IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES,	)	No. S147999
Judicial Council Coordination Proceeding No. 4365	)	

Brief of *Amici Curiae* Asian American Bar Association of the Greater Bay Area & 62 Asian Pacific American Organizations in Support of Respondents Challenging the Marriage Exclusion

INTRODUCTION

Amici curiae, the Asian American Bar Association of the Greater Bay Area and 62 other Asian Pacific American organizations (collectively, "Amici"),[1] fully support the position of the parties challenging the

* The editors of the UCLA ASIAN PACIFIC AMERICAN LAW JOURNAL have striven to preserve the integrity of the original text. Thus, only minor editorial changes have been made to this document.

1. The coalition of additional Asian Pacific American organizations that filed the brief included: the API Equality, the API Equality – LA, API Equality – SF, the Asian American Institute, the Asian American Justice Center, the Asian American Legal Defense and Education Fund, the Asian American Psychological Association, the Asian American Queer Women Activists, the Asian and Pacific Islander American Health Forum, the Asian and Pacific Islander Lesbian, the Bisexual Women and Transgender Network, the Asian and Pacific Islander Parents and Friends of Lesbians and Gays, the Asian Communities for Reproductive Justice, the Asian Law Alliance, Asian Law Caucus, the Asian Pacific AIDS Intervention Team, the Asian Pacific American Bar Association of Los Angeles County, the Asian Pacific American Labor Alliance – Alameda, Asian Pacific American Labor Alliance - Los Angeles, the Asian Pacific American Legal Center, the Asian Pacific Americans for Progress - Los Angeles, the Asian Pacific Bar Association of Silicon Valley, the Asian Pacific Islander Family Pride, the Asian Pacific Islander Legal Outreach, the Asian Pacific Islander Pride Council, the Asian Pacific Islander Wellness Center, the Asian Pacific Policy & Planning Council, the Asian Pacific Women's Center, the Asian Women's Shelter, the Asian/Pacific Bar of California, the Center for the Pacific Asian Family, the Chinese for Affirmative Action (CAA), the Chinese Progressive Association, the Conference of Asian Pacific American Law Faculty, the Filipinos for Affirmative Action, the Gay Asian Pacific Alliance, the Gay Asian Pacific Support Network, the Institute for Leadership Development and Study of Pacific Asian North American Religion (PANA Institute), the Japanese American Bar Association of Greater Los Angeles, the Japanese American Citizens League, the Khmer Girls in Action, the Korean American Bar Association of Southern California, the Korean Community Center of the East Bay, the Korean Resource Center, the Koreatown Immigrant Workers Alliance, the My Sister's House, the National Asian Pacific American Bar Association, the National Asian Pacific American Law Student Association, the National Asian Pacific American Women's Forum, the National Korean American Service & Education Consortium, the Orange County Asian Pacific Islander Community Alliance, the Pan Asian Lawyers of San Diego, the Philippine

marriage exclusion ("Respondents").[2]

However, Amici submit that there is a necessity for additional argument. As discussed below, classifications affecting fundamental interests are subject to strict scrutiny under the California Equal Protection Clause. *Serrano v. Priest* (*Serrano I*), 5 Cal. 3d 584, 596-597 & n.11 (1971). Marriage is such a fundamental interest, because of its important role in fostering integration into society. Indeed, the experience of Asian Americans in California illustrates the important role of marriage in fostering integration into society.[3]

Because of its key role in fostering integration into society, marriage is important both to individuals AND TO SOCIETY.[4] The parties' briefs already address the myriad ways that marriage is of critical importance to individuals. In this brief, Amici focus upon marriage's importance to society as a whole and, in particular, the way marriage fosters formation of new families and integration of those families into society. Conversely, the discriminatory denial of marriage necessarily impedes integration of an excluded group.

Thus, strict scrutiny should be applied to classifications affecting marriage.

American Bar Association, the Satrang, the South Asian American Leaders of Tomorrow, the South Asian Bar Association of Northern California, the South Asian Bar Association of San Diego, the South Asian Bar Association of Southern California, the South Asian Network, the Southeast Asia Resource Action Center, the Southeast Asian Community Alliance, the Southern California Chinese Lawyers Association, and the Vietnamese American Bar Association of Northern California.

2. Amici also fully support the position of amici curiae Mexican American Legal Defense and Education Fund et al., set forth in their amicus brief submitted to this Court by O'Melveny & Myers LLP.

3. The terms "Asian Americans" and "Asian Pacific Americans" are used interchangeably and inclusively in this brief to refer to the diverse ethnic groups who trace their ancestry to Asia. As a community of predominantly immigrants, Asian Americans have faced specific challenges—as immigrants—in their ability to marry and integrate into American society, and those challenges are the focus of this brief. Although the Asian Pacific American community is often defined to include Pacific Islanders, this brief does not specifically address their unique and different experiences as a primarily indigenous community.

This brief uses, as examples, the experience of Chinese Americans, Japanese Americans, Filipino Americans, and South Asian Americans to illustrate the important role of marriage in fostering integration into society. We use these examples because those groups came to California in significant numbers in the first century of California's statehood and were subject to California's anti-miscegenation statutes and other discriminatory measures impeding family formation.

4. *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n,* 475 U.S. 1, 8 (1986) (noting that the constitutional guarantee of free speech "serves significant societal interests" apart from the speaker's interest in self-expression, and that by protecting individuals who wish to enter the marketplace of ideas, the First Amendment protects the public's interest in receiving information).

ARGUMENT

I. CLASSIFICATIONS AFFECTING FUNDAMENTAL INTERESTS ARE SUBJECT TO STRICT SCRUTINY UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE

In the Rymer Respondents' Opening Brief on the Merits, Respondents argue that "California's statutory exclusion of same-sex couples from marriage is subject to strict scrutiny because it denies equal access to a fundamental right." Respondents' Opening Br. on the Merits, p. 50. That argument should be dispositive in this case, regardless of whether this Court concludes that strict scrutiny is required because of the other constitutional grounds set forth in Respondents' Opening Brief on the Merits.

In *Serrano I*,[5] this Court recognized that "in cases . . . touching on 'fundamental interests,' . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." 5 Cal. 3d at 597. "Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." *Id.*

In *Serrano I*, this Court considered whether education is a "fundamental interest." *Id.* at 604. This Court began by acknowledging that there was no "direct authority" supporting the contention that education is a fundamental interest. *Id*. Nonetheless, this Court proceeded to "examin[e] the indispensable role which education plays in the modern industrial state." *Id*. at 605. Among other things, "education is a unique influence on a child's development as a citizen and his participation in political and community life." *Id*. In the course of its decision in *Serrano I*, this Court reviewed prior cases addressing the important role education plays both in an individual's life and in society; this Court noted that the United States Supreme Court in *Brown v. Board of Education,* 347 U.S. 483, 493 (1954), declared that education 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." This Court further noted its prior observation that "[u]nequal education . . . leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society." *San Francisco Unified Sch. Dist. v. Johnson,* 3 Cal. 3d 937, 950 (1971) .

This Court focused on the "factual . . . significance of learning" and the "fundamental importance of education," even though there were no legally controlling cases on point. 5 Cal. 3d at 605. After reviewing those facts,[6] this Court was "convinced that the distinctive and priceless function of edu-

5. Cited in Respondents' Consolidated Reply Br. on the Merits, p. 18.

6. For example, this Court noted that "education is unmatched in the extent to which it molds the personality of the youth of society." 5 Cal. 3d at 609-610.

cation in our society warrants, indeed compels, our treating it as a 'fundamental interest.'" *Id*. at 608-609.[7]

Thus, in determining what is a "fundamental interest" that triggers strict scrutiny of any classifications, this Court considers the factual significance that the interest has on an individual and on society. In *Serrano I*, this Court found, in essence, that education plays an important role in enabling individuals to thrive in society and fostering their integration into society. Thus, education is a "fundamental interest," and classifications affecting that fundamental interest are subject to strict scrutiny.[8]

The crucial inquiry, then, is whether marriage is similarly a fundamental interest because of its role in helping to create families that are recognized, and can thrive, in society and fostering integration of those families into society.

II. Marriage Is a Fundamental Interest

A. *Marriage Plays an Important Role in Fostering Formation of Families and Their Integration into Society*

The State of California concedes, as it must, that "[m]arriage is an important institution in our society." Reply of the State of California and Attorney General to Supplemental Briefs, p. 8.

Marriage undeniably plays an important role in creating recognized family units and fostering their integration into society. As in *Serrano I*, it is the factual significance of marriage that is critical. Like education, marriage plays an indispensable role in modern society. Marriage can have a unique influence on an individual's participation in community life.

The "distinctive and priceless function" of marriage in our society is fully explained by Respondents in their briefs to this Court and in the record below.[9] Of particular interest to Amici, however, is how the experience of Asian Americans in California illustrates the important role of marriage in building families and fostering integration into society.

---

7. Notably, this Court's inquiry in *Serrano I* did not focus on whether education is a right that is protected by a specific constitutional provision. Instead, this Court considered the factual significance that education has in society and, based on that, found that education is a "fundamental interest."

8. The "fundamental interest" test for triggering strict scrutiny has been applied by this Court in cases both before and after *Serrano I*. *See Westbrook v. Mihaly*, 2 Cal. 3d 765, 784-785 (1970), *vacated on other grounds*, 403 U.S. 915 (1971); *Weber v. City Council of Thousand Oaks*, 9 Cal. 3d 950, 959 (1973); *Darces v. Woods*, 35 Cal. 3d 871, 885 (1984).

9. Judy Baker, the mother of Respondent Devin Baker and also a marriage and family therapist, described the role of marriage based on her experience and professional work: "[W]hile couples can create families without marriage, the marriage rituals create a family unit in a clear, deliberate way. From what I have seen, those rituals create a sense of welcome and belonging, a framework for working together. . . . [T]his sense of connection helps couples and families to take care of each other, and builds wider networks or relationships, caring and support, which can be of great benefit to society." Respondents' App., No. A110451, at 177-178 (J. Baker Decl. ¶¶ 14, 18).

B. *The Experience of Asian Americans in California Illustrates the Important Role of Marriage in Fostering Integration into Society*

The institution of marriage is fundamental to the formation of families and the development of kinship and other social networks. Marriage, family, and kinship networks all play crucial roles in integrating individuals into communities and democratic society. As a result, restrictions on the institution of marriage impede the development of these networks and affect the social, political, and economic integration of individuals into communities and society.

The historical experience of Asian Americans in California illustrates the important role of marriage in fostering integration into society. As discussed below, laws limiting the ability to marry can limit the growth of a community and impede integration into society.

1. The Experience of Chinese Americans

The Chinese were drawn to California by the Gold Rush and other economic opportunities. In addition, civil strife in certain regions of China led to increased emigration from China to the United States. By 1880, the Census listed the number of Chinese in the United States as 100,000.[10] Although most Chinese were drawn initially to mining, they soon began to work in other industries—primarily railroad construction, agriculture, common labor, manufacturing, domestic service, and laundering.[11]

Soon after their arrival in the United States in the mid-1800s, Chinese immigrants were subjected to exclusionary laws affecting virtually every aspect of their lives—immigration, naturalization, marriage, taxation, employment and profession, education, the courts, and residence.[12] Many of

10. *See* Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850*, at 9-13, 15 (1988) .

11. *Id.* at 19.

12. *Immigration*. *See*, *e.g.*, Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974); Chinese Exclusion Acts of 1882 (ch. 126, 22 Stat. 58), 1884 (ch. 220, 23 Stat. 115), and 1892 (ch. 60, 27 Stat. 25) (repealed 1943). The Chinese Exclusion Act and subsequent exclusionary immigration laws were applied against most Asian immigrant groups and were not repealed until 1943 for Chinese, 1946 for Filipinos and South Asians (Indians), and 1952 for Japanese and Koreans. Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 17 n.59 (1994). It was not until 1965 that Asian Americans were allowed to immigrate into the United States in substantial numbers. *See id.* at 18 n.61.

Naturalization. *See In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104) (denying "the first application made by a native Chinaman for naturalization" because a "Mongolian" is not a "white person"); Chinese Exclusion Act of 1882.

Marriage. Cal. Civ. Code, § 60 (adding "Mongolians" in 1905 to the list of groups barred from marrying "white persons"; such marriages were "illegal and void") (Deering 1949) (repealed 1959) and § 69 (prohibiting the issuance of a license authorizing the marriage of a white person with a Mongolian) (West 1957) (amended in 1959 to omit this prohibition).

Taxation. Foreign Miners Tax, ch. 97, 1850 Cal. Stat. 221, ch. 37, 1852 Cal. Stat. 84 (repealed 1872); *see* Sucheng Chan, *Asian Americans: An Interpretive History* 46 (1991).

Employment and Profession. *See* Chin Kim & Bok Lim C. Kim, *Asian Immigrants in American Law: A Look at the Past and the Challenge Which Remains*, 26 Am. U. L. Rev. 373, 399 n.146 (1977) ("By the start of World War II, nearly all jurisdictions had instituted some form of citizenship requirements for the occupations of certified public accountant and lawyer, while about half

these laws were directed toward maintaining the status of Chinese immigrants as temporary laborers and to deny them a place in American society. Further, much of this exclusionary legislation directly or indirectly impeded marriage and the formation of families in the Chinese immigrant community in California, where most Chinese immigrants had settled. As a result, Chinese male immigrants were faced with the choice of abandoning the United States or living alone in bachelor societies without the hope of ever having families.

The issuance of marriage licenses to Chinese and Caucasian couples was prohibited in 1880.[13] The 1880 restriction created some ambiguity, though, because the particular provision dealing with anti-miscegenation was section 60 of the California Civil Code.[14] This ambiguity was cleared up in 1905, when section 60 was amended to include "Mongolians" among those groups whose marriage with whites was declared void.[15]

The federal government also acted to prevent marriage between Chinese immigrant men and white women. In 1907, Congress passed a law stripping the citizenship of "any American woman who marries a foreigner."[16] Although this statute was "partially repealed in 1922 to alleviate the perceived harshness of expatriating women who married German nationals denied naturalization as 'alien enemies' during World War I, . . . that law 'continued to require the expatriation of any woman who married a foreigner racially barred from citizenship.'"[17] Though these federal citizenship-stripping provisions supplemented the operation of state anti-miscegenation statutes directed against "Mongolians," they also "made it a

required citizenship of dentists and physicians; somewhat under one-half the jurisdictions required citizenship of pharmacists, architects, teachers, optometrists, and engineers and/or surveyors.") (citation omitted).

Education. Cal. Educ. Code, §§ 8003, 8004 (authorizing the segregation of children of Chinese, Japanese, or Mongolian parentage, and Indians under certain circumstances) (Deering 1944) (repealed 1947), *cited in Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947).

Courts. *See*, *e.g.*, *People v. Hall*, 4 Cal. 399 (1854) (holding testimony of Chinese witnesses inadmissible against white defendant).

Residence. Robert C. Berring, Book Review, 2 Asian L.J. 87, 92, 99 (1995) (reviewing Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (1994)).

13. 1880 Code Amendments, p. 3, ch. XLI, § 1 (amending Cal. Civ. Code, § 69).

14. Irving G. Tragen, Comment, *Statutory Prohibitions against Interracial Marriage,* 32 Cal. L. Rev. 269, 272 nn.17-18 (1944).

15. Act of March 21, 1905, 1905 Cal. Stat. 554. An earlier attempt to amend the statute in 1901 was declared unconstitutional on procedural grounds. *See Lewis v. Dunne,* 134 Cal. 291 (1901).

16. *See* Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228-29 (providing that "any American woman who marries a foreigner shall take the nationality of her husband").

17. Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law,* 11 Berkeley Women's L.J. 142, 148 n.36 (1996) (book review) (citing Ian F. Haney Lopez, *White by Law: The Legal Construction of Race* 47 (1996)); *see* Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1021, 1022 (providing that "any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States") (repealed 1931).

real liability for American-born women of Asian ancestry to marry immigrant men."[18]

Thus, marriages between Chinese men and white American women were both outlawed by the State of California and placed outside the bounds of American society by federal law.

At the same time, the ability of Chinese immigrant men to marry Chinese women was effectively denied through a series of laws that severely curtailed the immigration of women from China. The Page Act of 1875 forbade "the entry of Chinese, Japanese, and Mongolian contract laborers, women for the purpose of prostitution, and felons."[19] Though the law was ostensibly directed against prostitution, "immigration officials relied on images of Chinese moral decadence . . . , thereby converting it [the Page Act] into what amounted to a female exclusion law."[20] This exacerbated the already skewed gender ratio in the Chinese immigrant community in the United States—the gender ratio for Chinese Americans went from 1 female to every 13 males in 1870, to 1 female to every 21 males in 1880, to 1 female to every 27 males in 1890.[21]

The exclusion of immigrants from Asia was completed by the Immigration Act of 1924,[22] which forbade entry of any alien ineligible for citizenship, a provision that applied at that time only to persons of Asian ancestry. As a result, Chinese women who were married to men in the United States, could not join their spouses:

> "'The necessity [for this provision],' a congressman stated, 'arises from the fact that we do not want to establish Oriental families here.' This restriction closed tightly the gates for the immigration of Chinese women. 'We were beginning to repopulate a little now,' a Chinese man said bitterly, 'so they passed this law to make us die out altogether.'"[23]

These barriers to the formation of families had a destructive effect on the Chinese immigrant community as the aging male population died or was forced to return to China in order to rejoin their spouses or to marry. The number of persons of Chinese ancestry in the United States in 1890 was 107,488. By 1920, that number had dropped to 61,639.[24]

Restrictions on marriage were an integral part of a broader system that excluded and isolated Chinese Americans, ultimately forcing many to repatriate. Marriage restrictions, and related barriers to the formation of

18. Chan, *supra* note 12, at 106. R

19. *Id.* at 54.

20. George Anthony Peffer, *If They Don't Bring Their Women Here: Chinese Female Immigration Before Exclusion* 9 (1999).

Following the Page Act of 1875, Congress in 1882 passed the Chinese Exclusion Act, which forbade the entry of male Chinese laborers for ten years. The Chinese Exclusion Act was amended and renewed on several occasions and was not repealed until 1943. *See supra* note 12; R
see also Daniels, *supra* note 10, at 55-58. R

21. Daniels, *supra* note 10, at 69. R

22. Ch. 190, 43 Stat. 153 (codified at 8 U.S.C. §§ 201-231) (repealed 1952).

23. Ronald Takaki, *Strangers from a Different Shore* 235 (1989).

24. *See* Robert S. Chang, *Disoriented: Asian Americans, Law, and the Nation-State* 82-83 (1999).

families, prevented the development of stable and growing Chinese American communities in the United States, resulting instead in pockets of Chinese Americans who were isolated socially, politically, and economically.

The experience of Chinese Americans in California illustrates that limitations on the ability to marry can, in fact, impede a group's integration into society, thus confirming the important role of marriage.

