APPEAL NO. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF THE STATE OF CALIFORNIA AND GOVERNOR ARNOLD SCHWARZENEGGER

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

Judicial Watch, Inc. ("Judicial Watch") is a public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly monitors on-going litigation, files *amicus curiae* briefs, and prosecutes lawsuits on matters that it believes are of public importance.

The laws of this nation rely on the proper functioning of the courts, including a proper balance of powers and the judiciary's ability to demonstrate restraint. The case at bar raises issues regarding the proper balance of powers between the people, including their elected representatives, and the judiciary. Judicial Watch has undertaken extensive research on these issues and respectfully wishes to share the results of its considerable research with the Court by filing this *amicus curiae* brief.

DISCUSSION

I. Introduction.

In the case at bar, this Court has been called upon by Petitioners to perform "the gravest and most delicate duty" that a court can be called on to perform, that is, review, and possibly annul, the exercise of power by another, coordinate branch

of government. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991) (citation omitted). "It is no small matter for one branch of the government to annul the formal exercise by another and coordinate branch of power committed to the latter . . .." *Methodist Hosp. of Sacramento v. Saylor*, 5 Cal. 3d 685, 692 (Cal. 1971). As a result, various principles of judicial restraint have evolved to guide courts through this "grave and most delicate" task. These principles are discussed below and then applied to the facts of this case.

II. The Separation of Powers Doctrine Guards Against the Concentration of Power in a Single Branch of Government and Protects One Branch Against the Overreaching of the Others.

"The California Constitution establishes a system of state government in which power is divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further states that those charged with the exercise of one power may not exercise any other (Cal. Const., art. III, § 3)." *People v. Bunn*, 27 Cal. 4th 1, 14 (Cal. 2002). This interdict on one branch of government exercising the power of another is commonly known as the separation of powers doctrine. "The separation of powers doctrine protects each branch's core constitutional functions from lateral attack by another branch." *Id.* at 16. This doctrine "not only guards against the concentration of power in a single branch of government;

it also protects one branch against the overreaching of the others." *Kasler v. Lockyer*, 23 Cal. 4th 472, 495 (Cal. 2000) (citations omitted).

III. People Will Remain Free Only When Each Branch, Including the Judiciary, Keeps Within Its Own Power.

The rationale for separate and distinct divisions of power is obvious: when power, which can have a corrupting influence, is vested in one body or person, liberty is in peril. Said another way, the separation of powers doctrine is "a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).[1] In *Federalist No. 47*, James Madison approvingly quoted Montesquieu's eloquent defense of the need for separate and distinct divisions of power:

> 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.' Again: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'

James Madison, *The Federalist No. 47*, 299, 302-303 (G. P. Putnam's Sons ed., 1908) (quoted by *Buckley*, 424 U.S. at 120-121). Hence, our American freedoms are preserved and maintained by the "wise appreciation" of the separation of

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[1] This Court considers the decisions of the United States Supreme Court and lower federal courts regarding the doctrine of separation of powers as persuasive. *See Kasler*, 23 Cal. 4th at 491.

powers doctrine. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

IV. The California Constitution Vests Each Branch of Government with Certain Core or Essential Functions That May Not Be Usurped by Another Branch.

The California Constitution "vest[s] each branch with certain 'core' or 'essential' functions that may not be usurped by another branch." *Bunn*, 27 Cal. 4th at 14 (internal citations omitted). Particularly relevant to this case are the core or essential functions of the legislature and judiciary. "The Legislature is charged, among other things, with 'mak[ing] law . . . by statute.' Cal. Const., art. IV, § 8, subd. (b)." *Id.* The legislative power is the "creative element" of government. *Nougues v. Douglass*, 7 Cal. 65, 70 (Cal. 1857). "This essential function embraces the far-reaching power to weigh competing interests and determine social policy." *Bunn*, 27 Cal. 4th at 14-15.

