IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))	No. S147999
IN RE MARRIAGE CASES	Judicial Council Coordination Proceeding No. 4365
	First Appellate District Nos. A110449, A110450, A110451, A110463, A110651, A110652
	San Francisco Superior Court Case Nos. 429539, 429548, 428794, 503943, 504038 Los Angeles Superior Court Case No. BS-088506 Hon. Richard A. Kramer

LEGISLATORS' APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CHALLENGING THE MARRIAGE EXCLUSION; AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CHALLENGING THE MARRIAGE EXCLUSION

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LEGISLATORS' APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CHALLENGING THE MARRIAGE EXCLUSION

Pursuant to Rule 8.520(f) of the California Rules of Court, California Senators Elaine Alquist, Ellen Corbett, Christine Kehoe, Sheila Kuehl, Carole Migden and Darrell Steinberg and Assemblymembers Noreen Evans, Loni Hancock, Jared W. Huffman, Dave Jones, John Laird, Mark Leno, Sally J. Lieber, Fiona Ma, Anthony J. Portantino and Lori Saldaña (together "the Legislators") respectfully request that the Court permit them to file the accompanying proposed amicus curiae brief in support of appellants challenging the marriage exclusion.

A. The Applicants' Interest in the Litigation

The applicants have a substantial and direct interest in this case. Many of them spearheaded legislation that relates to this case, and they have a significant institutional interest in ensuring that the courts properly construe those laws and the intent behind them. For example, Applicants and then-Assemblymembers Migden and Kuehl authored Assembly Bill No. 26, which became California's first Domestic Partnership Law when it was enacted in 1999. AB 26 provided for the registration of domestic partnerships with the Secretary of State, authorized public employers to offer health benefits to domestic partners and established hospital visitation rights for domestic partners. Then-Assemblymembers Alquist and Steinberg coauthored AB 26, and then-Assemblymember Corbett supported it.

In 2003, Applicant Assemblymembers Laird, Leno and then-Assemblymember Kehoe were among the authors of Assembly Bill No. 205, which is cited by both respondents and the majority in *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 49 Cal.Rptr.3d 675, as a

justification for finding a rational basis for the discriminatory marriage laws at issue here. Senator Kuehl was the principal coauthor in the Senate, Assemblymembers Hancock and Lieber and then-Assemblymember Steinberg were coauthors, and then-Assemblymember Corbett supported the bill. AB 205, which took effect on January 1, 2005, extended the same rights and obligations available to spouses under state law to registered domestic partners. Known as the California Domestic Partner Rights and Responsibilities Act of 2003, the law provided significant new rights to domestic partners, including the same rights and obligations spouses have during and after a marriage, and after a spouse's death, and the same rights and obligations with respect to a child of a spouse.

In 2005 and again this year, Applicant Legislators were and are engaged in efforts to ensure California's marriage statutes are gender-neutral. In 2005, Applicant Assemblymembers Leno, Laird and Lieber introduced Assembly Bill No. 849, the Religious Freedom and Civil Marriage Protection Act, which provided that marriage is a personal relation arising out of a civil contract between two persons. Senators Kehoe, Kuehl and Migden were principal coauthors of AB 849 in the Senate. Assemblymembers Evans, Hancock, Jones and Saldaña and Senator Alquist were also coauthors. Both houses of the Legislature passed AB 849, but the Governor vetoed the bill on September 29, 2005.

During the current legislative term, Assemblymembers Leno, Laird and Lieber again introduced the Religious Freedom and Civil Protection Act as Assembly Bill No. 43. Again, the principal Senate coauthors were Senators Kehoe, Kuehl and Migden. Assemblymembers Evans, Hancock, Huffman, Jones, Ma, Portantino and Saldaña and Senators Alquist and Steinberg joined as coauthors of the measure, and Senator

Corbett supported it. Like AB 849, AB 43 provides for civil marriages between same-sex couples in order to "end the pernicious practice of marriage discrimination in California." Both houses of the Legislature have passed the bill, and it is awaiting the Governor's signature. The Governor, however, recently signaled that he will veto the bill once more.

