Case No. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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INTRODUCTION

Family Code sections 300 and 308.5 are incompatible with the autonomy and informational privacy protections contained in the Privacy Clause of article 1, section 1 of the California Constitution.[1] For gay men and lesbians, the current dual system of recognizing committed relationships unconstitutionally conditions marriage upon surrender of critical aspects of the right to autonomy. Further, by sorting couples into the separate categories of "marriage" and "domestic partnership," the dual system unconstitutionally requires members of same-sex couples to publicly disclose their sexual orientation in innumerable situations in which sexual orientation and the sex of one's partner are irrelevant. Both of these burdens, neither of which may be the price of legal recognition of committed relationships, would be alleviated by uniform recognition of marriage.

The Family Code unconstitutionally conditions marriage upon surrender of the Privacy Clause right to pursue familial relationships with persons of the same sex. It is settled law that when the State extends a right or benefit, it must not condition that right or benefit upon surrender of the right to autonomy without substantial justification. Such conditions are subject to heightened scrutiny and the State must show that there are no less restrictive means available. Here, the marriage restriction must be subjected to such heightened scrutiny because it penalizes Californians for exercising their privacy right to form consensual familial relationships with persons of the same sex. This Court addressed a similar situation in *Committee to Defend Reproductive Rights v. Myers* in which the State

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[1] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

conditioned Medi-Cal funding upon surrender of the right to reproductive freedom. The State could not justify its interference with autonomy in *Myers* and it cannot do so here.

This Court would not abide a dual system of family law under which couples whose members were of different races or religions were relegated to a status under which they were required, as a condition of family recognition, to register as "interracial partners" or "interfaith partners." Even if registered partners were entitled to the same statutory and common law rights as married persons, such partners still would carry with them, by virtue of their separately-named statuses, a marker of the race or religion of their spouse. Registered partners would be required in numerous interactions with government or private actors to indicate the race or religion of their partners even where race or religion are irrelevant to the interaction, or even where it would be illegal for race or religion to be taken into account.

In the same way, domestic partnerships are constitutionally inferior to marriage because they impair informational privacy. Domestic partnership requires members of same-sex couples to repeatedly and permanently "out" themselves when they complete government applications or documents, request public benefits, provide payroll information to employers, seek loans or respond to juror questionnaires. Repeatedly, on paper and over the Internet, same-sex couples must check a "domestic partnership" box, one reserved primarily for gay men and lesbians, and thereby publicly declare their sexual orientation. Appellants' and the Court of Appeal's dismissal of this issue as "largely symbolic" entirely misses the point. The demarcation of difference that California's dual system of family law imposes upon members of same-sex relationships is a form of public stigmatization and violates the Privacy Clause. Such demarcation renders domestic partners unable to limit

disclosure of sexual orientation to those contexts in which such disclosure is necessary, safe and appropriate.

Control over dissemination of information is a critical part of what Californians intended to protect when enacting the Privacy Clause. Every Californian is entitled to exercise this informational privacy right regardless of sexual orientation. One need look no farther that the Attorney General's statistics on hate crimes motivated by knowledge or perception of a victim's sexual orientation (described below) to understand why control over dissemination of such information is vital. Uniformly applying the status "marriage" to committed relationships would restore to members of such relationships control over the contexts in which those individuals must disclose their sexual orientation. Clearly, certain contexts would require a same-sex spouse to mention the name or sex of his or her spouse. However, those contexts would be limited to the ones in which heterosexual couples today reasonably are required to reveal such information.

To be clear, forced disclosure is objectionable not because there is anything wrong with being in a same-sex relationship, or because one ought to hide one's sexual orientation. Rather, what is objectionable (and what disqualifies domestic partnership from substituting for marriage) is the requirement that domestic partners disclose their sexual orientation every time they identify or describe their relationship's legal status – just as it would be objectionable to require persons in interracial or interfaith marriages to refer to their relationships by a distinct legal term.

Respondents are entitled to marry, and relegation of same-sex couples to a stigmatizing alternative contravenes article I, section 1 of the California Constitution.

ARGUMENT

I. THE MARRIAGE RESTRICTION UNCONSTITUTIONALLY CONDITIONS MARRIAGE UPON NONASSERTION OF THE RIGHT UNDER THE PRIVACY CLAUSE TO PURSUE CONSENSUAL FAMILIAL RELATIONSHIPS WITH PERSONS OF THE SAME SEX

The defense of the marriage ban offered by Appellants and the Court of Appeal turns on the contention that the ban does not interfere with the ability of Californians to enter into same-sex relationships without interference from the State. (State's Br. at pp. 65-66 [quoting Opn. at pp. 47-48].) That is the wrong analysis under California constitutional principles.

Under settled California law, the State may not condition receipt of a public right or benefit upon an individual's nonassertion of a constitutional right, unless there is a compelling need to do so. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213; *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 270.) That restriction on the State's power applies to the legal status of marriage. Family Code sections 300 and 308.5 impermissibly condition marriage upon nonassertion of the right to pursue and maintain "consensual familial relationships" with persons of the same sex, an "interest fundamental to personal autonomy." (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34.) The restrictive definitions contained in Family Code sections 300 and 308.5 therefore are subject to heightened scrutiny, which they cannot withstand.

A. This Court Should Apply Heightened Scrutiny to the Restrictive Definition of Marriage, Which Plainly Conditions Marriage, a Public Right and Benefit, upon Nonassertion of the Privacy Clause Right to Form Consensual Familial Relationships with Persons of the Same Sex

Respondents correctly assert that State recognition of marriage is a right, subject to compliance with consanguinity restrictions and age requirements. (Resp. Supp. Br. at pp. 19-29.) Further, the legal status of marriage is a benefit as it confers advantage and promotes well-being. (See Black's Law Dict. (7th ed. 1999) pp. 150, cl. 2 - 151, cl.1 [defining "benefit" as "advantage; privilege"]; Webster's Third New Int'l Dict. (1981) p. 204, cl. 1 [defining "benefit" as "something that guards, aids or promotes well-being"].) This Court repeatedly has held that when receipt of such a public right or benefit is made contingent upon surrender or nonassertion of a constitutional right, that condition is unconstitutional unless it passes heightened scrutiny and the accompanying three-part test. (*Robbins v. Superior Court*, *supra*, 38 Cal.3d 199, 213 [applying heightened scrutiny and three-part test to statute requiring surrender of the autonomy right to choose one's living arrangements in exchange for general assistance benefits]; *Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 257 [applying heightened scrutiny and three-part test to statute conditioning the receipt of Medi-Cal benefits upon surrender of the right to reproductive choice]; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 501 [applying heightened scrutiny and three-part test to restrictions placed on freedom of expression in exchange for public employment]; *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536, 546-46 [applying heightened scrutiny and three-part test to restriction of freedom of expression in exchange for access to classrooms for after-school meetings].)

The restrictive definition of marriage triggers the unconstitutional conditions framework. Family Code section 300 declares: "Marriage is a personal relation arising out of a civil contract between a man and a woman. . . ." Marriage therefore is unavailable to those who pursue family relationships with persons of the same sex. However, the Privacy Clause indisputably guarantees the right to pursue such relationships. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th 1, 34 [noting that the freedom to pursue "consensual familial relationships" is "an interest fundamental to personal autonomy," and that the State must demonstrate a "compelling interest" before restricting this freedom]; *Robbins v. Superior Court*, *supra*, 38 Cal. 3d 199, 212 [explaining that privacy "'is a fundamental and compelling interest [that] protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose'" (quoting ballot pamphlet for 1972 amendment)].)

Because the restrictive definition of marriage requires nonassertion of the right to form consensual familial relationships with persons of the same sex, this Court must apply heightened scrutiny and the accompanying three-part test. As discussed below, the restrictive definition of marriage fails that test.

