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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
The Honorable Richard A. Kramer

APPLICATION TO FILE AMICUS CURIAE BRIEF AND
PROPOSED AMICUS CURIAE BRIEF OF
SANTA CLARA COUNTY BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS
CHALLENGING THE MARRIAGE EXCLUSION

JAMES McMANIS (40958)
CHRISTINE PEEK (234573)
McMANIS FAULKNER & MORGAN
A Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244

Attorneys for Amicus Curiae,
Santa Clara County Bar Association

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Attorneys for Amicus Curiae,
Santa Clara County Bar Association

INTRODUCTION

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the Santa Clara County Bar Association (“SCCBA”) respectfully requests leave to file the attached brief in support of Respondents.

STATEMENT OF INTEREST AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

Formed in 1917, the SCCBA is a nonprofit association of legal professionals in Santa Clara County, with a membership of approximately 3400 attorneys. The SCCBA is committed to promoting the fair administration of justice and equality under the law. The SCCBA strives to improve the administration of justice by, among other things, promoting advances in the judicial system and by promoting an independent judiciary. (SCCBA Bylaws, art. II, § 1, subds. (b)(1), (3).) The SCCBA also serves the public by promoting full and equal access to the legal system by all individuals. (SCCBA Bylaws, art. II, § 1, subd. (c)(3).)

In pursuit of these goals, the SCCBA has taken the lead in opposing discrimination against gay men and lesbians and has consistently supported measures to reduce discrimination and to advance the goal of full equality. In 2005, the SCCBA Board of Trustees (“Board”) adopted a resolution in favor of marriage equality and in opposition to proposed constitutional amendments seeking to preclude gay and lesbian individuals from marrying. In 2007, the Board voted to support a resolution sponsored by

the American Bar Association's Section of Individual Rights and Responsibilities amending the ABA's Goal IX to include persons of differing sexual orientations and gender identities in promoting full and equal participation in the legal profession. The ABA House of Delegates voted to adopt the proposed amendment in August 2007. The Board also approved the filing of an amicus brief in this coordinated action in support of marriage equality.

The SCCBA writes to address the confusion and uncertainty created by the State's attempt to confer marital "rights and duties," but not marital status, on members of same-sex couples, and the detrimental effect of such uncertainty on same-sex couples and the legal system. The SCCBA also explains why future amendments to the domestic partnership scheme cannot adequately address these problems going forward. Indeed, only full marriage equality can end the confusion created by the State's exclusionary marriage laws and remedy the constitutional defects inherent in a separate system. The SCCBA therefore urges the Court to follow the reasoning of *Perez v. Sharp* (1948) 32 Cal.2d 711, 715, and hold that under the California Constitution, lesbian and gay individuals cannot be denied the fundamental right to marry the person of one's choice. (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 (observing the right to marry is protected by the express right to privacy found in article 1, section 1 of the California Constitution); *Perez v. Sharp, supra*, 32 Cal.2d at 715

(concluding marriage is a fundamental right protected by the Fourteenth Amendment to the United States Constitution); *see also People v. Belous* (1969) 71 Cal.2d 954, 963 (acknowledging the rights related to marriage).)

CONCLUSION

For the foregoing reasons, the SCCBA respectfully requests that the Court accept the attached brief for filing in the California Marriage Cases.

Dated: September 26, 2007

McMANIS FAULKNER & MORGAN

Christine E. Peek
CHRISTINE PEEK

Attorneys for Amicus Curiae,
SANTA CLARA COUNTY BAR
ASSOCIATION

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Telephone: (408) 279-8700
Facsimile: (408) 279-3244

Attorneys for Amicus Curiae,
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INTRODUCTION

California's marriage law unconstitutionally denies gay men and lesbians the fundamental right to marry the person of one's choice. California's domestic partnership scheme, although an important step towards equality, cannot remedy this constitutional violation and imposes an unreasonable degree of legal uncertainty and confusion on same-sex couples and the courts. This Court has the opportunity to end this discrimination and to hold California's exclusionary marriage law unconstitutional. The SCCBA urges this Court to do so.

The State of California and the Attorney General (collectively, the "State") contend that denying same-sex couples the right to marry is constitutional so long as the Legislature ensures all rights and benefits enjoyed by married couples are also made available to same-sex couples through the State's domestic partnership scheme. (Reply of the State of California and Attorney General to Supplemental Briefs (hereafter, "State Supp. Reply"), pp. 2-3.) The State further contends the Legislature has made all such rights and benefits available (State's Supplemental Brief Pursuant to Court Order Dated June 20, 2007, pp. 1-2), and any "problematic" differences between marriage and domestic partnership can be corrected with new legislation. (State Supp. Reply, pp. 6-7.)

The State is wrong. Uncertainty about how to apply the laws governing marriage to domestic partners and the experience of domestic

partners in the courts contradict the State's position. The Legislature has not succeeded in ensuring that domestic partners were provided all rights and benefits enjoyed by married couples. (Rymer Respondents' Supplemental Brief, pp. 1-17.) Even if it had, this would not justify excluding same-sex couples from marriage. No amount of legislative correction can erase the fact that the domestic partnership scheme consigns same-sex couples to a second-class status. The time has come to grant gay and lesbian individuals full marriage equality.