In addition to authoring or supporting legislation at issue here, several of the applicants have a significant personal interest in this case. In particular, Senators Kuehl, Kehoe and Migden and Assemblymembers Laird and Leno are members of the Legislature's Lesbian, Gay, Bisexual and Transgender Caucus. These applicants are among the first elected openly gay or lesbian lawmakers in the country.

Senator Kuehl has served in the Legislature since 1994, and was the first openly lesbian woman to be elected to the California Legislature, as well as the first woman in California history to be named Speaker Pro Tempore of the Assembly. Senator Kuehl is currently the Chair of the Senate Health Committee.

Senator Kehoe is the Chair of the Senate Energy, Utilities and Communications Committee and prior to her election as Senator, was the second woman in California history to be named Speaker Pro Tempore of the Assembly.

Senator Migden has served as a member of the Board of Equalization, the Assembly, and the Senate. She is the Chair of the Senate Democratic Caucus and the Labor and Industrial Relations Committee, and while in the Assembly, served as the Chair of the Appropriations Committee. Senator Migden married her longtime partner in February 2004 in a ceremony at San Francisco City Hall officiated by San Francisco Mayor Gavin Newsom. That marriage was later rendered

void by *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055.

Assemblymembers Laird and Leno were the first two openly gay men to serve in the California Legislature when they were elected in 2002. Assemblymember Leno spearheaded the gender-neutral marriage bills, and chairs the Assembly Appropriations Committee. Assemblymember Laird was a Santa Cruz City Councilmember, as well as mayor of Santa Cruz, serving as one of the first openly gay mayors in the United States. He is currently the Chair of the Assembly Budget Committee and the Lesbian, Gay, Bisexual and Transgender Caucus.

In sum, the Legislators have a both personal and institutional interest in this case and in seeing their efforts to end discrimination against gay men and lesbians fully enforced by the courts.

B. The Applicants Will Assist the Court With Understanding the Intent Behind the Laws at Issue Here

The applicants intend to provide context for the legislative efforts to provide for marriage by same-sex couples. A review of this legislative record shows not only that there is no rational basis for denying same-sex couples the right to marry under state law but also that, contrary to the Court of Appeal's finding, the Legislature has no interest in maintaining two separate institutions for committed relationships, one for opposite-sex couples and one for same-sex couples.

The accompanying brief will be helpful to the Court because it examines the recent legislation concerning the rights of gay men and lesbians in a comprehensive manner different from that of both the court below and the parties to the case. A review of both the intent and purpose of this legislation makes clear that there is no support for the Court of

Appeal's finding that prohibiting marriage by same-sex couples is rationally related to a legitimate governmental purpose of maintaining two separate institutions of marriage.

Dated: September 26, 2007

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CHALLENGING THE MARRIAGE EXCLUSION

INTRODUCTION

In the decision below, the Court of Appeal cited the Legislature's interest in maintaining two separate civil institutions – domestic partnerships for same-sex couples and marriage for opposite sex couples – in support of its determination that a rational basis existed for excluding same-sex couples from the institution of marriage. Indeed, the Court of Appeal pointed to the domestic partnership laws as evidence of a desire by the Legislature to preserve the "traditional" definition of marriage as between a man and woman. The Legislature, however, did not intend this two-tiered system to be a permanent solution to the discriminatory effect of the State's marriage laws on gay men and lesbians. Rather, every legislative action over the last eight years, including the domestic partnership laws, has been one step toward the ultimate goal of marriage equality in California. Thus, any attempt to justify the existence of two separate civil institutions for couples as an act of deference to the legislative branch badly misreads the goals of the Legislature in enacting these laws.

Furthermore, to the extent the Court of Appeal's decision rests on an interest in maintaining the status quo and preventing social conflict, the Legislators believe those fears can be allayed by looking to the success – and social tranquility – occasioned by the first few years under California's comprehensive domestic partnership law. As of March 2007, over 38,000 couples had registered as domestic partners under the new

law.[1] The implementation of this law has not been met with social upheaval. Rather, it has been accepted with little fanfare. Based on this record, there is no reason to believe that according gay men and lesbians the right to marry will result in significant social upheaval.

