

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

ACA 5 (Low)
Version: June 5, 2023
Hearing Date: June 27, 2023
Fiscal: No
Urgency: No
ID

SUBJECT

Marriage equality

DIGEST

ACA 5 proposes to repeal the void and unconstitutional provision of the California Constitution that limits marriage to a “man and a woman,” and replace it with a provision that expressly affirms that the right to marry is a fundamental right.

EXECUTIVE SUMMARY

The right to marry is a right that has long been considered to be a fundamental right under the principles of liberty, equality, and due process. As anti-marriage equality groups attempted to add statutes and provisions to the California Constitution limiting the right to marry to opposite-sex couples, state and federal courts found that such laws were not constitutional. In the case *In re Marriages Cases*, the California Supreme Court struck down Proposition 22, a proposition that added sections forbidding California from recognizing same-sex marriages to the Family Code, finding that the provisions violated the Equal Protections Clause of the California Constitution. Only a few years later, the Ninth Circuit likewise found that the constitutional provision limiting marriage to opposite-sex marriages that was added to the California Constitution through Proposition 8 was also unconstitutional. Finally, in the case *Obergefell v. Hodges* in 2015, the United States Supreme Court affirmed marriage equality nationwide, finding that any state laws that prohibited same-sex marriage were an unconstitutional violation of the Equal Protection Clause of the United States Constitution. However, the unconstitutional provisions of the California Constitution stating that marriage is between a man and a woman remains on the face of California’s Constitution, capable of revival if the legal precedents on marriage equality were to change. ACA 5 proposes to amend the California Constitution to remove these discriminatory and unconstitutional provisions from the California Constitution.

ACA 5 is co-sponsored by the ACLU, Equality California, the National Center for Lesbian Rights, the Human Rights Campaign, as well as the Offices of Lt. Governor Eleni Kounalakis and Superintendent of Public Instruction, Tony Thurmond. It is supported by several California cities and numerous labor, social justice, and religious organizations. It is opposed by the California Capitol Connection and California Family Council. Should ACA 5 pass this Committee, it then will be heard in the Senate Elections Committee.

PROPOSED CHANGES TO THE LAW

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. (Fam. Code § 300.)
- 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. (Cal. Const. Art. I, Sec. 1.)
- 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. (Cal. Const., Art. I, Sec. 7.5.)
- 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. (Fam. Code § 308.)
- 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. (Cal. Const. Art. I, Sec. 7; U.S. Const., Amend. XIV.)
- 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; or
- c) by an initiative before the voters. (Cal. Const. Art. XVIII.)

- 7) Provides that a proposed amendment or revision of the Constitution shall be submitted to voters, and if approved by a majority of the vote, 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. (Cal. Const. Art. XVIII, Sec. 4.)

This bill:

- 1) Repeals Section 7.5 of Article 1 of the California Constitution, which states that only marriage between a man and a woman is valid or recognized in California.
- 2) Adds Section 7.5 of Article I to the California Constitution to declare 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 Section 1 of Article I of the California Constitution; and
 - b) the rights to due process and equal protection guaranteed by Section 7 of Article I of the California Constitution.

COMMENTS

1. Author's statement

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. A brief history of LGBTQ rights and discrimination

Lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals have always been a part of California's communities. However, because of prejudice and misunderstanding, LGBTQ people in California and throughout the nation have long experienced discrimination, threats of harm, familial rejection, and denials of their basic rights. They have been denied employment opportunities or experienced harassment in the workplace. And they have been denied the rights to enjoy and access the same

benefits that non-LGBTQ individuals enjoy, including the right to love and have their relationship and commitment recognized by the state.

In light of these injustices, LGBTQ people began a movement to organize and demand their rights, dignity, and safety. The modern LGBTQ movement is generally understood to have begun with the Stonewall riots, which occurred in 1969 after police raided an LGBTQ bar called the Stonewall Inn in New York. It had not been the first raid of the Stonewall Inn; the bar had frequently been raided by the police on claims of trying to clean up the neighborhood of “sexual deviants.”

Led by figures like Marsha P. Johnson, the movement began demanding safety and recognition for LGBTQ people. The first gay pride parade was a march the year after the Stonewall riots, in which thousands of LGBTQ people marched through the streets of New York. In San Francisco in 1977, Harvey Milk, the first openly gay member of San Francisco’s Board of Supervisors, led an effort to introduce a gay rights ordinance protecting gays and lesbians from being fired from their jobs. In 1979, an estimated 75,000 people marched in Washington, D.C., demanding LGBTQ rights and civil rights legislation. Through this movement and organizing, LGBTQ people gained better recognition and acceptance nationwide, as well as a number of monumental wins like protections against discrimination in employment, inclusion in anti-hate crime laws, and eventual recognition of same-sex marriages.

