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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

**AMICUS CURIAE BRIEF IN SUPPORT OF THE PARTIES
CHALLENGING THE MARRIAGE EXCLUSION**

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INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California declared its interest in “promoting stable and lasting family relationships and in protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones and other life crises” when it enacted the California Domestic Partner Rights and Responsibilities Act (hereafter, referred to as “The Act”). 2003 Stats., ch. 421, Family Code § 297 *et seq.* Promotion of stability has long been an enunciated public policy in the determination of parentage and custody of minor children.

As will be demonstrated in this brief, registered domestic partnership is inadequate to serve the best interests of children of same-sex parents. California’s statutory exclusion of marriage for same-sex partners discriminates against both the partners and their children. For children in particular, the ban on their parents’ marriage creates instability in determining parentage; and, if both of a child’s parents are not legally recognized, the child may suffer the loss of a vital source of emotional and psychological support, as well as a host of financial benefits provided by the lost parent. In addition, children of same-sex couples live in a situation socially analogous to children formerly labeled as illegitimate: they recognize they and their parents are treated as second-class citizens.

The right to marry is itself more than the sum of the property and financial rights that attend its legal status. The social recognition and creation of community created by civil marriage itself are not matched by registered

domestic partnership. The right to marry a person of one's choice is the signal right at stake, and there can be no substitute for it.

One of the legitimate purposes of marriage remains the creation of an optimal environment for the rearing of children. When viewed from the perspective of its childrearing function, marriage cannot legitimately or rationally be denied to same-sex partners. Tradition does not justify excluding same-sex partners or their children from participation in the civil institution of marriage.

These amici curiae support the parties challenging the marriage exclusion of same-sex couples. These amici adopt and do not repeat the constitutional arguments presented by the parties challenging the marriage exclusion.

ARGUMENT

I. CHILDREN IN PARTICULAR ARE HARMED BY THEIR PARENTS' NOT BEING ALLOWED TO MARRY.

A. Thousands of Children Reared by Same-Sex Couples in California Are Affected.

The number of same-sex households across the United States totaled 594,391 in the U.S. Census 2000.¹ This total represents a 314 percent increase

¹ U.C. Census Bureau, Census 2000 Summary File 1. www.census.gov/prod/2003pubs/censr-5.naf.

from ten years earlier.² In the 2000 Census, California had 92,138 same-sex unmarried households – more than any other state in the nation; and, of these households, 20.2 percent (18,612) of the male partners and 34.3 percent of the female partners (31,603) – collectively 54.5 percent (50,215) of all same-sex households - included their own and/or unrelated children.³ These statistics likely under-report the number of children of same-sex couples in California because: (1) the numbers represent the number of parents rather than the number of children; (2) people may under-report their same-sex orientation;⁴ (3) the statistics are limited to households; and (4) the statistics are now at least seven years out of date.

Seventy-four percent (74%) of same-sex couples want to be legally married.⁵ All of the children whose parents want to marry, deserve the same legal protections and other positive effects afforded children of marriage. Previously, children in same-sex households were predominantly born of a prior heterosexual relationship of one or both members of the same-sex couple.

² David M. Smith and Gary J. Gates, “*Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households*,” a Human Rights Campaign Report, August 22, 2001. www.hrc.org.

³ U.S. Census, *supra*.

⁴ See Declaration of M.V. Lee Badgett in Support of City and County of San Francisco’s Constitutional Challenge to Marriage Statutes, Respondent’s Appendix at 0189.

⁵ As reported in “*Same-Sex Marriage: Mental Health Perspectives*,” Psychiatric Times, August 1, 2006.

Increasingly, same-sex couples are making an affirmative decision to co-parent from the outset with their partner, either by adoption or by a variety of methods of medical assistance. Inherent in this decision is the intention and commitment of both parents to assume the responsibilities and rights of parenting the children, regardless of whether their family remains intact. It is difficult to ensure that their children are afforded the legal benefits of two parents – or even treated like other children of same-sex couples - unless the parents are entitled to marry. Yet, to date, California has excluded their parents from marriage. In doing so, California has worked significant harm on them, as well as on their parents, as detailed herein.

B. Legal Parentage for Children of Same-Sex Couples Is More Precarious than for Children of Marriage.

Enactment of the Domestic Partnership Rights and Responsibilities Act was intended to secure to eligible couples and their children all of the rights and responsibilities as the laws of California extend to and impose upon spouses. Stats. 2003 ch. 421 (AB 205) §15, F.C.§§297-299.6. As discussed below, children of registered domestic partners are not yet ensured all of the legal rights of children of marriage and in fact are subject to considerable uncertainty as to their parentage. The parentage of children of same-sex couples who were either born prior to their parents' registration or born to couples who do not register is far more uncertain.

