emphasis in the original), their interpretation should take into account that constitutions are intended "to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *Id.* at 415. "In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be." *Weems v. United States* (1910) 217 U.S. 349, 373. Otherwise, a constitution's "general principles would have little value and be converted by precedent into impotent and lifeless formulas." *Id.*

Across a wide range of issues, therefore, constitutional interpretation has taken into account changed social circumstances and cultural understandings. *Brown v. Board of Education* (1954) 347 U.S. 483, provides a signal example in the context of the federal constitutional guarantee of equal protection. There, the original understanding of the Fourteenth Amendment could not determine for all time the constitutionality of school segregation. Indeed, the United States Supreme Court conducted reargument of the school segregation cases after specifically asking the parties to brief the question whether the drafters and ratifiers of the Fourteenth Amendment "understood or did not understand, that it would abolish segregation in public schools," *Brown v. Board of Education* (1953), 345 U.S. 972. But the same Congress that submitted the amendment to the states had also segregated the schools in the District of Columbia. Rather than bind itself to that historical practice of discrimination, the Court declared that the amendment's original history was "not enough to resolve the problem with which we are faced." 347 U.S. at 489. Instead, it rested its opinion on the *contemporary* reality of the place of public education in the nation's civic, economic and social order:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. . . .
>
> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for

> later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 492-93.

The United States Supreme Court has similarly interpreted the equal protection clause in light of an evolving understanding of gender discrimination. After all, the framers of the Fourteenth Amendment limited enfranchisement in section 2 of the amendment to men, *see Minor v. Happersett* (1875) 88 U.S. 162, and as late as *Hoyt v. Florida* (1961) 368 U.S. 57, the Supreme Court declined "to canvass . . . the continuing validity of this Court's dictum in *Strauder v. West Virginia*, 100 U.S. 303, 310 to the effect that a State may constitutionally 'confine' jury duty 'to males,'" a "constitutional proposition [that] has gone unquestioned for more than eighty years," 368 U.S. at 60. And yet, in *Reed v. Reed* (1971) 404 U.S. 71, the Court began the process of more skeptically scrutinizing classifications based on sex, holding in *Craig v. Boren* (1976) 429 U.S. 190, and its progeny that distinctions based on gender must be subjected to heightened scrutiny and for the most part be struck down. No constitutional amendment was required to work this extension of equality; indeed the Equal Rights Amendment was proposed many times but never ratified.

So, too, with respect to the due process clause and the right of gay people to engage in consensual intimate relationships. As Justice White pointed out in his now-overruled opinion for the Court in *Bowers v. Hardwick* (1986) 478 U.S. 186, 192-93 nn.5-6, a majority of states criminalized sodomy both in 1791, when the Bill of Rights was ratified, and

in 1868, when the Fourteenth Amendment was ratified. Justice Blackmun responded in dissent that:

> [T]he fact that . . . moral judgments . . . may be "'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Roe v. Wade*, 410 U.S. 113, 117 (1973), quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

Bowers, 478 U.S. at 199 (dissenting opinion). In *Lawrence v. Texas* (2003) 539 U.S. 558, the Supreme Court agreed, overruling *Bowers* outright and explaining that:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79.

The equal protection and due process clauses are not unique in drawing specific meaning from the changing context of the times in which they have been interpreted. The Eighth Amendment's prohibition on cruel and unusual punishment has also been interpreted in light of contemporary understandings. The Supreme Court of the United States has recognized for at least fifty years that "the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958) 356 U.S. 86, 100-01 (plurality opinion). Thus, while the Court once upheld the imposition of capital punishment on mentally retarded defendants, *Penry v. Lynaugh* (1989) 492 U.S. 302, and on sixteen and seventeen year-old defendants, *Stanford v. Kentucky* (1989) 492 U.S. 361, it later overturned those holdings in *Atkins v. Virginia* (2002) 536 U.S. 304, and *Roper v. Simmons* (2005) 543 U.S. 551, respectively, because it concluded that "objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice," *Roper*, 543 U.S. at 563, no longer supported executing such defendants. Similarly, at the time of the framing, states engaged in corporal punishment and placed offenders in stocks or pillories. Today, by contrast, such practices violate the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man." *Hope v. Pelzer* (2002) 536 U.S. 730, 738 (quoting *Trop*, 356 U.S. at 100) (brackets and interpolations in the original).

Changed social circumstances have also informed the Supreme Court's interpretation of the contracts clause in Article I, § 10 of the federal Constitution. The clause was included to prevent states from enacting the kind of debtor relief laws that had followed the Revolutionary War, laws that often changed or postponed loan repayment periods. *See generally* Benjamin Wright, Jr., The Contract Clause of the Constitution (1938). And

yet, in *Home Building & Loan Association v. Blaisdell* (1934) 290 U.S. 398, the Supreme Court of the United States upheld a Depression-era Minnesota mortgage moratorium law with precisely these features. While the Court declared that "[e]mergency does not create power," *id.* at 424, it went on to recognize "a growing appreciation" of the public interest in protecting individuals' home ownership, *id.* at 442:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning . . . . When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U.S. 416, 433, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Id. at 442-43.

Judicial interpretation that adapts historic constitutional text to changed social circumstances is equally characteristic of this Court's

jurisprudence as it is of federal constitutional law. The California Constitution's Declaration of Rights, like the federal Fourteenth Amendment, is broad and open-ended in its guarantees; it speaks in terms of "*all* people" enjoying "inalienable rights" to "enjoying and defending life and liberty . . . and pursuing and obtaining safety, happiness, and privacy," Article I, § 1 (emphasis added), and being entitled to "due process of law" and "equal protection," Article I, § 7(a). While the text of these provisions has remained essentially stable for a long time, this Court's *application* of these provisions to particular legal questions has reflected its recognition that constitutional provisions must be interpreted in light of contemporary understandings. There is little question, for example, that the equal protection principles that have been part of the California Constitution through Article I, § 21 of the Constitution of 1879 and through Article I, § 7 of the current Constitution, would not always have been interpreted by the courts to forbid discrimination against gay people. And yet, for nearly thirty years, this Court has interpreted those principles to forbid much discrimination on the basis of sexual orientation. *See*, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458.

And this Court, perhaps informed by social realities in California, where women have long occupied leadership roles in the political, judicial and economic spheres, has gone further under the California equal protection clause than have federal courts under the Fourteenth Amendment, applying strict rather than merely heightened scrutiny to gender-based classifications. *See Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 17-20.

Contemporary understanding that gay men and lesbians enjoy equal rights of citizenship in California is confirmed by the series of laws, executive orders, and local ordinances that have prohibited discrimination

against gay people within this State. *See* Respondents' Opening Brief on the Merits at 32-33 nn. 18-20 (citing statutes, executive orders, and regulations that bar discrimination on the basis of sexual orientation.) Interpreting the California Constitution in line with this contemporary understanding would be entirely consistent with a tradition of constitutional jurisprudence tracing back to Chief Justice Marshall.

II. This Court Need Not Declare any New Right or Protected Class In Order to Hold that Equal Protection Requires the State To Allow Same-Sex Couples To Marry

These cases challenge the proposition that California may constitutionally restrict marriage to opposite-sex couples. This restriction implicates both due process and equal protection concerns: the former because the right to marry is a form of liberty and the latter because the restriction treats lesbians and gay men differently from straight individuals. For reasons set out in detail in respondents' briefs, this Court may choose to strike down the restriction either because it infringes impermissibly on the fundamental right to marry or because it discriminates on the basis of sex and sexual orientation – classifications that should be subjected to heightened judicial scrutiny – or because it offends both simultaneously, since the two guarantees, contained in a single sentence of the California as well as the federal constitutions, are mutually reinforcing. Amici will not repeat that analysis.

Instead, amici focus on the narrower proposition, also sufficient to decide this case: that equal protection sometimes provides a guarantee of equal treatment with respect to important interests – even where courts do *not* go so far as to declare those interests absolutely protected by substantive due process nor to conclude that a line of classification is always suspect as a matter of equal protection. In a range of constitutional

cases, the United States Supreme Court has interpreted equal protection to impose a contingent obligation on government: a state need not create certain privileges or penalties, but if it does so it must be evenhanded in allocating them. Perhaps the most elegant exposition of this constitutional version of the golden rule is Justice Robert Jackson's concurrence in *Railway Express Agency v. New York* (1949) 336 U.S. 106:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 112-13 (Jackson, J., concurring); *see also Eisenstadt v. Baird* (1972) 405 U.S. 438, 454-55 (relying on Justice Jackson's concurrence to strike down Massachusetts' differential treatment of married and unmarried individuals who sought to use contraceptives). As Justice Scalia later observed, "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Director, Missouri Dep't of Health* (1990) 497 U.S. 261, 300 (concurring opinion).

Marriage has long been treated as just such a privilege – so important that even discrimination that is otherwise permissible is not

permissible with respect to it. For example, as detailed below, prisoners may be denied many privileges of everyday life but must be allowed to marry; and fees may be charged even to indigents for bankruptcy petitions and public benefits appeals but not for filings for divorce. Regulation of marriage is but one of a broad range of situations in which the government, having created an institution or established a privilege that it need not have created in the first place, is then required to provide equal access. Appreciation of this longstanding principle provides a narrow basis for ruling for the challengers here.

A. For Marriage as for Voting, Access to the Courts and Speech in Limited Public Forums, Equal Protection Requires that State-Created Privileges Be Distributed on a Nondiscriminatory Basis

Federal equal protection analysis has long had two different strands: under one, discrimination against suspect or quasi-suspect classes is impermissible because such classifications are deemed presumptively irrational; under the other, discrimination that might otherwise be permissible is prohibited because it affects a privilege or penalty so important that it must be distributed even-handedly. Under the latter line of cases, even where exclusion is not along lines of a suspect or quasi-suspect classification, the government must nonetheless provide equal access. Similarly, the federal free speech clause has long been interpreted to require equal access on the basis of viewpoint even to forums that government never need have created in the first place. These areas provide a useful analogy to marriage and divorce cases that follow the same principle.

Voting. With relatively few exceptions, the federal constitution does not require public offices to be filled through elections. *See Sailors v. Board of Education* (1967) 385 U.S. 105, 108-11 (states may choose to select school boards through appointment rather than election).

Nonetheless, once a state decides to choose particular officials by election, the right to vote in such elections becomes fundamental, and any discriminatory distribution of the franchise must be closely scrutinized. For example, in *Kramer v. Union Free School District No. 15* (1969) 395 U.S. 621, the Court applied strict scrutiny to and invalidated a New York statute restricting who could vote in school board elections to registered voters who either owned or rented property within the district or had children attending district schools – even though childless bachelors who live with their parents are not otherwise a suspect class. As the Court summarized the principle in *Bush v. Gore* (2000) 531 U.S. 98 (per curiam), for example, "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College" under Article II, § 1, but nonetheless, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." 531 U.S. at 104.

Access to Court. As a matter of federal constitutional law, states are not generally required by the due process clause to provide appellate review of trial courts' decisions. *Griffin v. Illinois* (1956) 351 U.S. 12, 18. Just as there is no federal constitutional right to vote, there is no federal constitutional right to an appeal. Nonetheless, if states *do* provide such review, they may not condition litigants' access on ability to pay. In *Griffin* itself, the Supreme Court struck down an Illinois rule that effectively conditioned appeals from criminal convictions on the defendant's procurement of a transcript of trial proceedings, reasoning that such a rule deprived indigent defendants of equal access to the appellate process. In

Douglas v. California (1963) 372 U.S. 353, the Court held that the equal protection clause required states to provide indigent defendants with appointed counsel on appeal. And in *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, the Court held that states must provide indigent individuals whose parental rights have been terminated with the right to proceed *in forma pauperis* on appeal. Each of these cases applied demanding equal protection scrutiny even though wealth is not otherwise a suspect classification.

Access to Limited Public Forums. In a variety of circumstances, states may create programs that operate as limited public forums for the discussion of particular issues. Such forums are not the equivalent of streets and parks, the traditional public forums in which no content discrimination of any kind is permissible. States are never obligated to create limited public forums in the first place and may limit them to a given subject matter. But if they do create such forums, they must provide equal access; they may not discriminate on the basis of speakers' viewpoints. So, for example, in *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) 515 U.S 819, the University of Virginia did not have to create a student activities fee or subsidize student publications. But having decided to do so, it could not discriminate against a publication with an explicitly Christian viewpoint. Similarly, in *Arkansas Educational Television Commission v. Forbes* (1998) 523 U.S. 666, the Supreme Court noted that if a public television station decides to conduct candidate debates, it cannot exclude candidates on the basis of their viewpoints (although on the facts of the case before it, the Court held that Forbes's exclusion was justified by his lack of demonstrated support).

This Court's decision in *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal. 3d 252, followed a similar principle. California was not constitutionally obligated to provide a Medi-Cal program. *See id.* at 262. Nonetheless, having decided to fund medical care for indigent

individuals, the state was required to fund abortions as well as other pregnancy-related services because otherwise the program would have the "invidious" effect of "deny[ing] to poor women the right of choice guaranteed to the rich"—an impermissible outcome even if other adverse effects on the basis of wealth were permissible. *Id.* at 286; *see also Danskin v. San Diego Unified School District* (1946) 28 Cal. 2d 536, 545-46 (holding that "[t]he state is under no duty to make school buildings available for public meetings," but "[i]f it elects to do so, . . . it cannot arbitrarily prevent any members of the public from holding such meetings").