Yet there have also been many setbacks. In the 1980’s, Auto Immune Deficiency Syndrome (AIDS) exploded in the LGBTQ community, killing thousands while the Federal government failed to act despite repeated pleas from the LGBTQ community. In 1993, the Federal government established the “Don’t Ask, Don’t Tell” policy, barring openly LGBTQ individuals from serving in the United States armed forces. Many states during this time also passed their own laws discriminating against LGBTQ people, such as the state of Texas’s law criminalizing private consensual sexual acts that was later overturned by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 538 (2003). In 1996, the Federal Defense of Marriage Act was signed into law, defining marriage as between one man and one woman.

3. The fight for marriage equality in California

In California, the fight for marriage equality has been a turbulent one. As the LGBTQ movement was growing and gaining momentum in the 1970’s, the Legislature placed the first prohibition on same-sex marriage into state law. Prior to that law, the provisions relating to marriage were gender neutral, such that there was a question whether same-sex marriages were allowed under their terms, and several same-sex couples attempted to obtain marriage licenses. In response, the Legislature amended the Family Code to expressly define marriage as between a man and a woman. (AB 607, Ch. 339, Stats. 1977.) However, throughout the state, opinions were already shifting, and local jurisdictions were awarding some of the legal benefits of marriage to many

LGBTQ couples through domestic partnerships. These domestic partnerships provided some recognition of and benefits to LGBTQ couples, but were still far from equal in benefit and importance to marriage.

As general acceptance grew, groups against marriage equality continued to fight to keep marriage equality out of California. In 2000, State Senator William “Pete” Knight placed a measure on the ballot that defined marriage in the Family Code as between a man and a woman, and forbade the state from recognizing same-sex marriages from other states. Although no state had yet recognized same-sex marriage, Proposition 22 was placed on the ballot to change long-standing state law that the state would not need to recognize a valid marriage from another state if that marriage did not fit California’s definition of marriage. The proposition passed. However, the passage of Proposition 22 did not deter the proponents of marriage equality. Numerous efforts were made in the state Legislature to pass a law that made same-sex marriage legal.

In 2004, the city of San Francisco started issuing marriage licenses to same-sex couples, in open defiance of Proposition 22 and the 1977 law. The city’s reasoning was that Proposition 22 was unconstitutional under the Equal Protection Clause of the California Constitution, which states that “a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.” (Cal. Const. Art. I, Sec. 7; *see also Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1069 (2004).) In response, opponents of marriage equality sued the city to stop the issuance of same-sex marriage licenses and the registration of the marriages already performed. In a narrow ruling, the California Supreme Court ordered the city of San Francisco to stop issuing marriage licenses to same-sex couples, but the Court did not invalidate already-issued marriage licenses or rule on the constitutionality of Proposition 22. (*Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055 (2004).)

Following that decision, the City of San Francisco, along with others, brought separate suits directly challenging the Proposition 22 and the Family Code provisions defining marriage as between a man and a woman as unconstitutional under the California Constitution’s Equal Protection Clause. (*In re Marriages Cases*, 43 Cal.4th 757 (2008).) The Court found that the right to marry is one of the fundamental constitutional rights embodied in the California Constitution, that sexual orientation is a suspect class that requires strict scrutiny of any law that discriminates on the basis of sexual orientation, and that the state’s interest in limiting marriage to opposite-sex couples is not a compelling state interest sufficient to justify the infringement on same-sex couples’ right to marry. (*Id.*) The Court reasoned that one of the core elements of the right to marry “is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families” such that denying same-sex marriage “poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.” (*Id.* at 783.) Thus, the Court said 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.)

While the California Supreme Court’s decision in *In re Marriages Cases* should have been the end of the debate, anti-marriage equality groups resolved to add language into the California Constitution prohibiting same-sex marriage. They managed to place Proposition 8 on the California ballot in November 2008, and the proposition passed narrowly, amid reports of possible confusion among voters regarding whether a vote for the proposition was for or against marriage equality. Proposition 8 added the provision to the California Constitution that this amendment seeks to remove: “Only a marriage between a man and a woman is valid or recognized in California.” (Cal. Const. Art. I Sec. 7.5.) After Proposition 8 passed, marriage equality advocates sued to challenge its constitutionality, on grounds that it violated the Due Process Clause and Equal Protection Clause of the United States Constitution. The Ninth Circuit on appeal agreed with the federal district court and the plaintiffs that Proposition 8 was unconstitutional, and the United States Supreme Court did not address the merits of the case in its decision to uphold the Ninth Circuit ruling. (*Perry v. Brown*, 671 F.3d 1052 (2012), *Hollingsworth v. Perry*, 570 U.S. 693 (2013).) Thus, after 2013, while the language added by Proposition 8 was still in the California Constitution, it was no longer enforceable.

4. Marriage Equality was declared the law nationwide by the Supreme Court in *Obergefell*

While *Perry v. Brown* established marriage equality as a constitutional right in California, the United States Supreme Court had not yet decided if this right applied nationwide. That landmark moment came with the Court’s decision in *Obergefell v. Hodges* in 2015. In a five-to-four ruling, the Court found that the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment provided LGBTQ individuals a fundamental right to marry, and that no state law banning same-sex marriage is Constitutional. (*Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).) Accordingly, the Court reasoned, no state may refuse to recognize a lawful same-sex marriage performed in another State on the grounds that it is a same-sex marriage. (*Id.* at 681.) The Court concluded its opinion:

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. (*Id.*)

5. ACA 5 is a proposed amendment to the California Constitution

After the Ninth Circuit decision invalidating Proposition 8, efforts were taken by the Legislature to remove provisions of the law that prohibited same-sex marriage. SB 1306 removed the provisions of the Family Code stating that marriage is only between a man and a woman, and reset the marriage sections in gender-neutral terms. (Leno Ch. 82, Stats. 2014.) Thus, this Legislature previously made the state's statutes conform with the legal precedent on marriage equality, but the Legislature has yet to conform the language in the California Constitution.

SB 1306, as an amendment to state law, simply required passage by the Legislature and a signature of the Governor. In contrast, because it is a proposed amendment to the California Constitution, ACA 5's task is rather different: it must pass both houses of the Legislature by a two-thirds vote, and then be approved by a majority of the voters of the state as an item on the ballot. (Cal. Const. Art. XVII.) This process recognizes that amendments to the Constitution are not meant to be a regular or common occurrence, and that the Constitution serves as the principal, guiding document of the state.

6. ACA 5 removes discriminatory and unconstitutional language from California's Constitution

It is true that marriage equality is still currently the law in the United States; however, it is not impossible that this will not always remain the case, not because the reasoning underlying *Obergefell* and marriage equality is dubious or unclear on the issue, but because Courts can change. And in fact, the United States Supreme Court already has. It no longer includes two of the Justices who were a part of the majority decision in *Obergefell*, and at least one current Justice has expressed his interest in revisiting the Court's decision in that case. In *Dobbs v. Jackson Women's Health Organization*, Justice Thomas opined in his separate concurrence that the court "should reconsider all of [the] Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." (*Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, J. Thomas concurrence 3 (2022).) Regardless of the probability that the Supreme Court actually revisits *Obergefell*, the state need not wait until the issue is imminent to align the state Constitution with the state's ideals.

While the argument for marriage equality is part of the larger LGBTQ movement, it is also incredibly straight-forward. Marriage equality is about equal treatment under the law, and the ability for LGBTQ couples to enjoy recognition and dignity in the eyes of the state. For these reasons, both the California Supreme Court and the United States Supreme Court have found that bans on marriage equality are unconstitutional. Yet the United States Supreme Court's decision on marriage equality does not by operation

remove unconstitutional provisions from the law. Instead, those unlawful provisions remain unless specifically removed by an act of the Legislature, capable of revival if legal precedent changes. ACA 5 corrects this concern: removing the California Constitution's provision denying marriage equality will not only remove the blight of an unconstitutional infringement on a fundamental right from the face of the state's principal guiding document, but also will ensure that the provision will not spring back into effect should the legal precedents on marriage equality ever change.

7. Arguments in support

According to Equality California, a co-sponsor of ACA 5:

For more than twenty years, Equality California has led the Golden State's fight for full LGBTQ+ equality. We bring the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ+ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve.