"Quite distinct from the broad power to pass laws is the essential power of the judiciary to resolve specific controversies between parties." *Id.* at 15 (citation and internal quotation marks omitted); *see also Marin Water & Power Co. v. Railroad Com. of California*, 171 Cal. 706, 711-712 (Cal. 1916) ("The judicial function is to declare the law and define the rights of the parties under it.") (citation and internal quotation marks omitted). It is not the function of the

judiciary "to declare what [the law] should be," *Minor v. Happersett*, 88 U.S. 162, 178 (1875), or otherwise make the law. *See Kopp v. Fair Political Practices Comm.*, 11 Cal. 4th 607, 673 (Cal. 1995) (Mosk, J., concurring) (Judiciary's "province" is "to expound the law, not to make it.") (quoting *Luther v. Borden et al.*, 48 U.S. 1, 41 (1849)); *see also Fowler v. Lindsey*, 3 U.S. 411, 414 (1799) ("But it is the duty of judges to declare, and not to make the law."); and *Supervisors v. Galbraith*, 99 U.S. 214, 219 (1879) ("Our duty is to execute the law, not to make it."). "Their authority is only a negative – never an affirmative – force. It cannot create, it cannot initiate, it cannot put into action any governmental policy of any kind . . .." *Kopp*, 11 Cal. 4th at 673 (Mosk, J., concurring) (citation and internal quotation marks omitted).

Accordingly, the judiciary should not innovate social policy. *See Sharon S. v. Superior Court*, 31 Cal. 4th 417, 443 (Cal. 2003), *cert. denied*, 540 U.S. 1220 (2004) (approving aforementioned principle as stated in *West v. Superior Court*, 59 Cal. App. 4th 302, 306 (Cal. Ct. App. 1997), overruled in part on other grounds by *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (2005)). Instead, the "locus of social policy development" is in the legislature, "especially with respect to the structure and dynamics of the family." *West v. Superior Court*, 59 Cal. App. 4th at 306; *see also Circuit City Stores v. Adams*, 532 U.S. 105, 120 (2001) (It is the province of

legislature, not the courts, "to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes."). When "complex practical, social and constitutional ramifications" exist, the legislature is "better equipped to consider expansion of the current California law should it choose to do so." *West v. Superior Court*, 59 Cal. App. 4th at 306. Legislatures are uniquely suited for this task, possessing "flexible mechanisms for fact finding" and the "power to experiment." *Washington v. Glucksberg*, 521 U.S. 702, 788 (1997) (Souter, J., concurring).

Furthermore, the "role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order. Judges are not knight[s]-errant, roaming at will in pursuit of [their] own ideal of beauty or of goodness." *People v. Carter*, 58 Cal. App. 4th 128, 134 (Cal. Ct. App. 1997) (citation and internal quotation marks omitted). "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 53 (Cal. 1996). "The responsibility" of the judiciary "is to construe and enforce the Constitution

and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations." *Evans v. Abney*, 396 U.S. 435, 447 (1970).

"Courts are not representative bodies. They are not designed to be a good reflex of a democratic society . . .. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); *see also Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 129 (1992) (locally elected legislative bodies are better suited to make policy choices).

V. Judicial Review Is the Gravest and Most Delicate Duty That a Court Can Perform, So Extreme Care and Great Judicial Restraint Must Be Exercised.

The "sensitive balance underlying the tripartite system of government," however, "assumes a certain degree of mutual oversight and influence." *Bunn*, 27 Cal. 4th at 14 (citations and internal quotation marks omitted). For example, "the judiciary passes upon the constitutional validity of legislative and executive actions, the Legislature enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings, and the Governor appoints

judges and participates in the legislative process through the veto power." *County of Mendocino*, 13 Cal. 4th at 53.

This oversight, however, must be exercised with extreme care and great restraint, as it "is no small matter for one branch of the government to annul the formal exercise by another and coordinate branch of power committed to the latter . . .." *Methodist Hosp. of Sacramento*, 5 Cal. 3d at 692. Consequently, in the instance of judicial review of legislation, the United States Supreme Court has described the task as "the gravest and most delicate duty" that a court can be called on to perform. *Rust*, 500 U.S. at 190-191 (citation omitted). Clearly, "[j]udicial 'self-restraint' is an indispensable ingredient of sound constitutional adjudication." *Griswold*, 381 U.S. at 501 (Harlan, J., concurring) (citing and quoting majority opinion).