Recent court decisions show that the status of marriage matters. Lower courts have not consistently followed the Legislature's mandate that domestic partners shall have the same rights and duties as spouses. (*See* Fam. Code § 297.5; *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1172-74; *Garber v. Garber* (Super. Ct. Orange County, 2007, No. 04D006519) (G039050, app. pending).) Such decisions illustrate the impossibility of separating the "rights and duties" of marriage from the "status" marriage affords. The State's attempt to confer marital "rights and duties" without their accompanying status has led to uncertainty and confusion regarding the rights and duties of domestic partners. Such confusion is intertwined with cultural beliefs about the status of "domestic partnership," as compared to "marriage" – beliefs currently enshrined by the State's refusal to confer the status of marriage on same-sex couples.

The State cannot confer the rights and duties of marriage on gay and

lesbian individuals if it withholds the title and status of marriage from them. The State's failure to grant full equality is not just symbolic. The confusion and uncertainty resulting from the State's separate system imposes tangible costs upon gay and lesbian individuals and the judicial system. Such uncertainty and its accompanying costs will continue unless and until the State's failure to grant full marriage equality is remedied. Accordingly, the SCCBA urges the Court to reverse the Court of Appeal and grant full marriage equality to same-sex couples.

LEGAL DISCUSSION

I. ALTHOUGH THE LEGISLATURE PURPORTED TO CONFER THE SAME RIGHTS AND DUTIES ON DOMESTIC PARTNERS AS ARE GRANTED TO AND IMPOSED UPON SPOUSES, ITS ATTEMPT TO SEVER THOSE RIGHTS FROM THE STATUS OF MARRIAGE HAS FAILED.

The Domestic Partner Rights and Responsibilities Act of 2003 (hereafter "DPRRA" or "AB 205") dramatically expanded the rights and responsibilities previously available to domestic partners. (Stats. 2003, ch. 421.) In AB 205, the Legislature stated its intent to grant domestic partners the same rights as spouses, subject to certain exceptions:¹

¹ Exceptions include the following: (1) DPRRA does not modify eligibility for long-term care plans pursuant to Chapter 15 of Part 3 of Division 5 of Title 2 of the Government Code; and (2) DPRRA does not modify provisions of the California Constitution or any provision of any statute adopted by initiative. (Fam. Code § 297.5, subs. (g), (i).) In addition, DPRRA does not grant same-sex couples standing to seek any of the federal rights associated with marriage or to claim a right to recognition by

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, *whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law*, as are granted to and imposed on spouses.

(Fam. Code § 297.5, subd. (a) (emphasis added); *see also id.*, subds. (b)-(j).)

Nevertheless, the Legislature did not grant domestic partners a status equivalent to that of married spouses. (*See Knight v. Superior Court (Schwarzenegger)* (2005) 128 Cal.App.4th 14, 19.) This is evident from the uncodified statement of purpose of AB 205, which provides:

This act is 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, 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.

(Stats. 2003, ch. 421, § 1, subd. (a) (emphasis added).) In acknowledging that AB 205 was intended to help California “move closer” to fulfilling constitutional requirements, the Legislature recognized its domestic partnership scheme did not actually satisfy the demands of the California

other states based on settled principles of comity requiring states to honor marriages validly entered in other jurisdictions.

Constitution. Observing the “numerous dissimilarities” between marriage and domestic partnership, *Knight* similarly concluded the Legislature had not created “marriage” by another name. (*Knight v. Superior Court, supra*, 128 Cal.App.4th at 30-31.)

Ignoring these facts, the State and Governor Schwarzenegger assert the State has granted “legal recognition comparable to marriage.” (Answer Brief of Governor Arnold Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad on the Merits (“Governor’s Answer Brief”), pp. 29-32 (citing *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 845); Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits (“State’s Answer Brief”), pp. 47-48 (citing *Koebke v. Bernardo Heights Country Club, supra*, 36 Cal.4th at 845).) The State and the Governor contend “legal recognition comparable to marriage” is sufficient to satisfy the demands of the California Constitution. (Governor’s Answer Brief, pp. 29-32; State’s Answer Brief, pp. 43-54.)

The State’s effort to divorce the “rights and duties” of marriage from the “status” of marriage requires courts to adjudicate property and other rights in the face of contradictory messages about the status of domestic partners. “[M]arriage is a civil contract “of so solemn and binding a nature . . . that the consent of the parties alone will not constitute marriage . . . *the consent of the state is also required.*” [Citation.]” (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274 (quoting *Nieto v. City of Los Angeles* (1982) 138

Cal.App.3d 464, 470-471).) On one hand, the State refuses to consent to marriage between people of the same sex, sending the unmistakable message that same-sex couples occupy a second-class status in the eyes of the government. (*See Opns. of the Justices to the Senate* (2004) 440 Mass. 1201, 1207 [802 N.E.2d 565].) On the other hand, the State asserts that registered domestic partners shall enjoy the same rights and duties as spouses. (Fam. Code § 297.5, subds. (a)-(f).)

The State's refusal to grant same-sex couples the status of marriage affects the degree to which their rights will be recognized and understood by the courts. Such difficulties necessarily accompany any attempt to replicate the rights and responsibilities of marriage in a separate system. *See Sally F. Goldfarb, Granting Same-Sex Couples the "Full Rights and Benefits" of Marriage: Easier Said Than Done* (2007) 59 Rutgers L. Rev. 281, 281 (discussing New Jersey law and observing that making rights available to same-sex couples "requires rethinking a host of legal rules and doctrines that either were not crafted with same-sex couples in mind or were designed specifically to exclude them"). Here, the State's effort to carve out the rights and duties of marriage and apply them under another name to domestic partners has created problems, even as it has given same-sex couples some protection under the law: