

Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate Division, Division Three
Nos. A110449, A110450, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP 4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
The Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND
PROPOSED BRIEF OF *AMICI CURIAE* OUT & EQUAL
WORKPLACE ADVOCATES AND LEVI STRAUSS & CO. IN
SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE
EXCLUSION

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And LEVI STRAUSS & CO.

SUPREME COURT
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Deputy

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And LEVI STRAUSS & CO.

**APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF
RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION
AND STATEMENTS OF INTEREST OF *AMICI CURIAE***

Pursuant to California Rule of Court, Rule 8.520, subdivision (f), *amici curiae* Out & Equal Workplace Advocates and Levi Strauss & Co. hereby respectfully apply for leave to file an *amici curiae* brief in support of the Respondents challenging the marriage exclusion. The proposed *amici curiae* brief is attached to this Application. The proposed *amici* are familiar with the questions presented by this case. They believe that there is a need for further argument, as discussed below.

STATEMENTS OF INTEREST

Out & Equal™ Workplace Advocates (commonly known as “Out & Equal”) is a national 501(c)(3) nonprofit organization headquartered in San Francisco, California. **Out and Equal** champions safe and equitable workplaces for lesbian, gay, bisexual, and transgender (LGBT) people. **Out and Equal** advocates building and strengthening successful organizations that value all employees, customers and communities. **Out and Equal** provides a variety of services to companies, human resource professionals, employee resource groups (ERGs) and individuals. **Out and Equal** is committed to full workplace equality, and believes that employees function at their highest potential and business at their most competitive when all employees are treated equally and enjoy the same respect and

dignity. **Out and Equal** believes having the right to marry is a critical quality of life and workplace issue for all LGBT employees.

Founded in 1853, **Levi Strauss & Co.** is one of the world's largest brand-name apparel marketers with sales in more than 110 countries around the world. **Levi Strauss & Co.** employs over 10,500 people worldwide and over 3,920 in North America alone. In 1992, **Levi Strauss & Co.** became the first major U.S. Fortune 500 company to extend full medical benefits to domestic partners of its employees, a practice now followed by many corporations and public agencies.

Levi Strauss & Co. and the companies serviced by **Out and Equal** collectively employ thousands of Californians and are engaged in an increasingly competitive effort to recruit and retain talented employees. Their continued business success depends on (1) their ability to recruit and retain the best employees in a global market for talent and (2) the continued diversity and innovation of the communities in which they are located. Since California's discriminatory marriage laws have a direct and negative influence on both of these drivers of business success, *amici* have a direct and substantial interest in this case.

The *amici* are familiar with the issues before the Court. *Amici* believe that further briefing is necessary to address the matters described above, which are not fully addressed by the parties' briefs. Specifically, *amici* will set forth, and will explain:

1. How eliminating discrimination in California's marriage laws would enhance the ability of California businesses to recruit and retain talented employees; and

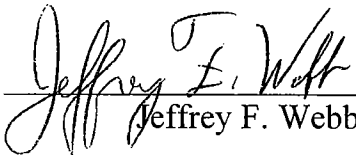
2. How ending discriminatory marriage laws would enhance California's reputation for respect and diversity – a key factor associated with increased business development and economic growth.

For the foregoing reasons, Out & Equal Workplace Advocates and Levi Strauss & Co. respectfully request leave to file the attached brief.

Dated: September 26, 2007

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
JEFFREY F. WEBB

By:  _____
Jeffrey F. Webb

Attorneys for *Amici Curiae*
Out & Equal Workplace Advocates and
Levi Strauss & Co.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Ending discrimination in California's marriage laws is not only good law – it also makes good business sense. As organizations with a keen interest in California's business community, *amici curiae* recognize that business success is directly affected by (1) the ability to compete for talented employees in a highly competitive marketplace, and (2) the diversity and innovativeness of the state in which businesses are located. Ending marriage discrimination will improve businesses' ability to attract the best and the brightest to California and enhance California's reputation as a diverse, inclusive and innovative community, both of which are key factors to continued economic growth and prosperity in this state.

First, the competitiveness of California businesses vis-à-vis businesses in other states and countries depends upon the ability to recruit and retain the most talented employees in a highly competitive market. Many employers have found that it is easier to recruit and retain employees in communities known for their diversity and respect for diversity. In recognition of this fact, many businesses in state after state have actively opposed proposals to ban marriage by same-sex couples because they fear such laws will impair their ability to recruit and retain the best and the brightest employees. Such employees, those businesses explain, may instead decide to work in other states with better reputations for respect and

inclusiveness, such as Massachusetts where marriage by same-sex couples is permitted.