VI. In Order to Effectuate the Separation of Powers Doctrine, Several Well-Settled and Fundamental Principles of Constitutional Adjudication Must Be Applied in Every Case.

In order to effectuate the separation of powers doctrine, the judiciary has created several well-settled and fundamental principles of constitutional adjudication that must be applied in every case. These principles are observed by California courts. They are discussed in turn below.

A. A Court Must Not Unnecessarily Pronounce Upon the Constitutionality of Any Duly Enacted Statute, Especially When a Statute Raises Novel Constitutional Issues.

"It has heretofore been considered against the policy of this [C]ourt (and of courts of last resort generally) to reach out and unnecessarily pronounce upon the constitutionality of any duly enacted statute." *Palermo v. Stockton Theatres, Inc.*, 32 Cal. 2d 53, 65-66 (Cal. 1948). Said another way, a "court will not decide a constitutional question unless such construction is absolutely necessary." *Estate of Johnson*, 139 Cal. 532, 534 (Cal. 1903). Justice Frankfurter elucidated the reason for this constitutional avoidance principle in his concurring opinion in *Anti-Fascist Committee v. McGrath*:

> [T]his practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature.

341 U.S. 123, 154-155 (1951) (Frankfurter, J., concurring).

This principle is especially applicable when novel constitutional issues are raised. "As a prudential matter," courts should "avoid the unnecessary decision of novel constitutional questions." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 181 (1979); *see also Matrixx Initiatives, Inc. v. John Doe*, 138 Cal. App. 4th 872, 881 (Cal. Ct. App. 2006) ("In an emerging area of the law, we do well to tread

carefully and exercise judicial restraint, deciding novel issues only when the circumstances require.") (citation omitted).

One maxim that springs from the aforementioned general principle of constitutional avoidance is that a "court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it." *Tennessee Publishing Co. v. American Nat'l Bank*, 299 U.S. 18, 22 (1936) (citation omitted). Sometimes the "facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but are more readily subject to discovery through legislative factfinding and experimentation." *Washington*, 521 U.S. at 787 (Souter, J., concurring). In such cases, appellate review of a constitutional issue may prove difficult and premature, and constitutional avoidance is the better course of action. *Id.* at 787-88; *Tennessee Publishing Co.*, 299 U.S. at 22.

B. A Court Must Assume That the Legislature Legislates in Light of Constitutional Limitations, and Such Focused Legislative Judgment on Any Question Enjoys Significant Weight and Deference by the Courts.

Out of respect for a coordinate branch of government, a court must "assume [that the legislature] legislates in the light of constitutional limitations." *Rust*, 500 U.S. at 190-191. And "when the Legislature has enacted a statute with the

relevant constitutional prescriptions clearly in mind . . . the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision." *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 180 (Cal. 1981) (citations omitted). Such a "focused legislative judgment on the question enjoys significant weight and deference by the courts." *Id.* "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations imposed by the Constitution are to be construed strictly, and are not to be extended to include matters not covered by the language used.*" *Id.* (emphasis in original) (citation and internal quotation marks omitted).

C. Statutes Are Presumed Constitutional and Must Not Be Annulled Unless the Constitutional Conflict Is Clear, Positive, and Unquestionable.

"[A]ll presumptions and intendments are in favor of the constitutionality of a statute enacted by the legislature." *Jersey Maid Milk Products Co. v. Brock*, 13 Cal. 2d 620, 636 (Cal. 1939); *see also San Francisco v. Industrial Accident Comm.*, 183 Cal. 273, 280 (Cal. 1920) (The "acts of a state legislature are to be presumed constitutional until the contrary is shown."); and *Bush v. Vera*, 517 U.S. 952, 992 (1995) ("Statutes are presumed constitutional."). "In case of doubt, every presumption, not clearly inconsistent with the language or subject matter, is

to be made in favor of the constitutionality of the act." *Industrial Accident Com.*, 183 Cal. at 280; *see also Jersey Maid Milk Products Co.*, 13 Cal. 2d at 636 ("[A]ll doubts are to be resolved in favor and not against the validity of a statute."). Indeed, even in the "case of a fair and reasonable doubt as to its constitutionality, the statute should be upheld and the doubt resolved in favor of the expressed wishes of the people as given in the statute." *Jersey Maid Milk Products Co.*, 13 Cal. 2d at 636.

