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 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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF FAMILY LAW IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

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APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PARTIES CHALLENGING MARRIAGE EXCLUSION AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 8.520, amici curiae hereby respectfully apply for leave to file an amicus curiae brief in support of the City and County of San Francisco and the individuals and organizations challenging the marriage exclusion (hereafter petitioners.)

Amici are all professors of family law in California. Amici include the authors of major casebooks and treatises on family law, as well as other scholarly works related to the issue before this Court. Many of the amici have played major roles in drafting California family law legislation and have participated as amici curiae in significant family law, adoption, and parentage cases decided by this Court.

As family law scholars, amici have a substantial interest in the issue before this Court, which concerns a central aspect of family law, the nature of marriage. Amici are extremely familiar with California family law history, legislation, case law, and policy as they apply to this case. Amici believe that their expertise and perspective as family law scholars can help the Court understand more fully the merits of petitioners' position and request for relief.

Amici Curiae include:

- **Scott Altman**, Professor of Law and Associate Dean, University of Southern California Law Center;
- **R. Richard Banks**, Professor of Law, Stanford University;
- **Grace Ganz Blumberg**, Professor of Law, University of California, Los Angeles School of Law;
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- **Barbara J. Cox**, Professor of Law, California Western School of Law;
- **Jay Folberg**, Professor of Law Emeritus, University of San Francisco School of Law;
- **Deborah L. Forman**, Professor of Law and J. Allan Cook & Mary Schalling Cook Children's Law Scholar, Whittier Law School;
- **Joan H. Hollinger**, Lecturer-in-Residence and Director Child Advocacy Program, University of California, Berkeley School of Law (Boalt Hall);
- **Lisa Ikemoto,** Associate Professor of Law, University of California, Davis School of Law;
- **Courtney G. Joslin**, Acting Professor of Law, University of California, Davis School of Law;
- **Herma Hill Kay,** Barbara Nachtrieb Armstrong Professor of Law, University of California, Berkeley School of Law (Boalt Hall);
- **Jan Kosel**, Professor of Law, Golden Gate University;
- **Lawrence Levine**, Professor of Law, University of the Pacific, McGeorge School of Law;
- **Maya Manian**, Associate Professor of Law, University of San Francisco School of Law;
- **Mary Ann Mason,** Professor of Family Law, School of Social Welfare, University of California at Berkeley;
- **John Myers**, Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law;

- **E.Gary Spitko**, Professor of Law, Santa Clara University School of Law;
- **Michael S. Wald**, Jackson Eli Reynolds Professor of Law Emeritus, Stanford University;
- **D. Kelly Weisberg,** Professor of Law, Hastings College of the Law;
- **Lois Weithorn,** Professor of Law, Hastings College of the Law;
- **Michael Zamperini**, Professor of Law, Golden Gate University.

SUMMARY OF ARGUMENT

What are the constitutional limits on the authority of the California legislature to regulate access to the legal status of marriage? Amici submit that under well-established California constitutional principles the rights of individuals to equal protection of the law are violated when they are denied the opportunity to marry the person of their choice solely because that person is of the same sex.

In resolving the constitutional issues in this case, this Court must first determine the legal nature and purposes of marriage. In California, the answer has always been clear: marriage is a legal status, created by the Legislature, which individuals may choose to assume. The legal status "married" would not exist if the state did not provide for it. Individuals might express their commitment to each other through religious vows, or in other ways, but they could not claim the legal status of being married, with the state-created obligations and rights that accompany that status.

Under California family law, the purposes of civil marriage are to enable two individuals who choose to integrate their lives, legally and emotionally, and to express their commitment to each other publicly, to do so. The State strongly favors and supports marriage because of the benefits it provides to the couple, to any children they may have, and to the society as a whole.

Once the State has created the legal status of marriage, the California Constitution imposes substantial barriers against any governmental limitations on access to this status. The State must make the opportunity to marry available to all similarly situated individuals. The California Legislature has specifically recognized that same-sex and opposite-sex couples are functionally equivalent with respect to the purposes that underlie marriage law. Yet, instead of allowing individuals of the same sex

to marry, the State has relegated them to a separate legal institution, telling them that they may enter only into domestic partnerships.

Depriving these individuals of the opportunity to marry prevents them from gaining access to the distinctive personal, psychological, and social benefits associated with the status of marriage through our law and culture. Domestic partnerships are not, and cannot be, the equivalent of marriage. Domestic partnerships differ from marriage in ways that inflict specific and permanent harms on the individuals who are denied the opportunity to marry. In fact, the Legislature recognized this when, in 2005, and again in 2007, it approved legislation authorizing marriage between individuals of the same sex.

Access to marriage has long been protected under both the Equal Protection and the Due Process clauses of the California, and U.S., Constitutions. Amici submit that equal protection doctrine is of particular salience in this case, given the Legislature's determination that same-sex and opposite-sex couples are functionally equivalent with respect to the purposes of marriage. The difference in treatment is unconstitutional when measured under the "rational basis" test as applied in California. Moreover, because the interest in marrying holds such a special place within our society, any restrictions on the opportunity of people to marry, and to select someone of their choice as a marital partner, require some form of heightened scrutiny by this Court. In this regard, marriage is similar to other fundamental interests, including the right to vote or to a public education. Once established it must be open to all on an equal basis absent a compelling state justification for different treatment.

With equality as its touchstone, the California Constitution forbids a result in which people who are found to be identically situated to others with regard to the purposes of a statute are nonetheless treated differently. That is precisely the state of affairs produced by California's creation of a

separate legal status for same-sex couples. This case does not require this Court to create a new constitutional right or a new definition of marriage. This Court is simply being asked to exercise its traditional judicial function of applying constitutional principles to protect the rights of the petitioners and, by doing so, to carry out the purposes of California family law in a consistent manner. Amici therefore ask this Court to apply well-established equal protection principles to California's marriage laws and declare that the petitioners have a constitutional right to marry the person of their choice. To rule otherwise would require abandoning core principles of California equal protection jurisprudence.