2. The Experience of Japanese Americans

The Japanese American experience includes both early laws that facilitated formation of families, and later laws that interfered with marriage and undermined the Japanese American community's integration into California society.[25]

Japanese immigration to the United States proceeded at a slow pace until the late nineteenth century, when rapid industrialization in Japan and related events led to displacement of Japanese farmers.[26] Many Japanese emigrants were drawn to the United States because wages were higher in the United States than in Japan.[27]

One major difference between the Chinese and Japanese immigration experience was that "the U.S. government restricted Japanese immigration in stages, thereby allowing Japanese men more time to decide whether or not to bring women to America."[28] Before 1915, farmers or merchants with sufficient income and capital were permitted to send for "picture

25. Like Chinese immigrants, Japanese immigrants in the United States faced an array of exclusionary laws. *See supra* note 12. R

Immigration. Gentlemen's Agreement of 1907, whereby the Japanese government agreed to stop issuing visas to male laborers in exchange for the U.S. government's interceding with state and local authorities in California not to subject children of Japanese ancestry to segregated public education. *See* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy 1850-1990,* at 29, 207-212, 243 n.95 (1993); Chan, *supra* note 12, at 16. R

Naturalization. *See Ozawa v. United States*, 260 U.S. 178 (1922).

Marriage. Cal. Civ. Code, § 60 (adding "Mongolians" in 1905 to the list of groups barred from marrying "white persons"; such marriages were "illegal and void") (Deering 1949) (repealed 1959) and § 69 (prohibiting the issuance of a license authorizing the marriage of a white person with a Mongolian) (West 1957) (amended in 1959 to omit this prohibition).

Employment and Profession. *See, e.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

Landownership. *See generally* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment,* 40 B.C. L. Rev. 37 (1998).

Education. Based on the Gentlemen's Agreement of 1907, children of Japanese ancestry were for a time not subject to segregated public education. This protection disappeared, though, at a later time. *See* Hing, *supra* this note, at 29, 207-212, 243 n.95.

Residence. *See* Hans J. Hacker & William D. Blake, *The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in* Brown versus Board of Education, 8 Berkeley J. Afr.-Am. L. & Pol'y 5, 31 (2006) ("Although most restrictive covenants targeted blacks, records indicate that restrictive covenants were used to exclude 'Mexicans, Armenians, Chinese, Japanese, Jews, Persians, Syrians, Filipinos, [and] American Indians.'") (citation omitted).

26. Chan, *supra* note 12, at 9. R

27. *Id.* at 12.

28. *Id.* at 107.

brides."[29] In 1915, Japanese men in other occupations were also permitted to do so, and the financial requirements were reduced.[30]

The entry of Japanese women during this period, immigrating as wives of Japanese men already in the United States, permitted the formation of families. That, in turn, made possible the success of Japanese immigrant farmers who relied on unpaid family labor to be competitive.[31] The ability to form families initially afforded Japanese Americans a measure of economic power. They were able to be their own "bosses" on their farms and create a growing community of Japanese farmers.[32]

However, anti-Japanese sentiment, in part fueled by the success of Japanese Americans, brought efforts that undermined Japanese American family formation and interfered with their integration into society. The entry of "picture brides" was cut off in 1920, when the Japanese government, responding to anti-Japanese sentiment in the United States, stopped issuing visas to "picture brides."[33]

Successful Japanese farmers were targeted by laws limiting the ownership or long-term lease of agricultural land by aliens ineligible for citizenship.[34] The progress of the Japanese American communities was seen as a threat to whites. One commentator has noted, in the context of alien land laws, that:

> "Progressives in California believed that economic self-preservation was closely united with racial preservation. It was believed that, if the Japanese were allowed to make economic inroads, it would only be a matter of time before they would make racial inroads. Inter-marriage and propagation of their race would impair the Anglo-Saxon racial purity so important to the Progressives' concept of economic leadership."[35]

Anti-miscegenation laws and other restrictions had the effect of fostering segregated communities that were unable to integrate more broadly into society. Thus, the families and kinship/social networks remained largely ethnically Japanese.

This social isolation and relative lack of integration created a vulnerability that made possible the internment of Japanese Americans during World War II. The United States Supreme Court implicitly acknowledged this point about social isolation and its effects in its decision upholding

29. *Id.*

30. *Id.*

31. *Id*.

32. In the face of societal discrimination, more recent Asian immigrants have often adopted a strategy of entrepreneurship through small family-owned and -operated businesses. *See generally* Ivan Light & Edna Bonacich, *Immigrant Entrepreneurs: Koreans in Los Angeles, 1965-1982* (1988).

33. Chan, *supra* note 12, at 108. **R**

34. *See* Chang, *supra* note 24, at 52-53. **R**

35. Herbert P. Le Pore, *Prelude to Prejudice: Hiram Johnson, Woodrow Wilson, and the California Alien Land Law Controversy of 1913,* 61 S. Cal. Q. 99, 100 (1979), *reprinted in Japanese Immigrants and American Law: The Alien Land Laws and Other Issues* 265, 266 (Charles McClain ed., 1994).

Gordon Hirabayashi's conviction for violating the curfew regulations.[36] The Supreme Court stated: "There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population."[37] In its supporting footnote, the "conditions" referred to included legal restrictions with regard to immigration, naturalization, land ownership, marriage, and employment.[38] Though conceding the government's role in creating these conditions, the Court then conjectured that the social isolation of Japanese Americans could have provided a reasonable basis for Congress and the Executive, including the military commander, to doubt the loyalty of Japanese Americans and to take appropriate proactive protective measures.[39] The social isolation of Japanese Americans, though not "causing" their internment, was essentially a precondition for the internment. More generally, this example illustrates that laws impeding integration into society can create a vulnerability that can lead to further discrimination.

The story of Japanese Americans in California illustrates that the ability to marry can be an important component of economic success and the growth of communities, though without the opportunity for full integration, the story is one of only limited success.

3. The Experience of Filipino Americans

Similar themes can be seen in the treatment of Filipino immigrants. In particular, the Legislature's amending the state's anti-miscegenation statute to specifically include Filipinos illuminates the racial prejudice that underlay many of these restrictive laws.

Significant immigration from the Philippines to the United States did not take place until several years after the United States annexed the Philippines at the conclusion of the Spanish-American War in 1898.[40] Unlike immigrants from other Asian countries, Filipinos initially were not subject to the various Asian exclusion acts because they were considered, until the Tydings-McDuffie Act of 1934,[41] U.S. nationals.[42]

36. *See Hirabayashi v. United States*, 320 U.S. 81, 96 (1943). The curfew regulations were part of the web of legal restrictions that culminated in nearly 120,000 Japanese Americans being confined to internment camps pursuant to Executive Order 9066 (7 Fed. Reg. 1407 (Feb. 19, 1942)), issued by President Roosevelt after Pearl Harbor was attacked. *Hirabayashi*, 320 U.S. at 88-89; Eric Yamamoto et al., *Race, Rights and Reparation: Law and the Japanese American Internment* 100-101 (2001).

