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SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) **IN RE MARRIAGE CASES**	**Case No. S147999** Judicial Council Coordination Proceeding No. 4365

First Appellate District No. A110449 (Consolidated on appeal with case nos. A110450, A110451, A110463, A110651, A110652)

San Francisco Superior Court Case No. 429539 (Consolidated for trial with San Francisco Superior Court Case No. 429548) Hon. Richard A. Kramer, Judge

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION, THE AMERICAN ANTHROPOLOGICAL ASSOCIATION, AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA URGING REVERSAL OF THE DECISION OF THE COURT OF APPEAL

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 8.520(f)(1), *amici curiae*, the American Psychoanalytic Association, the American Anthropological Association, and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area respectfully request permission of the Chief Justice to file the attached brief in support of petitioner City and County of San Francisco and the other parties that urge reversal of the decision of the Court of Appeal. Pursuant to California Rule of Court 8.520(f)(2), this application is timely made 30 days after the final reply brief was filed by the parties on August 27, 2007.

STATEMENT OF INTEREST

This proposed *amicus curiae* brief focuses on the differences in rights, benefits, obligations, and duties under current California law affecting couples who are registered domestic partners as compared to couples who are legally married and discusses the significance of those differences in the context of this case. The brief will assist the Court because, *inter alia*, it offers the unique perspective of these *amici* on issues central to the Court's decision on this case, including those identified in the Court's Order of June 20, 2007, requesting supplemental briefing.

These *amici* have extensive experience with the subjects addressed here. The American Psychoanalytic Association is a national membership organization that has been the leading organization of psychoanalysts for the past 90 years. The membership of the association includes the leading psychoanalysts in the United States, many of whom are also leaders in their fields of psychiatry, psychology, and social work. There is a large volume of psychoanalytic literature concerning the psychological dimensions of same-sex sexual orientation and the challenges faced by gay and lesbian individuals in our society. In 1997, the American Psychoanalytic Association's Board of Directors, after careful study that

addressed not only the well-being of members of gay and lesbian couples, but also the well-being of their children, families, and the larger society, adopted a resolution stating that, "Because marriage is a basic human right and an individual personal choice, ... the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage." This statement was backed by extensive systematic research and clinical information that demonstrated the salutary effects for gay men and women, their children, and the community of the availability of marriage to same-sex couples.[1]

The American Anthropological Association is the world's largest professional organization of anthropologists and others interested in anthropology. Its membership includes all specialties within anthropology, including (among others) cultural anthropology, linguistics, and applied anthropology. In 2004, the American Anthropological Association adopted a Statement on Marriage and the Family, which provides: "The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies."

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[1] An expanded version of the research upon which this resolution was based was published by Bertram Cohler and Robert Galatzer-Levy in The Course of Gay and Lesbian Lives: Social and Psychoanalytic Perspectives (2000).

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR") is affiliated with the national Lawyers' Committee for Civil Rights Under Law, established in 1963 at the request of President John F. Kennedy. LCCR was formed to support the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating cases on behalf of the traditionally underrepresented. In addition, LCCR monitors judicial decisions and legislation that affect the traditionally disadvantaged and frequently files amicus briefs in cases challenging discriminatory practices. (See, e.g., *Branch v. Smith* (2003) 538 U.S. 254 [challenge to discriminatory voting practices]; *Mukhtar v. Cal. State Univ.* (9th Cir. 2003) 319 F.3d 1073 [challenge to discriminatory employment practice].) Since advancing the rights of lesbian, gay, bisexual, and transgender individuals is integral to any civil rights agenda, LCCR's *amicus* work has encompassed these issues as well. (See, e.g., *Evans v. City of Berkeley* (2006) 38 Cal.4th 1 [*amicus* supporting city's refusal to provide public subsidies to organizations that discriminate on the basis of sexual orientation].)

BRIEF OF *AMICI CURIAE*

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Court must determine whether the State of California, having properly accepted the proposition that discrimination against gay men and women is wrong, may nonetheless perpetuate and reinforce that discrimination by barring such people from one of the most fundamental relationships that the State both sanctions and encourages for everyone else. This brief addresses the proposition that lies at the heart of the State's effort to justify this discrimination: that same-sex couples have no legitimate basis for complaint because the Domestic Partnership Act grants them all of the same legal rights and benefits as married couples.

The positions offered by the parties in this case fall into three broad categories: The petitioners, including the City and County of San Francisco ("City"), assert that the bar on marriage between same-sex couples serves no rational, much less compelling, state interest and hence violates the State's Constitution in multiple respects. At the other end of the spectrum, the private respondents[2] base most of their arguments on the sometimes unspoken, yet pervasive, assumption that gay couples are "different" in important ways that the law properly recognizes, and that discrimination against them is therefore consistent with the natural order of things. And then there are the State respondents (represented in separate filings by the Attorney General and the Governor), who do not defend the State's discrimination against gay couples on the merits; they rather seek to argue that such discrimination does not truly exist in any meaningful sense because California law grants same-sex couples all of the same legal rights

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[2] These include the Proposition 22 Legal Defense and Education Fund and the Campaign for California Families.

through domestic partnership that opposite-sex couples receive through marriage, and that any vestigial differences between "marriage" and "domestic partnership" have a rational basis in "tradition" and deference to the political process.

This *amicus* brief focuses on this last proposition – that there is no material difference between marriage and domestic partnership in California and that any trivial difference that does exist is therefore constitutionally sustainable.[3] As we demonstrate, the State's ban on marriage between same-sex couples is not, as the State seeks to portray it, merely a trivial matter of semantics that has no significant real-world impact on affected couples. First, there are important legal differences in California law between a marriage and a domestic partnership, differences that have a very real impact on couples who are barred from the former and hence relegated to the latter as a second-best choice. But perhaps more significantly, the mere fact that same-sex couples are limited to that lesser choice – or any alternative choice selected specifically for them – represents a message delivered by the State, not just to them but to the public at large, that they are entitled to no more, that the State regards their relationships as having lesser value, and that they themselves are unworthy of equal status and treatment under the law. Even the use of a different term – "domestic partnership" rather than "marriage" – delivers this message in a powerful and unmistakable way.

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[3] We join in and support the arguments made by the City on all other issues in this case, including its responses to the positions of the private respondents. As to the latter, we note that the State respondents themselves disavow the arguments of the private respondents in important respects. (See, e.g., Governor Answer Br. at 30, fn. 22; AG Answer Br. at 8-10, 41-43.)

Thus, regardless of whether the standard to be applied here rests on the "rational basis" test, the "compelling interest" test, or something in between, the State cannot escape its burden of meeting that standard by pretending it has virtually nothing to justify. When one recognizes the very real gulf between marriage and domestic partnership, it is clear that the State's justification for maintaining this "separate but [allegedly] equal" regime must be real as well, identifying a "social evil" that the State's discriminatory policy serves to combat. No such justification can be established merely by invoking "tradition" (particularly where such tradition is based on biases and assumptions that the State itself rejects) or a mere failure of the political process to change the law.

ARGUMENT

Stripped to its bare essentials, the core position of the State respondents is that, under California law, domestic partnership is virtually the same as marriage, and that the State's burden to justify maintaining domestic partnership as a category separate from marriage is accordingly minimal. This argument fails for multiple reasons, but first and foremost because the proposition on which it rests – the lack of meaningful disparity between domestic partnership and marriage – is untrue. There are both clearly identifiable legal differences between the two institutions and substantial intangible differences flowing from those distinctions (and from the mere existence of a regime that segregates same-sex relationships into a different, and differently named, legal status) that serve to perpetuate and even to encourage discrimination against gay men and women. The purported "justifications" that the State petitioners offer for this state of affairs are no justifications at all.