ARGUMENT

I. THE LEGAL ISSUES AND CONTEXT

A. Legal Issues

Is the Equal Protection Clause of the California Constitution violated when two individuals of the same sex are denied the opportunity to marry each other when virtually any two individuals of the opposite sex may marry? In answering this question, this Court must determine what the State hopes to accomplish when it enables people to marry and whether there is a rational basis, in light of these purposes, for making the sex of the partners a factor in providing access to marriage. Amici believe that under California family law and constitutional principles there is no acceptable basis for this disparate treatment.

Because of recent changes in California law, the Court also must decide a second question, are the registered domestic partnerships that same-sex couples may now enter as the result of legislation enacted in 2003 the equivalent of marriage, or a satisfactory alternative to marriage, from a

constitutional perspective? Again, amici believe that the answer clearly is no.

B. The Factual Context

In assessing the constitutionality of the current legal structure, this Court faces a highly unusual, if not unique, factual context. Over the past ten years, the California legislature has enacted a number of statutes that recognize and support the relationships of same-sex couples. In passing these statutes, the Legislature has found and declared that same-sex and opposite-sex intimate, committed, consensual relationships are functionally equivalent, with respect to all the purposes that underlie marriage law. In 2005, and again in 2007, the Legislature passed bills that would have allowed same sex individuals to marry. It is against this legislative backdrop that this Court must consider the constitutional issues.

1. *The Legislature Creates Domestic Partnerships*

In 1999, the same year that Vermont enacted the nation's first comprehensive Civil Union statute, the California Legislature took a first step in extending some of the rights and obligations of marriage to domestic partners. It enacted Family Code sections 297-299 providing for registration and termination of domestic partnerships. This law guaranteed hospital visitation for all registered partners and, for certain state employees, health care coverage. In the next few years, additional rights were provided by Assembly Bill No. 25 (Reg. Sess. 2001-2002) and by Assembly Bill No. 2216 (Reg. Sess. 2001-2002), which amended Probate Code section 6401, subdivision (c) to include a surviving registered domestic partner as an intestate heir of a deceased partner.

In 2003, the Legislature enacted a more comprehensive domestic partnership statute, Assembly Bill No. 205 (Reg. Sess. 2003-2004), the

Domestic Partner Rights and Responsibilities Act of 2003 (Stats. 2003, ch. 421) (hereafter A.B. 205), which became effective on January 1, 2005. This statute makes it clear that the State considers committed same-sex couple relationships the functional equivalent of marriage relationships. (See Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, (2004) 51 UCLA L. Rev. 1555.) In enacting this law, the Legislature declared that "despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex," (A.B.205 (Reg. Sess. 2003-2004) § 1, subd. (b)), and therefore that "providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties" would "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." (*Id.* at subd. (a).)

This Court has consistently construed A.B. 205 to serve its purpose of placing domestic partners on the same legal footing as married couples. In *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, this Court applied the Unruh Civil Rights Act to a lesbian couple who were denied some of the membership benefits enjoyed by married couples. The majority held that "the Unruh Civil Rights Act prohibits discrimination against domestic partners registered under the Domestic Partner Act in favor of married couples." (*Id*. at p.850.) Similarly, as the Attorney General acknowledges, this Court has recognized "that same-sex partners should have the same rights and bear the same responsibilities as traditional

couples with regard to the children of their relationships" (Answer Brief of Appellants State of California and the Attorney General to Opening Brief on the Merits, 9 [citing *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 113; *K.M. v. E.G.* (2005) 37 Cal.4th 130, 134; *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, 166].)

2. *The Legislature Authorizes Marriage for Same-Sex Individuals*

Although A.B. 205 established that same-sex and opposite-sex committed relationships are functionally equivalent for general family law purposes, the Legislature has also recognized that domestic partnerships cannot substitute for marriage and do not provide the equivalent panoply of tangible and intangible rights and protections that marriage provides. In response to this reality, on September 6, 2005, the Legislature enacted Assembly Bill No. 849 (Reg. Sess. 2005-2006), The Religious Freedom and Civil Marriage Protection Act (hereafter A.B. 849), a measure designed to end this discrimination by authorizing marriage by individuals of the same sex. The bill declared that "[t]he Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners…The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners." (Assem.Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, § 3, subd. (d), (f), (g) & (j).)

As discussed below, A.B. 849 was vetoed by the Governor. In September 2007, the Legislature again passed legislation authorizing marriage by individuals of the same sex. (Assem. Bill No. 43, approved by Assem. June 5, 2007 and by Senate, Sept. 7, 2007 (2007-2008 Reg. Sess.) In addition to reiterating the findings in A.B. 849 regarding the functional

equivalence of same-sex and opposite-sex couples, the new bill emphasizes the harms experienced by same-sex couples and their families as a result of the marriage exclusion. (*Id*. at § 3, subd. (g), (h), (i) & (k).)

3. *The Governor Vetoes A.B. 849*

A.B. 849 did not become law; Governor Schwarzenegger vetoed it. The Governor did not express any differences with the Legislature's policy conclusions. Rather, he based his veto on procedural grounds, indicating that he believed the Legislature did not have the authority to amend Family Code section 308.5 to permit marriage by same-sex individuals. He noted that

> [t]he 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.
>
> (Governor's veto message to Assem. on Assem.Bill No. 849 (Sept. 29, 2005) Recess Journal No. 4 (2005-2006 Reg. Sess.) pp. 3737-38.)

