SENATE COMMITTEE ON
ELECTIONS AND CONSTITUTIONAL AMENDMENTS
Senator Steven Glazer, Chair
2023 - 2024 Regular

Bill No:	ACA 5	**Hearing Date:**	7/5/23
Author:	Low		
Version:	6/5/23		
Urgency:		**Fiscal:**	No
Consultant:	Scott Matsumoto		

Subject: Marriage equality.

DIGEST

This measure, subject to voter approval, repeals a provision in the California Constitution that limits marriage to a "man and a woman," and replaces it with provisions that makes the right to marry a fundamental right.

ANALYSIS

Existing law:

1) Defines marriage as a personal relation arising out of a civil contract between two persons, to which the consent of the parties capable of making that contract is necessary. Specifies that consent must be followed by the issuance of a license and solemnization, as authorized.

2) Provides that all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

3) Provides, in an unconstitutional, voided provision of the California Constitution, that only a marriage between a man and a woman is valid or recognized in the state of California.

4) Provides that a marriage contracted outside California is valid in California if it is valid by the laws of the jurisdiction in which it was contracted.

5) Provides that no person may be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

6) Provides that the California Constitution may be revised through any of the following means:

    a) The Legislature, by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, proposes an amendment or revision of the Constitution.

b) The Legislature, by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, submits at a general election the question whether to call a convention to revise the Constitution. If the majority of the electorate vote yes on that question, the Legislature shall provide for the convention within 6 months. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.

c) By an initiative before the voters.

7) Provides that every constitutional amendment, bond measure, or other legislative measure submitted to the people by the Legislature shall appear on the ballot of the first statewide election occurring at least 131 days after the adoption of the proposal by the Legislature.

8) Provides, if approved by a majority of the vote, the amendments will take effect five days after the Secretary of State files the statement of the vote, unless the measure provides for a later effective date.

This measure:

1) Repeals a provision of the California Constitution stating that only marriage between a man and a woman is valid or recognized in California.

2) Adds provisions to the California Constitution declaring that the right to marry in California is a fundamental right and specifies that this section is in furtherance of both of the following:

a) The inalienable rights to enjoy life and liberty and to pursue and obtain safety, happiness, and privacy guaranteed by the California Constitution.

b) The rights to due process and equal protection guaranteed by the California Constitution.

BACKGROUND

Brief History. In the late 1960s and early 1970s, the prospect of same-sex marriage became imaginable and realistic with the rise of the gay and lesbian rights movement. In 1977, the Legislature passed and the Governor signed AB 607 (Nestande), Chapter 339, Statutes of 1977. AB 607 was the first California statute expressly limiting marriage to "a man and a woman." The absence of express language assumed that marriage could only occur between a man and woman. The California Legislature preemptively amended Family Code Section 300 to expressly define marriage as between a man and a woman. It should also be noted that this statute did not mean that the state recognized same-sex marriage prior to that date.

Beginning in the mid-1980s, local jurisdictions began to recognize same-sex couples by establishing a legal status called "domestic partnership," which gave same-sex couples not only limited protections for themselves and their children, but also, for the first time, afforded government recognition of same-sex relationships. By 2000, 18 California local governments had established domestic partnership registries. In 1999, the

Legislature enacted AB 26 (Migden), Chapter 588, Statutes of 1999, which enacted Family Code Section 297.5, the state's first domestic partnership statute.

Proposition 22. The half-measure of domestic partnership not only failed to give domestic partners all of the rights and benefits enjoyed by married couples, it highlighted the law's unequal treatment of same-sex and opposite-sex couples and thereby raised the question of whether such classifications violated the equal protection clauses in the United States and several state constitutions. In the 1990s, the movement for marriage equality began to bear fruit as a handful of state courts began to recognize same-sex marriage. For example, in 1993, the Hawaii Supreme Court held that its state law limiting marriage to opposite-sex couples violated both the state and federal equal protection clauses. However, in a pattern that would be repeated elsewhere, the decision in favor of same-sex marriage generated counter movements seeking to entrench the idea that only marriages between a man and a woman were legally valid. In 1998, Hawaii voters adopted a constitutional amendment that only recognized marriage between a man and a woman. California followed a similar trajectory. In response to fears that California courts could reverse California statutes – or that same-sex couples married in other states might come to California – California voters approved Proposition 22 in 2000. Proposition 22 (unlike the later Proposition 8) did not amend the state constitution. Instead, it amended the Family Code to prevent California from recognizing same-sex marriages, whether created in California or in any other state. The measure passed with 61 percent of the vote and was codified as Section 308.5 of the Family Code.