Recent legislation attempting to end discrimination against lesbians and gay men and to provide equality for all Californians – and the public response to this legislation – demonstrates that there is no constitutional justification for denying marriage rights to same-sex couples.

ARGUMENT

I.

THE LEGISLATURE HAS EXPRESSLY REJECTED THE NEED OR DESIRE TO CREATE A SEPARATE SYSTEM OF RIGHTS FOR SAME-SEX COUPLES

The Court of Appeal upheld the exclusion of same-sex couples from civil marriages by concluding that "it is rational for the Legislature to preserve the opposite-sex definition of marriage . . . while at the same time providing equal rights and benefits to same-sex partners through a comprehensive domestic partnership system." (*In re Marriage Cases* (2006) 143 Cal.App.4th 873, 49 Cal.Rptr.3d 675, 720-721, review granted Dec. 20, 2006; *see also id.* at 723 ["the opposite-sex requirement in the marriage statutes is rationally related to the state's interest in preserving the institution of marriage in its historical opposite-sex form, while also providing comparable rights to same-sex couples through domestic

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[1] *See* Legislators' Request for Judicial Notice ("RJN"), Exh. A, Assem. Floor Analysis, 3d Reading of Assem. Bill No. 43 (2007-2008 Reg. Sess.) as amended April 9, 2007, p. 2 [noting that there is no distinction between same-sex and opposite-sex domestic partnerships, but "[i]t is assumed that the vast majority of these are same-sex couples."].

partnership laws."].) "Under rational basis review," the court found, "we must view the Legislature's dual system of domestic partnership and marriage rights with much more deference." (*Id.* at 721.)

Even under the rational basis test, however, a court must engage in "a serious and genuine judicial inquiry into" the challenged "classification and the legislative goals" behind the classification. (*Warden v. State Bar of Cal.* (1999) 21 Cal.4th 628, 647, citations and internal quotations omitted, emphasis omitted.) This inquiry thus requires a determination of the objectives of the Legislature. While the Legislators of course agree that the courts should give appropriate deference to legislative policy decisions, the Court below selectively interpreted legislative history and ignored recent legislative actions, and as a result, misconstrued the Legislature's rationale for maintaining "the opposite-sex definition of marriage."[2]

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[2] The Court of Appeals cites *Warden* for the proposition that, under rational basis review, it "must uphold the opposite-sex requirement for marriage if it is supported by *any* plausible reason." (*In re Marriage Cases, supra*, 49 Cal.Rptr.3d at 722, emphasis in original, citing *Warden v. State Bar, supra*, 21 Cal.4th at 644; *id.* at 726, fn. 36 ["rational basis review obliges us to consider all reasonably conceivable state interests justifying the challenged law" so analysis cannot be limited to statements in the legislative record].) The court, however, cannot "defer" to a rationale that is contrary to the actual policy expressed by the Legislature. Indeed, *Warden* also held that the court may not invent "'fictitious purposes that could not have been within the contemplation of the Legislature.'" (*Warden v. State Bar, supra*, 21 Cal.4th at 648-649, citation and internal emphasis omitted; *see also In re York* (1995) 9 Cal.4th 1133, 1152 [citing to legislative history to determine objective of legislative amendment and finding a rational basis for amendment].)

The Court of Appeal thus erred in concluding that the Legislature meant to establish two separate systems for couples in order to preserve the "traditional" definition meaning of marriage.[3] In fact, the Legislature has shown no desire to preserve the traditional definition of marriage at the expense of denying same-sex couples substantial civil rights. To the contrary, it has taken several progressive steps in the past decade to rectify discrimination against gay men and lesbians and ultimately to ensure same-sex couples full equality. A review of recent legislation demonstrates this evolution.[4]

A. Legislation Enacting Domestic Partnership

Over the past decade, the Legislature has sought to prevent discrimination against lesbian, gay, bisexual and transgender individuals in many different spheres of life. (*See, e.g.*, Stats. 1999, ch. 592 [barring

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[3] The Attorney General and Governor are likewise wrong to claim that there is a rational basis for maintaining a traditional understanding of marriage with this dual system. (Answer Brief of State of California and the Attorney General at 45-48, 55-56; Answer Brief of Governor Arnold Schwarzenegger at 27-32.) Simply put, domestic partnerships are not, and were not meant to be, equivalent in all ways to the institution of marriage.