Marriage. Like voting and access to court and non-traditional forums, marriage has been held too important a privilege to be distributed along lines that would otherwise constitute a permissible discrimination. This principle was first set forth on the stark facts of *Skinner v. Oklahoma* (1942) 316 U.S. 535, an equal protection decision in which the Court held that three-time thieves may not be sterilized, even if recidivism is not otherwise a suspect classification, because procreation is "is one of the basic civil rights of man," *id.* at 541. The Court later said the same of marriage in a decision invalidating antimiscegenation laws, explaining that "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Loving v. Virginia* (1967) 388 U.S. 1, 12.

This Court had already, two decades earlier, presaged *Loving* in *Perez v. Sharp* (1948), 32 Cal.2d 711, relying on both the due process clause and the equal protection clause to strike down California's ban on interracial marriages. *See id.* at 714 (quoting *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, for the proposition that the due process clause includes

"the right of the individual . . . *to marry*" and concluding that marriage "is a fundamental right of free men" (emphasis in *Perez*)); *id.* at 715-27 (finding that the ban on interracial marriage violated the equal protection clause).

But even when the restriction of marriage does not involve a suspect or quasi-suspect classification, courts have struck down distinctions that they most likely would have upheld had a less important interest been at stake. For example, *Turner v. Safley* (1987) 482 U.S. 78, recognized that prisoners retain the right to marry, even though otherwise, virtually across the board, states are permitted to treat incarcerated individuals differently from free persons. Indeed prisoners must be allowed to marry even while they may be denied basic rights with respect to voting, speech and association. Similarly, *Zablocki v. Redhail* (1978) 434 U.S. 374, struck down a Wisconsin statute that denied marriage licenses to individuals behind on their child support obligations, even though parents with outstanding support obligations are clearly not a suspect or quasi-suspect class.

If anything, the case for even-handedness in allocation of a privilege is stronger for marriage than for voting, access to court, or speech limited public forums, for two reasons. First, equal treatment of all who seek a government-allocated privilege is most important when there is no private substitute for the government-created or –sponsored program. So, for example, in *Boddie v. Connecticut* (1971) 401 U.S. 371, the Supreme Court held that the state was required to allow indigent individuals to file for divorce without paying the otherwise applicable filing fees, even though the Court has tolerated such de facto wealth discrimination with respect to other filing fees such as those for bankruptcy or appeals from denials of public benefits. The Court reasoned that, "given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this

relationship," indigents must be allowed to end their marriages without financial obstacle – even though wealth is not otherwise a suspect classification. *Id.* at 374. And as the Court recognized, the state has a monopoly not only over the dissolution of marriages, but also over the creation of marriages in the first place:

> It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.
>
> *Id.* at 376.

Second, marriage involves an area where due process and equal protection principles converge. In *Loving v. Virginia* (1967) 388 U.S. 1, for example, the Supreme Court of the United States struck down Virginia's ban on interracial marriages on both equal protection and due process grounds. Virginia's law ran afoul of the equal protection clause because it reflected nothing more than "arbitrary and invidious discrimination ... designed to maintain White Supremacy." *Id.* at 10, 11. At the same time, Virginia's law deprived interracial couples of due process by denying them the "freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* at 12. In *Loving*, the two clauses operated in tandem.

Similarly, in *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, the Court rejected the imposition of a fee to appeal the termination of parental rights, treating parental terminations more like divorce proceedings than like bankruptcy not only because of the state's monopoly but also because a fundamental interest was at stake:

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.

519 U.S. at 116 (internal citations and quotation marks omitted).

The same is true in the case now before the Court. Perhaps California need not have created the institution of civil marriage in the first place – an issue we address in the next section of this brief – but having done so, it is not free to engage in forms of discrimination even if in other settings such discrimination might not be suspect. This is so both because the State has made marriage a monopoly with no equivalent private substitute and because marriage involves intimate relationships "basic to civilized man." Thus, this Court need go out on no limb creating new absolute rights or protected classes in order to hold that "the principles of law which officials would impose upon a minority must be imposed generally," *Railway Express*, 336 U.S. at 112 (Jackson, J., concurring) – and that the public privilege of marriage be equally open to all loving and responsible unrelated adults on an equal-opportunity basis.

B. The State Could Not Satisfy Its Obligation To Treat Same-Sex and Opposite Couples Equally By Abolishing the Institution of "Marriage" at this Point

In its June 20 order regarding supplemental briefing, this Court's third question asked, among other things, whether the Legislature could, consistent with the California Constitution, abandon the term "marriage" altogether and simply preserve the underlying rights and obligations that are now associated with marriage under a new nomenclature.

