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Definition of Marriage Is at Heart of California Case

By **ADAM LIPTAK**

SAN FRANCISCO — For almost four hours on Tuesday, the California Supreme Court heard arguments in the most important same-sex marriage case since Massachusetts's highest court allowed gay and lesbian couples to marry there more than four years ago.

But it took only 15 minutes for Justice Carlos R. Moreno to identify the central question. "Doesn't this just boil down to the use of the m-word — marriage?" he asked.

California has a domestic partnership law that gives gay and lesbian couples nearly all of the legal rights and responsibilities that come with heterosexual marriage. That leaves open the question posed by Justice Moreno, one freighted with history, symbolism and emotion: What is so special about marriage?

Lawyers for the same-sex couples seeking the right to marry said that marriage was a unique expression of love and commitment and that calling their unions anything else was a form of second-class citizenship.

Lawyers for groups opposed to same-sex marriage agreed that marriage was a fundamental bond with ancient roots, but they drew the opposite conclusion, saying that allowing same-sex couples to marry would undermine the institution of marriage itself.

Lawyers for the state also opposed a constitutional right to same-sex marriage, but they took a markedly more modest and even tentative approach. The Legislature, they said, may parcel out nomenclature in this area largely as it wishes, and the matter is for the political process rather than the courts.

"Realistically, you have to give society time to adjust," said Christopher E. Krueger, a lawyer with the state attorney general's office.

The state ban on same-sex marriage is based on a law enacted by the Legislature in 1977 and a statewide initiative approved by the voters in 2000 that defined marriage as being only between a man and a woman. The question before the court is whether those laws violate provisions of the state Constitution protecting equality and fundamental rights.

Massachusetts is the only state that allows same-sex marriage, based on a ruling of its highest court interpreting the state's Constitution. The high courts of other states, including New York, New Jersey and Washington, have said there is no right to same-sex marriage under their Constitutions. The Connecticut Supreme Court is expected to rule on the question shortly.

The California court heard from eight lawyers in six consolidated cases. Therese M. Stewart, representing the city and county of San Francisco, argued alongside three lawyers representing homosexual couples in favor of

same-sex marriage. In 2004, San Francisco issued marriage licenses to thousands of same-sex couples until the courts put a halt to it.

“Domestic partnership and marriage are not equal,” Ms. Stewart said. “Words matter. Names matter.”

The Supreme Court here was the first state high court to strike down a law barring interracial marriage, in a 1948 decision called *Perez v. Sharp*. The United States Supreme Court did not follow suit until 1967.

Ms. Stewart asked whether giving interracial couples the same rights under a different name — “say we called it transracial unions instead of marriage,” she said — would have satisfied the state Constitution in 1948.

Several of the justices seemed receptive to the analogy. Chief Justice Ronald M. George, seen by many here as the swing vote on a closely divided court, paused three times during the argument to quote from the *Perez* decision.

“The essence of the right to marry is freedom to join in marriage with the person of one’s choice,” Chief Justice George said at one point, quoting a passage from the *Perez* decision by Justice Roger J. Traynor, who would go on to become chief justice of the court.

Lawyers for the state argued that the domestic partnership law was sufficient to satisfy any constitutional concerns, but Chief Justice George said that by leaving open the question of nomenclature, the state might actually have weakened its hand. “Does this ironically put the state in a worse position?” he asked.

Justice Joyce L. Kennard, picking up on the point, elaborated on that possibility. “The state has effectively conceded that there is no valid ground for distinction,” she said.

Justice Carol A. Corrigan, on the other hand, wondered about moving too fast.

“Why is this the moment,” she asked, “as opposed to 10 years from now?”

The four lawyers arguing against a constitutional right to same-sex marriage offered varying rationales. In an unusual move, Gov. Arnold Schwarzenegger sent his own lawyer, apparently because of a difference of opinion with the attorney general, Jerry Brown, about the level of scrutiny the court should use if it decides to conduct a more searching review than simply asking the state for a rational reason for forbidding the marriages.

But the lawyers for the governor and the attorney general agreed on the government interests that they said justified reserving the term marriage for heterosexual unions: tradition and the will of the majority.

Two private groups went further, arguing that allowing same-sex couples to marry would damage the families of heterosexual couples. Kenneth C. Mennemeier, the lawyer for Mr. Schwarzenegger, disclaimed that rationale. “State law recognizes that families take many forms,” he said, “and the state does not give preference to one form over another.”

Mathew D. Staver, a lawyer for the Campaign for California Families, which opposes same-sex marriage, gave a vigorous presentation on the importance of marriage to society in general and to children in particular.

When Ms. Stewart, the lawyer for San Francisco, rose to respond, Justice Ming W. Chin asked, "Did he just make your argument for you?"

Ms. Stewart responded, "He helped."

Under its rules, the court here must issue its decision in 90 days. Should it decide that the state constitution allows same-sex marriage, its ruling would almost certainly become an issue in the presidential election. Many political analysts believe that the Massachusetts decision, in late 2003, hurt Senator John Kerry, the Democratic nominee in 2004, in that year's presidential election.

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