Second, California businesses rely for their long-term success on the vitality of their local business environments. As described more fully below, research demonstrates that talented and creative people tend to migrate to and cluster in communities that offer a level of acceptance and respect that allow them to flourish. The economy of the state of California has always depended – and flourished – because of its reputation as a diverse, respectful and innovative community. Ending discriminatory marriage laws will strengthen and deepen California’s reputation for diversity, innovation and respect, and help prevent California from falling behind other states in achieving real diversity and full participation for its citizens. California should do everything it can to eliminate any remaining sources of discrimination, including marriage discrimination, because this may serve as the tipping point for talented individuals to choose California over less tolerant states.

In sum, *amici* respectfully request that the Court reverse the decision of the Court of Appeals and strike down the discriminatory restriction in California’s marriage statute. Doing so will have a positive effect on the business environment in the State of California.

I.

ELIMINATING DISCRIMINATION IN CALIFORNIA'S MARRIAGE LAWS WOULD ENHANCE THE ABILITY OF CALIFORNIA BUSINESSES TO RECRUIT AND RETAIN TALENTED EMPLOYEES.

One significant reason that the *amici* support marriage for same-sex couples in California is that it will help California businesses to recruit and retain employees. This is true because in a global marketplace, competition for talent is affected by a community's perceived inclusiveness, which affects the ability of companies in that community to recruit and retain talent. (See, e.g., Liz Winfield & Susan Spielman, *Straight Talk About Gays in the Workplace* (2d ed. 2001), pp. 22-23 [discussing negative ramifications for business of anti-gay initiatives in Colorado and Portland, Oregon]; Harris Interactive and Witeck-Combs, Press Release, *U.S. Adults Increasingly Support Workplace Equality for Lesbians and Gays* (Sept. 20, 2005) <<http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-20-2005/0004111343&EDATE=>> [last visited September 15, 2007].)

In general, “[b]usiness leaders are not radical social engineers trying to define or redefine families. They respond to basic pocketbook needs and real marketplace challenges, such as competition and the need to attract and

retain top workers.” (Bob Witeck & Gary Gates, *Same-Sex Marriage: What’s at Stake for Business?* (July 21, 2004)

<www.urban.org/url.cfm?ID=900722> [last visited September 15, 2007].)

As New York’s chief financial officer Bill Thompson aptly explained, “[w]e just think about it as good business and good business sense If employees feel that they’re not open to be discriminated against I think it makes everyone feel a little safer and a little more wanted. And then you have better and more productive employees.” (*Companies confused over gay rights*, CNN (July 13, 2005)

<<http://edition.cnn.com/2005/BUSINESS/07/13/corporate.gayrights/index.html>> [last visited September 15, 2007].)

Over the past four years, business leaders in many states have concluded that marriage discrimination is bad for business. For example, earlier this year, strong opposition from Eli Lilly, WellPoint, Cummins, Emmis Communications, and Dow AgroSciences and other companies helped defeat a proposed Indiana constitutional amendment banning marriage by same-sex couples. (See Bill Ruthhart, *Same-sex marriage ban collapses*, *The Indianapolis Star* (April 4, 2007).) A Lilly representative, Tony Murphy, noted that Lilly opposed the measure because “[g]iven the great lengths Lilly takes to attract and retain top talent from around the world, we oppose any legislation that might impair our ability to offer competitive employee benefits or negatively impact our recruitment and

retention.” (Mary Beth Schneider, *Lilly against marriage ban*, The Indianapolis Star (March 28, 2007), as reprinted at <http://americansfortruth.com/news/eli-lilly-takes-sides-in-culture-war-opposes-indy-marriage-amendment.html>) [last visited September 15, 2007].) Mr. Murphy further noted his concern that “the amendment ‘sends an unwelcoming signal to current and future employees making Indiana appear intolerant.’” (*Id.*) And as a representative for Cummins, another corporation that opposed the ban, pointed out, “[t]his resolution had no place in a state that professes to treat all residents with dignity.... Those who defeated it have done something good for Indiana and good for business.” (“Same-sex marriage ban collapses,” *supra.*) In short, the business community in Indiana opposed the measure because it would have impaired the ability of Indiana employers to compete for the best workers. (*Id.*)

In 2006, a Madison, Wisconsin business organization decided to oppose a proposed state ban on marriage for same-sex couples because it would harm Wisconsin’s economy. An editorial in the Wisconsin State Journal noted that the proposed constitutional amendment to prohibit marriage for same-sex couples would “post a ‘gays unwelcome’ sign on Wisconsin’s borders. With the state’s businesses already complaining of shortages of skilled employees, making Wisconsin less attractive to a population of willing workers is a bad idea. At stake is Wisconsin’s ability

to generate jobs and income in a highly competitive global marketplace.”

