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## Chapter 834: Clearing a Roadblock in the Battle over Same-Sex Marriage

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## Chapter 834: Clearing a Roadblock in the Battle over Same-Sex Marriage

*Sean D. O'Dowd*

### *Code Section Affected*

Family Code § 400 (amended).  
SB 1140 (Leno); 2012 STAT. Ch. 834.

### I. INTRODUCTION

For nearly six months in 2008, same-sex marriage was legal in California.<sup>1</sup> During that time, “approximately 18,000 same-sex couples wed.”<sup>2</sup> A recent Ninth Circuit Court of Appeals decision suggests that these unions will soon again be permitted,<sup>3</sup> although final word will come from the United States Supreme Court.<sup>4</sup>

At the heart of the debate is the constitutionality of the California Marriage Protection Act,<sup>5</sup> commonly known as “Prop 8.”<sup>6</sup> Originally a ballot proposition, Prop 8 changed the California Constitution to read “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>7</sup> The Supreme Court will decide whether Prop 8 violates the Equal Protection Clause, and is, therefore, unconstitutional and void.<sup>8</sup>

In preparation for this legal battle, the California Legislature passed Chapter 834, in an attempt to clear a potential hurdle for same-sex couples.<sup>9</sup> Chapter 834 mandates that no religious entity shall be punished for refusing to solemnize marriages contrary to religious beliefs.<sup>10</sup> The new law directly addresses a primary argument made by proponents of Prop 8: that religious entities would be

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1. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1140, at 2–3 (June 19, 2012).

2. *Id.*

3. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, No. 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

4. *Id.* (challenging California’s Proposition 8); Bob Egelko, *Supreme Court Sets Prop. 8, DOMA Hearings*, SFGATE (Jan. 7, 2013), <http://www.sfgate.com/nation/article/Supreme-Court-sets-Prop-8-DOMA-hearings-4172681.php> (on file with the *McGeorge Law Review*).

5. *Perry*, 671 F.3d at 1063.

6. Ariane de Vogue, *California Prop 8 Headed to U.S. Supreme Court*, ABC NEWS (June 5, 2012, 3:26 PM), <http://abcnews.go.com/blogs/politics/2012/06/california-prop-8-headed-to-u-s-supreme-court/> (on file with the *McGeorge Law Review*).

7. *Perry*, 671 F.3d at 1067.

8. *See id.* at 1096 (affirming Prop 8 as unconstitutional on the grounds that it violates the Equal Protection Clause).

9. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1140, at 4 (June 19, 2012).

10. CAL. FAM. CODE § 400(a) (amended by Chapter 834).

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forced to solemnize gay marriages in fear of losing their tax-exempt status.<sup>11</sup> By addressing this concern now, however, California legislators have paved the way for a smooth transition towards legalizing gay marriage, should the United States Supreme Court affirm the Ninth Circuit’s decision to overturn Prop 8.<sup>12</sup>

## II. LEGAL BACKGROUND

Prior to Chapter 834, Section 400 of the California Family Code did not implicate same-sex marriage in any way.<sup>13</sup> The section simply outlined the different classifications of individuals authorized to solemnize marriages: religious personnel,<sup>14</sup> judges,<sup>15</sup> and state legislators.<sup>16</sup> To better understand how Chapter 834 transformed section 400 into same-sex marriage law, a brief legal history of gay marriage in California is necessary.<sup>17</sup>

### A. Challenging the Traditional Designation of “Marriage”

In 2000, California Proposition 22 added Section 308.5 to the California Family Code, which states: “Only marriage between a man and a woman is valid or recognized in California.”<sup>18</sup> In 2004, San Francisco’s then-Mayor Gavin Newsom challenged the statute, requesting the County Clerk’s advice on what changes would be necessary to “provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation.”<sup>19</sup> Newsom believed that the California Constitution prohibited “discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage.”<sup>20</sup>

The clerk’s office subsequently started issuing marriage licenses to same-sex couples in 2004.<sup>21</sup> California Attorney General Bill Lockyer responded by filing a petition.<sup>22</sup> The matter, *Lockyer v. City & County of San Francisco*, went directly

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11. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1140, at 4 (June 19, 2012). In the alternative, religious entities were worried about being punished for *not* performing same-sex marriages. *Id.*

12. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 3–4 (May 1, 2012).