"[B]efore an act of a coordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, and unquestionable . . .." *Id.* "[C]ourts should not and must not annul, as contrary to the constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution" *Methodist Hosp. of Sacramento*, 5 Cal. 3d at 692; *see also National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 604 (1949) (Statute must not be annulled unless "clear showing that it transgresses constitutional limitations.").

In *Ashwander v. Tennessee Valley Authority*, Justice Brandeis surveyed prior court decisions elucidating this presumption of validity:

> Mr. Justice Washington said, in *Ogden v. Saunders,* 12 Wheat. 213, 270: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this Court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench."
>
> Mr. Chief Justice Waite said in the Sinking-Fund Cases, 99 U.S. 700, 718: "This declaration [that an act of Congress is unconstitutional] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

297 U.S. 288, 355 (1936) (Brandeis, J., concurring) (cited approvingly by *The People v. Navarro*, 40 Cal. 4th 668, 675 (Cal. 2007)).

D. **The Burden of Establishing Unconstitutionality Is on Those Who Assail a Statute.**

"It is a salutary principle of judicial decision, long emphasized and followed by this Court, that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it . . ..'" *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 584 (1935) (as quoted by *Brown v. Superior Court*, 5 Cal. 3d 509, 520 (Cal. 1971)). This burden never shifts.

E. Facial Challenges Are Disfavored and Those Who Bring Them Bear a Heavy Burden.

The United States Supreme Court has stated that "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) and citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored")); *see also Goldin v. Public Utilities Com.*, 23 Cal. 3d 638, 660 (Cal. 1979) (quoting *Broadrick*, 413 U.S. at 613). Consequently, any persons advancing a facial challenge to a statute confronts a "heavy burden" in advancing their claims. *Id.*

"To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . .." *Pacific Legal Foundation*, 29 Cal. 3d at 180-181 (emphasis in original); s*ee also United States v. Salerno*, 481 U.S. 739, 745 (1987) ("the fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . .."). "Rather, petitioners must demonstrate that the act's provisions inevitably pose a

present total and fatal conflict with applicable constitutional prohibitions." *Pacific Legal Foundation*, 29 Cal. 3d at 180-181; *see also Salerno*, 481 U.S. at 745 (statute not facially unconstitutional unless every reasonable interpretation of it would be unconstitutional); and *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-97 (1984) (same)).

F. Courts Are Reluctant to Expand the Concepts of Substantive Due Process and Equal Protection.

Courts have "always been reluctant to expand the concept of substantive due process . . .." *Collins*, 503 U.S. at 125 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226 (1985)).[2] The "doctrine of judicial self-restraint requires [a court] to exercise the utmost care whenever [] asked to break new ground in this field." *Id.* "A similar judicial restraint marks [a court's] approach to the questions whether an asserted substantive right is entitled to heightened

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[2] This Court considers the decisions of the United States Supreme Court and lower federal courts as persuasive regarding due process and equal protection as the provisions of the California Constitution guaranteeing equal protection and due process are substantially the equivalent of the equal protection and due process clauses of the Fourteenth Amendment. *See Department of Mental Hygiene v. Kirchner*, 62 Cal. 2d 586, 588 (Cal. 1965); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 771 (Cal. 1997); and *Montalvo v. Madera Unified Sch. Dist. Bd. of Education*, 21 Cal. App. 3d 323, 333 n.3 (Cal. Ct. App. 1971).

solicitude under the Equal Protection Clause . . .." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 n.10 (1977).

Judicial restraint is critical in these areas for several reasons. First, by "extending constitutional protection to an asserted right or liberty interest," a court effectively places "the matter outside the arena of public debate and legislative action." *Washington*, 521 U.S. at 720. Such actions are democratically suspect. Indeed, "[s]uch excursions, if embarked upon recklessly, endanger the very ecosystem in which such liberties thrive – our republican democracy. Once elevated to constitutional status, a right is effectively removed from the hands of the people and placed into the guardianship of unelected judges." *Williams v. AG of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004) (*citing Glucksberg*, 521 U.S. at 720). And these constitutional rulings on statutes cannot be reversed by ordinary legislative means.