[4] The relevant legislative history is included in the Legislators' accompanying Request for Judicial Notice. (*See In re J.W.* (2002) 29 Cal.4th 200, 211 ["To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice."]; *People v. Murphy* (2001) 25 Cal.4th 136, 153, fn. 6 [taking judicial notice of committee analysis citing author's background material]; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, fn. 3 [taking judicial notice of legislative history, including committee reports and individual legislators' and bill co-authors' comments from the Assembly and Senate committee bill files]; *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 986, fn. 12 [taking judicial notice of committee analysis of vetoed bill and governor's veto message].)

discrimination based on sexual orientation in employment and housing]; Stats. 2003, ch. 331 [barring discrimination based on sexual orientation in foster parenting and adoption].) In addition, in the past several years, the Legislature has taken steps to ameliorate the effects of discrimination against same-sex couples by affording them a panoply of domestic partnership rights.

The Legislature enacted California's first domestic partnership statute in 1999. The new law established a statewide domestic partnership registry, which allows same-sex couples over the age of 18, or opposite-sex couples where at least one of the domestic partners is over the age of 62, to file a Declaration of Domestic Partnership with the Secretary of State as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." (Stats. 1999, ch. 588 [AB 26].) The Act also provided registered domestic partners with hospital visitation rights and authorized health benefits for domestic partners of state employees. The next year, the Legislature provided qualified domestic partners access to housing in specially designed accessible housing for senior citizens. (Stats. 2000, ch. 1004 [SB 2011].)

The Legislature expanded the rights and benefits granted to domestic partners in 2001. (Stats. 2001, ch. 893 [AB 25].) AB 25 provided domestic partners the right to sue for wrongful death, use employee sick leave to care for an ill partner or partner's child, make medical decisions on behalf of an incapacitated partner, receive unemployment benefits if forced to relocate because of a partner's job, and to adopt a partner's child as a stepparent. In 2002, the Legislature enacted additional laws to grant more rights to domestic partners, including inheritance rights if a partner dies without a will (Stats. 2002, ch. 447 [AB 2216]), exemptions for domestic

partners from the prohibition on receiving an inheritance from a will or trust that they helped to draft (Stats. 2002, ch. 412 [SB 1575]), and six weeks paid family leave to care for a sick domestic partner (Stats. 2002, ch. 901 [SB 1661]).[5]

Finally, the Legislature restated these laws by passing the Domestic Partner Rights and Responsibilities Act of 2003, and extended, as of January 1, 2005, all rights, benefits, and obligations of married persons under state law to registered domestic partners. (Stats. 2003, ch. 421 [AB 205].) AB 205 did not, however, extend any rights, benefits, and obligations accorded only to married persons by federal law, the California Constitution or initiative statutes.[6]

The legislative history of the California Domestic Partner Rights and Responsibilities Act makes clear that the Legislature did not view comprehensive domestic partnership as the final say in ending discrimination against same-sex couples, or as a separate but equal system of marriage. Indeed, the Legislature declared that the Act was

> intended to *help California move closer* to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all caring and committed couples,

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[5] During this time, the Legislature also enacted laws permitting San Mateo (Stats. 2001, ch. 146 [AB 1049]), Los Angeles, Santa Barbara and Marin (Stats. 2002, ch. 373 [AB 2777]) Counties to offer death benefits to domestic partners of county employees.

[6] In 2006, the Legislature enacted SB 1827, which amended the Act to treat domestic partners' earned income as community property for the purposes of state income taxes and allow domestic partners to file joint tax returns. (Stats. 2006, ch. 802 [SB 1827].)

> regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.
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> (Stats. 2003, ch. 421, § 1(a) [AB 205], emphasis added.)

The Senate Judiciary Committee's analysis of the bill likewise noted that "[t]his bill continues the march towards parity in rights and benefits between registered domestic partners, as currently defined, and married couples, under state law." (RJN, Exh. B, Sen. Jud. Com., Analysis of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended June 3, 2003, p. 2.) It did not claim that the bill would give equal rights to same-sex couples, but only that it "would expand the rights of and impose responsibilities on registered domestic partners, *similar* to the rights and responsibilities conferred on married couples by state law." (*Id.*, p. 3, emphasis added.) The analysis also observed that the bill's requirement that domestic partners consent to the superior court's jurisdiction over their separation "is a major step towards recognizing the legal relationship formed between domestic partners." (*Id.*, p. 8.)

The analysis before the Assembly Committee on Judiciary also stated that "while the bill results in more equity with respect to how domestic partners are treated under the law, it does not provide full equality between the two groups." The analysis went on to quote the bill's author, Assemblymember Jackie Goldberg:

> "This bill seeks to extend to registered domestic partners most, but not all, of the protections provided under California law to different-sex couples who marry and the corresponding obligations imposed upon them. However, even this step would not provide equal treatment to gay and lesbian couples and their families.
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> * * *
>
> Granting the substantial rights and proportional responsibilities provided for by this bill will further the State's interest in promoting stable and lasting family relationships. It will not, however, create equality. Far from it. Until same-sex couples have access to the full range of legal protections at both the state and federal level, through the same institution with all of the same ceremonies and respect as different-sex couples, they will continue to experience very substantial economic and practical hardships and discrimination. Though it will not create equality, this bill nonetheless will improve the lives of many thousands California families in tangible, important ways."
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> (RJN, Exh. C, Assem. Com. on Jud., Analysis of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended Mar. 25, 2003, pp. 3-4.)[7]

In the analysis before the Senate's Revenue and Taxation Committee, the bill's author noted that the "bill will provide more equity to registered domestic partners. It does not provide complete equality because heterosexual couples are institutionally and legally recognized by marriage while gay and lesbian couples are not and will not under this bill." (RJN, Exh. F, Sen. Rev. & Tax. Com., Analysis of Assem. Bill No 205 (2003-

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[7] *See also* RJN, Exh. D, Assem. Floor Analysis, Assembly Concurrence in Senate Amendments to Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended Aug. 21, 2003, p. 3 [same]; RJN, Exh. E, Assem. Floor Analysis, 3d Reading of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended June 2, 2003, p. 3 [same].

2004 Reg. Sess.) as amended Mar. 25, 2003, p. 4.) Finally, in the analysis for the bill's Assembly Third Reading, the bill's author stated: "AB 205 does not pertain to or affect marriage in any way . . . . Even with the passage of AB 205, domestic partnership will remain quite distinct from marriage in a number of ways [including that] . . . it will not grant same-sex couples the full social and symbolic equality of marriage." (RJN, Exh. E, Assem. Floor Analysis, 3d Reading of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended June 2, 2003, p. 5.)

The Court of Appeal recognized that the Legislature's goal in enacting AB 205 was to "move closer" to full equality for same-sex couples (*In re Marriage Cases*, *supra*, 49 Cal.Rptr.3d at 696, 709, fn. 22), but even in the face of this express language, found that the Legislature intended to maintain a two-tier system. To the contrary, the legislative history of AB 205 makes clear that while domestic partnership is an important step toward equal treatment for same-sex couples, it does not achieve the ultimate legislative goal of full equality. The Legislature realized that goal two years later when both houses approved a gender-neutral marriage bill.

B. Legislation Approving Marriage of Same-Sex Couples

The Court of Appeal stated that the issue before it was "who gets to define marriage in our democratic society," and then determined that "this power rests in the people and their elected representatives," not the courts. (*In re Marriage Cases, supra*, 49 Cal.Rptr.3d at 685.) In September 2005 and again in September 2007, the people's representatives in the Legislature approved the Religious Freedom and Civil Marriage Protection Act to include same-sex couples in the definition of marriage and thus end marriage discrimination in California. Although the Governor vetoed the Act in 2005 and has threatened to veto it again, passage of these

bills by a majority of both houses demonstrates the Legislature's clear intent to provide same-sex couples with exactly the same marriage rights that opposite-sex couples currently enjoy.[8]