13. FAM. § 400 (West 2012).

14. *Id.* § 400(a).

15. *Id.* § 400(b)–(d).

16. *Id.* § 400(e).

17. *See generally* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 1–3 (May 1, 2012) (explaining California law prior to Chapter 834).

18. FAM. § 308.5 (West 2004).

19. *Lockyer v. City & Cnty. of San Francisco*, 33 Cal. 4th 1055, 1069–70, 95 P.3d 459, 464 (2004) (internal citations omitted).

20. *Id.* at 1070, 95 P.3d at 464–65.

21. *Id.* at 1071, 95 P.3d at 465.

22. *Id.* at 1072, 95 P.3d at 466.

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before the California Supreme Court,<sup>23</sup> which ultimately held that San Francisco's local officials lacked the authority to issue marriage licenses to same-sex couples in violation of state statutes.<sup>24</sup> The court expressly declined to address the constitutional validity of the statutes themselves.<sup>25</sup>

While *Lockyer* was still pending, same-sex marriage proponents began filing petitions challenging the constitutionality of California's marriage statutes.<sup>26</sup> *In re Marriage Cases* consisted of six such petitions consolidated into one appeal before the California Supreme Court.<sup>27</sup> Unlike *Lockyer*, however, the court only considered the substantive constitutionality of the statutes themselves.<sup>28</sup>

In finding the marriage statutes unconstitutional, the court stated that the statutes imposed "differential treatment on the basis of sexual orientation"<sup>29</sup> and were constitutionally suspect under the state's Equal Protection Clause.<sup>30</sup> The court found classification based on sexual orientation analogous to classifications based on race and gender.<sup>31</sup> The court further determined marriage to be a "fundamental right whose protection is guaranteed to all persons,"<sup>32</sup> noting that the state's domestic partnership laws also violated the constitutional right of privacy by forcing individuals to "involuntarily and unnecessarily disclose" their sexual preference.<sup>33</sup> The court's ruling effectively voided section 300, the language of which limited marriage to a man and woman, and labeled section 308.5 as a "provision [that] cannot stand."<sup>34</sup> Judge Corrigan dissented, stating that any new meaning of marriage in California "should develop among the people . . . and find its expression at the ballot box."<sup>35</sup>

*B. Proposition 8 and Its Progeny*

Before the court decided *Marriage Cases*, gay marriage opponents began circulating a petition for an initiative measure to amend the California Constitution to read: "Only marriage between a man and a woman is valid or

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23. *Id.*

24. *Id.* at 1069, 95 P.3d at 464.

25. *See id.* ("[T]he substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding . . .").

26. *In re Marriage Cases*, 43 Cal. 4th 757, 786, 183 P.3d 384, 402–03 (2008).

27. *Id.* at 778, 183 P.3d at 397.

28. *Id.*

29. *Id.* at 788, 183 P.3d at 404.

30. *Id.*

31. *Id.* at 843, 183 P.3d at 443.

32. *Id.* at 809, 183 P.3d at 419.

33. *State Constitutional Law—California Supreme Court Declares Prohibition of Same-Sex Marriages Unconstitutional—In re Marriage Cases*, 183 P.3d 38 (Cal. 2008), 122 HARV. L. REV. 1557, 1560 (2009).

34. *In re Marriage Cases*, 43 Cal. 4th at 857, 183 P.3d at 453.

35. *Id.* at 884, 183 P.3d at 471 (Corrigan, J., concurring and dissenting).

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recognized in California.”<sup>36</sup> The initiative measure, ultimately designated Prop 8, reiterated the same fourteen words found in section 308.5 with one major difference: the language would now be directly incorporated into the state’s constitution instead of a mere statutory provision.<sup>37</sup>

On June 2, 2008, Prop 8 had received sufficient signatures “to appear on the . . . general election ballot”<sup>38</sup> and passed by a narrow margin in the November election.<sup>39</sup> The next day, gay marriage proponents filed three separate petitions challenging the validity of Prop 8, and the petitions were once again consolidated before the California Supreme Court.<sup>40</sup>