I. UNDER CALIFORNIA LAW, DOMESTIC PARTNERSHIP IS NOT EQUAL TO MARRIAGE.

Fundamental to the position of the State respondents is the proposition that domestic partnership in California law conveys to same-sex couples all of the rights, benefits, and obligations of marriage that state law can provide.[4] This is demonstrably untrue.

As the City and other petitioners have pointed out in their opening and supplemental briefs, the list of differences between the legal rights, obligations, and benefits conveyed by marriage, on the one hand, and domestic partnership, on the other, is a long one.[5] We do not repeat that full list here; rather, we discuss just a few important differences that make even the formal legal aspects of a domestic partnership clearly inferior to marriage.

A. The Different Requirements for the Formation and Dissolution of Domestic Partnerships and Marriages Reflect a Dramatically Different Attitude of the State Toward the Underlying Relationships.

In considering the legal differences between marriage and domestic partnership, it is important to keep in mind that marriage is not simply a private institution that the State chooses to recognize; it is, rather one that the State actively encourages as an important feature of public policy. (See *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274.) This policy "is rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." (*Ibid.*, internal quotation marks and citation omitted.)

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[4] See, e.g., AG Answer Br. at 1, 10-11, 46-48, 54; Governor Answer Br. at 1, 9, 29-32; Governor Supp. Br. at 1-2.

[5] See, e.g., City Supp. Br. at 1-17; Rymer Supp. Br. at 1-17.

The State's official attitude toward marriage, including its effort to promote that institution, is not extended in the same way to domestic partnership. And the first essential differences emerge when one reviews the legal requirements for forming and dissolving each of them.

The primary difference, of course, is the critical eligibility distinction challenged in this case. In order to marry, two people must be of different sexes. (Fam. Code, § 300.) In contrast, to form a domestic partnership, both people must be of the same sex (or at least one person must be over the age of 62). (*Id.*, § 297(b)(5).) With only a narrow exception, therefore, the two institutions are defined to be mutually exclusive: Couples who are eligible to marry are not eligible for domestic partnership (unless they are over 62), and vice versa. California law thus creates a classic regime of legal segregation, in which two groups of otherwise similarly situated people are separated into mutually exclusive legal categories. As discussed further below, this segregation has immense social, psychological, and legal significance.

Second, unlike married couples domestic partners must "have a common residence." (Fam. Code, § 297(b)(1).) This requirement excludes non-cohabiting same-sex couples such as prisoners, the homeless, and couples in long-distance relationships. Significantly, it is well-established that even prisoners have a fundamental right to marry (see *Turner v. Safley* (1987) 482 U.S. 78); hence in this context California law does not even attempt to provide equivalent rights to same-sex couples.

Third, in order to create a domestic partnership, there is no requirement that couples obtain a government-issued license or solemnize their union. Rather, all that is required is a Declaration of Domestic Partnership filed with the Secretary of State. (Compare Fam. Code, § 297(b) with *id.*, §§ 350(a), 420(a).) The contrast in formality is even greater for dissolution procedures. Even summary dissolution of a

marriage requires a court judgment (*id.*, § 2403) and may be obtained only after "[i]rreconcilable differences have caused the irremediable breakdown of the marriage." (*Id.*, § 2400(a)(2).) In contrast, summary dissolution of a domestic partnership can be accomplished by filing a simple notice with the Secretary of State, followed by a six-month waiting period (*id.*, §§ 299(a), (b)), and there is no legal requirement of "[i]rreconcilable differences." Moreover, the residency requirements that apply to persons seeking to dissolve a marriage do not apply in dissolving a domestic partnership. (Compare *id.*, § 2320 with *id.*, § 299(d).) Thus, domestic partnerships are, on balance, considerably easier to dissolve than are marriages.

The law makes marriages difficult to create – and even more difficult to dissolve – for a reason. Reflecting the public policy favoring the institution of marriage, the formalities required to create a marriage require the couple to view it as a serious step and to enter into the marriage only after due consideration.[6] Similarly, barriers to divorce are intended to have – and do have – the effect of encouraging married couples to work out their differences and to preserve the relationship if at all possible.[7] There is

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[6] See Fam. Code, § 306; *Mott v. Mott* (1890) 82 Cal. 413, 416 (the State views marriage as "a contract of so solemn and binding a nature, and which so affects the public weal, that ... the consent of the state is also required" to complete its formation); see also *Nieto v. City of Los Angeles* (1982) 138 Cal.App.3d 464, 471; *Knight v. Super. Ct.* (2005) 128 Cal.App.4th 14, 28; Nock, *A Comparison of Marriages and Cohabiting Relationships* (1995) 16 J. of Fam. Issues 53, 56 (hereafter Nock); Cherlin, *The Deinstitutionalization of American Marriage* (2004) 66 J. of Marriage and Fam. 848, 854-55.

[7] *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 864 ("the law seeks to foster and preserve marriage"); *Howard v. Super. Ct.* (1975) 52 Cal.App.3d 722, 725 (the State has a "strong public interest" in encouraging couples to choose conciliation over divorce); Herek, *Legal Recognition of Same-Sex Relationships in the United States – A Social Science Perspective* (2006) 61 Am. Psychologist 607, 615 (hereafter Herek); Nock, 16 J. of Fam. Issues at 56; Adams & Jones, *The Conceptualization of Marital Commitment: An* (continued...)

no reason why the state would wish to treat committed same-sex relationships any differently. (See *Knight*, 128 Cal.App.4th at 29 [citing *Elden* and finding that "California's societal interest in 'providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society'" and promoting family stability "applies equally to domestic partners"].)[8] Yet the relatively casual, easy steps established to form and dissolve a domestic partnership demonstrate a very different attitude on the part of the State toward these important elements, "indicat[ing] that marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership." (*Id.* at 31.)

Thus, the rights and obligations attendant on a domestic partnership are different from those of marriage both at the outset and at the end. The law expects and encourages a spouse whose marriage is encountering difficulty (as nearly every one does sooner or later) to try to work things out, in furtherance of the State's interest in promoting the stability of the relationship. For a domestic partnership, however, the law only requires one of the parties to know where to file the dissolution form. These are very real differences – and, as discussed below, they have real significance for affected couples and their children.

Integrative Analysis (1997) 72 J. of Personality and Social Psychology 1177, 1190.

[8] The State respondents do not claim a lesser need to promote the stability of committed same-sex relationships. The private respondents focus much of their argument on the State's interests in protecting children, but since same-sex couples can (and do) form families with children, the State clearly has an interest in promoting the stability of those families regardless of whether parents are of the same or different sexes.

B. California Courts Continue to Deny Domestic Partners Legal Rights and Obligations That Are Routinely Given to Married People.

Notwithstanding the purported requirement of the domestic partnership statute that domestic partners be granted all of the rights and obligations of married persons, California courts continue to treat the two differently in important ways.

For example, in *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1172-74, the Court of Appeal held that there is no putative domestic partner protection equivalent to that recognized for putative spouses under the Family Code. The putative spouse doctrine offers couples certain protections of marriage if either spouse believes in good faith that the marriage was valid, even if it was technically invalid for failure to follow all legal requirements. (*Id.* at 1172-73.) The court refused to grant similar protection to a putative domestic partner, speculating that "given the different and less stringent requirements for formation of a domestic partnership, the Legislature may not have wanted to create a putative domestic partnership status to grant parties dissolution rights despite the invalidity of the relationship due to a legal infirmity." (*Id.* at 1174.)