Amici believe that the Governor misstated the legal implications of both A.B. 849 and Section 308.5. Section 308.5 is intended to ensure that California need not recognize the validity of marriages by same-sex couples performed in sister states. No party to this case seeks the recognition of a Massachusetts marriage by a same-sex couple. (See Kay, *Same-Sex Divorce in the Conflict of Laws*, (2004) 15 King's College L.J. 63, 72-74.) By contrast, A.B. 849 was designed to amend Family Code section 300 which,

since 1977, limits marriages that can be performed in California to those involving a man and a woman.

As a result of the Governor's veto of A.B. 849, the language in Family Code section 300 remains unchanged and individuals who wish to marry someone of the same sex in California still cannot do so. As we now will show, this discrimination is unconstitutional and should be rectified by this Court.

II. THE NATURE AND PURPOSES OF CIVIL MARRIAGE

A. Civil Marriage is a State-Created Legal Status

The critical starting point for analysis is that marriage in California is a civil status created by the Legislature, which individuals may contract to assume. Family Code section 300 currently provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." However, while marriage, as a legal matter, is a status arising out of a contract between individuals, it is considerably more than a simple agreement to enter into a personal relationship. The public policy of California has always regarded marriage as a distinctive and special institution, warranting public acknowledgment, regulation, support, and encouragement. (In re *Estate of De Laveaga* (1904) 142 Cal. 158, 170-71; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275 (hereafter *Elden*).)

B. Why the State Provides for Marriage

Courts and commentators have long recognized that California's public policy toward marriage is based on the premise that civil marriage benefits all of society because it encourages stable family relationships that

are good for adults and children, promotes economic interdependence and security for adults, and enhances the physical and emotional well-being of adults. (See *Elden supra*, 46 Cal.3d at pp. 274-275 [noting that the state accords marriage a special place because marriage is "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime" (internal quotation omitted)].) As the Massachusetts Supreme Judicial Court noted, "(c)ivil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals, provides for the orderly distribution of property, [and] ensures that children and adults are cared for . . . . " (*Goodridge v. Dept of Health* (Mass. 2003) 798 N.E.2d 941, 954 (hereafter *Goodridge)*; see also Wald, *Same-Sex Couple Marriage: A Family Policy Perspective* (2001) 9 Va. J. Soc. Pol'y & L. 291, 300-03.)

Because of the special nature and importance of marriage, California, like all states, regulates most aspects of marital status. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 25 [the State's involvement in marriage is "pervasive"].) Under California law, marital partners have obligations of mutual support, a joint interest in assets acquired during the marriage, and a right to a share of their decedent spouse's estate. While married couples are now free to negotiate most of the economic consequences of the marital relationship, some elements are not subject to negotiation.[1] Since relatively few people enter into premarital contracts, most married couples are subject

[1] *See* Family Code section 1620 (Except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property); Family Code section 1612, subdivision (c) (under some circumstances, couples cannot waive spousal support obligations in a premarital agreement); and Family Code section 1100, subdivision (e) (married couples cannot waive the statutory imposition of a fiduciary obligation in their management and control of community property and they cannot waive spousal support obligations under some circumstances.)

to the legal elements of the marital status established by California law. These elements, as well as the limitations on opting out, reflect the State's interest in protecting the commitment married couples have made to integrate their lives and promote their joint well-being.

In sum, while marriage starts as a contract between individuals, the State has always regarded marriage as something more than just a private agreement to enter into a formal legal status. The State treats marriage as a special institution and rewards the choice by two individuals to integrate their lives. (See *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 287-288.) This recognition simultaneously enhances the well-being of married couples and of society at large.

C. Choice of Partners is a Critical Aspect of Marriage

Given the purposes of marriage, the State has long regarded the choice of a partner as a central element of marriage, essential both to the personal decision to marry and to the societal benefits that follow from marriage. The State assumes that the social benefits flowing from civil marriage depend on a cooperative integration of individual lives.

Today, California places almost no restrictions on marital choice.[2] Virtually all adults are able to marry the person of their choice, without regard to their race, color, national origin, religion, age, income, education,

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[2] In a very limited number of situations, California does impose other limits on the right to marry a person of one's choice. Bigamous and polygamous marriages are prohibited (Fam. Code § 2201.) These relationships are thought to be less susceptible to the emotional integration and stability that the state seeks to further. There also are a limited number of restrictions based on consanguinity. Finally, marriage must be entered into voluntarily and both participants must be capable of making that choice. To ensure that capability, each person must be at least 18 years old, or, if 16 or 17, must obtain parental consent or a court order allowing the marriage to occur (Fam. Code §§ 301-03.)

health, fertility, or other characteristics. Our courts also have recognized the critical importance of choice, elevating it to a constitutionally protected right. As this Court stated nearly sixty years ago when striking down the State's anti-miscegenation law, "(t)he essence of the right to marry is freedom to join in marriage with the person of one's choice." (*Perez v Sharp* (1948) 32 Cal.2d 711, 717 (hereafter *Perez*).) Two decades later, the United States Supreme Court reached the same conclusion in *Loving v. Virginia* (1967) 388 U.S. 1 (hereafter *Loving*). Subsequently, that Court has held that a state may not prevent other classes of people from marrying, including parents delinquent in their child-support payments (*Zablocki v. Redhail* (1978) 434 U.S. 374), and prisoners (*Turner v. Safley* (1987) 482 U.S. 78 (hereafter *Turner*)), because those restrictions too substantially burden an individual's right of choice in marriage. The importance of choice was seen as overriding other state interests, including child-support enforcement and regulating prisons.