In *Strauss v. Horton*, the California Supreme Court determined whether Prop 8 constituted a “permissible change to the California Constitution,” and, if so, what effect it would have on the estimated eighteen-thousand marriages performed before the measure was adopted.<sup>41</sup> In finding Prop 8 constitutional, the court commented that Prop 8 “carves out a narrow and limited exception . . . reserving the official *designation* of the term ‘marriage’ for the union of opposite-sex couples,” while leaving a same-sex couple’s “constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection” undisturbed.<sup>42</sup> The court held that Prop 8 could not be applied retroactively, however, and that all same-sex marriages performed before November 5, 2008, were to remain valid and recognized in the state.<sup>43</sup>

Proponents of same-sex marriage rushed to federal court to challenge the California Supreme Court’s endorsement of Prop 8, alleging that the measure violated the Fourteenth Amendment of the United States Constitution.<sup>44</sup> After a twelve-day bench trial, the District Court for the Northern District of California deemed Prop 8 to be “unconstitutional under the Due Process Clause because no compelling state interest justify[ed] denying same-sex couples the fundamental right to marry.”<sup>45</sup> The district court “also determined that [Prop] 8 violated the Equal Protection Clause because there is no rational basis for limiting the designation of ‘marriage’ to opposite-sex couples.”<sup>46</sup> The Ninth Circuit affirmed the district court’s ruling in *Perry v. Brown*, adding that Prop 8 “serves no

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36. *Strauss v. Horton*, 46 Cal. 4th 364, 395, 207 P.3d 48, 66 (2009).

37. *Id.* By directly amending the Constitution, Prop 8 attempted to avoid the same fate as Prop 22 because “[a] California statute . . . is invalid if it conflicts with the governing provisions of the California Constitution.” *Id.*

38. *Id.* at 397, 207 P.3d at 68.

39. *Id.* at 398, 207 P.3d at 68 (noting that the majority was only 52.3 percent of the casted votes).

40. *Id.*

41. *Id.* at 385, 207 P.3d at 59.

42. *Id.* at 388, 207 P.3d at 61.

43. *Id.* at 392, 207 P.3d at 64.

44. *Perry v. Brown*, 671 F.3d 1052, 1068 (9th Cir. 2012), *cert. granted sub nom.* *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

45. *Id.* at 1069.

46. *Id.*

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purpose, and has no effect” other than to strip same-sex couples of the right “to obtain and use the designation of ‘marriage’ to describe their relationships,” a right which they previously possessed.<sup>47</sup> Additionally, the Ninth Circuit specifically noted that Prop 8 had no effect on religious freedoms or Free Exercise Clause implications.<sup>48</sup>

*C. Free Exercise Implications*

Although dismissed by the Ninth Circuit in *Perry*,<sup>49</sup> opponents of same-sex marriage argue that Prop 8 is necessary to protect religious freedoms—namely that a religious entity could be punished for refusing to solemnize same-sex unions by losing its tax-exempt status.<sup>50</sup> If true, the constitutionality of this type of state or federal action would be analyzed under the Free Exercise Clause of the First Amendment.<sup>51</sup>

The First Amendment of the United States Constitution safeguards the “free exercise” of each person’s chosen form of faith,<sup>52</sup> and it applies equally to both state and federal laws.<sup>53</sup> The California Constitution has a similar provision protecting the exercise and enjoyment of religion.<sup>54</sup>

In the past, the United States Supreme Court has recognized narrow religious exemptions when the application of secular law infringes upon religious freedoms.<sup>55</sup> For example, the Court has upheld religious exceptions to federal employment discrimination laws,<sup>56</sup> public education mandates,<sup>57</sup> and the broad internal governance of religious organizations themselves.<sup>58</sup> The Court additionally acknowledged certain limited religious exceptions to federally created programs, such as Social Security.<sup>59</sup>

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47. *Id.* at 1063–64.

48. *Id.* at 1063.

49. *Id.*

50. Laurie Goodstein, *A Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES (Oct. 26, 2008), <http://www.nytimes.com/2008/10/27/us/27right.html?pagewanted=all> (on file with the *McGeorge Law Review*).

51. U.S. CONST. amend. I.

52. *Id.*

53. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

54. CAL. CONST. art. I, § 4.

55. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 4 (May 1, 2012).

56. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

57. *See Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972) (finding that requiring Amish parents to send their children to attend public high school would violate free exercise rights).

58. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 709 (2012) (stating that the purpose of the ministerial exception, grounded in the Free Exercise Clause, is to ensure that the authority to select and control church personnel belongs to the church alone).