In another case, the Superior Court for Orange County recently rejected an argument that a man no longer owed spousal support to his ex-wife because she had entered into a registered domestic partnership. If the woman had remarried, there would have been no doubt that the ex-husband's spousal support obligation would have terminated. But because the court found that "[a] Registered Domestic Partner is not the equivalent of a marriage," it held that the ex-husband's spousal support obligation must continue. (*Garber v. Garber* (Super. Ct. Orange County, June 13, 2007, No. 04D006519).)

These cases – whether or not rightly decided – reinforce what is obviously true: Domestic partnership is not fully equivalent to marriage, and no one – including California courts presented with the plain language of the domestic partnership statute – truly thinks that it is. And so long as the State insists on continuing to segregate same-sex couples into a different institution, such inequities – whether the result of proper application of the law or merely confusion by the lower courts – will inevitably persist.

C. Domestic Partners Have a Reduced Ability to Obtain Equal Rights and Benefits That Might Otherwise Be Available Under Other Laws, Including Those of Other States, Other Countries, and the Federal Government.

Many jurisdictions would not recognize marriages between people of the same sex even if California law permitted them. But some would do so,[9] and California's failure to permit such marriages precludes same-sex couples who reside in California from obtaining benefits elsewhere that would otherwise be available to them. Moreover, those jurisdictions that would honor a California marriage of a same-sex couple would not necessarily also honor the protections that California provides to

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[9] For example, New York recognizes for some purposes marriages of same-sex couples performed in other states. (New York State Department of Civil Service, Civil Services Recognizes Same-Sex Marriages for Spousal Coverage Under New York State Health Insurance Program (Apr. 27, 2007) <http://www.cs.state.ny.us/pio/pressrel/nyship_samesexspousalcoverage.cfm> (hereafter New York State Press Release) [as of Sept. 24, 2007]; *Godfrey v. Spano* (Supreme Ct. 2007) 836 N.Y.S.2d 813, 814 [Westchester County may lawfully recognize out-of-state marriages of same-sex couples].) Rhode Island also recognizes same-sex couples' marriages obtained elsewhere. (*Godfrey*, 836 N.Y.S.2d at 816, fn. 3.) Numerous other countries recognize such marriages as well. (RA 344-571, 635-832.)

domestic partners.[10] Thus, the purported "fix" that the State claims to provide for its failure to offer same-sex couples the right to marry will not be reliably effective outside California's borders, even, ironically, in places that would be hospitable to marriages between those same couples.[11]

California cannot be held responsible for the discriminatory laws of other jurisdictions. But it can be held responsible for denying its citizens their best chance to avoid such discrimination elsewhere. (Cf. *McClaurin v. Okla. State Regents* (1950) 339 U.S. 637, 641-42 [removal of state-imposed segregation of black student would not force white students to associate with him but "at the very least, the state will not be depriving [him] of the opportunity to secure acceptance ... on his own merits"].) And its refusal to grant real, rather than pretended, equality to same-sex couples by permitting them to marry has exactly that result.

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In sum, California law creates a variety of legal benefits and burdens associated with marriage that are not extended in the same way to domestic partners. This alone belies the State's claim that there is no substantive difference between domestic partnership and marriage. But as the discussion below explains, these deficiencies are only the tip of the

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[10] See, e.g., New York State Press Release (stating that New York will offer spousal benefits to married same-sex couples from Massachusetts, Canada, and other countries, but not to couples with civil unions).

[11] California's relegation of same-sex couples to a separate status also has implications for their potential rights under federal law. Given the current status of federal law, same-sex couples, even if they were permitted to marry in California, would not have access to the rights granted to married persons under federal law. (See 1 U.S.C. § 7.) However, by failing to permit same-sex couples to marry, California deprives them of the ability to challenge the federal restrictions that impose this inequity. (*Smelt v. County of Orange* (9th Cir. 2006) 447 F.3d 673, 682-86 [standing to challenge federal Defense of Marriage Act restricted to plaintiffs who are married under state law].)

iceberg. The more substantial and harmful differences between marriage and domestic partnership stem from the distinction itself and from the many intangible consequences that flow from its very existence.

II. THE SEPARATION OF DOMESTIC PARTNERSHIP AND MARRIAGE NEGATIVELY AFFECTS THE HEARTS AND MINDS OF SAME-SEX COUPLES AND THEIR CHILDREN AND FOSTERS DISCRIMINATION AGAINST THEM.

A. The Segregation of Same-Sex Couples into a Separate Legal Institution Creates Inherent Inequalities.

The idea that the government can justify the exclusion of a minority group from a public institution by providing it with a separate (but supposedly equal) alternative institution has long been rejected in constitutional jurisprudence. In *Brown v. Board of Education* (1954) 347 U.S. 483, 493, the United States Supreme Court held that providing separate segregated schools for racial minorities – even in instances where the physical facilities and other "tangible" factors were equal – inherently deprived the minority students of equal educational opportunities. The Court found that separating individuals from others solely because of their minority status "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (*Id.* at 494.) The Court emphasized that "[t]he impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." (*Ibid.*) For this reason, "[s]eparate educational facilities," the Court concluded, "are inherently unequal." (*Id.* at 495.)

Similarly, the State here has relegated gay men and women to the separate institution of domestic partnership, and such separation sends a state-sponsored message of inferiority that inevitably affects their hearts and minds, as well as their treatment by the rest of society.

Brown has a talismanic significance in our society and should not be invoked lightly. But the applicability here of the Supreme Court's holding in *Brown* – and in particular of the reasoning underlying that holding – is too striking to be overlooked. The core of the State's position is that, so long as it can claim to have provided equivalent tangible benefits to the disfavored minority whose rights are at issue, it may permissibly segregate them into a "separate but equal" legal regime. The *Brown* court flatly rejected that argument – not because the "separate" institutions were not really equal, but because, as separate institutions, they *could not be* equal. (347 U.S. at 495.)

The State respondents argue that comparisons to *Brown* are unwarranted because the State supports equal rights for gay men and lesbians and is simply trying, through the domestic partnership regime, to provide them with benefits they would not otherwise have. (AG Answer Br. at 45-48; Governor Answer Br. at 31.) But the fact that the State has a benevolent intent in giving people part of what they are entitled to receive does not excuse it in continuing to deprive them of their full rights.[12]

Nor can *Brown* be distinguished on the ground that the law currently discriminates against gay men and women less than it did against African Americans at the time of *Brown.* (See, e.g., Governor Answer Br.