Today, except for individuals who are already married or who wish to marry a person under the age of sixteen or a close biological relative, only individuals who want to marry someone of the same sex are deprived of the opportunity to marry the person of their choice. As we discuss below, the rationales offered for that denial are as deficient as were the rationales offered in the past for denial based on race, income, or other individual characteristics. Same-sex couples are relegated to a non-marital status solely because of their sex and their sexual orientation despite the fact that they wish to comport themselves toward each other and toward society at large in a manner equivalent to the lives of opposite-sex married couples. The exclusion of same-sex couples from marriage is all the more significant because, as a matter of family law policy, virtually everyone is welcomed into the marital circle.

III. THE CURRENT LEGAL STRUCTURE VIOLATES PETITIONERS' RIGHTS UNDER CALIFORNIA'S EQUAL PROTECTION CLAUSE

Having created the institution of civil marriage, the State is bound under the Equal Protection Clause of the California Constitution to refrain from unjustifiable discrimination in restricting an individual's choice of a partner. The Federal Equal Protection Clause represents a minimum standard. The California Equal Protection Clause, however, is "possessed of an independent vitality" and this Court's "first referent is California law and the full panoply of rights Californians have come to expect as their due." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764 (hereafter *Serrano*).) Under California's Equal Protection Clause a classification must, at a minimum, "bear some rational relationship to a legitimate governmental purpose." (*Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7.) In assessing the legitimacy of the classification the Court must engage "in a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals" and a statute survives only if the Court can find "plausible reasons for the classification." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644, 647, citations and internal quotations omitted; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201.) Evaluated against these standards, the restrictions of Family Code section 300 cannot be sustained. The establishment of "domestic partnerships" as an alternate institution also fails to remedy the injury.

A. There is No Rational Basis for Denying Same-Sex Couples Access to the Institution of Marriage

Looked at in the context of California's family law and policy (see *Brown v. Merlo* (1973) 8 Cal.3d 855, 862), the State's decision to exclude same-sex couples from marriage does not survive rational basis review. As

the trial court concluded, the exclusion is not rationally related to any legitimate state interests in creating the legal status of marriage. As discussed above, the Legislature has already determined that there are no meaningful differences in committed relationships based on the sex of the partners. Both the Attorney General and the Governor concede that same-sex unions further the same policy goals as opposite-sex unions. (Answer Brief of Appellants State of California and the Attorney General to Opening Brief on the Merits, 9-12, 62 (hereafter State Ans.); Answer Brief of Appellants Governor Arnold Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad to Opening Brief on the Merits, 1-3, 30 (hereafter Gov. Ans).)

Non-State respondents and some amici groups assert various justifications for differential treatment of opposite-sex and same-sex couples. However, the trial court and Court of Appeal, the Attorney General and Governor, and the Legislature all have rejected these arguments. As Judge Kramer noted in the trial court below, the fact "that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well." (*In re Coordination Proceeding, Special Title Rule 1550(c)* (Cal. Super. Ct. Mar. 14, 2005) 2005 WL 583129, at *4, rev'd in part by *In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, superseded by (2006) 53 Cal.Rptr.3d 317.) Similarly, the court below noted in declining to consider such arguments, "(m)any same-sex couples in California are raising children, and our state's public policy supports providing equal rights and protections to such families." (*In Re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 724.) The Attorney General and Governor have specifically disavowed the assertions of some respondents and amici that same-sex couples are less committed partnerships or less good parents, as

being inconsistent with California policy. (Gov. Ans. 30, fn.22; State Ans. 9-12, 62.)

B. Marriage is a Unique Legal, Social, and Cultural Status That Provides Advantages That Cannot Be Matched by a Domestic Partnership

Although the State accepts the need to treat same-sex and opposite-sex couples equally with respect to recognizing and supporting intimate, committed legal relationships, the Attorney General and the Governor contend that Family Code section 300 does not violate the Constitution because Registered Domestic Partnerships under A.B. 205 provide same-sex couples with rights equivalent to those that inhere in marriage. This case thus boils down to the issue of whether the legal status of domestic partnership is equivalent to the legal status of marriage. A careful examination reveals that while domestic partnerships provide many advantages to same-sex couples, there are significant differences that disadvantage same-sex couples. The two statuses are far from equal and cannot be equalized. By denying same-sex couples the opportunity to marry, the State devalues their unions both symbolically and practically. (See Case, *Marriage Licenses* (2005) 89 Minn. L.Rev. 1758, 1775.)

Under current law, there remain important differences between the economic and other legal benefits provided to married couples but not to domestic partners, resulting in numerous inequalities between the two statuses. These differences are fully documented in the Supplemental Briefs filed by petitioners at the request of this Court and will not be discussed here.

Instead, from our perspective as family law scholars, we focus on the fact that, even if all the economic and other legal benefits associated with marriage were provided to domestic partners, being **married** is a unique

social, as well as legal status, with attendant social and cultural meanings that provide considerable and irreplaceable advantages to married couples. No alternative to, or substitute for, marriage can be constitutionally adequate. By prohibiting individuals from marrying someone of the same sex, the Legislature has effectively denied same-sex partners the opportunity to experience and benefit from the vast array of intangible benefits enjoyed by married couples.

For the vast majority of individuals in our society, marriage is probably the single most important social, as well as legal, institution. More than 90% of Americans rate having a happy marriage as a very important life goal, generally the most important goal in life. (See Waite & Gallagher, The Case for Marriage (2000) p.3 (hereafter Waite & Gallagher).) Furthermore, a substantial majority of all adults will marry at some point in their lives. (See Bramlett & Mosher, Centers for Disease Control, Division of Vital Statistics, *Advance Data from Vital and Health Statistics*, No. 323 (May 31, 2001) First Marriage Dissolution, Divorce, and Remarriage: United States.)