"Courts are not representative bodies. They are not designed to be a good reflex of a democratic society . . .. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring).

This same rationale applies with equal force to courts extending suspect and quasi-suspect protection to new classes of people. Once a court extends suspect or quasi-suspect protection to a new class of people, it effectively places "the matter outside the arena of public debate and legislative action." *Washington*, 521 U.S. at 720. Consequently, the democratic process is thwarted and the popular will is potentially frustrated. Courts unnecessarily risk illegitimacy by such actions. It is no wonder then that "the Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes." *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985)).

Second, judicial restraint should be exercised "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. "There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of [the] Court. That history counsels caution and restraint." *Moore*, 431 U.S. at 502 (emphasis in original).

Justice White prudently described the harm that results when courts fail to exercise judicial restraint in this field:

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Moore, 431 U.S. at 502 (White, J., dissenting).

"An unenumerated right should not therefore be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of [a] Court's central obligations in making constitutional decisions." *Glucksberg*, 521 U.S. at 788-789 (Souter, J., concurring) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864-869 (1992)).

Lastly, judicial restraint should be exercised because, once a court recognizes a new fundamental right, there is a tendency of the "principle to expand itself to the limit of its logic," thus creating a slippery slope. *Glucksberg*, 521 U.S. at 733 n.23 (citation omitted). The resulting harm is obvious: "Each step, when taken, appears a reasonable step in relation to that which preceded it," but "the aggregate or end result is one that would never have been seriously considered in the first instance." *United States v. 12 200-ft Reels of Super 8MM Film*, 413 U.S. 123, 127 (1973). Courts should be "particularly mindful of this fact in the delicate area of morals legislation. One of the virtues of the democratic process is that, unlike the judicial process, it need not take matters to their logical conclusion. If the people [] in time decide that a prohibition [in such an area as morals legislation] is misguided, or ineffective, or just plain silly, they can repeal the law and be finished with the matter. On the other hand, if [courts] craft a new fundamental right by which to invalidate the law, [they] would be bound to give that right full force and effect in all future cases . . .." *Williams*, 378 F.3d at 1250.

VII. The Court of Appeals Correctly Applied the Aforementioned Principles in the Case at Bar.

Petitioners claimed below, *inter alia*, that Family Code provisions limiting marriage to unions between a man and a woman "violate their fundamental right to

marry, under the due process and equal protection clauses of the California Constitution, and discriminate against them on the basis of gender and sexual orientation, in violation of the *equal protection clause*. (*Cal. Const., art. I, § 7, subd. (a)* ['A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ...']." *In Re Marriage Cases*, 143 Cal. App. 4th 873, 904 (Cal. Ct. App. 2006) (emphasis in original). The issue thus presented to the Court of Appeals was "whether the statutory definition of marriage as the union of a man and a woman . . . is unconstitutional because it does not permit gays and lesbians to marry persons of their choice." *Id.* at 889.

The Court of Appeals correctly identified the applicable law. The due process clause includes a substantive component that "forbids the government from infringing certain fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 905 (citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); and *Dawn D. v. Superior Court*, 17 Cal. 4th 932, 939-940 (Cal. 1998)). "Impairment of a fundamental right or liberty interest is similarly prohibited under equal protection principles." *Id.* at 906 (citing *Zablocki v. Redhail*, 434 U.S. 374, 381-382 (1978); and *Perez v. Sharp*, 32 Cal. 2d 711, 714, 731-732 (Cal. 1948)). Likewise, if a law burdens a suspect class, it is

reviewed under the strict scrutiny test, which requires the state to advance a compelling interest for the regulation and only use means that are necessary to further its purpose. *Id.* at 904, 927-928 (citing *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 17 (Cal. 1974); and *Serrano v. Priest,* 18 Cal. 3d 728, 761 (Cal. 1976)).