In 2004, the City and County of San Francisco ignored Proposition 22 and began issuing marriage licenses to same-sex couples. However, after 4,037 same-sex couples were married, the California Supreme Court ordered San Francisco to stop issuing marriage licenses to same-sex couples and invalidated the marriages that had already occurred. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055.) In response to this ruling, then-Assemblymember Mark Leno introduced legislation to permit same-sex couples to marry in California. AB 19 (Leno) of 2005 failed passage on the Assembly Floor. Assemblymember Leno revived the bill later that year as AB 849 (Leno) of 2005, which passed both houses of the state legislature. However, Governor Schwarzenegger vetoed the bill. The proposal was reintroduced in 2007 as AB 43 (Leno) of 2007, but the Governor vetoed the bill as well, stating it was up to the Supreme Court to decide if the state's ban on same-sex marriage was constitutional.

On May 15, 2008, the California Supreme Court, in a 4-3 decision, struck down the California statutes (Family Code Sections 300 and 308) limiting marriage to a man and a woman. The majority opinion concluded that, "the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples." (*In re Marriage* Cases (2008) 43 Cal.4th 757, 782.) The Court found that although "our state Constitution does not contain any explicit reference to a 'right to marry,' past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution." (*Id.* at 809.) The core substantive rights embodied in the right to marry "include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an officially recognized and protected family

possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage." (*Id.* at 781.) Accordingly, the Court concluded that "in light of the fundamental nature of the substantive rights embodied in the right to marry — and their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society — the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation." (*Id.* at 820.) Approximately 18,000 same-sex couples married in California after the effective date of the *In re Marriage* Cases decision.

Proposition 8. Success in the quest for marriage equality once again prompted reaction. Since the California Supreme Court had based its decision on the due process and equal protection clauses of the state constitution, opponents of same-sex marriage sought to amend the constitution to make it clear that it permitted prohibitions on same-sex marriage. On November 4, 2008, by a margin of 52 percent to 48 percent, California voters adopted Proposition 8, which added Section 7.5 to Article I of the California Constitution. Specifically, Proposition 8 added the following words into the California Constitution: "Only marriage between a man and a woman is valid or recognized in California." However, Proposition 8 did not stem the momentum for same-sex marriage or bring the litigation to an end. Immediately after the passage of Proposition 8, marriage equality advocates filed a petition directly with the California Supreme Court seeking to invalidate the measure on the grounds that it was not permissibly enacted. The Supreme Court, in *Strauss v. Horton* (2009) 46 Cal.4th 364, upheld Proposition 8 in a 6-1 decision, but held, unanimously, that the same-sex marriages performed in California before the passage of Proposition 8 remained valid. While upholding Proposition 8, the Court reiterated its key holding in In re Marriage Cases, namely that in all respects, other than the word marriage, "same-sex couples retain the same substantive protections embodied in the state constitutional rights of privacy and due process as those accorded to opposite-sex couples and the same broad protections under the state equal protection clause, including the principle that sexual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation are constitutionally permissible only if they satisfy the strict scrutiny standard of review." (*Id.* at 412.)

In 2009, opponents of Proposition 8 filed another action in federal court challenged Proposition 8 on the grounds that it violated both the due process clause and equal protection clause of the 14th Amendment to the federal constitution. The federal district court concluded that Proposition 8 was unconstitutional, violating both the federal due process and the equal protection clauses. (*Perry v. Schwarzenegger* (2010) 704 F. Supp. 2d 921, 1003 (N.D. Cal.).) The Ninth Circuit agreed, though on somewhat different grounds. Specifically, the Ninth Circuit focused on the fact that Proposition 8 violated the equal protection clause by targeting a minority group and withdrawing a right that the group already possessed (the right to marriage under *In re Marriage* Cases), without any rational basis for doing so. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052.) The United States Supreme Court, on a 5-4 decision, dismissed an effort to appeal the Ninth Circuit ruling on the ground that petitioner lacked standing. (*Hollingsworth v. Perry* (2013) 570 U.S. 693.) As a result, the district court decision became the law of California, but the United States Supreme Court had still not addressed the underlying question of whether state laws banning same sex marriage –

whether they took the form of a statute or a constitutional amendment – violated the due process and equal protection clauses of the 14th Amendment.