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[12] For the same reason, the fact that gay rights organizations lobbied for a domestic partnership law does not mean that it is permissible to deny same-sex couples the right to marry. No one disputes that the domestic partnership law is better than nothing; it does not follow that true equality is therefore unnecessary. And the well-publicized events in San Francisco in February 2004 surely belie any possible argument (although the AG attempts one, AG Answer Br. at 47), that same-sex couples do not actually *want* to marry. In fact, one survey indicated that 74 percent of gay men and women desired the legal right to marry their partners. (The Kaiser Family Foundation, *Inside*-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation (Nov. 2001) p. 31.)

at 31.) Carried to its logical conclusion, such an argument would suggest that, because the law has now much reduced formal discrimination against African Americans, *Brown* no longer applies to them either. No modern court would seriously countenance such a conclusion. Nor can it be seriously disputed that *historical* discrimination against gay men and women, although often taking different forms than racial discrimination, has been heavy indeed. (See City Opening Br. at 6-19; see also *Gay Law Students Assn. v. Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d 458, 488 ["The aims of the struggle for homosexual rights ... bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities"].) Far from sending a positive message supporting same-sex relationships (as the State suggests in its Answer Brief at pp. 46-48), the State's segregation of same-sex couples into a separate category in fact perpetuates this historical attitude of discrimination.[13]

There can be no question that the segregation of same-sex couples into a separate institution was the expected effect of the Domestic Partnership Act. Notably, while the legislative findings embodied in that statute recognize the State's strong antidiscrimination policy with respect to gay men and women and its interest in confirming the value of their committed relationships, those findings go on to recognize that all the DPA ultimately does is to "*reduce* discrimination on the bases of sex and sexual

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[13] See Scheyett, *The Mark of Madness: Stigma, Serious Mental Illnesses, and Social Work* (2005) 3 Social Work in Mental Health 79, 84 (hereafter Scheyett) ("the process of doing things *to* people (quite often framed as doing things *for* people in their best interests)" represents the power struggle inherent in stigmatization) (emphases in original).

orientation" embodied in the State's existing marriage laws, not to eliminate it. (Stats. 2003, ch. 421, §§ 1(a) & (b), emphasis added.)[14]

Even if all of the tangible rights and benefits of marriage were conveyed though domestic partnership, the fundamental point of *Brown* would still hold true: The mere act of separation, and the message that act sends, has a deep negative impact on the targets of that separation and on society at large. (347 U.S. at 494.) The key inequity here emanates from "the indignity of separation itself, of the state setting one group apart with respect to a valued public institution." (RA 963 at ¶ 11.) As the Supreme Court has made clear again and again, it is the separateness itself that is the most troubling factor and that creates the inherent inequality. (See, e.g., *Sweatt v. Painter* (1950) 339 U.S. 629, 634 [rejecting racially segregated law schools based largely on "qualities which are incapable of objective

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[14] The Legislature has further recognized the lack of true equality between domestic partnership and marriage by twice enacting legislation that would have authorized same-sex couples to marry. (The first bill was vetoed by the Governor; his action on the second remains pending as of this writing.) In this legislation, the Legislature expressly found that "relegating same-sex couples to the status of domestic partnership while prohibiting them from marrying (1) causes severe and lasting harms to same-sex couples, their children, and their extended families; (2) stigmatizes same-sex couples, their children, their extended families and all gay, lesbian, and bisexual Californians in violation of the California Constitution; (3) violates California public policy by enabling and promoting discrimination by private actors and institutions on the basis of sexual orientation, contrary to California's compelling interest in eradicating discrimination based on sexual orientation; and (4) puts same-sex couples and their families at risk of illegal discrimination by state and local government agencies and officials." (Assem. Bill No. 43, approved by Assem., June 5, 2007 and by Senate, Sept. 7, 2007 (2007-2008 Reg. Sess.).) Even if vetoed, this bill is relevant to show the Legislature's understanding of the existing statute. (*Freedom Newspapers, Inc. v. Orange County Employees Retirement Sys.* (1993) 6 Cal.4th 821, 832-33.)

measurement"].)[15] With respect to same-sex couples, this conclusion is supported, not just by common sense, but by significant scientific evidence.

B. The State's Segregation of Same-Sex Couples into a Separate Institution of Domestic Partnership Inherently Stigmatizes Their Relationships as Inferior.

Interference with the ability to marry has long been a token of oppression of disfavored groups. American slaves, for example, could not enter into legally recognized marriages.[16] With emancipation came the right to marry, which, in addition to regularizing the relationships of couples and their children, had great psychological significance, as it established the full legitimacy of their unions and their capacity to live within the rules of the dominant society.[17] Even then, anti-miscegenation laws remained a continuing source of oppression until eliminated in California in 1948 with this Court's decision in *Perez v. Sharp* (1948) 32 Cal.2d 711, and then nationwide with the U.S. Supreme Court's decision in

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[15] See also *Heckler v. Mathews* (1984) 465 U.S. 728, 739-40 ("as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, [citation] can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group"); *Schiro v. Bynum* (1964) 375 U.S. 395 (segregation in municipal auditoriums); *Johnson v. Virginia* (1963) 373 U.S. 61 (courtroom seating); *Turner v. City of Memphis* (1962) 369 U.S. 350 (airport restaurants); *State Athletic Com. v. Dorsey* (1959) 359 U.S. 533 (athletic contests); *New Orleans City Park Improvement Assn. v. Detiege* (1958) 358 U.S. 54 (public parks and golf courses); *Gayle v. Browder* (1956) 352 U.S. 903 (buses); *Mayor of Baltimore v. Dawson* (1955) 350 U.S. 877 (public beaches and bathhouses); *Holmes v. City of Atlanta* (1955) 350 U.S. 879 (municipal golf courses); *Muir v. Louisville Park Theatrical Assn.* (1954) 347 U.S. 971 (parks).

[16] King, Stolen Childhood: Slave Youth in Nineteenth-Century America (1995) p. 63; Owens, This Species of Property: Slave Life and Culture in the Old South (1976) p. 192.

[17] Taylor, Travail and Triumph: Black Life and Culture in the South Since the Civil War (1976) pp. 163-67.

Loving v. Virginia (1967) 388 U.S. 1. These laws served to degrade whole classes of people by depriving them of the full ability to exercise their fundamental right to marry – a right defined by this Court as "the right to join in marriage with *the person of one's choice*." (*Perez*, 32 Cal.2d at 715, emphasis added.)

Research demonstrates that the impact on same-sex couples of the degraded status the law assigns to their unions – depriving a gay man or woman of "the right to join in marriage with the person of [his or her] choice" – has a similar stigmatizing effect, with substantial psychological, social, and other harms to gay men and women and to society at large.

1. The Government's Choice of Labels Conveys Substantive Meaning.

Assume, hypothetically, a situation in which (as was long the case) all judges are men. Now, suppose that a woman is elevated to the same position, but she is not permitted to use the title of "judge," because the traditional definition of a judge is "a man who decides legal disputes." Instead, she is required to use the term "adjudicator." Although this separate label is not inherently negative, no one would seriously argue that assigning a woman a different title than a man in the same position – based solely on her sex – would afford her equal treatment.[18] Similarly here, even

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[18] This issue has come into prominence in recent decades as women have achieved access to jobs and other roles that were traditionally closed to them. Many traditional job titles have evolved (e.g., "firefighter" coming to replace "fireman") for exactly this reason. There is considerable literature recognizing the importance of the language used to define and refer to women in these contexts. (See, e.g., Bucholtz, *Language, Gender, and Sexuality* in Language in the USA: Themes for the Twenty-First Century (Finnegan & Rickford edits., 2004) pp. 411-13; Spender, Man Made Language (1980) pp. 138-62; Bosmajian, The Language of Oppression (1974) pp. 90-120 (hereafter Bosmajian).)

though it may be seen by some as just a label, the separate term "domestic partnership" inherently conveys a meaning inferior to "marriage."

Language matters, especially when the language is dictated by the State through its laws.[19] Relegating same-sex couples to the separate, quasi-marital status of domestic partnership sends a clear message to same-sex couples that the State considers their committed intimate relationships to be inferior to similar heterosexual relationships and that they are less deserving of society's recognition.