(Editorial, *Gay marriage ban would be mistake*, The Wisconsin State Journal (July 20, 2006).)

Ohio faced a similar battle in 2004 when voters in that state were considering an amendment to that state’s constitution to ban marriage for same-sex couples and certain domestic partnership benefits. There, Republican Governor Bob Taft actively campaigned against the measure.

(*Taft, Others Speak out against Issue 1*, Columbus Business Journal (October 14, 2004)

<<http://www.bizjournals.com/columbus/stories/2004/10/11/daily18.html>>.)

Similarly, the AFL-CIO and Nationwide Mutual Insurance Co. issued a joint statement urging rejection of the Ohio amendment because it would “hurt job creation efforts in the state.” (*Id.*) And Ohio employers such as Proctor & Gamble and Federated Department Stores campaigned against the measure due to concerns over its negative impact on corporate recruiting. (Michelle Goldberg, *Homosexuals are Hellbound!*, Salon.com (October 18, 2004),

<dir.salon.com/story/news/feature/2004/10/18/gayohio/index.html> [last visited September 15, 2007].)

Employers in Michigan have found that Michigan’s 2004 constitutional amendment prohibiting marriage by same-sex couples has already negatively impacted worker recruitment and retention. For

example, public employers, such as local governments, schools and universities, have already experienced increased difficulty in recruiting top candidates since the passage of Michigan's ban on marriage for same-sex couples. (P.J. Huffstutter, *A Clash Over Gay Couples' Benefits*, The Los Angeles Times, p. 19 (July 8, 2007); Laura Berman, *State's Social Climate Is Its Next Foe*, The Detroit News, p. 3A (Mar. 24, 2007).) The Detroit News recently opined that a top scholar's withdrawal from consideration for an appointment as dean of arts and sciences at a state university was due in part to a "harsh social climate" resulting from the state's ban on marriage for same-sex couples and the appellate court's recent decision interpreting the ban to mean that state entities, like the university, could no longer offer domestic partnership benefits. (Berman, *State's Social Climate Is Its Next Foe*, p. 3A.) The article also reported anecdotally that other professors at Michigan schools were actively looking for jobs elsewhere. (*Id.* [noting that "Michigan's effectively becoming a laboratory for legal ways to drive out some of its smartest citizens – and to keep out others"].) Other public employers in Michigan acknowledge that they need to be able to offer equal benefits (that are now barred by the state's ban on marriage for same-sex couples) in order to compete for "top-notch" employees. (Huffstutter, *A Clash Over Gay Couples' Benefits*, The Los Angeles Times, p. 19.)

Here, *amici* submit that marriage equality in California can and will enhance the ability of California businesses to recruit and retain talent. For

example, highly sought-after workers in same-sex relationships may now choose to work and live in Massachusetts or Canada where they can legally marry instead of California. (Peter S. Canelos, *Even in Wal-Mart World, Local Identity Runs Deep*, The Boston Globe, p. A3 (Feb. 1, 2005) [quoting Vanity Fair's columnist James Wolcott's opinion that "Massachusetts' granting of . . . marriage [to same-sex couples] might be an economic asset, since high-salary jobs migrate to places that are most amenable to a range of lifestyles. Under that scenario, workers who come to Massachusetts would only reinforce the existing definition, making Massachusetts even more liberal and tolerant; the same pattern might occur in reverse in some other cities and states."]; see also *Same Sex Couples Flock to Gay Friendly Canada*, San Francisco Chronicle (Mar. 9, 2004) [interviewing several families who moved from California to Canada on account of Canada's progressive laws].)

The risk of losing top talent to Massachusetts is particularly acute in the high technology industry. Massachusetts' "Route 128" is a very successful high technology center that is often compared to Silicon Valley. It draws on the talented populations from Massachusetts Institute of Technology ("MIT"), Harvard and Massachusetts' other fine colleges and universities. (See Robert Weisman, *Bloom Returns to the High-Tech Beltway*, The Boston Globe (May 14, 2004) [describing the recent resurgence in high-technology companies, including Internet and other

technology start-ups, and healthcare and biotechnology firms, along Boston's Route 128]; Robert Weisman, *Many Jobs in Bay State are Tied to Venture Capital, Survey Says*, The Boston Globe (Mar. 26, 2007) [noting Massachusetts ranked second after Silicon Valley in cumulative venture capital investment and that venture capitalists favor Massachusetts because "that's where the ideas are"]; *Boston's Route 128: Complementing Silicon Valley*, Business Week (Aug. 25, 1997).) The economic opportunities provided by Route 128, combined with the ability to marry, may draw talented, educated workers away from states (including California) that do not offer equal rights.