If the right is not fundamental or the classification suspect, then a "rational relationship" test is employed. *Id.* at 904, 927 (citing *Warden v. State Bar of California*, 21 Cal. 4th 628, 644 (Cal. 1999); and *Hardy v. Stumpf*, 21 Cal. 3d 1, 8 (Cal. 1978)). This test is "extremely deferential" to the Legislature. *Id.* at 927. "It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.' [Citation.]" *Id.* at 927-928 (quoting *D'Amico*, 11 Cal. 3d at 16). Under this standard of review, a court must uphold a challenged law "if there is any reasonably conceivable state of facts that could provide a rational basis" for it. *Id.* at 928 (quoting *Warden*, 21 Cal. 4th at 644). Where there are "plausible reasons" for the law, a court's "inquiry is at an

end." *Id.* In addition, the statute is presumed constitutional and the burden is on the party assailing it to prove otherwise. *Id.* (citing *D'Amico*, 11 Cal. 3d at 17).

The Court of Appeals began its substantive due process and equal protection analysis with a careful description of the asserted right. *Id.* at 908-909; *see Reno*, 507 U.S. at 302 (Equal protection and substantive due process analysis "must begin with a careful description of the asserted right."); *Glucksberg*, 521 U.S. at 722 (The High Court has "a tradition of carefully formulating the interest at stake in substantive-due-process cases."); and *Dawn D.*, 17 Cal. 4th at 940 (This "careful description" must be "concrete and particularized, rather than abstract and general."). Rightly so, the Court of Appeals precisely described the asserted right at issue as the right to same-sex marriage, as opposed to the general right of marriage.

The Court of Appeals then examined the asserted right in light of our Nation's history, legal traditions, and practices to determine if the asserted right is a fundamental right. *In Re Marriage Cases*, 143 Cal. App. 4th at 907, 910-915; *see Moore*, 431 U.S. at 503 (Fundamental rights are only those rights that are "deeply rooted in this Nation's history and tradition."); and *Dawn D.*, 17 Cal. 4th at 940 (Fundamental right must find "support in our history, our traditions, and the

conscience of our people.").[3] The Court of Appeals correctly found that there is no historical tradition of same-sex marriage in this country. *In Re Marriage Cases*, 143 Cal. App. 4th at 907, 910-915. Indeed, the Court found, citing a host of cases, legislation, and other authorities, that, rather than being a "deeply rooted" right, the asserted right has "never existed before" and is a novel idea. *Id.* at 911. The Court rightly held that this novelty "precludes its recognition as a constitutionally protected fundamental right." *Id.*; *see Flores*, 507 U.S. at 303 ("The mere novelty" of claimed right weighed against it being ranked as fundamental.). Consequently, the Court correctly rejected Petitioners' fundamental right argument. *In Re Marriage Cases*, 143 Cal. App. 4th at 911.

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[3] *See also Glucksberg*, 521 U.S. at 721 (Fundamental rights are those rights "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.") (citation and internal quotation marks omitted); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (Right is fundamental when it reflects a "strong tradition" founded on "the history and culture of Western civilization," and is "established beyond debate as an enduring American tradition."); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (Right is fundamental when it is "basic in the structure of our society."); *Griswold*, 381 U.S. at 485-86 (Fundamental right was "older than the Bill of Rights"); *id.* at 496 (Fundamental right was "as old and as fundamental as our entire civilization.") (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring); and *Collins*, 503 U.S. at 126 (Right not fundamental because "[n]either the text nor history of the Due Process Clause" supported such finding)).

Regarding Petitioners' discrimination claim under the equal protection clauses, the Court of Appeals correctly found that the overwhelming weight of authority holds that homosexuality is not a suspect class. *In Re Marriage Cases*, 143 Cal. App. 4th at 919-922. Indeed, no controlling case holds that homosexuality constitutes a suspect class for equal protection purposes. Similarly, the United States Supreme Court and lower federal courts hold that laws which burden homosexuality do not require strict scrutiny. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (Court refused to apply strict scrutiny test to Texas antisodomy law, but instead found law furthered "no legitimate state interest."); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-574 (9th Cir. 1990) (homosexuality not a suspect class); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (same); *Equal. Found. of Greater Cincinnati. Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (same); *Richenberg v. Perry*, 97 F.3d 256 (7th Cir. 1996) (same); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (same); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997) (same); *Rich v. Secretary of Army*, 735 F.2d 1220 (10th Cir.1984) (same); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (same); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (same); and *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) (same).