B. The Restrictive Definition of Marriage Cannot Pass Heightened Scrutiny

Because marriage is conditioned upon nonassertion of the right to enter into a consensual familial relationship with a person of the same-sex, "the 'government bears a heavy burden of demonstrating the *practical necessity* for the limitation.' (*Bagley* v. *Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 505.)" (*Robbins v. Superior Court*, *supra*, 38 Cal.3d 199, 213, italics added.) Courts apply a three-part test to determine

whether the government has met this heavy burden. The government must demonstrate:

> (1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from the imposition of the condition manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means that could maintain the integrity of the benefits program without severely restricting constitutional rights. . . .(*Committee to Defend Reproductive Rights* v. *Myers, supra*, 29 Cal.3d 252, 265-266.)

(*Robbins v. Superior Court, supra*, 38 Cal.3d 199, 213.)

The marriage condition fails at each stage of this test. First, the government cannot – and has not even attempted to – identify any purpose of marriage that would make it uniquely suited to heterosexual couples or that otherwise would justify the exclusion of same-sex couples. (See State's Br. at pp. 7-10).[2] The only justifications offered by the State – deference to tradition and to majority preference – are unrelated to the purpose of marriage and merely re-state the restrictive definition at issue. This Court has noted:

> Unquestionably, there *is* a strong public policy favoring marriage. (*Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 9.) This policy serves specific interests "not based on

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[2] Appellants Campaign for California Families (hereinafter "Campaign") and Proposition 22 Legal Defense and Education Fund (hereinafter "Fund") also argue that excluding same-sex couples from marriage somehow furthers the state's interests in the welfare and best interests of children. (See Campaign's Answer Brief on the Merits at pp. 65-72; Fund's Answer Brief on the Merits at pp. 42-49). The Attorney General and the Governor rightly have disavowed this purported rationale as utterly inconsistent with the established public policies of this State. (See Attorney General's Answer Brief on the Merits at p. 9; Governor's Answer Brief on the Merits at p. 30, n. 22.)

> anachronistic notions of morality. The policy favoring marriage 'is rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'" (*Laws v. Griep* (Iowa 1983) 332 N.W.2d 339, 341.)

(*Koebke v. Bernardo Heights* (2005) 36 Cal.4th 824, 844, original italics [requiring country club to recognize member's domestic partner].) This Court further observed that recognizing same-sex relationships serves the same public purposes as recognizing marriage. (*Id.* at 844-846.) The State therefore falls far short of demonstrating the "practical necessity" of the marriage exclusion in relation to the purpose of marriage. (*Robbins v. Superior Court*, *supra*, 38 Cal.3d 199, 213.) As in *Myers*, the restriction here "bears no relation whatsoever" to the fundamental purposes of the Family Code; the State has failed to carry its burden. (*Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 271.)

The State likewise cannot pass the second stage of the test. The State has not demonstrated that the value accruing to the public from the imposition of the marriage restriction manifestly outweighs any resulting impairment of the constitutional right to pursue consensual familial relationships with persons of the same sex. This second stage of the test requires the Court:

> [T]o realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further the court must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is threatened or impaired, as a practical matter, by the specific statutory restrictions or conditions at issue.

(*Id* at 273-74.) Here, as explained above, the State has not demonstrated any legitimate public interests related to any purpose of the marriage statute that is served by the marriage exclusion. A "realistic assessment" of the restrictive Family Code definition reveals that it is based on nothing more than bare prejudice against same-sex couples. Because bare prejudice can never be a legitimate state interest, *Romer v. Evans* (1996) 517 U.S. 620, 634, the State's interest in maintaining this discriminatory exclusion carries little or no weight. But even if the State had demonstrated any legitimate interest served by the exclusion, this Court should conclude that the burden upon same-sex couples vastly outweighs that interest. The importance of the right to marry is indisputable. (*Perez v. Sharp* (1948) 32 Cal.2d 711, 714 [marriage "is a fundamental right of free men"].) Further, "as a practical matter" the current law completely bars same-sex couples from marriage and completely deprives them of the enormous intangible benefits and public validation that only marriage gives. (See *Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 271.) Moreover, access to marriage by same-sex couples would not threaten or impair the right of heterosexual persons to marry and would not harm marriages between persons of the opposite sex in any way.