On June 28, 2013, California began allowing same-sex couples to marry, and began recognizing marriages between same sex couples from other states. One year later, the Legislature brought existing statutes (but not the state constitution) into conformity with state and federal case law. SB 1306 (Leno), Chapter 82, Statutes of 2014, removed the language from the Family Code stating that marriage is only between a man and a woman, and recast the Family Code section in gender-neutral terms. SB 1306 also defined marriage as a personal relation arising out of a civil contract between two persons, and removed limitations on the validity of same-sex marriages performed outside of California. In other words, SB 1306 removed a statute rendered void and unenforceable by state and federal case law. This measure removes a similarly void and unenforceable constitutional provision.

Obergefell. In 2015, the United States Supreme Court held, in the landmark case of *Obergefell v. Hodges*, that preventing same-sex couples from exercising their fundamental right to marry violated the due process and equal protection clauses of the 14th Amendment. Writing for the majority, Justice Anthony Kennedy began with the Court's long held view that the right to marry is a fundamental right "inherent in the liberty of the person" and is therefore protected by the due process clause, which prohibits the states from depriving any person of "life, liberty, or property without due process of law." (Citing, among other cases, *Meyer v Nebraska (1923) 262 U.S. 390.*) Kennedy held that "the marriage right is also guaranteed by the equal protection clause, which forbids the states from denying to any person…the equal protection of the laws." Kennedy reasoned that the right to marry the person of one's choice is so closely connected to the requirements of individual liberty that it must "apply with equal force to same-sex couples."

In short, the Court held unequivocally that states cannot, consistent with the due process and equal protection clauses of the 14th Amendment, limit marriage only to unions between a man and a woman. The majority opinion also concluded with the following statement about marriage being a right:

> *No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. (Obergefell v. Hodges (2015) 576 U.S. 644.)*

COMMENTS

1) According to the author: California leads the way in LGBTQ+ protections and cutting-edge pro-equality legislation and our constitution should reflect those values. ACA 5 is an important opportunity to reaffirm the freedom to marry and protect loving

couples and families across California who deserve to have their marriages protected and respected under the law.

2) Argument in Support. In a letter supporting ACA 5, Equality California stated, in part, the following:

The recent passage of the federal Respect for Marriage Act was an important step forward – it requires the federal government to recognize same-sex and interracial marriages and affirms that states must recognize valid marriage licenses from other states. However, it does not require states to issue marriage licenses to same-sex couples nor does it remove Proposition 8 from California's constitution. ACA 5 is an important safeguard in case the Supreme Court were to overturn Obergefell and Perry. It will help ensure all couples have the freedom to marry in California and protect against any future attempts to restrict marriage rights for same-sex or interracial couples.

Marriage is about love and commitment. If two people love each other and want to make a lifetime commitment to one another, they should be able to do so – regardless of their gender, sexual orientation, or race. ACA 5 will reaffirm the freedom to marry as a fundamental right and protect loving couples and families across California who deserve to have their marriages respected under the law.

3) Argument in Opposition. In a letter opposing ACA 5, the California Family Council stated, in part, the following:

The United States since its founding has recognized the definition of marriage as the union of one man and one woman as the best foundation for raising children. Children are our future and the government has the right to encourage those relationships that lead to the furnishing of the next generation.

It is our opinion that children flourish best when they are intimately connected with and raised by their mother and father. That is why our public policy should encourage the forming of these relationships. Many religious traditions agree with this fact and have resisted efforts to expand marriage to include other groupings of individuals.

If the state cares about the health and well-being of future generations, it will continue to define marriage the way it has been defined for centuries.

RELATED/PRIOR LEGISLATION

SB 1306 (Leno), Chapter 82, Statutes of 2014, removed the language from the Family Code stating that marriage is only between a man and a woman, and recast the Family Code section in gender-neutral terms.

AB 607 (Nestande), Chapter 339, Statutes of 1977, was the first California statute expressly limiting marriage to "a man and a woman."

PRIOR ACTION

Senate Judiciary Committee:	11 - 0
Assembly Floor:	67 - 0
Assembly Appropriations Committee:	11 - 0
Assembly Judiciary Committee:	9 - 1

POSITIONS

Sponsor: ACLU CA Action
Equality California
Human Rights Campaign
Lieutenant Governor Eleni Kounalakis
National Center for Lesbian Rights
Superintendent of Public Instruction Tony Thurmond

Support: American Federation of State, County and Municipal Employees, AFL-CIO
California Labor Federation
California School Employees Association
California Teachers Association
Chinese for Affirmative Action
County of Los Angeles Board of Supervisors
Culver City Democratic Club
Disability Rights California
League of Women Voters of California

Oppose: California Family Council
Real Impact
One individual

-- END --