In addition, the Court of Appeals prudently refused to create a new suspect class for homosexuals who seek to marry. "For a statutory classification to be considered 'suspect' for equal protection purposes, generally three requirements must be met. The defining characteristic must (1) be based upon 'an immutable trait'; (2) 'bear[] no relation to [a person's] ability to perform or contribute to society'; and (3) be associated with a 'stigma of inferiority and second class citizenship,' manifested by the group's history of legal and social disabilities." *In Re Marriage Cases*, 143 Cal. App. 4th at 922 (citing *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18-19 (Cal. 1971)).

In the instant matter, the Court of Appeals correctly observed that there is considerable and widespread debate about whether homosexuality is "an immutable trait." *Id.* at 922. Seeing that the "facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but are more readily subject to discovery through legislative factfinding and experimentation," *Washington*, 521 U.S. at 787 (Souter, J., concurring), the Court was wise not to inject itself into the debate unnecessarily at this time. *See Tennessee Publishing Co.*, 299 U.S. at 22 (A "court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it.").

What is more, the Court of Appeals correctly held that establishing homosexuality as a suspect class on the sparse record in this case would not make for a solid decision. As noted by the Court, the "trial court did not conduct an evidentiary hearing, and no factual record was developed addressing the three suspect classification factors." *In Re Marriage Cases*, 143 Cal. App. 4th at 922-923. This Court and any court should be "reluctant to establish new suspect classes," (*Thomasson*, 80 F.3d at 928 (quoting *City of Cleburne*, 473 U.S. at 441)), and this Court and all courts should "do well to tread carefully and exercise judicial restraint" when considering the establishment of any new suspect class. *Matrixx Initiatives, Inc.*, 138 Cal. App. 4th at 881. The Court should not innovate social policy by creating a new suspect class for homosexuals who seek to marry, (*Sharon S*, 31 Cal. 4th at 443), but should defer to the focused judgment of the Legislature, especially with respect to matters bearing on the structure and dynamics of the family. *West v. Superior Court*, 59 Cal. App. 4th at 306; *Pacific Legal Foundation*, 29 Cal. 3d at 180. The Court of Appeals correctly rejected Petitioners' suspect class argument. *In Re Marriage Cases*, 143 Cal. App. 4th at 923.

CONCLUSION

In so rejecting Petitioners' fundamental right and suspect class arguments, the Court of Appeals prudently exercised judicial restraint and refused to usurp the power of the legislative by redefining or otherwise expanding by judicial fiat the concept of marriage to include the idea of same-sex marriage which has been rejected directly by the people of California and through their elected representatives in the Family Code provisions. Applying the judicial restraint principles mentioned throughout this brief, the Court perceptively stated:

> Courts simply do not have the authority to create new rights, especially when doing so involves changing the definition of so fundamental an institution as marriage. "'The role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order. Judges are not' 'knight[s]-errant, roaming at will in pursuit of [their] own ideal of beauty or of goodness.' [citation]" (*People v. Carter* (1997) 58 Cal. App. 4th 128, 134 [67 Cal. Rptr. 2d 845].) In other words, judges are not free to rewrite statutes to say what they would like, or what they believe to be better social policy.

Id. at 889-890. The Court rightly concluded that the power to change the definition of marriage rests with the people and their elected representatives and that its role here was simply to decide the legal issues based on precedent and the appellate record, which it did. This prudent conclusion should not be overturned.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 8.520(c)

I certify that pursuant to Rule 8.520(c), the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 7644 words.

June 19, 2007

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PROOF OF SERVICE

I, David F. Rothstein, declare that I am over the age of eighteen and am not a party to this action. My business address is 501 School Street, S.W. Suite 500, Washington, D.C. 20024. On June 19, 2007, I served Brief of *Amicus Curiae* Judicial Watch, Inc. in Support of the State of California and Governor Arnold Schwarzenegger on the interested parties in this action in the manner indicated below:

X By Mail: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail in Washington, D.C. (as indicated on the Service List).

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on June 19, 2007, in Washington, D.C.

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