For the first 127 years of California history, the definition of marriage was gender-neutral: "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary." (Former Civ. Code, § 4100, added by Stats. 1969, ch. 1608, § 8, p. 3314.) In 1977, the Legislature amended section 300 (then-Civil Code 4100 and 4101) to limit marriage to a "civil contract between a man and a woman" in order to close a perceived loophole that might allow

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[8] Although AB 849 was ultimately vetoed and AB 43 is still on the Governor's desk, the legislative history of these bills is relevant to determining the Legislature's understanding of the relationship between the domestic partnership and gender-neutral marriage laws. (*Irvine Corp. v. California Employment Com.* (1946) 27 Cal.2d 570, 578 [reviewing various legislative attempts to define agricultural labor: "Though these bills failed to become law, the legislative action in connection with the subject under discussion is of some significance as evidencing the continuity of legislative intent regarding the use of the broad term "agricultural labor."]; *see also Freedom Newspapers, Inc. v. Orange County Employees Retirement System Bd. of Directors* (1993) 6 Cal.4th 821, 832-833 ["The Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute."], citations omitted, superseded by statute on other grounds as stated in *Funeral Security Plans, Inc. v. State Bd. of Funeral Directors* (1994) 35 Cal.Rptr.2d 36, 48, fn. 4; *Eu v. Chacon* (1976) 16 Cal.3d 465, 470 [citing legislative record and Governor's veto message to determine Legislature and Governor's understanding of statute: "Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed."].)

same-sex marriage. (Stats. 1977, ch. 339, § 1, p. 1295; Appellants' Appendix on Appeal at 64; *see also In re Marriage Cases*, *supra*, 49 Cal.Rptr.3d at 692.) The voters passed Proposition 22 in 2000, which added section 308.5 to the Family Code to read: "Only marriage between a man and a woman is valid or recognized in California." This provision prevents the state from recognizing out-of-state same-sex marriages. (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1422-1424; *cf. Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 18, 23-24.)

In 2005, both houses of the Legislature passed AB 849, the Religious Freedom and Civil Marriage Protection Act, which provided for marriage by same-sex couples. The Governor vetoed this legislation. (*See infra*, pp. 19-20.) The Legislature recently passed the Act again in a nearly-identical bill when the Assembly approved AB 43 on June 5, 2007, and the Senate approved it on September 7, 2007. Both bills restored the definition of marriage in Family Code section 300 to its pre-1977 gender-neutral state, and amended section 300 to read: "Marriage is a personal relation arising out of a civil contract between two persons, to which the consent of the parties capable of making that contract is necessary." (RJN, Exh. G, Assem. Bill No. 43 (2007-2008 Reg. Sess.) as amended April 9, 2007, § 4.) They also made related marriage laws gender neutral. (*Id.*, §§ 5, 6.) These bills explicitly avoided amending Proposition 22's Family Code section 308.5. (*Id.*, § 3(m) ["This act is in no way intended to alter Section 308.5 of the Family Code, which prohibits California from treating as valid or otherwise recognizing marriages of same-sex couples solemnized outside of California."].) Finally, they provided that no priest, minister or rabbi of any religious denomination, or other religious official,

shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion. (*Id.*, § 7 [adding Fam. Code section 403].)

In AB 43's statement of purpose and intent, the Legislature noted that "[b]y excluding same-sex couples from marriage, California's marriage law discriminates against members of same-sex couples based on their sexual orientation and based on their gender." (*Id.*, § 3(f).) "California's discriminatory exclusion of same-sex couples from marriage further harms same-sex couples and their families by denying them the unique public recognition and validation that marriage confers." (*Id.*, § 3(i); *see also* RJN, Exh. H, Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, § 3(i).) The explicit intent of the Legislature is thus

> to end the pernicious practice of marriage discrimination in California. California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantees of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians. California's exclusion of same-sex couples from marriage serves no legitimate government interest and is contrary to the public policies of California.
>
> (RJN, Exh. G, Assem. Bill No. 43, § 3(l).)

The court below reviewed AB 849's attempt to end discrimination in California's marriage laws and the Legislature's intent to "'correct the constitutional infirmities' of the marriage laws," but nonetheless held that there was a rational basis in maintaining separate institutions of domestic partnership and marriage in order to preserve the

"traditional" definition of marriage. (*In re Marriage Cases*, *supra*, 49 Cal.Rptr.3d at 696-697, quoting Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, § 8 [RJN, Exh. H].)