Substantial psychological research confirms that the choice of words to describe situations or conditions has a profound impact on how they are understood.[20] When two people identify themselves as being

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[19] Oh, *Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept* (2005) 7 U. Pa. J. Const. L. 837, 837-39 ("Language matters because language is about power; whoever controls the linguistic terms of the debate also controls and frames the debate"); Bosmajian, at p. 47 ("Language not only expresses ideas and concepts but it may actually shape them"); Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning* (1989) 64 Notre Dame L.Rev. 886, 888 ("The concepts, categories, and terms that law uses ... has a particularly potent ability to shape popular and authoritative understandings of situations. Legal language ... reinforces certain world views and understandings of events").

[20] The power of names and labels has been widely demonstrated through empirical investigation. (Nielsen, *Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech* (2002) 58 J. of Social Sciences 265, 279; Delgado & Stefancic, Understanding Words that Wound (2004) pp. 11-18; Milich et al., *Effects of Stigmatizing Information on Children's Peer Relations: Believing Is Seeing* (1992) 21 School Psychology Review 400, 400-09 (hereafter Milich et al.) [negative labels lead to stigmatization].) For example, "hate speech" is a widely recognized phenomenon. (See, e.g., Butler, Excitable Speech: A Politics of the Performative (1997) pp. 50-52; Mello, *Balancing Hate Speech, Professional Ethics, and First Amendment Rights: A Case of and from the Judiciary* (2006) 18 Employee Responsibilities and Rights J. 21, 27; Mullen & Leader, *Linguistic Factors: Antilocutions, Enthnonyms, Ethnophaulisms, and Other Varieties of Hate Speech* in On the Nature of Prejudice: Fifty Years After Allport (Dovido et al. edits., 2005) pp. 192-204.)

"married," the essence of their relationship is instantly understood and recognized.[21] Marriage is a virtually universal human institution and has a legitimacy that has been earned through centuries of validation and institutionalization in nearly every known society.[22] Many understand marriage to represent "the ultimate reward, the happy ending," the sign of adult belonging, and the definitive expression of love and commitment.[23]

By contrast, there is no universal understanding of what is meant by the term "domestic partnership," much less any common understanding that it is a synonym for "marriage." One reason for this is that, when compared to the institution of marriage, domestic partnership is a very new and often misunderstood creation, with great variation across jurisdictions. Many people associate domestic partnerships with adult cohabitation arrangements rather than the committed relationships that are associated with marriage. (See, e.g., *Garber* (Super. Ct. Orange County, 04D006519) at 1 ["A Registered Domestic Partner[ship] is not the equivalent of marriage. It is the functional equivalent of cohabitation"].)[24] Adding to the lack of understanding is the fact that, in many other jurisdictions, a domestic partnership refers to a legal relationship that

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[21] See Willetts, *An Exploratory Investigation of Heterosexual Licensed Domestic Partners* (Nov. 2003) 65 J. of Marriage and Fam. 939, 947 (hereafter Willetts).

[22] Glenn et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (2002) 5 Am. Experiment Q. 34, 37.

[23] Cott, Public Vows: A History of Marriage and the Nation (2000) p. 225; see also RA 241 at ¶ 8.

[24] See Willetts, 65 J. of Marriage and Fam. at 941 ["domestic partnership ordinances have emerged as an alternative form of cohabitation"].

conveys few of the key rights and benefits of marriage.[25] Whereas married couples can expect their relationship to be recognized and understood across state and national borders, domestic partners generally cannot.[26]

Since the one thing that everyone understands about domestic partnership is that it is *not* synonymous with marriage, the inevitable message that the State sends through the creation of this separate category is that the committed relationships of same-sex couples are inferior to "real" marriages. (See RA 961 at ¶ 5.) As Justice Poritz warned in his dissent in *Lewis v. Harris*, "We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities.... Ultimately, the message is that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage." ((N.J. 2006) 908 A.2d 196, 226-27.) By the same token, by indicating through its laws that same-sex relationships are not worthy of the full range of benefits conferred by marriage – including the name itself – the State reinforces the stigma historically attached to homosexuality.

2. The Stigma Created by the State's Differential Treatment of Gay Men and Women Has Severe Psychological and Social Impacts.

In the social sciences, the term "stigma" refers to the phenomenon through which an individual with an attribute that is discredited by his or her society is rejected as a result of that attribute.[27]

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[25] For example, Washington's domestic partnership law does not provide registered couples with any community property or child custody rights. (See Wash. Stats. 2007, ch. 156.)

[26] See pp. 12-13 above. See also Herek, 61 Am. Psychologist at 617.

[27] Goffman, Stigma: Notes on the Management of Spoiled Identity (1963) pp. 2-3.

The concept has been the subject of numerous empirical studies and has achieved nearly universal acceptance by social scientists.[28] In modern usage, "stigmatization" refers to an invisible sign of disapproval that permits "insiders" to draw lines around "outsiders." This demarcation permits "insiders" to know who is "in" and who is "out" and allows the group to maintain its solidarity by punishing those who deviate from accepted norms of conduct.[29]

The demarcation between gay and straight relationships that the State draws through the segregation of "domestic partnerships" and "marriage" creates precisely this kind of stigmatization:

> "Denying same-sex couples the label of marriage – even if they receive all other rights and privileges conferred by marriage – arguably devalues and delegitimizes these relationships. It conveys a societal judgment that committed intimate relationships with people of the same sex are inferior to heterosexual relationships and that the participants in a same-sex relationship are less deserving of society's recognition than are heterosexual couples. It perpetuates power differentials whereby heterosexuals have greater access than nonheterosexuals to the many resources and benefits bestowed by the institution of marriage. These elements are the crux of stigma. Such stigma affects all homosexual and bisexual persons, not only

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[28] See, e.g., Dovido et al., *Stigma: Introduction and Overview* in The Social Psychology of Stigma (Heatherton et al. edits., 2000) pp. 1-28 (hereafter Dovido); Major & O'Brien, *The Social Psychology of Stigma* (2005) 56 Ann. Review of Psychology 393, 394-412.

[29] Falk, Stigma: How We Treat Outsiders (2001) pp. 17-33, 339-40 (hereafter Falk); see also Funderburk et al., *Does Attitude Toward Epilepsy Mediate the Relationship Between Perceived Stigma and Mental Health Outcomes in Children with Epilepsy?* (2007) 11 Epilepsy and Behavior 71, 71-72 ("'stigma exists when elements of labeling, stereotyping, separation, status loss, and discrimination occur together in a power situation that allows them to unfold' [citation]").

> the members of same-sex couples who seek to be married."

(Herek, 61 Am. Psychologist at 617.)

An extensive amount of psychiatric, psychiatric, psychoanalytic, and sociological research literature exists showing the severe adverse psychological and social effects of stigma.[30] Stigma can significantly lower the self-esteem of stigmatized individuals, leading to social withdrawal, decreased expectation for oneself, avoidance of attempts at high achievement, and angry resentment.[31]

In the context of same-gender sexual orientation, the deep and pervasive impacts of stigma are well documented.[32] The best data available demonstrate substantially increased psychological distress among gay men

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[30] See, e.g., Levin & van Laar edits., Stigma and Group Inequality: Social Psychological Perspectives (2006) (exploring many different effects of stigma); Dollard, Caste and Class in a Southern Town (3d ed. 1957) pp. 61-96 & generally (hereafter Dollard) (African Americans); Limandri, *Disclosure of Stigmatizing Conditions: The Discloser's Perspective* (Apr. 1989) 3 Archives of Psychiatric Nursing 69, 69-74 (hereafter Limandri) (survivors of domestic violence and individuals with HIV or AIDS).