Even if the legal and economic benefits that come with marriage were repealed, people would marry because marriage has profound personal meaning and social significance. No other institution provides a comparable opportunity for the personal expression of mutual commitment. As the Massachusetts Supreme Judicial Court recognized, "(c)ivil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." (*Goodridge*, *supra*, 798 N.E.2d at pp.954-955.) The U.S. Supreme Court also has recognized the importance of the expressive aspects of marriage. (*Turner, supra,* 482 U.S. at p.78.) In its ruling that a state could not deny prisoners the right to marry even when the other benefits of marriage are stripped away, the Court noted that marriage

enables individuals to express "emotional support and public commitment," which the Court found to be an "important and significant aspect of the marital relationship." (*Id*. at pp.95-96.) By preventing same-sex couples from marrying, "the State deprives [them] of the critical emotional support to be found in the formalized and symbolic relation itself." (*Johnson v. Rockefeller* (S.D.N.Y. 1973) 365 F.Supp. 377, 382 (conc. & dis. opn. of Lasker, J.), summarily affd sub nom. *Butler v. Wilson* (1974) 415 U.S. 953.) For many couples, no other state-recognized relationship can have the same spiritual significance.

The difference is more than just spiritual, as important as that is. Marriage combines legal privileges and duties with an extralegal, socially understood set of conventions. These conventions affect the impact of marriage on the individuals themselves and the ways in which married couples are treated by others. Leading researchers from many disciplines and differing value perspectives agree that the institution of marriage, both in its meaning to the couple and its treatment by the broader society, contributes to the quality and stability of the relationship. (See Waite & Gallagher, *supra*, pp. 18-23; Nock, *Marriage as a Public Issue* (2005) 15 The Future of Children 13, 17-21.) There is substantial research indicating that the status of being married is a universal concept that conveys multiple messages to the community that prompt the community to support the marriage. Married couples are treated differently from single individuals or those cohabiting. Their relationships generally receive affirmation and support from extended family, employers, and the community-at-large. As Professor Elizabeth Scott has written "(m)arriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between spouses-norms such as fidelity, loyalty, trust, reciprocity, and sharing. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by

individuals entering marriage." (Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency* (2004) U. Chi. Legal F. 225, 241.)

These expectations cannot just be transferred to a new institution. Domestic partnerships lack the historic prestige of marriage. Excluding same-sex couples from marriage deprives them of the unique public validation and understanding that only marriage provides. (See, e.g., *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1132 (conc. & dis. opn. of Kennard, J.) [discussing "the public validation that only marriage can give"]; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 31 ["[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership"].)

The consequences of being married are pervasive and often subtle. For example, the language associated with marriage conveys clear meanings to the general public. There are no domestic partnership analogues to the verb "to marry" or the adjective "married." The status of "spouse" or "husband" or "wife" is distinctly different from the status of "partner" or even "domestic partner," terms that apply to many types of relationships and do not connote the same degree of commitment. Children of same-sex couples cannot simply describe their parents as married. All of these factors impact these couples' well-being and the stability of their relationships. "The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning. . . [Its] . . .meanings depend on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love." (Dworkin, *Three Questions for America* (Sept. 21, 2006) New York Review of Books, at p.30) Granting same sex individuals the opportunity

to marry will not guarantee that they will get the support of all members of the public; but it is a necessary precondition for garnering that support.

The challenges domestic partners face in being recognized as the equivalent of married couples are exacerbated by the current differences in the statutory entry and exit requirements for married spouses and domestic partners, as more fully explained in the Supplemental Briefs of Petitioners. These differences send a message–to the couple as well as to their relatives, friends, colleagues, and the general public–that domestic partnership is a less weighty, less substantial, and less esteemed institution than marriage. The legislative structure implies that a domestic partnership is a less permanent, less committed relationship than is a marriage. In addition, because the legal rights and obligations of domestic partners are not clear, individuals entering these relationships endure considerable uncertainty and complexity in managing both the internal and external aspects of their partnership, especially with respect to recognition by employers and other third-parties.[3] From a legal, as well as a social, perspective, the surest way to provide same-sex couples with the status and benefits of marriage is to allow them to marry. Any other approach will necessarily make their legal status subject to a range of uncertainties.

Finally, by consigning lesbian and gay couples to a marriage substitute, the State signals that their relationships are inferior and less worthy, regardless of any intentions to the contrary. As Chief Justice Poritz of the New Jersey Supreme Court explained:

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[3] Some of the uncertainties in the present situation are described in several recent opinion pieces in California newspapers. (Bennett and Gamblin, *Domestic Partnership: Not Enough*, Daily Journal July 27, 2007 p.6; Brill, *Domestic partnerships aren't marriage*, Sacramento Bee July 1, 2007 p.E5; Jackie Goldberg, *Going past domestic partnership*, Los Angeles Times August 9, 2007 p.A21.)

> Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage. (Lewis v. Harris (N.J. 2006) 908 A.2d 196, 226-27 (dis. opn. of Poritz, C.J.).)

Thus, access to marriage is more than just access to "a word," as the Attorney General would have the Court believe. Marriage is an institution that is more than the sum of its component parts; it is not just a label or an acronym for a bundle of specific rights and obligations. When this label is available to some couples but not to others, there are bound to be adverse consequences for those relegated to the separate status. As Judge Kramer observed below, "[t]he idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal." (*In re Coordination Proceeding, Special Title Rule 1550(c)* (Cal. Superior, Mar. 14, 2005) 2005 WL 583129, at *5 [citing *Brown v. Bd. of Education* (1952) 347 U.S. 483, 494].)

While amici do not contend that this separate status carries the same badge of inferiority as segregation of Blacks and whites once did, a separate status for same-sex couples can cause substantial harms. (See Herdt and Kertzner, *I Do, But I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbian and Gay Men in the United States* (2006) 3 J. Sexuality Res. Soc. Pol'y 33.) The fact that domestic partnerships create so many of the same legal entitlements as marriage highlights the symbolic devaluation of the relationships of same-sex couples, which in turn may undermine the benefits to relationships that the legal institution of marriage is meant to further.

