Case No. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Appeal from a Judgment of the Court of Appeal
First Appellate District, Division Three,
Nos. A110449, A110450, A110451, A110463, A110651, A110652

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES

Urging affirmance

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES:

Pursuant to the California Rules of Court, Rule 8.520(f), *Amicus Curiae,* the National Legal Foundation, respectfully requests permission to file the accompanying brief in support of the appellees in *In Re Marriage Cases.*

Amicus Curiae, the National Legal Foundation (NLF), is a 501(c)(3) non-profit public interest law firm based in Virginia Beach, Virginia. The NLF is dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous briefs in important cases pertaining to the sanctity of marriage. The NLF has an interest, on behalf of its constituents and supporters, in arguing to protect the sanctity of marriage. This brief should aid the Court in reaching the conclusion that the fundamental right to marriage only includes opposite-sex couples.

DATED: September 17, 2007

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SUMMARY OF THE ARGUMENT

California's historical definition of marriage is limited to the union of opposite-sex couples. This Court should join the vast majority of appellate courts in retaining the traditional form of marriage. In fact, there has only been one anomalous decision that expanded the definition of marriage. The primary substantial objection to the argument based on definition is that it is tautological. However, chemistry provides a clear analogy of why this argument is not tautological. The study of chemistry has revealed that the only process in which table salt can be formed is through the union of sodium (Na) and chlorine (Cl). Even if you call a union of two sodium atoms or two chorine atoms "salt," as a matter of definition, it cannot be. The same is true for marriage, even if you call a union of two same-sex persons a marriage, it simply cannot be. This analogy has proven helpful to at least one court in the past, namely the United States Court of Appeals for the Ninth Circuit in *Smelt v. County of Orange* (9th Cir. 2005) 447 F.3d 673, and hopefully it will prove helpful to this Court as well.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE COURT OF APPEAL'S RULING BECAUSE THE FUNDAMENTAL RIGHT TO MARRY ONLY INCLUDES OPPOSITE-SEX MARRIAGE.

The Court of Appeal properly found that California's historical definition of marriage as a legal union between a man and a woman does not deprive individuals of a fundamental right. (*In re Marriage Cases* (2006) 143 Cal. App. 4th 873, 890, 49 Cal. Rptr. 3d 675, 686.) The only appellate decision that recognize "marriages" between persons of the same-sex was made by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* ((2003) 798 N.E.2d 941.) This controversial decision, however, has been given little support by other appellate courts; the vast majority of courts do not recognize same-sex "marriages." (*Marriage Cases*, 143 Cal. App. 4th at 908, 49 Cal. Rptr. 3d at 701.)

While marriage itself is an established fundamental right (*see Smelt v. County of Orange* (2005) 374 F. Supp. 2d 861, 877), the right to marry a person of the same sex is not. The United States Supreme Court has not "conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship." (*In re Kandu*, 315 B.R. 123, 140 (Bankr. D. Wash. 2004); *see also Dean v. D.C.* (D.C. Cir. 1995) 653 A.2d 307, 333 ("[S]ame-sex marriage cannot be called a fundamental right

protected by the due process clause.") (Ferren, J., dissenting in part)[1]; *Standhardt v. Superior Ct. of Ariz.* (2003) 77 P.3d 451, 460 ("[S]ame-sex marriage is not a fundamental [right] protected by due process."); *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, 44 (finding no fundamental right to same-sex marriage.))

People are generally free to enter into any relationship they please. However, the simple right to enter a relationship does not make that relationship a fundamental right. (*See Washington v. Glucksberg* (1997) 521 U.S. 702, 727 ("[T]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy [does not warrant the sweeping conclusion] that any and all important, intimate, and personal decisions are so protected . . . ."); *see also Wilson v. Ake* (M.D. Fla. 2005) 354 F. Supp. 2d 1298, 1306-07 ("[N]ot all important decisions are protected fundamental rights."); *Standhardt*, 77 P.3d at 459-60 ("[N]ot all important decisions sounding in personal autonomy are protected fundamental rights.")) Nor does the right to enter a relationship inherently require any particular status be given to that relationship. "[T]here is a distinct difference between protecting the right to engage in private conduct . . . and the 'affirmative right to receive official and public recognition'" of that conduct. (*Wilson*, 354 F. Supp. 2d at 1307 n.10 (*quoting Lofton v. Sec'y of*

[1] The opinion of the court was rendered pur curiam, and included Judge Ferren's dissent in part.

the Dep't of Children & Family Services (11th Cir. 2004) 58 F.3d 804, 817.))

By definition, "'marriage' is the legal union of one man and one woman as husband and wife." (*Baker v. State* (Vt. 1999) 744 A.2d 864, 868; *see also* The American Heritage Dictionary of the English Language 1102 (3rd ed. 1996) (marriage is the "union of a man and woman as husband and wife."); Webster's New International Dictionary 1506 (2nd ed. 1955) (marriage is "being united to a person . . . of the opposite sex as husband or wife"); Black's Law Dictionary 758 & 992 & 1628 (8th ed. 2004) (marriage is the "union of a couple as husband and wife[;]" a husband is "[a] married man;" a wife is "[a] married woman;"); Black's Law Dictionary 986 (7th ed. 1999) (marriage is the "union of a man and woman as husband and wife."); Black's Law Dictionary 756 (1st ed. 1891) (marriage is "one man and one woman united in law for life").) "[A]s it has been recognized and defined for centuries—indeed, millennia—[marriage] necessarily excludes two persons of the same sex from entering into that relationship." (*Dean*, 653 A.2d at 308 n.2 (Terry, J., concurring.))[2]

Some would dismiss this and similar observations as tautological, a "definitional or semantic substitute for meaningful analysis." (Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex*

[2] The opinion of the court was rendered pur curiam, and included Judge Terry's concurring opinion. This will be true for all cites to Judge Terry.