Although marriage equality for same-sex couples has been the law of the land in California since the Supreme Court's June 2013 ruling in *Hollingsworth v. Perry*, California's constitution still contains outdated and discriminatory language from Proposition 8 stating that same-sex couples are not allowed to marry. And while the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges* helped bring marriage equality nationwide, it has become increasingly clear that the far-right majority of the current Supreme Court cannot be trusted to uphold their own precedent or protect our civil rights. Just last year, in a ruling overturning 50 years of precedent affirming the constitutional right to an abortion, Justice Clarence Thomas argued that the Supreme Court should reconsider *Obergefell* and "all of this Court's substantive due process precedents."

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.

8. Arguments in opposition

According to California Capitol Connection:

Marriage has been defined as a union between a man and a woman from the beginning. God instituted it. The Bible teaches us in Genesis 1 and 2, "So God created man in his own image, in the image of God created he him; male and female created he them...And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it...Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." Jesus Christ reaffirmed this truth in Matthew 19 when He said, "...Have ye not read, that he which made them at the beginning made them male and female, And said, For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh? Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder."

The debate about marriage is not about love or hate. It is about truth. Man cannot redefine what God has already defined.

SUPPORT

ACLU California Action (sponsor)
Equality California (co-sponsor)
National Center for Lesbian Rights (co-sponsor)
Human Rights Campaign (co-sponsor)
Office of Lieutenant Governor Eleni Kounalakis (co-sponsor)
Office of Superintendent of Instruction Tony Thurmond (co-sponsor)
AFSCME
Ajc San Francisco
American Jewish Committee (AJC) San Diego
American Jewish Committee - Los Angeles
Anti-defamation League
California Federation of Teachers Afl-cio
California Labor Federation, Afl-cio
California Lgbtq Health and Human Services Network
City of San Diego
City of West Hollywood
City of Sunnyvale
Culver City Democratic Club
Disability Rights California
Hadassah

Jrc Bay Area
Jewish Center for Justice
Jewish Community Federation and Endowment Fund
Jewish Community Relations Council of Sacramento
Jewish Community Relations Council of Silicon Valley
Jewish Democratic Club of Silicon Valley
Jewish Democratic Club of Solano County
Jewish Family & Children's Service of Long Beach and Orange County
Jewish Family & Community Services East Bay
Jewish Family Service of Los Angeles
Jewish Family Service of The Desert
Jewish Family Service San Diego
Jewish Family Services of Silicon Valley
Jewish Federation of Greater Los Angeles, the
Jewish Federation of Greater Santa Barbara
Jewish Federation of The Greater San Gabriel and Pomona Valleys
Jewish Federation of The Sacramento Region
Jewish Long Beach
Jewish Public Affairs Committee
Jvs Social
League of Women Voters of California
National Association of Social Workers, California Chapter
Planned Parenthood Affiliates of California
Progressive Zionists of California
Santa Monica Democratic Club

OPPOSITION

California Family Council
California Capitol Connection

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1306 (Leno, Ch. 82, Stats. 2014) removed the provisions from the Family Code that stated that marriage is only between a man and a woman, and amended the remaining provisions relating to marriage to be in gender-neutral terms. It also removed the provision denying the recognition of valid same-sex marriages from other jurisdictions.

SB 54 (Leno, Ch. 625, Stats. 2009) would have clarified that a marriage contracted outside of California that was valid by the laws of the jurisdiction in which it took place is valid in California. Stated that valid same-sex marriages of other states that took place prior to November 5, 2008 are valid in California, and that valid same-sex marriages of other states entered into after November 5, 2008 shall be accorded the same rights, protections, and benefits that opposite-sex marriage are accorded.

AB 43 (Leon, 2007) would have provided that marriage is a personal relation arising out of a civil contract between two persons, and replaced references to spouses' genders with gender-neutral language, similar to AB's 849 and 19. AB 43 passed the Legislature but was vetoed by the Governor.

AB 849 (Leno, 2005) would have provided that marriage is a personal relation arising out of a civil contract between two persons, and replaced references to spouses' genders with gender-neutral language. AB 849 passed the Legislature, but was vetoed by the Governor.

AB 19 (Leno, 2005) would have provided that marriage is a personal relation arising out of a civil contract between two persons, and replaced references to spouses' genders with gender-neutral language. AB 19 failed to pass the Assembly.

AB 607 (Nestande, Ch. 339, Stats. 1977) added a provision to the Family Code expressly defining marriage as between a man and a woman.

PRIOR VOTES:

The Assembly Floor vote was not available at the time this analysis was published.
Assembly Appropriations Committee (Ayes 11, Noes 0)
Assembly Judiciary Committee (Ayes 9, Noes 1)