[31] See Scheyett, 3 Social Work in Mental Health at 80, 84, 88 (society's "negative valuation" of the stigmatized individual "is integrated into the individual's sense of self-worth and identity, and result[s] in an inability to exert power or believe in one's ability to participate in society"); Limandri, 3 Archives of Psychiatric Nursing at 69-74 (stigmatized individuals experience shame). The negative impacts of stigma are extended, not just to the individuals who have the stigmatized characteristic, but also to those who are associated with them. (Sigelman et al., *Courtesy Stigma: The Social Implications of Associating with a Gay Person* (Feb. 1991) 131 J. of Social Psychology 45, 45-55; Puhl & Latner, *Sigma, Obesity, and the Health of the Nation's Children* (2007) 133 Psychological Bull. 557, 567 [citing study].)

[32] See, e.g., Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence* (2003) 129 Psychological Bull. 674, 674-85 (hereafter Meyer); Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences* (1990) 5 J. of Interpersonal Violence 366, 369-70 (hereafter Garnets).

and women.[33] This is especially evident during adolescence. Among other things, gay adolescents have a materially greater suicide attempt rate than their peers, resulting from the pain of being stigmatized and, ironically, the self-hatred associated with internalization of the social values that led to their stigmatization in the first place.[34] By perpetuating the stigma through its segregation of gay couples into a separate form of legal relationship, the State contributes materially to these harmful, and sometimes tragic, outcomes.

In addition to affirmatively stigmatizing them, the State's refusal to permit gay men and women to marry persons of their choice deprives them of a critical source of affirmation of their lives. Beginning in earliest infancy and continuing throughout one's entire life, the experience of being affirmed by external sources of power and respect promotes psychological well being.[35] The absence of such affirmation is associated with emotional pain and may lead to significant psychological difficulties.[36]

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33 Meyer, 129 Psychological Bull. at 683-85.

34 *Id.* at 684-85; Isay, *On the Analytic Therapy of Homosexual Men* (1985) 40 Psychoanalytic Study of the Child 235, 250-52; Isay, *The Development of Sexual Identity in Homosexual Men* (1986) 41 Psychoanalytic Study of the Child 467, 474, 487; Drescher, Psychoanalytic Therapy & the Gay Man (1998) pp. 257-91; Garnets, 5 J. of Interpersonal Violence at 369-70.

35 Stern, The Interpersonal World of the Infant: A View from Psychoanalysis and Developmental Psychology (1985) pp. 72-76, 101-11, 138-61; Galatzer-Levy & Cohler, The Essential Other: A Developmental Psychology of the Self (1993) pp. 61-63, 136-37, 189-95; Cottle, A Sense of Self: The Work of Affirmation (2003) p. 166 & generally; Ornstein, *A Developmental Perspective on the Sense of Power, Self-Esteem, and Destructive Aggression* (1997) 25 Ann. of Psychoanalysis 145, 150 (hereafter Ornstein).

36 Kohut, *Forms and Transformations of Narcissism* (1966) 14 J. of the Am. Psychoanalytic Assn. 243, 245-48; Kohut, *The Psychoanalytic Treatment of Narcissistic Personality Disorders: Outline of a Systematic Approach* (1968) 23 Psychoanalytic Study of the Child 86, 88-89; Ornstein, (continued...)

The impact of this deprivation is, again, particularly acute for younger people. Like all children, youngsters who have a gay or lesbian predisposition spend considerable time imagining what their lives will be like when they "grow up." These psychologically important ideas include images of the stable romantic relationships and families they will create as adults. Such ideas are important to the mental health of children, because they help establish a positive personal identity and serve to motivate socially adaptive behaviors (such as doing well at school) and to facilitate turning these dreams into realities.[37] These children, like their heterosexually oriented peers, dream of marriage (and are encouraged by society to do so), but, under the current legal regime, cannot see concrete models of how this dream can be actualized. The unavailability of marriage consistent with their sexual orientation thus enhances the psychological burden borne by gay youth.

In light of the particularly heavy toll that the State's segregation of same-sex relationships has on children and teenagers with a same-sex orientation, it is particularly difficult to countenance the State respondents' suggestion that children should simply accept the status quo as "close enough" to equality and wait for some unspecified future time when

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25 Ann. of Psychoanalysis at 150. Affirmation has been shown to buffer the effects of negative attitudes toward oneself that may stem from a homosexual orientation. (Bonfitto, *The Formation of Gay and Lesbian Identity and Community in the Connecticut River Valley of Western Massachusetts, 1900-1970* (1997) 33 J. of Homosexuality 69, 88-93.)

[37] Astington, *Narrative and the Child's Theory of Mind* in Narrative Thought and Narrative Language (Britton & Pellegrini edits., 1990) pp. 151-71; Cohler & Freeman, *Psychoanalysis and the Developmental Narrative* in The Course of Life (Pollock & Greenspan edits., vol. 5 1993) pp. 126-27, 146, 153-56; Miller et al., *Narrative Practices and the Social Construction of Self in Childhood* (1990) 17 Am. Ethnologist 292, 304-06; Ricoeur, Hermeneutics & the Human Sciences (Thompson edit., 2006 ed.) pp. 274-96.

the law might by changed through means other than judicial intervention. The unconstitutional law under challenge is doing real harm today, not just to the current generation, but to the next generation as well.

3. The Separation of Domestic Partnership and Marriage Fuels Public Prejudice Against Gay Men and Women and Invites the Public to Discriminate Against Them.

Decades of research have confirmed that stigmatized people are ostracized, devalued, rejected, scorned, and shunned, experiencing discrimination, insults, attacks, and even murder.[38] This is particularly true for gay men and women, a stigmatized group that has suffered a well-documented history of ostracization, discrimination, and violence.[39]

By establishing and perpetuating a regime in which separate treatment of same-sex couples is not only condoned, but enshrined as a matter of public policy, the government encourages disparate treatment of gay men and women by the broader society and fosters a climate in which such treatment thrives.[40]

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[38] See, e.g., Dovido, at pp. 1-24; Falk, at pp. 17-35; Dollard, at pp. 61-96; see also Scheyett, 3 Social Work in Mental Health at 87 (citing studies demonstrating links between stigma and discrimination in housing, the workplace, and the criminal justice system); Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men (2001) p. 9 (describing economic impact of being seen as member of disfavored group); Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults* (1999) 67 J. of Consulting and Clinical Psychology 945, 947-48.

[39] Meyer, 129 Psychological Bull. at 680; Herek, 61 Am. Psychologist at 617; Berrill & Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes* (1990) 5 J. of Interpersonal Violence 401, 410; Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism* (1990) 5 J. of Interpersonal Violence 316, 323-26.

[40] See Herek, *Hate Crimes Against Lesbians and Gay Men* (1989) 44 Am. Psychologist 948, 949 (describing antigay hate crimes as a "logical outgrowth" of a climate of government intolerance, which "fosters" violent behavior); Meyer, 129 Psychological Bull. at 680 (stating that abuses (continued...)

The reason that government action affects private behavior is clear: "laws send cultural messages; they *give permission*."[41] When California separates same-sex couples, it gives the public permission to view gay men and women as separate and different, fueling prejudice and discrimination against them. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 575 ["When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"].)