In approving both AB 43 and AB 849, however, the Legislature considered whether the domestic partnership laws afforded same-sex couples equality with married opposite-sex couples, and determined that they did not. "The harms caused by prohibiting same-sex couples from marrying in California cannot be remedied, as required by the California Constitution, by any measure short of permitting same-sex couples to marry in California." (RJN, Exh. G, Assem. Bill No. 43, § 3(l).) Specifically, the Legislature found that "[d]espite the intention of California's domestic partnership statutes to reduce discrimination,"

> 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.
>
> (*Id.*, § 3(k).)

The legislative record makes very clear that

> [a]lthough California's domestic partner laws provide many of the benefits, obligations and protections to same-sex couples that are afforded to married heterosexual partners, domestic partnerships are not equal to marriage. Legal distinctions between heterosexual and same-sex couples relegate lesbian, gay, and bisexual Californians to second-class status and constitute an impermissible use of government power to stigmatize same-sex couples and their families with a brand of inferiority.
>
> (RJN, Exh. A, Assem. Floor Analysis, 3d Reading of Assem. Bill No. 43 (2007-2008 Reg. Sess.) as amended April 9, 2007, p. 4; RJN, Exh. I, Sen. Rules Com., Office of Sen. Floor Analyses, 3d Reading of Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, p. 15.)

As the Senate Judiciary Committee's analysis of AB 43 explained, "[t]he author and supporters of AB 43 clearly believe that as comprehensive and as marriage-like the rights and obligations of domestic partners are under current law, it is not enough to correct the harm being done to same-sex couples and their families." (RJN, Exh. J, Sen. Jud. Com., Analysis of Assem. Bill No. 43 (2007-2008 Reg. Sess.) as amended April 9, 2007, p. 18.) In passing AB 43, the Legislature demonstrated that it agreed with this assessment.

It is noteworthy that the Governor, who vetoed AB 849 and thereby prevented it from becoming law, did not articulate a desire to maintain the traditional definition of marriage or continue discrimination against same-sex couples. Indeed, in his veto message, the Governor stated: "I believe that lesbian and gay couples are entitled to full protection

under the law and should not be discriminated against based upon their relationships." He added that he was proud that "California is a leader in recognizing and respecting . . . the equal rights of domestic partners." (RJN, Exh. K, Governor's Veto Message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-2006 Reg. Sess.), pp. 3737-3738.) Instead, the Governor emphasized the need for the courts to resolve the challenge to the constitutionality of the prohibition against same-sex marriage:

> The ultimate issue regarding the constitutionality of section 308.5 and its prohibition against same-sex marriage is currently before the Court of Appeal in San Francisco and will likely be decided by the Supreme Court.
>
> This bill simply adds confusion to a constitutional issue. If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective.
>
> (*Id.*)[9]

The Court of Appeal acknowledged the reasons for the Governor's veto, but held that the issue was not constitutional, but in fact political, and should be determined by the "democratic process." (*In re Marriage Cases, supra*, 49 Cal.Rptr.3d at 697, 726, fns. 35 & 36.) Thus, the Governor deferred to the Court of Appeal, while the Court of Appeal

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[9] The Governor also stated that he believed the Legislature might not be able to amend Family Code section 300 without amending section 308.5, which was enacted by initiative and which cannot be amended without voter approval. The Court of Appeal did not address this issue because it was not directly presented on appeal. (*In re Marriage Cases, supra*, 49 Cal.Rptr.3d at 693.)

deferred to the political process of which the Governor is a part, leaving the Legislature caught in the middle. The Court avoided ruling whether discriminatory marriage laws are unconstitutional because it is too "controversial" and should be left to the democratic process. But the Governor avoided signing the Legislature's bill to rectify the issue because he believed that the courts first had to determine whether existing law is unconstitutional. It is clear that this Court must rule on the constitutionality of the discriminatory marriage laws before the Governor will engage the democratic process and allow any gender-neutral law to be enacted.