Eliminating marriage discrimination in California would send a message that California promotes acceptance and equality, thus enhancing the ability of California businesses to compete nationwide for top talent. While California already enjoys a reputation for being a respectful and diverse state, state recognition of marriage by same-sex couples would only deepen and strengthen the state's reputation. (Peter S. Canelos, *Even in Wal-Mart World, Local Identity Runs Deep*, The Boston Globe, p. A3.) Given the global competition for talent, this heightened reputation for respect and diversity could tip the balance in California's favor for highly sought after employees. This could only inure to the benefit of California and its economy.

II.

ENDING DISCRIMINATORY MARRIAGE LAWS WOULD ENHANCE CALIFORNIA'S REPUTATION FOR RESPECT AND DIVERSITY – KEY FACTORS ASSOCIATED WITH INCREASED BUSINESS DEVELOPMENT AND ECONOMIC GROWTH.

California has a well-deserved reputation as a respectful, diverse and innovative state and a long history of allowing diverse communities to flourish. This reputation for diversity and respect has been a key driver of California's economic success, wealth and continued growth. As described more fully below, research demonstrates that talented and creative people tend to migrate to and cluster in communities that offer a level of acceptance and respect that allow them to flourish. By supporting such communities, California has been able to draw talented employees from all other parts of the country and has benefitted from their ideas and creativity.

However, in this increasingly competitive marketplace for talent, California must continue to build on its comparative economic advantage – that of being a leader in diversity, respect and innovation – or risk falling behind other states with enhanced reputations for diversity.¹ Eliminating

¹ Bans on marriage by same-sex couples and other discrimination against same-sex couples have a negative economic and social impact on communities. (See, e.g., Associated Press, *Wisconsin Faces Potential*

[Footnote continued on next page]

California's discriminatory marriage laws would be a critical next step towards achieving full diversity and opportunity for all its residents and making it the kind of place to which talented people continue to be drawn.

Economists have long recognized that a key determinant of growth and development of cities and regions can be found in the productivity gains associated with clustering of talented people and human capital. (See Florida & Gates, *Technology and Tolerance: the Importance of Diversity to High-Technology Growth*, The Brookings Institution's Center on Urban & Metropolitan Policy (2001) [quoting Robert Lucas, Jr., "On the Mechanics of Economic Development, *Journal of Monetary Economics*, p. 38-39 (1998)].) Vibrant state and regional economies are increasingly determined by how well individual regions compete for talented people. (Hamilton,

[Footnote continued from previous page]

Gay Brain Drain (Nov. 16, 2006) ("Gay and lesbian faculty and staff at the University of Wisconsin-Madison say they might quit their jobs because of the state's passage of a constitutional amendment banning same-sex marriage."); BBC, *Gay Marriages: Your Views* <http://news.bbc.co.uk/2/hi/talking_point/4633091.stm> [as of September 15, 2007] ("If our country cannot provide its citizens with the protections they need and deserve, expect nothing less than a mass exodus"); *Quite Damaging, Wide-reaching, Nefarious, and Mean Spirited: Reactions to Wisconsin's "Yes" Vote on the Marriage Amendment* <<http://alhouse.blogspot.com/2006/11/quite-damaging-wide-reaching-nefarious.html>> [as of September 16, 2007] ("[I]n Ohio, brain drain is a big deal. The kids leave and never come back, and people from outside the state think that coming here is a bad thing. Anti-gay policies are disliked by many people that aren't gay, and those people tend to be young, and they vote with their feet.".)

Economic Development in Metropolitan Areas

<http://www.personal.psu.edu/bac8/ch._for_Hamilton_book.doc> [as of September 13, 2007].)

In their ground-breaking study, *Technology and Tolerance: The Importance of Diversity to High-Technology Growth*, Richard Florida and Gary Gates found a strong correlation between a metropolitan area's ethnic and social diversity and its success in attracting talented people. (Richard Florida & Gary Gates, *Technology and Tolerance: the Importance of Diversity to High-Technology Growth*, The Brookings Institution's Center on Urban & Metropolitan Policy (2001).) Building on census data, the researchers constructed indices of the gay, artistic, and immigrant communities to capture the level of diversity in major metropolitan areas. (*Id.*) They then compared this data to a measure of high-technology industry concentration and growth developed by the Milken Institute. (*Id.*) They found that diverse communities, which had large gay, artistic, and immigrant populations, "were ideal for nurturing creativity and innovation, [which are] both keys to success in new technology." (*Id.*) Significantly, the researchers found that a large gay population was a leading indicator of a metropolitan area's high-technology success and that five of the cities (*i.e.*, San Francisco, Boston, Seattle, Washington, D.C. and Dallas) that rank in the top ten for high-technology growth from 1990 to 1998 also ranked within the top ten largest gay communities. (*Id.* ["In all our

statistical analysis, the Gay Index [the level of the gay population in a given community] does better than other individual measures of social and cultural diversity as a predictor of high-tech location.”].)