By giving same-sex committed relationships a different legal status, segregated from that enjoyed by equivalent opposite-sex relationships, the State conveys a message that relationships with people of the same sex are different and, implicitly, inferior. (See Herek, 61 Am. Psychologist at 617.) The public listens to this message and understands that gay men and women are not, in the eyes of the government, worthy of equal participation in all of society's institutions. The resulting stigma attaches, not only to same-sex couples who seek to be married, but to all gay men and women, regardless of their relationship status or desire to marry. (*Ibid.*)

The long history of official state harassment and discrimination directed at gay men and women – and of the parallel discrimination inflicted by private parties – has been discussed at length in

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against gay men and women are "sanctioned by governments and societies through formal mechanisms such as discriminatory laws and informal mechanisms, including prejudice"); Herek, *The Psychology of Sexual Prejudice* (Feb. 2000) 9 Current Directions in Psychological Science 19, 21.

[41] Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory* (2000) 61 Ohio St. L.J. 867, 879, emphasis in original; see also Limandri, 3 Archives of Psychiatric Nursing at 70 ("Societal messages that some behaviors or conditions are taboo become[ ] manifested in discrimination").

other briefs to this Court and need not be repeated here. Significantly, the link between the State's policy of segregation of gay couples and discriminatory private conduct continues today, even though in most other contexts California's policy with respect to its gay citizens is now the opposite of what it once was. In virtually every context other than the one at issue here, California law condemns discrimination against gay men and women.[42] Indeed, the briefs of the State petitioners are full of protestations that California "has steadily expanded the rights of same-sex couples." (See, e.g., Governor Answer Br. at 9; AG Answer Br. at 10.) Yet, by treating gay men and women differently in the area of marriage, the State continues to perpetuate and compound the historical stigma against gay men and women, sending the public the message that at least some discrimination is still acceptable. Such a mixed message from the State inherently undercuts the antidiscrimination policy that California law otherwise actively pursues.

Moreover, the state's failure to permit same-sex couples to marry provides a structure that affirmatively enables private discrimination against same-sex couples. In some instances, the fact that same-sex couples are not married can give "cover" to private parties who discriminate on the basis of sexual orientation. One arguable example of

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[42] See, e.g., Civ. Code, § 51 (equal accommodation in business establishments); *id.*, § 51.7 (violence based on sexual orientation); Code Civ. Proc., § 204 (jury service); Ed. Code, § 220 (state-funded educational institutions); *id.*, § 32228 (hate violence in schools); Gov. Code, § 11135 (state-funded programs); *id.*, §§ 12921, 12940 (employment); *id.*, §§ 12921, 12955 (housing); Health & Saf. Code, § 1365.5 (contract availability or terms); *id.*, § 1586.7 (adult day care centers); Ins. Code, § 10140 (life and disability insurance); Lab. Code, § 1735 (contractors); *id.*, § 4600.6 (workers' compensation); Pen. Code, §§ 422.55, 422.6 (hate crimes); Welf. & Inst. Code, § 9103.1 (services provided under Older Americans Act); *id.*, § 16001.9 (foster children's access to services).

this is *North Coast Women's Care Medical Group v. Superior Court* (2006) 137 Cal.App.4th 781, in which two doctors refused to perform an artificial insemination procedure for a woman in a domestic partnership, claiming as their reason, not the fact that she is a lesbian, but rather that she is not married.[43] Regardless of whether or not this explanation was a pretext for discrimination based on her sexual orientation, permitting the couple to marry would have removed the doctors' ability to offer it.

The segregation of same-sex couples into the separate institution of "domestic partnership" has numerous other real-life impacts as well – some the result of outright discriminatory intent, some simply flowing from the lack of clarity about what "domestic partnership" really is (other than that it is "not marriage"). For instance, examples abound of people who have been denied rights in critical medical situations that would have been afforded married persons as a matter of routine.[44] Even where same-sex couples are able to obtain equal treatment in the private sector, they are often able to do so only after protracted and often expensive advocacy that married couples virtually never have to endure. Thus, for example, although this Court ultimately confirmed the rights of the same-sex couple in *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, it took several years and an expensive lawsuit to achieve that result – a

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[43] A further appeal in that case is currently pending before this Court. (Review granted June 14, 2006, S142892; see Opening Br. of Guadalupe T. Benitez (Sept. 20, 2006) p. 2 [stating that plaintiff Benitez has a domestic partner].)

[44] See, e.g., McKee, *Domestic Miss*, S.F. Recorder (Aug. 20, 2007) pp. 1, 11 (San Francisco veteran denied visiting privileges and medical information about hospitalized partner); Hagedorn, *Couple: Hospital's Refusal of Visit Was Discrimination*, The Bakersfield Californian (Mar. 7, 2007) <http://www.bakersfield.com/102/story/103906.html> [as of Sept. 25, 2007] (denial of access to emergency room where domestic partner was attending daughter).

burden that no married couple would have had to undertake. A threatened lawsuit was also needed to vindicate the rights of imprisoned domestic partners, who were not permitted to have conjugal visits until mid-2007, although married spouses have been allowed such visits since the 1970s.[45]

Disparate treatment of domestic partners remains endemic in the employment context, where domestic partners can be – and frequently are – denied benefits that they would receive if they were married. (See RA 897-98 at ¶ 3; RA 193-94; see also RA 322-23 at ¶¶ 6-7 [detailing disparate treatment of domestic partners by private entities].) California law requires insurance companies to cover registered domestic partners to the same extent that they cover married people, but this requirement does not apply to insurance policies issued outside California (Ins. Code, § 381.5(a)) or to the nearly one-third of employers who self-insure.[46] Employers therefore remain able to exclude same-sex couples from benefit plans based on the apparently benign rationale that benefits are provided only to people who are "married." This is not simply a theoretical concern; many employers distinguish between married couples and same-sex "domestic partners" on precisely this ground.[47]

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[45] See McKinley, *Gay Inmates to Be Granted Conjugal Visits in California*, N.Y. Times (June 3, 2007) sec. 1, p. 28.

[46] See 29 U.S.C. §§ 1144(a), (b)(2)(B) (preempting state laws regulating employer-funded benefit plans); Butler, ERISA Preemption Manual for State Health Policy Makers (Nat. Academy for State Health Policy Jan. 2000) p. 8.

[47] For example, State Farm, which offers benefits to "spouses" as defined by state law, refuses benefits to California domestic partners who are enrolled in State Farm's self-funded policy or an out-of-state policy. But for same-sex couples who are "married" under Massachusetts law, State Farm offers the same benefits that it offers to opposite-sex married couples. (See Rostow, *Civil Unions & Domestic Partnerships: A Distinction with a Difference*, S.F. Bay Times (Aug. 2, 2007) <http://www.sfbaytimes.com/index.php?sec=article&article_id=6680> [as (continued...)

Thus, the State's official segregation of same-sex and different-sex couples leads directly to discrimination against same-sex couples – not merely through intangible messages conveyed by the State's law of segregation, but as a direct and concrete result of the law itself.

C. Depriving Same-Sex Couples of the Ability to Marry Has Adverse Effects on Their Children.

The state's refusal to permit same-sex couples to marry does not merely affect the couples themselves; it also affects their children. A recent study funded by the American Academy of Pediatrics concluded that, in families headed by same-sex parents, "[c]ivil marriage can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support.... Children who are raised by civilly married parents benefit from the legal status granted to their parents."[48] Thus, children raised by same-sex couples would benefit from the greater stability and security that would characterize their parents' relationship if it were recognized as a marriage.[49]

Permitting same-sex couples to marry would also alleviate the stigma suffered by their children.[50] Children of school age and in early to

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of Sept. 25, 2007].) UPS follows a similar approach. (*Ibid.* See also Human Rights Campaign Foundation, Corporate Equality Index: A Report Card on Gay, Lesbian, Bisexual and Transgender Equality in Corporate America (2007) 16-17, 27-39 <http://www.hrc.org/cei> [as of Sept. 18, 2007] [identifying 14 surveyed California companies that do not offer equal benefits to domestic partners and married persons].)

[48] Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children* (2006) 118 Pediatrics (Official J. of the Am. Academy of Pediatrics) 349, 361.

[49] Herek, 61 Am. Psychologist at 616; Chan et al., *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers* (1998) 69 Child Development 443, 455.

[50] The impact of stigmatization of all types on children has been well documented. (Milich et al., 21 School Psychology Review at 400-09.)

mid-adolescence generally have a strong desire to conform to the norms of their community, to be like other kids and not to stand out from their peers.[51] Coming from a family that is perceived as ordinary or normal is extremely important to many children. Given the social disapproval of same-sex couples that persists in many communities, the children of such a relationship may suffer some degree of stigma and resulting distress regardless of the State's official attitude toward their parents' relationship, but such distress is enhanced if the State itself labels their parents' relationship as "different" and implicitly of lesser standing.

III. THE STATE OFFERS NO SUBSTANTIVE JUSTIFICATION FOR THE SEGREGATION OF SAME-SEX COUPLES INTO A DISTINCT AND INFERIOR INSTITUTION.

The State's action in segregating same-sex couples into the separate institution of domestic partnership creates and perpetuates both a perception and a reality of disparate treatment of same-sex couples. This disparity is not trivial – it is both formal and informal, tangible and intangible, and touches virtually every aspect of life. It is a disparity that cries out for a justification. The State has none to offer.

Indeed, perhaps the most remarkable thing about the State respondents' briefs is the fact that, although they expend considerable effort in arguing about which standard they need to meet in justifying the ban on marriage between same-sex couples, they never get around to offering an actual justification that would be sufficient to meet even the limited "rational basis" standard for which they advocate.

It is for this reason, presumably, that the State respondents work so hard to discount the significance of the challenged ban. If

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[51] Rubin et al., *Peer Interactions, Relationships, and Groups* in Handbook of Child Psychology (Damon edit., vol. 3, 5th ed. 1998) pp. 641-44, 653-54, 658.

domestic partnership "fixes" the problem, they apparently hope this Court will conclude that the need for a real justification all but disappears. But because the assumption underlying this argument is false – because domestic partnership is not a panacea and, in fact, even enhances the adverse impact on same-sex couples in some respects – the State must step forward with a real justification.

This Court made clear more than six decades ago that any law purporting to limit exercise of the fundamental right "to join in marriage with the person of one's choice" must be directed at an effort to avoid a "social evil." (*Perez*, 32 Cal.2d at 713-15; see also *United States v. Virginia* (1996) 518 U.S. 515, 533 [applying similar standard in equal protection context].) The State respondents make no serious effort to identify any "social evil" that is averted by prohibiting same-sex couples from marrying.[52] Nor is there any. Permitting same-sex couples to marry would not, after all, do any cognizable injury to anyone else. The only "injury" of any kind that is really at issue here lies in the fact that some groups find the idea of marriage between same-sex couples to be offensive or inconsistent with their own personal views of who should and should not be permitted to marry.[53] But the Constitution and the courts have long since rejected the idea that civil liberties may be infringed merely because

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[52] The arguments on this subject presented by the private respondents are by and large not supported – indeed, they are to a large extent affirmatively rejected – by the State respondents. Arguments such as a preference that children be raised by differently-sexed couples are, moreover, flatly inconsistent with the existing law and policy of the State, which affords full parental and adoption rights to same-sex couples.

[53] Underlying this attitude, in turn, is a persistence of the attitude condemning homosexuality itself – an attitude that the State itself has now officially disavowed.

some people in society find the conduct or status of others to be subjectively offensive.[54]

The State respondents are in an unenviable position here. Laudably, they take some care to avoid the old homophobic arguments that seek to demonize and degrade gay men and women or to present them as generally undeserving of equality before the law. But their disavowal of such attitudes, coupled with their insistence that California law *intends* to give completely equal rights to same-sex couples, ultimately belies any suggestion that the State's policy on marriage has a "rational basis." There can be no "rational basis" for something that the State itself is unprepared to defend on the merits and that ultimately contradicts the State's own policy. (Cf. *U.S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 536-37 [fact that laws already exist to address the claimed government purpose "necessarily casts considerable doubt" on whether the challenged law "could rationally have been intended to prevent those very same abuses"].)

The "justifications" offered by the State respondents are nothing more than a flimsy effort to offer this Court political cover for avoiding what even they implicitly acknowledge, by silence if nothing else, is substantively the right outcome here. Their suggestions that this Court should defer to the political process are wholly non-substantive and ignore the time-honored obligation of this Court to protect and declare the rights of

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[54] Were it otherwise, more than two centuries of First Amendment free speech jurisprudence would have taken a very different course. (See *Texas v. Johnson* (1989) 491 U.S. 397, 414 ["If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [Citing cases]"].)

individuals even in the face of majority opposition to the contrary.[55] If this argument were valid, the electorate could bar anyone it wished – such as prisoners or deadbeat parents – from eligibility for marriage. Ample authority rejects any such conclusion.[56]

Nor is the appeal to "tradition" well-taken. It was, after all, until fairly recently a time-honored tradition to view white males as the only ones worthy of true equality in our society. Indeed, the traditional view of marriage itself was one in which one partner, sworn to "obey" the other, had a distinctly unequal role. And it was a long-standing "tradition" to view gay men and women as virtual criminals, unworthy of even minimal respect in society. None of these traditions could withstand the constitutional guarantees of equal treatment for all of our citizens. The "tradition" of denying a substantial number of those citizens the benefit of marriage has no greater standing.

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[55] See, e.g., *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 262; *In re Horton* (1991) 54 Cal.3d 82, 97.

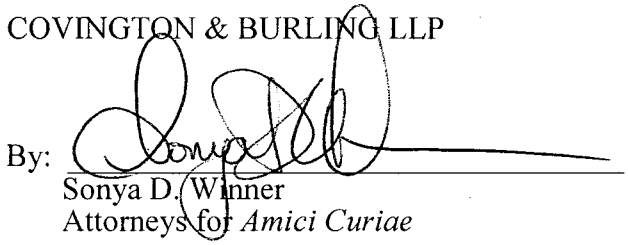
[56] See *Turner v. Safley* (1987) 482 U.S. 78 (upholding prisoners' right to marry); *Zablocki v. Redhail* (1978) 434 U.S. 374, 387 (finding statute limiting marriage rights of parents with child-support obligations to be unconstitutional).

CONCLUSION

This Court should reject the State's invitation to stand by the sidelines while the system of segregation of same-sex couples, with all of the harms that flow from it, is perpetuated. The Court should hold that the State's definition of marriage, as reflected in Section 300 of the Family Code and other statutes, is unconstitutional.

DATED: September 26, 2007

COVINGTON & BURLING LLP

By: 

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION, THE AMERICAN ANTHROPOLOGICAL ASSOCIATION, AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA URGING REVERSAL OF THE DECISION OF THE COURT OF APPEAL

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[X] (BY U.S. MAIL) the document listed above, postage prepaid, to the addresses set forth on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 26, 2007 at San Francisco, California.

By: Ken Mielen
Ken Mielen