The question whether a state, having created and maintained for more than 150 years the institution of civil marriage, could eliminate that

institution, either in anticipation of or in response to an order to permit same-sex couples to marry, differs substantially from the question whether a state would have been constitutionally required to establish civil marriage in the first place. To be sure, as a *political* matter, it is inconceivable that any American jurisdiction would have failed, particularly in the period when California was entering the Union, to provide for marriage laws. But even if California could initially have decided to recognize and regulate family formation using some other vocabulary, that time is now passed. Marriage has long since become a vital liberty interest.[2] In their Opening and Supplemental Briefs, respondents have explored this proposition at length, and amici will not repeat that argument here.

Rather, we focus on a subsidiary point: the decision to abolish marriage rather than to permit lesbian and gay people to share its benefits would *itself* involve impermissible discrimination. A particularly pointed analogy can be found in the Supreme Court of the United States' decision in *Griffin v. County School Board* (1964) 377 U.S. 218. Following the decision in *Brown*, Prince Edward County, Virginia, was faced with the prospect of having to desegregate its schools. In response, the county simply shut down its schools altogether, preferring to abolish public education rather than to provide it on a nondiscriminatory basis.

---

[2] "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man." Oliver Wendell Holmes, Jr., *The Path of the Law* (1897) 10 Harv. L. Rev. 457, 477.

The Supreme Court, however, held that the federal district court had the power to order the county to reopen, and to fund, its public schools. "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Id.* at 231. So, too, with respect to the institution denominated "marriage." If the state were to abolish the institution in order to deny its benefits to lesbians and gay men, this would constitute a new, and unconstitutional, discrimination on the basis of sexual orientation. *Cf. Board of Education of Island Trees v. Pico* (1982) 457 U.S. 853, 871 (holding that, even though school boards have virtually plenary discretion decide "to choose books to *add* to the libraries of their schools," they cannot "*remove*" them "from school library shelves simply because they dislike the ideas contained in those books," for such targeted removal would constitute impermissible viewpoint discrimination) (emphases in original).

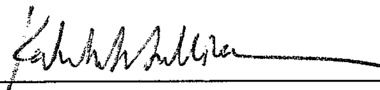
Thus, the option of nondiscriminatory denial of civil marriage to all no longer exists. Any abolition of the civil institution of marriage at this point would bear the unremovable taint of discrimination.

V. CONCLUSION

For the reasons set forth in this brief, amici respectfully request that this Court hold that the State of California must issue marriage licenses to same-sex couples on the same terms as such licenses are issued to opposite-sex couples.

Dated: September 25, 2007

Respectfully submitted,



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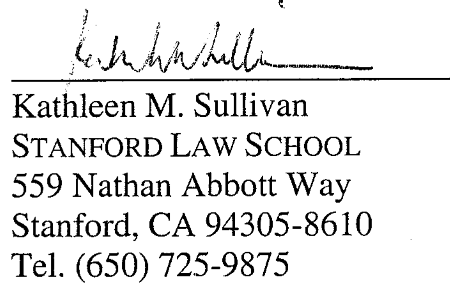
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief Amicus Curiae has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepare this brief, I further certify that the total number of words of this brief is 6,186 words, exclusive of those materials not required to be counted.

I declare under penalty of perjury that this Certificate of compliance is true and correct and that this declaration was executed on 25 September, 2007.

Respectfully submitted,

Kathleen M. Sullivan

By: 

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I, Joanne Newman, declare that I am over the age of eighteen years and I am not a party to this action. My business address is Stanford Law School, 559 Nathan Abbott Way, Stanford, CA 94305.

On September 26, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

BRIEF OF AMICI CURIAE CONSTITUTIONAL LAW PROFESSORS PAMELA S. KARLAN *ET AL.* IN SUPPORT OF THE PARTIES CHALLENGING THE MARRIAGE EXCLUSION

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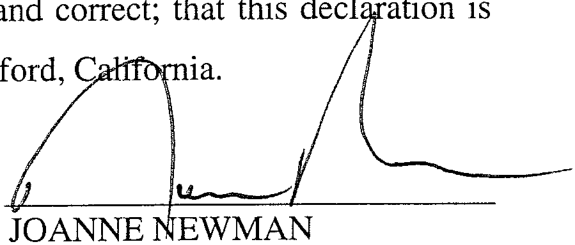

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Court of Appeal Case No. A110451

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

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Campaign for California Families v. Newsom, et al.
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Court of Appeal Case No. A110652

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