While these findings do not show that a large gay and lesbian, artist, or immigrant population causes the development of a technology industry, the researchers concluded that people in technology businesses – the vast majority of whom are heterosexuals – *are drawn* to places known for diversity of thought and open-mindedness. (*Id.*) Thus, a community’s reputation for diversity and respect can help it attract the types of people known as the “creative class” – people in the technological, educational, medical, and liberal arts fields – who in turn are responsible for economic growth and development. (*Id.*) Researchers estimate that more than 30 percent of the workforce in the U.S. economy is comprised of creative class workers, and the creative sector accounts for about 50 percent of all wages and salary income. (*Id.*; see also Florida, *The Rise of the Creative Class*, pp. 44-48, 2002.) Other studies also demonstrate that talented people are drawn to regions that exhibit high levels of tolerance for diversity—particularly with respect to sexual orientation—in part because openness to ideas is crucial in attracting talent and succeeding economically. (Florida, *Regions and Universities Together Can Foster a Creative Economy*, Chronicle of Higher Education (Sept. 15, 2006).)

California has long been regarded as a hub for technological and cultural growth—two elements which have factored heavily into the state’s dominant position in the country’s economic landscape. (Florida, *Technology and Tolerance* (2001).) California also has been a diversity leader and has led the charge in providing protections for same-sex communities, including by prohibiting discrimination on the basis of sexual orientation and gender identity and providing for equal benefits in state contracting and a comprehensive domestic partnership law. And California has realized a substantial economic benefit by focusing on diversity. In its treatment of same-sex couples, however, California now lags behind not only Massachusetts and our neighbor to the north, Canada, which offer marriage to same-sex couples, but also Vermont, Connecticut, and New Jersey, whose civil unions laws offer more protections than California’s domestic partnership laws.

California must continue to stay on the cusp of diversity issues to retain its comparative advantage. California decision-makers still seek to lure creative workers to their communities because they can help foster a productive and healthy economy and draw additional forms of capital to the region. (See Charlotta Mellander, *There Goes the Neighborhood, How and Why Bohemians Artists and Gays Affect Regional Housing Values* (March 2007); Robert Weisman, *Many Jobs in Bay State are Tied to Venture Capital, Survey Says*, *The Boston Globe* (Mar. 26, 2007) [noting Silicon

Valley ranked number one in cumulative venture capital investment nationwide].) In this increasingly competitive marketplace for talent, California should do everything in its power to eliminate all remaining barriers to diversity, respect and innovation. Eliminating the discrimination in California's marriage laws is a critical next step towards ensuring that California embodies the type of diverse communities to which talented people wish to come and innovate.

III.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully request that this Court reverse the decision of the Court of Appeals and strike down the discriminatory restriction in California's marriage statute.

Dated: September 26, 2007

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
JEFFREY F. WEBB

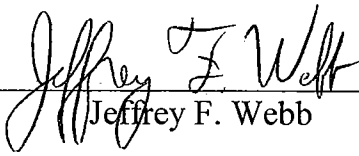
By: _____
Jeffrey F. Webb

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of California Rules of Court, Rule 14(c)(1) because it contains 3,424 words, excluding the parts of the brief exempted by California Rules of Court, Rule 8.520(c). This brief also complies with the typeface requirements of California Rules of Court, Rule 8.204(b)(2)-(4) because it has been prepared in a proportionately spaced font using Microsoft Word 2000 in 13-point Times New Roman typeface.

DATED: September 26, 2007



Jeffrey F. Webb

Attorneys for Amici Curiae

PROOF OF SERVICE

I, Sally A. Parisi, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071.

On September 26, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

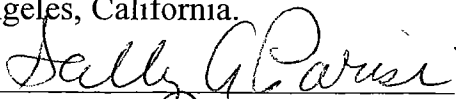
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INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on September 26, 2007, at Los Angeles, California.


Sally A. Parisi

SERVICE LIST

City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Woo, et al. v. California, et al.
San Francisco Superior Court Case No. CPF-04-504038
Court of Appeal Case No. A110451

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