37. *Hirabayashi*, 320 U.S. at 96.

38. *Id.* at 96 n.4.

39. *Id.* at 98-99.

40. Chan, *supra* note 12, at 16-18. R

41. Ch. 84, 48 Stat. 456.

42. Rick Bonus, *Locating Filipino Americans: Ethnicity and the Cultural Politics of Space* 37-38 (2000).

Filipino laborers were recruited in significant numbers by Hawaiian plantation owners as replacement workers after a long strike by Japanese workers in 1909.[43] In the 1920s and 1930s, "[w]hen Filipinos realized that work could be had not only in Hawaii but also on the [U.S.] mainland, more than 50,000—a third of them reemigrants from Hawaii—headed for the [mainland]."[44] By 1930, of the 108,260 Filipinos in the United States, 30,470 resided in California.[45]

Similar to the earlier populations of Chinese and Japanese immigrants, the early wave of laborers were largely male, with females constituting less than seven percent of the Filipinos admitted to California between 1920 and 1929.[46] This gender imbalance was by design.[47]

Filipinos in California during this period faced what earlier waves of Asian immigrants had experienced before—restrictions on their right to marry as part of a broader effort to deny them full citizenship and inclusion.[48] Such antagonism, "while economic in its roots, reached its most fevered pitch concerning Filipino relations with white women."[49]

It was initially unclear whether the anti-miscegenation laws applied to Filipinos. In particular it was unclear whether Filipino Americans were so-called "Mongolians" under the state's anti-miscegenation statute and thus prohibited from marrying whites.[50]

This uncertainty was resolved in *Roldan v. Los Angeles County*, 129 Cal. App. 267 (1933), a case involving a challenge by a Filipino male and white female couple who were denied a marriage license based on the anti-miscegenation statute. The court in that case found that Filipinos were members of the Malay, and not Mongolian, race and therefore not precluded from intermarriage with whites under the statue. *Id*. at 272-273. The California Legislature responded that same year by amending the anti-

43. Chan, *supra* note 12, at 18. R

44. *Id.*

45. Bonus, *supra* note 42, at 36-37. R

46. *Peoples of Color in the American West* 338 (Sucheng Chan, Douglas Henry Daniels, Mario T. Garcia & Terry P. Wilson eds., 1994).

47. Bonus, *supra* note 42, at 37 ("Women and children were frequently barred by recruiters from traveling with the men; they were likely viewed as burdens that would interfere with the farm work."). R

48. Though they were U.S. nationals, "Filipinos were ineligible for citizenship and were legally barred from voting, establishing a business, holding private and public office, and owning land and other property." Bonus, *supra* note 42, at 37-38 & n.31. R

49. Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. Davis L. Rev. 795, 796 (2000).

50. For years, interpretations of the law varied to some degree. For instance, in 1921, Los Angeles County commenced issuing marriage licenses to Filipino-Caucasian couples because counsel for the County advised that "Malayans" were "brown people" rather than the "yellow" people to which the word "Mongolians" ordinarily refers. *Peoples of Color, supra* note 46, at 339. The California Attorney General issued a conflicting opinion in 1926 that classified Filipinos as Mongolians. Volpp, *supra* note 49, at 816. County clerks, tasked with issuing or denying marriage certificates, appear not to have followed a consistent approach. *Id.* at 817 & n.88. R R

miscegenation statute to include Malays among the list of groups prohibited from marrying whites.[51]

Congress passed the Tydings-McDuffie Act[52] the next year, in 1934, which "effectively halted Filipino immigration."[53] Although the Act set the Philippines on the road to independence, in exchange it limited Filipino immigration to the United States to only 50 persons per year."[54] Thus, like Chinese and Japanese Americans, Filipino Americans were the object of governmental efforts to limit their ability to immigrate to the United States and to marry and form families, which in turn impeded their ability to integrate fully into society.

4. The Experience of South Asian Americans

The experience of South Asian communities illustrates how laws restricting marriage can transform a community and its ethnic identity. The immigration of South Asians to the western United States began early in the twentieth century.[55] Most early immigrants came from India's Punjab province, which had experienced disruptions to its land tenure system because of taxation by Great Britain.[56] Many of the immigrants were drawn to the United States because of stories about economic opportunities in the United States.[57]

The gender ratio in the South Asian immigrant community was extremely skewed: fewer than a dozen South Asian women immigrated to the United States before World War II,[58] while "6,800 or so Indians . . . came to the western United States between 1899 and 1914."[59]

Under the specter of the anti-miscegenation statute, hundreds of South Asian men married Mexican American women and formed households and families of mixed ethnicity in California.[60] One study of the

51. Acts effective Aug. 21, 1933, chs. 104-105, 1933 Cal. Stat. 561 (codified at Cal. Civ. Code, §§ 60, 69) (repealed 1959, 1969).

52. Ch. 84, 48 Stat. 456 (1934).

53. Volpp, *supra* note 49, at 823. R

54. Tydings-McDuffie Act, ch. 84, § 8(a)(1), 48 Stat. 456, 462. The following year, Congress passed the Filipino Repatriation Act, ch. 376, 49 Stat. 478 (1935), which provided for free transportation of Filipinos back to the Philippines. The Act was intended to return an estimated 45,000 Filipinos, though only about two thousand took advantage of the program. *See* Bonus, *supra* note 42, at 41; Volpp, *supra* note 49, at 823 n.112. R

55. Like other Asian immigrant groups, South Asians were subject to exclusionary laws with regard to immigration, naturalization, marriage, and land ownership.

Immigration. Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952).

Naturalization. *United States v. Thind*, 261 U.S. 204 (1923).

Marriage. *See* Karen Isaksen Leonard, *Making Ethnic Choices: California's Punjabi Mexican Americans* 62-63 (1992) (discussing the application of California's anti-miscegenation statute to Punjabi immigrant men).

Land Ownership. Immigrants from South Asia, as aliens ineligible for citizenship, were subject to state alien land laws. *Id.* at 135.