Given this history, the Court of Appeal's holding that a rational basis review requires the Court to defer to the Legislature's desire to maintain the traditional definition of marriage rings hollow. Such a perceived rationale is not justified, and is in fact explicitly contradicted by the legislative history of the domestic partnership laws, as well as recently approved legislation ending marriage discrimination in California.

II.

THERE IS NO REASON TO BELIEVE THAT PERMITTING SAME-SEX MARRIAGES WILL CAUSE SIGNIFICANT SOCIAL UPHEAVAL

Both the Attorney General, explicitly, and the Court of Appeal, implicitly, oppose marriages by same-sex couples in part out of a concern that such a change will cause social upheaval and, perhaps, undermine the institution of civil marriage. (*In re Marriage Cases*, *supra*, 143 Cal.App.4th at 685, 703, 723, 725-726; Answer Brief of State of California and the Attorney General at 2, 44.) The Legislators believe those concerns are not valid and, more importantly, should not inform the legal analysis in this case. Marriage by same-sex couples is gaining acceptance and would not cause social conflict if the Court were to

conclude that the United States and California Constitutions prohibit the State from discriminating against same-sex couples.

First, California's experience with the domestic partnership laws is instructive. The concern that permitting same-sex marriages will cause social upheaval is contradicted by California's experience with the domestic partnership laws. When the Legislature first considered the California Domestic Partnership Rights and Responsibilities Act of 2003, many groups opposed it, calling it an "in-your-face bill." (RJN, Exh. F, Sen. Rev. & Tax. Com., Analysis of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended Mar. 25, 2003, p. 6.) Despite initial controversy, however, the law has been a success and is accepted by Californians.

Since the passage of the law, more than 38,000 domestic partners have registered with the Secretary of State without problem. (*Supra*, pp. 6-7, fn. 1.) By extending many of the rights of marriage to gay men and lesbians in 2003, California has already confronted vocal opposition and has emerged unscathed. Moreover, by enacting two gender-neutral marriage bills in the last several years, the Legislature has demonstrated that it believes that Californians are ready for the final step on the road to marriage equality.

Second, as the City and County of San Francisco makes clear in its Consolidated Reply Brief at pages 29-30, nearly 10,000 same-sex couples have married in Massachusetts without any of the dire consequences imagined by the Attorney General and the Court of Appeal. It is hard to believe that the citizens of California will react any differently.

In sum, the Legislators believe that while there are vocal opponents to marriage by same-sex couples, California has, in many ways, moved beyond that controversy. Furthermore, fear of such "controversy"

should not serve as the rationale for maintaining an unconstitutional law, particularly in the face of the efforts by the people's elected representatives to redress marriage discrimination.

CONCLUSION

The Legislators believe that deference should be accorded to their policy judgments. But the deference accorded by the Court of Appeal to the Legislature's determination to preserve "traditional" marriage by instituting domestic partnerships was misplaced. In fact, the Legislature recognized that domestic partnerships were but one step in the evolution of the state's marriage laws. A perceived basis that is actually contrary to legislative intent cannot support upholding the state's discriminatory marriage laws.

Dated: September 26, 2007

Respectfully submitted,

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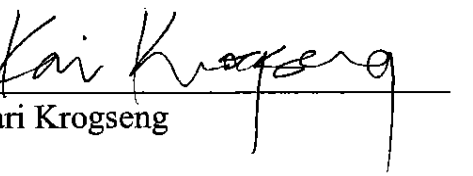
By: 
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BRIEF FORMAT CERTIFICATION PURSUANT TO RULES 8.204 and 8.490 OF THE CALIFORNIA RULES OF COURT

Pursuant to Rules 8.204 and 8.520 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 6,156 words as counted by the Microsoft Word 2002 word processing program used to generate the brief.

Dated: September 26, 2007

Kari Krogseng

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On September 26, 2007, I served a true copy of the following document(s):

Legislators' Application to File Amicus Curiae Brief in Support of Appellants Challenging the Marriage Exclusion; Amicus Curiae Brief in Support of Appellants Challenging the Marriage Exclusion

on the following party(ies) in said action:

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- ☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.
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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on September 26, 2007, in San Leandro, California.

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