Marriage, 1996 BYU L. Rev. 1, 38; *but see* Jay Alan Sekulow and John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?* (1988) 12 BYU J. Pub. L. 309.) If the sole argument were that marriage must remain the union of one man and one woman for no other reason than it has always been that way, then such a dismissal might be in order. The "definition" of marriage, however, is much more than a relatively meaningless semantic distinction. A cogent analogy is found at the molecular level.

For millennia, the layman has known sodium chloride (NaCl) as common table salt, or simply salt. The study of chemistry has established that a molecule of salt is made up of the union of one atom of sodium (Na) and one atom of chlorine (Cl).[3] Two atoms of chlorine may, nonetheless, join together and form Cl_2. Two atoms of sodium may also join together, forming Na_2. However, neither Cl_2 nor Na_2 are NaCl, nor can they ever be. At the very least, each lacks a key component to complete the union required for NaCl. It is a definitional impossibility.

Just as the union of one atom of sodium and one atom of chlorine has a very specific outcome, so the union of one man and one woman has a very specific outcome. One is a chemical formula, with very specific features and dynamics and effects on the world around it. The other is a

[3] Technically, salt is an ionic compound, but it is often referred to as a molecule, and for ease of discussion here, we shall refer to it as a molecule.

social or relational formula, with very specific features and dynamics and effects on the world around it. One can certainly *call* Na_2 or Cl_2 "salt," but neither will ever be, nor have the same features, dynamics, and effects as, NaCl. Likewise, one can call the union of two men or two women "marriage," but neither will ever be, nor have the same features, dynamics, and effects as, the union of one man and one woman.

Just as the term "salt" is given to the specific molecular union NaCl, the term "marriage" is given to the specific social union of one man and one woman. Recognizing that the union of two men or two women is not marriage because it is a definitional impossibility is no different than recognizing that Na_2 or Cl_2 is not salt. That is not circular reasoning—simply a recognition that the union of two men or two women is not the same as the union of one man and one woman. The reservation of the term "marriage" for the specific union of one man and one woman, therefore, is not tautological, but only employment of that timeless, basic system of verbal communication used to convey specific and exclusive meaning.

While it may be argued that there is more similarity between same-sex unions and opposite-sex unions than either Na_2 or Cl_2 and NaCl, it has been recognized through the ages, and more recently by the United States Congress, that a man and a woman each contribute and produce something unique in that particular union that cannot be duplicated by another union. (*See, generally,* H.R. Rep. No. 104-664 (1996).) Congress has determined

that the protection and promotion of this union is in the best interest of the state. (*See id.; see also* Defense of Marriage Act, 1 U.S.C. § 7 (2006) (hereafter referred to as DOMA).) Such a determination is well within the authority of the legislature to make, and well outside the authority of the judiciary to refute, absent specific criteria.

The United States Court of Appeals for the Ninth Circuit utilized this salt analogy in its recent ruling in *Smelt v. County of Orange* (9th Cir. 2005) 447 F.3d 673. In that case, same-sex couples challenged the California statutory prohibition on same-sex marriage and DOMA. Although the court ultimately decided the case based on abstention and standing, it considered the definitional issues along the way. (*Id*. at 680 n. 18, 681.) Furthermore, during the oral argument, the judges relied upon a brief filed by your *Amicus* to specifically question counsel about the salt analogy. (*Id.*, Audio File, May 05, 2006, *available at* http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2 (After reaching this web site, enter the docket number, 05-56040. On the next web page, click on the link for the docket number and the audio file will play.)) Relying on the salt analogy, one of the judges made the point repeatedly that prohibiting same-sex marriage does not constitute discrimination; rather, such prohibition simply implies that definitions matter. *By definition*, same-sex unions cannot be marriages.

"[T]he word 'marriage,' when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore . . . same-sex 'marriages' are legally and factually—*i.e.*, definitionally—impossible." (*Dean*, 653 A.2d at 308.) Thus, recognizing same-sex "marriage" as included in the fundamental right to marry "would not expand the established [fundamental] right to marry, but would redefine the legal meaning of 'marriage.'" (*Standhardt*, 77 P.3d at 458.) A court does not have the authority to "alter or expand the definition of marriage . . . ." (*Dean*, 653 A.2d at 362.) Should doing so ever become necessary, that responsibility lies with the legislature. (*Maynard v. Hill* (1888) 125 U.S. 190, 205; *Dean*, 653 A.2d at 362; *Shields v. Madigan* (N.Y. Sup. Ct. 2004) 783 N.Y.S.2d 270, 277.)

There is no legal justification for conferring fundamental right status on a relationship whose very name is a contradiction in terms and whose status is otherwise confirmed by relevant case law. "The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process." (*Standhardt*, 77 P.3d at 460.) The Court of Appeal properly concluded that the fundamental right to marry does not include same-sex "marriage."

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeal of California, First Appellate District, Division Three.

Respectfully submitted this 17th day of September 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface, containing 2,006 words, including footnotes. In making this certification, I have relied on the word count function of Microsoft Office 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *In re Marriage Cases*, No. S147999, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on September 17, 2007, addressed as listed below. The required number of paper copies were filed in the same manner on the same date.

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