In addition, as more fully described in the petitioners' briefs, offering only domestic partnership to individuals who wish to marry interferes with their constitutionally protected rights to personal intimacy and privacy. For example, by declaring their status as domestic partners, lesbians and gay men thereby disclose their sexual orientation even when such disclosure may expose them to harmful prejudices. Their children may suffer from the perception that their parents are being singled out for a separate and lesser status. Even if we speculate that over time domestic partnership will carry with it some of the intangible advantages that accrue to marriage, it is unjust to burden same-sex couples and their families with the responsibility of making this reality come to pass. The possibility of future equality fails to cure the present injury that the bar to marriage causes to same-sex couples, and their children.

C. The Desire to Preserve a "Traditional" Definition of Marriage Does Not Justify Unequal Treatment

1. *The Definition Of Marriage Has Evolved Over Time*

While conceding that same-sex and opposite-sex relationships are not equivalent, the State argues that it is acceptable to establish two different "marital" regimes because there is value in preserving a "traditional" definition of marriage. However, the State has not presented any rationales, in terms of the purposes of marriage or family law, for limiting marriage to opposite sex individuals or to some "traditional" definition. In fact, while only opposite-sex couples have been permitted to marry historically, the legal meaning of marriage has evolved considerably since the beginning of California's Statehood. There is no one "traditional" legal meaning of marriage that has endured since the beginning of California's Statehood. The definition of marriage has changed

substantially with respect to such basic elements as who may marry, the roles of the spouses, the management and control of marital assets, and the duration of the marital entity. These changes have been brought about both by shifts in the Legislature's conception of the marital elements needed to achieve the goals of marriage and by court decisions requiring equal treatment of married spouses in their family status. Since Statehood, the only constant element has been the goal of facilitating the decision of two people to integrate their lives into a single entity.

California, like all other Anglo-American jurisdictions, began with a model of marriage that embodied rigid gender-based roles and rights, endowing the husband with control of the finances and family decision-making. This model also greatly limited the right to dissolve a marriage. Over the next century and a half, the Legislature and courts acted to equalize the powers of husband and wife in the ownership, management, and control of their community property,[4] as well as to equalize their rights and responsibilities with respect to their children. (Fam. Code §§ 3040, subd. (a)(1); 3900.) In addition, the Legislature and the courts simplified the dissolution of marital relationships and gradually extended legal protections to unmarried cohabitants. These changes fundamentally altered the meaning of marriage. As discussed above, the Legislature recently has determined that enabling same-sex intimate partners to marry would support the goals of marriage since these families are functionally equivalent to families composed of opposite-sex partners.

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[4] As Professor Grace Ganz Blumberg points out, "the development of California community property law since 1866 has predominantly consisted of efforts to mitigate the sexual inequality promoted by the early legislation." (Blumberg, Community Property in California (Aspen 5th ed. 2007) p. 87.)

Each of these changes reflects differing legislative and judicial views over time about which elements of marital status are necessary to achieve the State's purposes in authorizing and encouraging marriage. Many of these changes were implemented over strong opposition, with opponents often claiming that the changes would fatally impair the institution of marriage. However, both the Legislature and the courts adopted these changes in order to promote and protect equality and fairness, as well as to further the goals of the State in providing for marriage. For similar reasons, it clearly has become discriminatory to deny marital status to same-sex couples.

(a) *Marital Roles*

Under California's initial marital regime in 1850, the husband was given a dominant role in the family. Although California adopted a community property regime, the husband was the sole owner and manager of the community property estate during the marriage. In 1860, this Court took the first step toward protecting the wife's constitutionally guaranteed right to her separate property, striking down the statutory provision which required that "the rents and profits of the separate estate of either husband or wife shall be deemed common property" on the ground that "[w]e think the Legislature has not the Constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors." *(*George v. Ransom (1860) 15 Cal.322, 323.)

The Legislature continued the work begun by this Court. By 1890 the wife had substantial control over the management of her separate property and its disposition at her death. In the following years, the Legislature further equalized the legal status of husbands and wives by enacting various statutes restricting the husband's power over the community property. This Court interpreted these statutes in ways that

benefited the wife's property interests (see *Shaw v. Bernal* (1912) 163 Cal. 262, 266; *Dunn v. Mullan* (1931) 211 Cal. 583, 587-88), thereby paving the way for even further equalization of the status of husbands and wives.

These legislative changes culminated in 1973 when California conferred on either spouse equal powers of management and control over the community real and personal property. (Former Civ. Code § 5125, as amended (Stats.1973, ch. 987, eff. Jan. 1, 1975, repealed by Stats.1992, ch.162, eff. Jan.1, 1994).) California has also abolished gender-based laws regarding child custody (Fam. Code § 3040, subd. (a)(1)) and created equal obligations of spousal support during marriage (Fam. Code, § 4300).

As a result of both legislative enactments and this Court's decisions, marital rights and obligations in California no longer turn on whether one is a husband or a wife. Simply stated, marital roles under California law are no longer sex-based–a far cry from the initial meaning of marriage. In addition to promoting gender equality, these changes paved the way for recognizing and according legal protection to same-sex relationships.

(b) *Access to Marriage*

As this Court well knows, California law once prohibited individuals from marrying someone of another race. When the anti-miscegenation statute was declared unconstitutional by this Court in Perez, *supra* 32 Cal.2d 711, the Legislature and the public believed that the need for racial separation outweighed the importance of marital choice. Yet this Court realized that outdated beliefs about racial mixing could not withstand scrutiny under the equal protection clause when they were embodied in laws that restricted an individual's opportunity to marry a person of her or his choice. In *Perez*, this Court noted that "a statute that prohibits an individual from marrying a member of a race other than his own restricts

the scope of his choice and thereby restricts his right to marry." (*Id*. at p.715.)