Finally, the third stage of the test "plays no role" as the State has not identified any legitimate interests served by the marriage exclusion. (See *Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 283.) Moreover, even if the Court were to accept that the State's asserted interest in "tradition" were legitimate, even despite the absence of any relationship to the substantive purposes of marriage or to any other substantive underlying rationale, excluding same-sex couples from marriage is not the least restrictive means of protecting any legitimate State interest in tradition. Rather, the State can further its interest in marriage as a valued tradition by making the institution of civil marriage available on an equal

basis to individuals who exercise their protected right to enter into a same-sex relationship. The State therefore fails this final stage of the test.

The restrictive definition cannot pass heightened scrutiny. Respondents must be permitted to marry.

C. Invalidating the Unconstitutional Condition in This Case Is Consistent with This Court's Longstanding Policy of Prohibiting the State from Providing Public Benefits Selectively in Order to Influence the Manner in Which Californians Exercise their Autonomy

This Court long has been concerned with the State's attempts to do indirectly, by conditioning access to important rights and benefits, what it cannot do directly through its police power. This Court consistently has rejected the argument, promoted here by Appellants, that the State may refuse to recognize a status or extend a benefit so long as it does not directly interfere with a constitutional right. (See State's Br. at pp. 46 and 61.) This Court should so hold once again with regard to the conditions placed on receipt of the right and benefit "marriage."

Appellant's unconstitutional reasoning is no different than the former Attorney General's claim in *Myers* that refusing to fund abortions does not interfere with the fundamental right to privacy, or the school district's claim in *Danskin* that refusing to allow "subversives" to meet in public school classrooms does not interfere with the right to free speech. As this Court noted in *Myers*, the issue of unconstitutional conditions concerns the State's ability to influence the manner in which Californians exercise their constitutional rights. (*Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 256-57.)

In support of the funding restriction in *Myers*, the Attorney General at the time cited *Harris v. McRae* (1980) 448 U.S. 297, in which the United States Supreme Court "concluded . . . that the federal Constitution *required no special justification for such discriminatory treatment so long as the*

program placed no new obstacles in the path of the woman seeking to exercise her constitutional right." (*Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 257, italics added.) This Court rejected the State's argument, based on principles of the California Constitution:

> By contrast [to *McRae*], the governing California cases . . . have long held that a discriminatory or restricted government benefit program demands special scrutiny *whether or not it erects some new or additional obstacle that impedes the exercise of constitutional rights*.

(*Ibid.*, italics added.)

The *Myers* Court's rationale for this rule was that the State may not wield its power to influence the exercise of constitutional rights:

> [W]e face the . . . question of whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support. [¶] . . . [¶] If the state cannot directly prohibit a woman's right to obtain an abortion, may the state by discriminatory financing indirectly nullify that constitutional right . . . ? Can the state tell a poor woman that it will pay for her needed medical care but only if she gives up her constitutional right to choose whether or not to have a child? [¶] Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion.

(*Com. to Defend Reproductive Rights v. Myers, supra*, 29 Cal.3d 252, 256-57, 284-85.)

This case presents precisely the same question the Court faced in *Myers*: whether the State, having chosen to establish civil marriage, and all of the tangible and intangible benefits provided through marriage, may selectively withhold marriage from persons otherwise qualified – based on compliance with consanguinity and age restrictions – solely because such persons seek to exercise their constitutional right to autonomy in a manner the State does not favor. The question also is strikingly similar to that in *Perez v. Sharp*, *supra*, 32 Cal.2d 711. At issue in *Perez* was a law banning interracial marriages that involved Caucasians. This Court resoundingly rejected such a restriction: "A member of any of these [non-Caucasian] races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." (*Id.* at 725.)

Though *Perez* was not an unconstitutional conditions case, it perfectly exemplifies the abhorrence of the condition the Family Code currently places upon marriage. As in *Perez*, this Court should recognize that the marriage ban, which conditions marriage upon the exercise of autonomy in a State-approved manner without compelling justification, is as limiting and dehumanizing as the anti-miscegenation laws of a thankfully bygone era. The remedy in this case must also be the same as that in *Perez*: Respondents must be permitted to marry.

II. A SEGREGATED SCHEME OF RECOGNIZING RELATIONSHIPS COMPELS SAME-SEX COUPLES REPEATEDLY TO DISCLOSE THEIR SEXUAL ORIENTATION IN CIRCUMSTANCES IN WHICH SEXUAL ORIENTATION IS IRRELEVANT, IN VIOLATION OF SUCH COUPLES' RIGHT TO INFORMATIONAL PRIVACY

Even if domestic partners enjoy nearly all the same rights and responsibilities as married couples, the existence of a separate regime to record, memorialize and refer to same-sex relationships infringes upon same-sex partners' constitutional right to informational privacy. Under California's segregated system of recognizing relationships, opposite-sex couples marry while same-sex couples register as domestic partners.[3] Inevitably, the State's establishment of a separate status makes one's sexual orientation a matter of public record and requires registered domestic partners repeatedly, in the course of everyday life, to disclose that their sexual orientation is likely gay or lesbian. According to this Court's jurisprudence, legally compelled disclosures of such intensely private information generally must be justified by a compelling state interest; yet California's bifurcated family law system necessitates disclosure of such private information in myriad contexts on a daily basis even though such information is irrelevant. Permitting same-sex couples to marry on terms equal to their heterosexual counterparts would reduce required informational disclosures to a level reasonably anticipated by a spouse with a marriage license on file with the county in which he or she resided at the time of marriage. Under a uniform system of marriage, same-sex spouses would receive the level of privacy, i.e., one which comports with the Privacy Clause, that opposite-sex couples enjoy.

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[3] The Family Code also permits couples with one member over the age of 62 to register as domestic partners (Fam. Code § 297(b)(5)(B)), though such couples are not precluded from marriage.

The required disclosure of one's sexual orientation, through the State's system of "parallel" schemes for same-sex and opposite-sex couples, is a marked departure from California's proud tradition of leading the nation in the protection of private information. (Wolf, Proskauer on Privacy (2006) § 5:1, 5-2 (rel. 1-7/07) ["Of the fifty states, California has been far and away the most active in its efforts to enact laws protecting the privacy of its citizens, to enforce those laws, and to educate the public about individual privacy issues"].) It also deviates from California's protection of couples from required disclosure of potentially stigmatizing information on official documents pertaining to their relationships. (See Health and Saf. Code, § 103175 ["The [marriage] certificate shall not contain any reference to the race or color of parties married"].)

In advancing this argument, amici do not suggest that they do not appreciate the efforts the State has made to recognize and formalize the lasting, committed, and caring relationships that have been entered into by tens of thousands of same-sex couples in this State. However, while domestic partnerships have been salutary as a temporary remedy – for those who can risk public disclosure of their sexual orientation – Appellants and the Court of Appeal are misguided in their reliance upon the availability of domestic partnerships as a justification for denying marriage to same-sex couples. The State's failure to permit same-sex couples to marry inevitably subjects members of such relationships to a scheme that impermissibly requires disclosure of their sexual orientation in situations where it is irrelevant, in violation of their rights under the Privacy Clause.

A. California's Maintenance of Separate Statuses Based on Sexual Orientation Unconstitutionally Requires Irrelevant and Repeated Disclosure of Sexual Orientation in Violation of the Privacy Clause

A central purpose of the Privacy Clause is to preserve individual control over private information: "'*Fundamental to our privacy is the*

ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives.'" (*White v. Davis* (1975) 13 Cal.3d 757, 774, original italics [quoting official election brochure].) The Privacy Clause "[p]rotects against the unwarranted, compelled disclosure of various private or sensitive information regarding one's personal life, including his or her financial affairs, political affiliations, medical history, sexual relationships, and confidential personnel information." (*Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 539.)

California's separate scheme for recognizing relationships flouts these principles. By separating same-sex and opposite-sex couples into two different categories for the purpose of recognizing their committed relationships, rather than permitting all couples to marry, California requires that all couples in this State publicly disclose their sexual orientation in numerous circumstances in which their sexual orientation is irrelevant. Domestic partners are required repeatedly, on every form that collects routine personal information, to disclose their likely sexual orientation when indicating that they are domestic partners. Whether completing payroll information, applying for auto insurance, providing medical history, enrolling in a state university, serving on a jury, opening a bank account, seeking a loan or applying for general assistance, domestic partners must inform total strangers of information they have no business knowing.

Claiming that one is "single," or otherwise declining to state that one is a registered partner, is not an option when one is asked to disclose one's legal relationship status. Under current California law, registered domestic partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations and duties under law,

whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." (Fam. Code § 297.5(a).) Moreover, "[w]here necessary to implement the rights of registered partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners." (Fam. Code § 297.5(j).)

Thus, as a matter of law, registered domestic partners may no longer answer the question "What is your marital status?" with anything other than "domestic partnership." Where that question is asked under penalty of perjury, failing to disclose one's domestic partnership status, and therefore one's sexual orientation, is punishable by severe sanctions. The Judicial Council has noted that placing potential jurors in the position of having to declare their sexual orientation in voir dire is "untenable." (Judicial Council of Cal., *Sexual Orientation Fairness in the California Courts* (Jan. 2001) 30, at <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf> (as of Aug. 30, 2007); See Brill, *Domestic Partnerships Aren't Marriages*, Sacramento Bee (July 1, 2007), at <http://www.sacbee.com/110/story/249447.html> (as of Aug. 30, 2007) [describing experience, in Los Angeles Superior Court in 2007, of having to disclose domestic partnership under oath during voir dire, and noting: "I'm open about my sexual orientation, but requiring disclosure that someone is gay as a condition of jury service feels intrusive and irrelevant"].)

It is unquestionable that sexual orientation information is protected by the Privacy Clause. "A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 36; *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1019 ["We must also safely conclude that the right of privacy extends to the details of one's

personal life"]; *Leibert v. Transworld Systems* (1995) 32 Cal.App.4th 1693, 1702 ["the details of one's personal life, including sexuality, generally fall within a protected zone of privacy"]; Ins. Code § 791.02(s) [protecting unauthorized disclosure of, inter alia, "any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics"].) This protection is broader than that provided by the penumbra of the federal Constitution. (*Com. to Defend Reproductive Rights v. Meyers*, *supra*, 29 Cal.3d 252, 281.)

In addition to protecting information that is widely considered to be personal, California's Privacy Clause also protects information that may subject individuals to social stigma or from which inferences can be drawn that would form the basis for discrimination. In *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1140, the Court of Appeal held that disclosure without consent of HIV status could form the basis of a claim for invasion of privacy, because HIV-positive status "is ordinarily associated either with sexual preference or intravenous drug users. It ought not be, but quite commonly is, viewed with mistrust or opprobrium. . . . [I]t is clearly a private fact of which the disclosure may be offensive and objectionable to a reasonable [person] of ordinary sensibilities. [Citation.]" (*Ibid.*)

The reason for this protection is clear: disclosure of such information in the wrong context or to the wrong people can have deleterious consequences. As the Attorney General – an Appellant in this action – has recognized, the prospect of repeated public disclosure of one's sexual orientation may prevent one from registering as a domestic partner altogether. (See 84 Ops.Cal.Atty.Gen. 55, *3 (2001) ["From the legislative record, including committee reports, concerning the enactment of Family Code sections 297-299.6, it is apparent that for some segments of society, a

social stigma may attach to those eligible to register as domestic partners. [Citation]. Conceivably, harassment of domestic partners may result from the disclosure of their common residence addresses"].) Only a compelling state interest could justify a scheme of "parallel" relationships that requires such disclosure:

> Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.

(*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th 1, 34.)

Because a person's sexual orientation is personal information that should be up to the individual to disclose and that has absolutely no relevance in the vast majority of circumstances, and because disclosure may subject individuals to harassment, violence and indignity, the state must have a compelling reason to require compulsory disclosure of information about a person's sexual orientation. But rather than protect individual control of the dissemination and use of private information – the right the Privacy Clause preserves – the State effectively compels public dissemination, and facilitates foreseeable improper use, of that information. In an age of widespread availability of information, domestic partners quickly lose control of the dissemination of information about their sexual orientation. The neutral title "marriage" would help restore such control.

Amici acknowledge that marriage is a matter of public record and that if same-sex couples were able to marry, there would be circumstances under which the *specific identity* of a person's spouse would be legally relevant (as is the case now for married heterosexual couples). There is a

vast difference, however, between the incidental disclosure of sexual orientation entailed by such circumstances and the systematic, compelled disclosure of sexual orientation required by the current law. The former does not violate California's constitutional guarantee of privacy; the latter does.

B. Public and Repeated Disclosure of Sexual Orientation Subjects Members of Same-sex Couples to Potential Violence, Discrimination and Indignity to a Greater Degree than Members of Such Relationships Would Be If They Were Spouses

The privacy intrusions intrinsic in California's bifurcated scheme for recognizing relationships subjects members of same-sex couples and their families to potential discrimination, violence and indignity.

Because the domestic partnership registry contains a list of all registered same-sex couples in California and is readily available to anyone who requests it, the very act of registering as a domestic partner can place members of domestic partnerships at a significantly increased risk of discrimination and violence. 84 Ops.Cal.Atty.Gen. 55, *3 (2001) [quoted *supra*].) In *Sharon S. v. Superior Court* (2003), 31 Cal.4th 417, in the context of adoption by a same-sex couple, this Court noted that "privacy concerns undermine the utility of domestic partner registration for some qualified adoptive parents who require confidentiality." It emphasized that "domestic partner registration requires a declaration that the couple shares 'an intimate and committed relationship,' in a document generally subject to public disclosure." (*Id.* at 442 n.23 [quoting Fam. Code § 298.5].)

The domestic partnership statutes require the Secretary of State to maintain a separate registry of all Declarations of Domestic Partnership filed with the Secretary of State. (Fam. Code § 298.5, subd. (b).) The information contained in the registry – name, address and date of filing – is publicly available on CD-ROM to anyone who requests it and pays a $20

fee. (See Cal. Secretary of State, Domestic Partner Registry Frequently Asked Questions, ques. 11 (undated), at <http://www.sos.ca.gov/dpregistry/dp_faqs.htm> (as of Aug. 30, 2007) [noting that names and addresses of domestic partners are available "both over the phone and by written request"].) Those in possession of the registry database may sort data by name, street address, city, ZIP code and date of registration.

In contrast, marriage licenses are registered with the local County Clerk, and, as a practical matter, lists of married couples are available only when requested county-by-county. (Health & Saf. Code § 102285.) While no disclosure of a marital abode is required by county marriage applications, same-sex couples must declare as a matter of public record not only their sexual orientation but also that they share a common residence the address of which is included in the Declaration of Domestic Partnership. (Fam. Code §§ 297(b)-(c), 298.5.)

Members of same-sex couples, amici and even the California Attorney General are all too aware that knowledge or suspicion of a person's homosexual or bisexual orientation can lead to violence and discrimination. The Attorney General, an Appellant in this action, has recognized anti-gay bias crimes as the second-most prevalent form of hate crime in California. (Brown, *Hate Crime in California, 2006*, Cal. Dept. J. 3, at <http://www.ag.ca.gov/cjsc/publications/hatecrimes/hc06/> (as of Aug. 30, 2007) (hereafter "*Hate Crime in California, 2006*") [noting that in 2006, crimes based on victims' sexual orientation were the second-most prevalent form of bias crime in California]; Lockyer, *Hate Crime in California, 2005*, Cal. Dept. J. 3, at <http://www.ag.ca.gov/cjsc/publications/hatecrimes/hc05/> (as of Aug. 30, 2007) [noting that "[s]exual

orientation hate crime offenses have consistently been the second largest bias motivation category of hate crimes since 1996"].[4])

In fact, the Attorney General himself has remarked on the amplified risk of harassment and violence that flows from the required disclosure of common residence in the Domestic Partner Act. (84 Ops.Cal.Atty.Gen. 55, *3 (2001) ["From the legislative record, including committee reports, concerning the enactment of Family Code sections 297-299.6, it is apparent that for some segments of society, a social stigma may attach to those eligible to register as domestic partners. Conceivably, harassment of domestic partners may result from the disclosure of their common residence addresses"].) The Attorney General's concern was no doubt informed by his finding that "residence/home/driveway" is the location where many hate crimes occur. In the period between 2000 and 2005, with the exception of one year, the greatest number of hate crimes each year took place at this location. (*Hate Crime in California, 2006* 25.)

A variety of other studies demonstrate that it can be dangerous even to be perceived as a gay man or lesbian, let alone to disclose that information together with one's home address as a matter of public record. (Franklin, *Anti-Gay Crimes Widespread, Research Finds*, American Chronicle (July 3, 2007), at <http://www.americanchronicle.com/> (as of Aug. 30, 2007) [reporting that "most reliable estimate to date of the prevalence of anti-gay victimization in the United States," conducted by University of California, Davis, demonstrated that "[n]early four in 10 gay men and about one in eight lesbians and bisexuals in the United States have

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[4] Despite these alarming numbers, hate crimes are generally underreported. (Bureau of J. Statistics, *Hate Crime Reported by Victims and Police* (Nov. 2005), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf> (as of Aug. 30, 2007) ["Approximately 44% of hate victimizations were reported to police"].)

been the target of violence or a property crime because of their sexual orientation"]; Southern Poverty Law Center, (Nov. 21, 2005), at <http://www.splcenter.org/> (as of Aug. 30, 2007) [summarizing U.S. Bureau of Justice Statistics study of hate crimes and concluding that "gays and lesbians are victimized at six times the overall rate"].)

In *Anderson v. Martin* (1964) 375 U.S. 399, the United States Supreme Court, applying rational basis review, invalidated a Louisiana statute requiring mandatory disclosure of a candidate's race because such compelled disclosure invited discrimination based on race:

> [B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important – perhaps paramount – consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. . . . The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.

(*Id.* at 402.) This Court has recognized that the constitutional harm in *Anderson* was that "[a]lthough the state practice did not *require* discrimination on the part of individual voters, it was struck down because it *encouraged* and assisted in discrimination." (*Mulkey v. Reitman* (1966) 64 Cal.2d 529, 540, affd. *Reitman v. Mulkey* (1967) 387 U.S. 369, original italics.)

The compelled disclosure of sexual orientation in California's dual scheme of marriage and domestic partnership works analogous harm. The State encourages private discrimination and harassment both by mandating disclosure of the very information that permits discrimination and harassment, and by highlighting the differences between same-sex and opposite-sex couples in the first place. This Court repeatedly has held that highlighting difference in a way that facilitates private discrimination

violates the Equal Protection Clause of the California Constitution. (See, e.g., *Parr v. Municipal Court* (1971) 3 Cal.3d 861, 862 [striking down municipal ordinance that described "hippies" as undesirables because such description singled such persons out for private discrimination]; *Mulkey v. Reitman*, *supra*, 64 Cal.2d 529; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1028 [approving municipality's refusal to place on ballot an initiative to repeal laws protecting on the basis of sexual orientation, as such a repeal would signal that private discrimination was acceptable].[5])

Californians long have been skeptical of compulsory disclosure and collection of private information, and history has proven that there is good reason for such skepticism. The State's "parallel" scheme of recognizing relationships requires unnecessary and repeated disclosure of private information to a degree far greater than that which same-sex spouses would experience. Uncontrolled disclosure of sexual orientation everyday in irrelevant contexts is at best undignified, and at worst, dangerous. The way to cure this constitutional infirmity is to permit same-sex couples to marry.

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[5] Amici do not further discuss the extent to which the existing California marriage/domestic partner scheme violates the Equal Protection Clause in this brief as they understand that that issue has been addressed by other amici as well as by Respondents.

CONCLUSION

Because same-sex couples may not be required to surrender their autonomy and informational privacy rights in order to achieve State recognition, amici curiae respectfully request that this Court affirm the judgment and writ relief granted by the Superior Court requiring the State of California to issue marriage licenses to same-sex couples on the same terms as such licenses are issued to opposite-sex couples.

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