56. Leonard, *supra* note 55, at 24; Chan, *supra* note 12, at 18-20. R

57. Leonard, *supra* note 55, at 31. R

58. Chan, *supra* note 12, at 109. R

59. Leonard, *supra* note 55, at 24 & n.24. R

60. *See id.* at 62-78.

mixed South Asian and Mexican American communities found that the integration of the South Asian men and their children

> "into the larger culture is now bound up with the rate and degree of assimilation of Mexican Americans generally. Hence instead of direct gradual acculturation into American culture, they are involved in a circuitous process, whereby they are first diverted into a [Mexican-American] subculture and from then on their Americanization is bound up with that of the Mexican-Americans."[61]

The interethnic marriages resulted in separate male and female social networks.[62] Within this framework, the children in these families began their childhoods in the female networks, including the religion of their mothers.[63] Also, the early schooling of these children tended to be in segregated settings where Spanish-speaking children predominated.[64] This second generation—Punjabi Mexican American children—was proud of their patrilineal Punjabi heritage, but most members of this generation married Hispanic or Anglo partners.[65]

With regard to self-perception, "Punjabi-Mexicans see themselves as exemplifying a positive trend toward participation in broader American culture."[66] In this sense, this is not a simple story of intermarriage where a minority community disappears into some other group. Rather, it is a complex and dynamic story that serves as an early example of the pluralistic, multicultural society that California is or aspires to be.

Marriage as an institution is a vital part of such a pluralistic, multicultural society. As illustrated by the experiences of Asian Americans in California, marriage is central to the formation of families and the development of kinship and other social networks, and often the achievement of economic success. Marriage plays a crucial role in integrating individuals into communities and democratic society. And, unfortunately, restrictions on the institution of marriage impede the social, political, and economic integration of individuals into communities and society.

Because marriage plays such an important role in fostering integration into society, marriage is a fundamental interest.

C. *Exclusion from Marriage Impedes Integration into Society and Opens the Door to Other Forms of Discrimination*

Asian Americans in this country are intimately familiar with the harms that marriage discrimination inflicts upon individuals, families and communities. As discussed above, since the beginning of Asian immigration to the

61. Yusuf Dadabhay, *Circuitous Assimilation Among Rural Hindustanis in California,* 33 Soc. Forces 138, 141 (1954). A more recent book questions whether South Asians had fully assimilated into the Mexican American culture, but supports the idea that the route to assimilation and integration was circuitous. *See* Leonard, *supra* note 55, at 99-100. **R**

62. *Id*. at 79-100.

63. *Id*. at 123, 126.

64. *Id*. at 123.

65. *Id.* at 123, 153.

66. *Id*. at 209.

United States and for much of the history of California, Asian American populations were denied the equal ability to marry. This denial was an integral part of broader legal and social policies that undermined the existence and participation of Asian Americans in this society. Laws restricting the ability of Asian Americans to marry were closely connected to other government efforts to keep Asian communities separate and excluded from American society generally.

At the core, this discrimination was motivated by stereotypes about each group and the putative threat each group posed to whites in California and the United States. For example, "[s]ome argued that American institutions and culture would be overwhelmed by the habits of people thought to be sexually promiscuous, perverse, lascivious, and immoral."[67] These stereotypes led to the enactment of anti-miscegenation laws and laws and rulings that effectively cut off immigration from Asia and rendered those present ineligible for naturalization. Not only did they impede the full integration of certain groups into society, they promoted segregated communities and institutions.

There is an additional danger: once the government signals that it is lawful and fair to treat a group differently, that notion can become woven into the fabric of society in such a way that private actors feel empowered to engage in extralegal policing of legally sanctioned discrimination.[68] In a stark example, legal enforcement of anti-miscegenation statutes was often accompanied by extralegal enforcement through lynchings.[69]

Although the historical contexts differ, there are important parallels between today's exclusion of lesbian and gay couples from marriage and the historical restriction of Asian Americans' ability to marry. Similar to the stereotypes, discrimination, and violence that Asians faced upon their arrival (many of which persist to this day), lesbians and gay men currently deal with stereotypical bias and stigma, social and economic discrimination and exclusion, and even violence. Moreover, both forms of marriage discrimination place a badge of inferiority on a minority group vis-à-vis the majority population, denying the ability to form an enduring and legally secure bond that can be the basis for building a family.

Thus, similar to Asian Americans historically, same-sex couples today are denied the opportunity to participate in marriage—an institution that has been recognized as the most effective means of solidifying commitment, achieving security as a family unit, and accordingly being integrated into society.

67. Volpp, *supra* note 49, at 802 (citation omitted). R

68. *See* Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in* The Birth of a Nation, The Cheat*, and* Who Killed Vincent Chin? 5 Asian L.J. 41 (1998) (discussing the way that Asian, black, and white sexuality were policed by the rule of law or the force of sanctioned vigilante violence).

69. *See generally* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 Yale J.L. & Feminism 31 (1996).

Respondent Stuart Gaffney described the epiphany he experienced when he and John Lewis, after seventeen years together, married at San Francisco City Hall. It was a recognition that he had just been lifted from a demeaned status to an equal one:

> "When John and I heard the words "by the authority vested in my by the State of California, I now pronounce you spouses for life," we . . . experienced for the first time our government treating us as fully equal human beings and recognizing us as a loving couple worthy of the full respect of the law."

Respondents' App., No. A110451, at 148 (Gaffney Decl. ¶ 5).

Noted Chinese American author Helen Zia similarly explains in her declaration in support of Respondent City and County of San Francisco in the instant litigation that the familial bonds forged when she and her life partner were able briefly to marry remain intact, with great, continuing significance both for the couple and their family members:

> "Marriage means a lot to Lia, to me, and to our families. . . . In the eyes of the law and of much of society, our commitment and our union, to each other and to our families, is not legitimate and not real, including because the stigma associated with being lesbian or gay in the Asian American community is deeply rooted. This hurts us, our families and others who love us. I am grateful to find, however, that having been lucky enough to get married for even a brief period, Lia is now my mother's daughter at least in my mother's eyes, and I am now her father's daughter in his eyes as well. Our relationship with our families has changed inalterably, and indescribably, as a result of our very brief civil marriage."

Respondents' App., No. A110449, vol. II, at 303 (H. Zia Decl. ¶ 17).

Lesbian and gay Americans cannot claim their full, rightful citizenship as long as they are denied the right to marry the person of their choice. Historically, many Asian Americans were either forced to leave California or the United States to be able to create families. Without equal marriage rights, California gay and lesbian couples today face the dilemma either of sacrificing their dignity and remaining home in California or relocating to Massachusetts—the only state that currently legally recognizes marriages of same-sex couples—or to Canada, Spain, Belgium, the Netherlands, or South Africa—the countries that legally recognize marriages of same-sex couples.[70]

III. Strict Scrutiny Should Be Applied to Classifications Affecting Marriage

Because marriage is a fundamental interest, key to formation of families and their integration into society, strict scrutiny should be applied to classifications affecting marriage: "[T]he state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but

70. *World Briefing Americas: Canada: Gay Marriage Approved*, N.Y. Times, July 21, 2005, at A6, *available at* 2005 WLNR 11417768; Clare Nullis, *Same-Sex Marriage Law Takes Effect in S. Africa,* Wash. Post, Dec. 1, 2006, at A20.

that the distinctions drawn by the law are *necessary* to further its purpose." *Serrano I*, 5 Cal. 3d at 597.

As discussed in Respondents' briefs, there is no legitimate state interest, let alone any compelling state interest, justifying the challenged statutes. Excluding same-sex couples from marriage is in no way necessary to further any compelling state interest. The statutes violate the California Equal Protection Clause.

A. *Tradition Alone Cannot Be a Compelling State Interest for Discriminatory Classifications Affecting Marriage*

This Court cannot rely on "tradition" to decide whether the California Constitution permits excluding lesbians and gays from their fundamental interest in marriage. Discrimination and exclusion have been deeply rooted in California's marriage "tradition."

When *Perez v. Sharp,* 32 Cal. 2d 711 (1948), was decided, marriage prohibitions and other exclusionary laws had reduced California's Chinese American population to a fraction of its former size.[71] The decade before, the California Legislature was still *adding* racial groups to the state's anti-miscegenation statute.

It fell to this Court to protect the fundamental interests in marriage of California's vulnerable residents. When this Court did so by invalidating the anti-miscegenation statute, it did so despite the ban's long history and pervasive effect on California society, and despite its continued support by the Legislature and the electorate.

The *Perez* majority, led by Justice Traynor, rejected the dissent's reliance on the discriminatory "tradition" of excluding interracial couples from marriage. As described by Justice Shenk in dissent, "[t]he provisions of the law here attacked have remained unchallenged for nearly one hundred years and have been unchanged so far as the marriage of whites with Negroes is concerned." 32 Cal. 2d at 746-747 (Shenk, J., dissenting). Justice Shenk also noted that both state and federal courts had uniformly upheld the constitutionality of the bans on interracial marriages and thus the court should defer to the legislative branch. Yet, the majority correctly understood that this long and consistent history was not a sufficient or appropriate basis upon which to uphold a discriminatory restriction on access to a fundamental human right.[72]

71. The 1860 census shows that Asians and Pacific Islanders constituted 9.2% of the total California population. However, by 1900, that number had declined to 3.8%. By 1950, the Asian and Pacific Islander population had dwindled to a mere 1.7% of the California population, according to the census data. *See* U.S. Census data, *available at* http://www.census.gov/population/documentation/twps0056/tab19.pdf.

72. *Perez* thus enormously benefited Respondent Stuart Gaffney's family. If Mr. Gaffney's parents, who were an interracial couple, had traveled to another state to marry, they still would not have been able to be legally married in California without *Perez*. California's anti-miscegenation statutes declared all such marriages "illegal and void."

As with the anti-miscegenation statutes, the Legislature deliberately imposed marriage discrimination against same-sex couples when it amended section 300 of the Family Code in 1977 to impose gender restrictions on the definition of marriage. *See, e.g., Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1076 n.11 (2004) (observing that the legislative history makes it clear that the "purpose of the bill is to prohibit persons of the same sex from entering lawful marriage"). And despite the broad protections that California domestic partnership laws now provide same-sex couples, these laws do not permit same-sex couples to marry and do not give them the fully equal legal responsibilities, protections, recognition, and security of marriage.

Many California same-sex couples have waited years to marry. Respondents Phyllis Lyon and Del Martin have been waiting over fifty years. Respondents' App., No. A110451, at 68-69 (Lyon Decl. ¶¶ 2-4). Respondents Gaffney and Lewis have been waiting over a decade and a half. *Id.* at 148 (Gaffney Decl. ¶ 3). Respondents and other loving, committed same-sex couples seek through this litigation what the *Perez* decision accorded interracial couples, like Gaffney's parents: "the right to become a married couple with equal status in the eyes of the law." *Id.* at 156 (Gaffney Decl. ¶ 34). This Court should follow *Perez* and enforce the California Constitution to invalidate the marriage restrictions on same-sex couples.

B. *Because an Important Function of Marriage Is to Integrate Married Couples as New Family Units into Society, the Separate Institution of Registered Domestic Partnership Cannot Serve this Function and Cannot Justify Denial of Lesbian and Gay People's Fundamental Interest in Marriage*

The briefings of Respondents Rymer and Frazer, et al., and of the City and County of San Francisco persuasively explain that while California's registered domestic partnership laws provide lesbian and gay couples many legal protections, that status is different from marriage, and does not perform important functions of marriage.[73]

The registration of a domestic partnership does not fulfill marriage's essential function of facilitating formation of new families and integrating them into society. Indeed, registered domestic partnership has precisely the opposite effect of marking gay and lesbian couples as different. *See, e.g.,* Rymer Reply Br., p. 14 ("Being 'domestic partners' rather than spouses . . . limits social recognition and support, which in turn restricts the couple's ability to be seen and respected as a family in day to day interactions with others. . . . [B]y placing all lesbian and gay couples in a separate

73. *See*, *e.g.,* Respondents' Opening Br. on the Merits, pp. 18-26; Respondents' Consolidated Reply Br. on the Merits ("Rymer Reply Br."), pp. 13-15; Respondents' Supplemental Br. ("Rymer Supplemental Br."), pp. 2-17; Respondents' Consolidated Supplemental Reply Br., pp. 1-9; Petitioner City & County of San Francisco's Opening Br. on the Merits, pp. 48-56; City & County of San Francisco's Consolidated Reply Br., pp. 9-16; City & County of San Francisco's Supplemental Br., pp. 1-18.

legal class with a separate name and status, the domestic partnership law highlights their sexual orientation and places the sexuality of those couples in a constant, unwelcome spotlight. . . ."); Rymer Supplemental Br., p. 2 ("[p]ersons in domestic partnerships are forced to disclose their sexual orientation every time they are required to disclose their marital status").

Becoming married transitions a newly joined couple into a new status and social role; in contrast, the exclusion of gay couples from marriage "pushes them outside of the common framework and vocabulary of family and civic life; it forces them to be outsiders." *Id.* at 25. "Rather than including same-sex couples within the boundaries of a universal human experience, domestic partnership serves as a constant reminder of an assumed difference." *Id*. at 28 n.19.

Lesbian and gay couples have the same desire as heterosexual couples to solemnize a life-bond and matriculate socially, with a need to have their relatives and friends recognize and celebrate the extended family networks that support a married couple. Registered domestic partnership does not create the same family ties as marriage; the peculiar status of domestic partnership is neither understood nor respected like marriage. For example, in this litigation Helen Zia recalled that registering as domestic partners with her life partner, Lia Shigemura, was neither special nor meaningful to them, but rather "like getting a dog license." Respondents' App., No. A110449, vol. II, at 298 (H. Zia Decl. ¶ 5). Their registration was not meaningful to their families either. *Id.* As Zia explains, "To both of our families, my Chinese American family and Lia's Japanese American family, the bonds of family are critically important. . . . Marriage . . . is a bonding of two families, the family of each person in the couple. . . . My mother's inability to say that we are married prevents her from sharing with many of her friends and colleagues the pride and joy and sense of connection that she would have if our union were recognized as a marriage by society." *Id.* at 300 (H. Zia Decl. ¶ 9).

Zia also described their relatives' very different reactions when she and Lia married in February 2004: "Love and affirmation poured forth from our families and friends. . . . The kind of things family members said were both striking and moving. . . . My 15-year old niece has only ever known us as being together. Yet, when we told her we had married, she said to Lia: 'Now you're *really* my auntie.' . . . [W]hile our families had known and accepted that we were together, marriage made it real." *Id.* at 301 (H. Zia Decl. ¶ 12).

Helen Zia's mother, Beilin Woo Zia, similarly stressed that the common rituals and language of marriage facilitate creation of and communication about family relationships, in ways that span the gulfs of history and culture:

> "Marriage and family are extremely important in Chinese culture, and are also important to me. Marriage helps bind the two people who marry together. It also creates a family relationship between the families of the two married people. . . . In China, the ideal is for the extended families to

> live together in one family compound. . . . The marriage relationships of the children are the building blocks to that ideal. . . . When your son or daughter is married, you know how to introduce their spouse to your friends: you call them your son or son-in-law or your daughter or daughter-in-law. Everyone knows what that means. It means they are related to you and are part of your family."

Id. at 305-306 (B.W. Zia Decl. ¶¶ 3-5). Mrs. Zia explained that Helen and Lia's marriage gave her helpful access to common concepts and language about family relationships, even though her daughter's marriage was later deemed legally invalid. In Mrs. Zia's words:

> "For many years, Helen and Lia lived together and loved each other but could not get married. I almost never talked with my friends about Helen and Lia's relationship because I did not know how to describe it. When I introduced Lia, I usually introduced her as 'Helen's girlfriend.' I don't know if people understood what that meant.
>
> "Now I tell people that all of my children are married. I introduce Lia to my friends as 'my daughter' or 'my daughter-in-law.' I feel that Lia and her family are now truly our relatives."

Id. at 306-307 (B.W. Zia Decl. ¶¶ 11-12).

Helen Zia also stresses the communication and social participation that marriage uniquely allows, speaking both as an Asian American history scholar and from her experience as an Asian American lesbian:

> "In Chinese culture and other Asian cultures that have their roots in Confucianism, the family is the core and the foundation of society. . . . In Chinese culture, then, marriage is . . . regarded as the social expression of family . . . Allowing gay men and lesbians to marry would . . . allow many gay men and lesbians to participate more fully in their families since their families would be able to understand and explain their relationship in the context of the legal and socially accepted institution of marriage."

fcis]Id. at 297-298 (H. Zia Decl. ¶ 3).

Other participants in these *Marriage Cases* have similarly attested that the distinct status of domestic partnership did not allow them to communicate effectively about their families and to participate socially as marriage would have done. Respondent Stuart Gaffney explained that, upon marrying:

> "we publicly held ourselves out as legally married spouses. We referred to each other as 'husband' to family, friends, co-workers, and the public in general. Marriage provided the highest public acknowledgement and validation of our relationship—something that a state domestic partnership cannot provide. Being able to tell other people we were married both in formal and informal settings permitted us to experience our dignity as equal human beings and allowed us to express the truth of our lives together."

Respondents' App., No. A110451, at 153 (Gaffney Decl. ¶24).

Taking a lesson from the Asian American history explored earlier in this brief, there is ample reason to believe that allowing lesbian and gay couples to enjoy their fundamental interest in marriage will permit normal-

ization and incorporation of these couples within the fabric of California society and support stability of the family unit.[74]

Recognizing marriage as a fundamental interest will protect individuals, build families, and strengthen society as a whole. The State cannot abridge anyone's fundamental interest in marriage absent compelling, narrowly tailored public interests, which it has not even attempted to demonstrate in this litigation.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeal should be reversed.

DATED: September 26, 2007.

Respectfully submitted,[75]

KEVIN M. FONG
PILLSBURY WINTHROP
SHAW PITTMAN LLP

By _____
Kevin M. Fong

Attorneys for Amici Curiae Asian American Bar Association of the Greater Bay Area and other Asian Pacific American bar associations

DAISY J. HUNG
VICTOR M. HWANG
ASIAN PACIFIC ISLANDER LEGAL
OUTREACH

By _____
Daisy J. Hung

Attorneys for Amici Curiae Asian Pacific Islander Legal Outreach and other Asian Pacific American organizations

74. In one of its briefs to this Court, the Campaign for California Families (the "Campaign") acknowledges that marriage is a gateway to "shared meanings and expectations essential to an orderly and effective society." Campaign's Supplemental Br. in Response to June 20, 2007 Order, p. 28. The Campaign also recognizes that marriage is "a universally recognized social construct" and "an enduring social institution upon which the future of society depends." *Id.* at 26-27.

75. Additional attorneys on the legal brief team included: Robert S. Chang, Alex Fukui, Alice Kwong Ma Hayashi, Deanna Kitamura, Andy Wong, Brian Wong, and Doreena Wong.

KARIN H. WANG
JULIE SU
ASIAN PACIFIC AMERICAN LEGAL
CENTER

By _____
Karin H. Wang

Attorneys for Amici Curiae Asian Pacific American Legal Center and other Asian Pacific American organizations