(c) *Marital Dissolution Reforms*

Initially, California greatly limited the right of spouses to dissolve their relationship. California's 1872 divorce statute recognized only fault-based grounds for divorce, permitting courts to dissolve marriages only upon a showing of the commission of specific acts by an offending spouse, not an unwillingness of each spouse to continue the relationship. Over time, the rigidity of the fault system gave rise to sharp practices, including intimidation, spying, and blackmail, in order to circumvent its provisions.[5]

In 1952, this Court instituted the first major change with respect to dissolution. In *DeBurgh v. DeBurgh* (1952) 39 Cal.2d 858, 868-73, the Court, led by Chief Justice Traynor, abolished the rule disallowing divorce if both parties were "at fault." In 1969, California became the first state to enact a no-fault divorce law in which all the fault-based grounds for divorce were abolished and only two no-fault grounds, "irreconcilable differences which have caused the irremediable breakdown of the marriage" and "incurable insanity," remained available. (Former Civ. Code, § 4506, added by The Family Law Act, Stats. 1969, ch. 1608, § 8, eff. Jan. 1, 1970, repealed and reenacted as Fam. Code, § 2310 without substantive change, Stats. 1992, ch. 162, § 10, eff. Jan. 1, 1994.) The Report of the California Governor's Commission on the Family, which proposed the no-fault divorce law, credited Chief Justice Traynor's opinion in *DeBurgh* as its inspiration for the concept of a fact-based showing of marriage breakdown as the legal standard for dissolution. (The Report of the California Governor's Commission on the Family 91(1966), Comment to § 028.)

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[5] Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, (1984) 63 Or. L.Rev. 649, 659.

The adoption of a no-fault system reflected the Legislative judgment that marriage should be viewed as a means of supporting relationships where the parties are committed to integrating their lives. The Legislative changes rejected traditional elements of marriage (divorce based only on fault grounds) when the tradition was no longer perceived as furthering the goals for supporting marriage.

The Attorney General's claim that deferring to a "traditional" definition of marriage is a justification for denying same-sex couples access to this legal status is especially troubling. While marriage has not had a constant or traditional legal meaning, it does convey a traditional social meaning of mutual commitment and potentially permanent interdependence of two consenting adults. As noted above, this social meaning carries with it intangible benefits. It is the opportunity to participate in this tradition and to enjoy its intangible benefits that same-sex couples seek. The exclusion of same-sex couples from this traditional social meaning of marriage only ensures that the institution of domestic partnership is and will remain unequal to that of marriage.

2. Preserving Discrimination Not A Justifiable End

As the Dissent in the Court of Appeal noted, "While tradition will often be a relevant factor reliance upon historical understandings to validate an intentionally discriminatory restriction *not otherwise justified* would devitalize and embalm the Constitution… Constitutional principles are 'not shackled to the political theory of a particular era.'" (*In Re Marriage Cases*, 49 Cal.Rptr.3d at 762 (conc. & dis. opn. of Kline, J. [citing *People v. Belous*, (1969) 71 Cal.2d 954, 967].) There is no independent justification here. The role of the State's equal protection analysis in guarding against discriminatory traditions is evidenced by this Court's decision in *Perez*. At the time that case was decided, there was nearly unanimous state and

federal judicial support for anti-miscegenation laws of the type at issue in that case. (See Perez, *supra* 32 Cal.2d at p.752 (dis. opn. of Shenk, J).) Moreover, the ban on interracial marriage had strong legislative support, unlike the current situation. But, notwithstanding that "tradition," the majority in *Perez* found the statute unconstitutional as an unjustifiable and discriminatory restriction on the right to marry. (See *Id.* at p.727.) As this Court stated in *Perez*, "[c]ertainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such justification." (*Id*. at p.727, citations omitted.)

IV. THE DENIAL OF CIVIL MARRIAGE TO SAME-SEX COUPLES, INFIRM EVEN UNDER RATIONAL BASIS REVIEW, WARRANTS HEIGHTENED SCRUNTINY UNDER THE ESTABLISHED JURISPRUDENCE OF THIS COURT

Although this Court can find for petitioners by applying a rational basis standard, a more exacting standard of review is the appropriate standard under which to determine the constitutionality of the state's decision to deny same-sex couples equal access to the benefits of marriage. Several different strands of doctrine dictate that the difference in treatment between same-sex and opposite-sex couples spelled out in Family Code section 300 must be subjected to heightened scrutiny under California's equal protection jurisprudence.

First, in California, laws that draw distinctions between groups in matters affecting "fundamental interests" are subject to heightened or at least intermediate scrutiny under California's equal protection clause. (See *Serrano, supra,* 18 Cal.3d at p.768 [holding that a classification that "affects the fundamental interest of education must be subjected to strict judicial scrutiny in determining whether it complies with our state equal protection analysis"].) Similarly, although the right to vote in state elections

is found nowhere in the California Constitution, our Courts have found that strict scrutiny is the appropriate standard of review to apply to any class-based denial of that right. (*Choudhry v. Free* (1976) 17 Cal.3d 660, 664; *Otsuka v. Hite* (1966) 64 Cal.2d 596, 602.) Any deprivation of the right to vote based on a classification that is "'not germane to one's ability to participate intelligently in the electoral process'" is impermissible. (*Otsuka v. Hite*, *supra,* at p.602 [quoting *Harper v. Va. State Bd. of Elections* (1966) 383 U.S. 663, 668].)