59. *See United States v. Lee*, 455 U.S. 252, 260–61 (1982) (clarifying that the religious exemption to social security only applies to self-employed individuals).

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These religious exceptions, however, are not absolute.<sup>60</sup> In *Employment Division Department of Human Resources of Oregon v. Smith*,<sup>61</sup> the Supreme Court drastically limited the free exercise doctrine, writing that strict scrutiny only applied to cases involving: (1) the denial of unemployment compensation when an employee refuses to work for religious reasons, (2) free exercise implications joined with other constitutional issues, or (3) direct discrimination against religion.<sup>62</sup> Congress responded to the *Smith* decision by passing the Religious Freedom Restoration Act of 1993 (RFRA), which requires strict scrutiny whenever any government “substantially burden[s] a person’s exercise of religion.”<sup>63</sup> However, the United States Supreme Court significantly limited this legislation in *City of Boerne v. Flores*, where it held that the RFRA is inapplicable as applied to state law.<sup>64</sup>

### III. CHAPTER 834

Chapter 834 mandates that no priest, rabbi, or other “authorized person of any religious denomination” shall be required to “solemnize a marriage that is contrary to the tenets of his or her faith.”<sup>65</sup> Refusal to solemnize would not be grounds to deprive a religious entity or person of their tax-exempt status.<sup>66</sup> Chapter 834 aims to distinguish marriage as a civil contract rather than a religious one.<sup>67</sup> Chapter 834 does not disturb section 400’s pre-existing provisions specifying the qualifications needed to solemnize marriages in California.<sup>68</sup>

### IV. ANALYSIS

Chapter 834 protects religious entities from losing their tax-exempt statuses should they refuse to solemnize same-sex unions.<sup>69</sup> Although such unions are not currently recognized in California, the law actually advances gay rights by countering one of the cornerstone arguments made by supporters of Prop 8.<sup>70</sup> In

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60. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (explaining that the freedom to believe is absolute in nature, while the freedom to act is not).

61. 494 U.S. 872 (1990).

62. *Id.* at 876–83.

63. 42 U.S.C. § 2000bb-1 (2006).

64. 512 U.S. 507, 536 (1997).

65. CAL. FAM. CODE § 400(a) (amended by Chapter 834).

66. *Id.*

67. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 1 (May 1, 2012).

68. FAM. § 400(b) (West 2012); see also *id.* § 400(a) (amended by Chapter 834) (allowing for persons to refuse to solemnize a marriage if it would be against their faith).

69. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 1 (May 1, 2012).

70. See *id.* at 2–3 (describing the ongoing national debate regarding the effect of equal marriage rights on religious freedom).

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this regard, Chapter 834 could prove useful to deter public resentment should gay marriage be legalized in the future.<sup>71</sup>

In actuality, Chapter 834 offers no greater protections than those that currently exist under the First Amendment.<sup>72</sup> Under the Free Exercise Clause, no government entity can interfere, regulate, or penalize based solely upon religious beliefs,<sup>73</sup> regardless of whether said beliefs are considered “acceptable, logical, consistent, or comprehensible.”<sup>74</sup> Under certain religious doctrines, marriage is limited to one man and one woman.<sup>75</sup> Under the First Amendment, individuals have a fundamental right to hold such a belief.<sup>76</sup> If the government were to eliminate a religious entity’s tax exemption based solely on religious beliefs about marriage, such regulation would likely receive strict scrutiny review and be deemed unconstitutional.<sup>77</sup> This is because the governmental interest pertaining to gay marriage is strictly limited to same-sex couples’ access to marriage, not the means by which those marriages are solemnized.<sup>78</sup> If the Supreme Court upholds the Ninth Circuit’s decision to overturn Prop 8, there would be many solemnization methods available for same-sex couples, including by those religious entities that condone gay marriage.<sup>79</sup> Furthermore, the legislature has already stipulated its intention to distinguish marriage as a civil contract, not a religious one.<sup>80</sup> Thus, there would be no “compelling” reason to force the two back together.<sup>81</sup>

The interesting thing about Chapter 834, however, is that its purpose was not to clarify or further existing religious freedoms at all.<sup>82</sup> Rather, the law is simply

71. The inference here is that by eliminating certain free exercise concerns, gay marriage opponents will be left with one less argument to draw support from. *See id.* at 4 (“[A]s long as there is confusion over this issue, it is [] valid . . . for the legislature . . . to clarify constitutional rights.”).

72. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1140, at 4–5 (June 19, 2012).

73. *Sch. Dist. of Abington Twp., Penn. v. Schempp*, 374 U.S. 203, 254 (1963).

74. *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).

75. *See, e.g., Genesis 2:18–24* (New American Bible) (recounting the story of Adam and Eve, wherein God makes woman, stating, “[i]t is not good for the man to be alone. I will make a suitable partner for him.”); *see also* CATECHISM OF THE CATHOLIC CHURCH 400–01 (Liguori Publications 1994) (interpreting this passage, and others, to mean that God intended marriage to be exclusively between a man and a woman).

76. *Schempp*, 374 U.S. at 254.

77. *See generally id.* (prohibiting government interference with religious beliefs); *Thomas*, 450 U.S. at 714 (explaining the irrelevance of judicial perception of a particular belief); *see also Bowen v. Roy*, 476 U.S. 693, 707–08 (1986) (stating that the government can only meet its burden “[a]bsent an intent to discriminate against particular religious beliefs”).

78. *See In re Marriage Cases*, 43 Cal. 4th 757, 809, 183 P.3d 384, 409 (2008) (defining “marriage” as a “fundamental right whose protection is guaranteed to all persons”); *see also Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012) (stressing the constitutional importance of same-sex marriage as the right “to obtain and use the designation of ‘marriage’ to describe [a same-sex] relationship”).

79. CAL. FAM. CODE § 400 (amended by Chapter 834); Goodstein, *supra* note 50.

80. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 1 (May 1, 2012).

81. *See id.* (inferring from legislative intent that the point of Chapter 834 is to separate religion from same-sex marriage, not mesh the two together).

82. *Id.* at 4.

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designed to eliminate a cornerstone argument against gay marriage by rendering it moot.<sup>83</sup> In passing Prop 8, gay marriage opponents relied heavily on doomsday-like scenarios in which same-sex marriage would single-handedly destroy both the family and the church.<sup>84</sup> Chapter 834 is very much a way to reassure these same constituents that religion, like heterosexual marriage, “isn’t going anywhere.”<sup>85</sup> Of course, to achieve this purpose, same-sex marriage would have to be permitted in the first place.<sup>86</sup>

## V. CONCLUSION

Chapter 834’s amendments to Section 400 of the Family Code have important implications for same-sex marriage.<sup>87</sup> Chapter 834 assures religious entities that they will not be punished should they refuse to solemnize same-sex unions in the future.<sup>88</sup> This may help to quell fears and religious backlash upon legalization of same-sex marriage in California,<sup>89</sup> although some questions remain as to whether Chapter 834 is necessary to achieve this purpose; regulation of religious ceremonies in violation of Chapter 834 may already offend First Amendment protections.<sup>90</sup> Nonetheless, Chapter 834 should help to clarify existing religious rights, temper both religious and secular fervor, and foreshadow the ultimate constitutional issues that lie ahead.<sup>91</sup>

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83. *See id.* at 3 (stating that Chapter 834 “seeks to resolve th[e] debate by . . . providing that members of the clergy are not required to solemnize marriages contrary to the tenets of their faith”).

84. *See* Goodstein, *supra* note 50 (citing religious conservatives as “warning in stunningly apocalyptic terms of dire consequences to the entire nation if Proposition 8 does not pass”).

85. *See, e.g., Letters to the Editor: May 21, 2012*, EXAMINER (May 20, 2012), <http://washingtonexaminer.com/article/633606> (on file with the *McGeorge Law Review*) (evidencing one commenter’s passion and commitment to his traditional views on marriage); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 3 (May 1, 2012).

86. *See generally* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140 (May 1, 2012) (referencing Chapter 834’s same-sex marriage implications, while recognizing that gay marriages are currently not legal in California).

87. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 3–4 (May 1, 2012).

88. CAL. FAM. CODE § 400(a) (amended by Chapter 834).

89. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1140, at 3–4 (May 1, 2012).

90. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1140, at 4–5 (June 19, 2012).

91. SENATE THIRD READING, BILL ANALYSIS, at 5 (June 13, 2012).