This Court has established unequivocally that individuals have a fundamental interest in being able to marry and being able to choose a marital partner. (See *Perez*, 32 Cal.2d at p.714; *Ortiz v. L.A. Police Relief Assn.* (2002) 98 Cal.App.4th 1288, 1292 (hereafter *Ortiz*); Elden, *supra*, 46 Cal.3d at pp.274-275 (discussing the unusual importance of marriage to society)). At both the state and federal level, courts have consistently referred to the fundamental right to marry. While the full contours of this right are not clear from these decisions, at a minimum they stand for the proposition that limitations on the opportunity to choose one's partner are subject to scrutiny more searching than mere rational basis review.

This is especially evident in the U.S. Supreme Court decision in *Turner, supra,* 482 U.S. 78. In *Turner*, the Court held that a state could not deny prisoners the right to marry, even though they would be unable to consummate the union or to enjoy many, or even most, of the material benefits of marriage. This holding is particularly significant given the states' strong interest in establishing prison regulations, an interest that the Court has regularly protected. Moreover, although the challenge was raised by a prison inmate, the Court observed that "the regulation may entail a 'consequential restriction on the [constitutional] rights of those who are not prisoners.'" (*Id.* at 97 [quoting *Procunier v. Martinez* (1974) 416 U.S. 396, 409].) The woman who wanted to marry prisoner Turner was effectively

barred from marrying the person of her choice. This was deemed unconstitutional even though she was free to marry anyone who was not a prisoner. She was only denied the opportunity to marry a relatively small number of individuals, those who are incarcerated; nonetheless, the Court found that even this denial implicated the constitutionally protected interest in marital choice. (See also *Zablocki, supra,* 434 U.S. 374 [same]; *Loving, supra,* 388 U.S. 1 [same].)

State and federal courts have upheld only those restrictions that incidentally burden some choices in order to serve important government interests unrelated to marriage. For instance, in *Ortiz, supra***,** 98 Cal.App.4th 1288, the California Court of Appeals held that the state could fire a police officer who chose to marry an inmate because her access to confidential police information, including the identities and addresses of undercover officers, created a substantial conflict of interest. In reaching that holding, the court noted that the rule against marriages between inmates and certain officers did not prevent Ortiz from marrying the person of her choice. Rather, it meant only that she might have to seek alternate employment and therefore suffer an incidental economic burden if her choice of spouse created a substantial conflict of interest with her work. Similarly, in *Califano v. Jobst* (1977) 434 U.S. 47, the Supreme Court upheld a provision of the Social Security Act under which secondary benefits paid to a disabled dependent child of a covered wage-earner terminated upon the child's marriage to someone who is not entitled to benefits under the Act. The Court held that it was constitutionally permissible to end benefits even though beneficiaries who marry other social security beneficiaries continue to receive benefits. Although the statute burdened certain marriage choices as compared to others, the Court concluded that it was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage" or an effort "to foist

orthodoxy on the unwilling by banning . . . nonconforming marriages." (*Id.* at 54 & n.11.) Rather, the rule furthered the government's interest in devising and administering a comprehensive benefits program, and any burden on the marriage choice was minimal and incidental. In contrast, the California law that bars lesbians and gay men from marrying someone of the same sex not only restricts choice, it effectively precludes the option of marriage, given their sexual orientation.

In addition, California courts have long held that government benefit programs that exclude or differentiate among certain classes of potential beneficiaries must be subject to special scrutiny. In order to sustain the constitutionality of such programs under the California Constitution, the state must demonstrate (1) 'that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege'; (2) that 'the utility of imposing the conditions . . . manifestly outweigh[s] any resulting impairment of constitutional rights'; and (3) that there are no 'less offensive alternatives' available for achieving the state's objective." (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 258 [quoting *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 505-07].) Because marriage is a status created by the state, upon which the availability of substantial material benefits is conditioned, it is analogous to other government benefits to which this standard of review has been applied. When measured against this established standard, Family Code section 300 is plainly unconstitutional. The exclusion in no way relates to the purposes of marriage and the State has pointed to no benefits that will be gained by the exclusion, let alone benefits that "manifestly outweigh" the harms. As the Legislature has already concluded, it is in the interest of the State to provide the opportunity to marry to individuals who want to marry someone of the same sex.

V. CONCLUSION

While the historic tradition of limiting marriage to opposite-sex couples cannot be a constitutionally sound justification for maintaining this exclusion, the historic and distinctive social meaning associated with marriage – the value of mutual commitment and interdependence of two consenting adults—is a tradition that remains critical to our contemporary and ongoing veneration of marriage. Being excluded from this tradition limits the ability of same sex couples to participate fully in the cultural fabric of our society. From the perspective of equal protection jurisprudence, the State does not have a sufficient justification to deny same-sex couples the opportunity to enjoy the benefits of that traditional meaning. We ask this Court to rectify this denial of petitioners' fundamental right to participate in the tradition and values of marriage and to the equal protection of the law.

Dated: September 20, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief Amicus Curiae has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepare this brief, I further certify that the total number of words of this brief is **8,961** words, exclusive of those materials not required to be counted.

I declare under penalty of perjury that this Certificate of compliance is true and correct and that this declaration was executed on 20 September, 2007.

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PROOF OF SERVICE

I, the undersigned hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On the date set forth below, I caused to be served the following documents:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE PROFESSORS OF FAMILY LAW IN SUPPORT OF PARTIES CHALLENGING THE MARRIAGE EXCLUSION

via First Class U.S. Mail, by placing one true and correct copy thereof in a properly addressed and sealed envelope in a pickup box routinely maintained by the United States Postal Service, in conformity with the usual business practices of the Stanford Law School, on the following interested parties:

[SEE ATTACHED SERVICE LIST]

I declare, under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on 20 September, 2007 at Stanford, California.

_____

Joanne Newman