Despite California's good intentions to treat children of registered domestic partners the same as children of spouses, as set forth in F.C.§297.5(d),

one cannot simply read that code section and understand without knowing the entirety of the Family Code what those rights and obligations are. No one who is not an expert in California family law can possibly understand what rights are conveyed by F.C. §297.5. Even for those who are expert in California family law, substantial uncertainty and potential disparity remain in determining parentage for the children of such partnerships. It may take a number of decisions by this Court before such problems are eliminated. This uncertainty and disparity would be substantially eliminated for same-sex partners who marry rather than register in California. The layering of another separate category (of domestic partnership) atop statutes applicable to marriage and written (as with F.C. §7611) in a gender-specific manner creates complexity in interpretation. Examples follow. These examples are not intended as exhaustive of all circumstances.

By application of F.C. §§297.5(d) and 7540, a child born during a registered domestic partnership should be recognized as a child of both partners. These sections could be undercut by F.C. §7541, which allows blood tests to disprove the ‘conclusive’ presumption of parentage provided in §7540. While these statutes have been construed for married couples, where the biological father is not the husband, in a way to promote the stability of the family unit,⁶ it is unclear whether registered domestic partners (for whom one partner is virtually always not a biological parent) will be treated the same as

⁶ *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932.

married partners in this analysis. In a different context, a trial judge construed registration as domestic partners as cohabitators rather than as spouses for purposes of determining whether spousal support terminates. (See section II, footnote 18 below.) If same-sex partners were married rather than registered domestic partners, the confusion and potential for applying a different analysis would not exist.

The connection of marriage to determination of parentage is reiterated in the presumptions of paternity contained in F.C. §7611(a) and (b). These sections have yet to be interpreted by the courts with respect to registered domestic partners. To date, only section 7611(d) has been applied to same-sex parents. *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108. In *Amy G. v. M. W.* (2006) 142 Cal.App.4th 1, the Court of Appeal construed the application of section 7611(d) to apply only when there were no competing claims to being the second parent. For example, if two women register as domestic partners, a child is born during the registered domestic partnership and a man who informally donated his sperm to the couple seeks recognition as parent to the child, do §§7540, 7611(a) and/or 7611(d) dictate that the child's parents are the two women? The intent of §297.5 would so indicate, but the man could cite §7541 and *Jhordan C. v. Mary K.* (1986) 179 Cal.App. 3d 386 in support of his position.

While registered domestic partnership has created many opportunities that did not exist before for same-sex couples, the different category of family

created by the Act creates an added layer of statutory interpretation – an added layer of uncertainty and confusion. Many family lawyers shy away from representing domestic partners for the reasons that the law is too new, too complex and too confusing.⁷

Although this Court has made great strides in allowing dual parentage for same-sex couples,⁸ it has neither interpreted the Act to render children of a registered domestic partnership as the children of both partners nor has it ruled on whether children born to a same-sex couple who later register as domestic partners are the children of the partners. In a marital dissolution proceeding, a trial court may determine the parentage of children born before the marriage. F.C. §2330.1. Presumably, by application of F.C. §297.5(d), a domestic partnership dissolution proceeding may likewise determine parentage, although the criteria for doing so have not been fully articulated. In cases previously decided, this Court has stopped short of endorsing a pre-birth or post-birth adjudication of parentage for same-sex partners who wish to obtain a judgment establishing joint parentage. *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156. It has not applied all sections of F.C. §7611 to same-sex partners. This Court has created a different criterion for children born of an ova donation from one

⁷ See, e.g., Roberta Bennett and David Gamblin, “*Domestic Partnership: Not Enough*,” Los Angeles Daily Journal, July 27, 2007, www.dailyjournal.com.

⁸ See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417; *Elisa B. v. Superior Court*, *supra*; *Kristine H. v. Lisa R.*, *supra*, and *K.M. v E.G.* (2005) 37 Cal. 4th 130.

same-sex partner to the other than provided by the Family Code for children born of artificial insemination. *K.M. v. E.G.* (2005) 37 Cal.4th 130.

The issue of predictability becomes far more complicated when one considers how many families – or former spouses or partners – move from one state to another. No one thinks to question the parentage of children born to opposite-sex married couples, regardless of where they married. The issue is quite otherwise for children of same-sex partners, even registered domestic partners. “(U)nlike a marriage, domestic partnership will not automatically be recognized in other states. Therefore, if the domestic partners move out of California, the rights bestowed by our state’s domestic partnership may well become illusory.” *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 33-34. As also noted by the court in *Knight, supra*, domestic partners do not have the same freedom to travel without losing the benefits of their union as married persons. Same-sex parents and their children should not have their right of travel burdened or inhibited by considerations of whether their parentage or other partnership rights would be jeopardized by relocating to another state. (See Declaration of Jeanne Rizzo, reflecting just such inhibition about relocation. RA 0115)

If California registered domestic partners move to another state, the recognition by that state of their dual parentage is uncertain and likely to be determined differently depending on which state becomes the residence of the affected children. California registered domestic partners who want to move to

another state are being advised to take redundant measures and obtain a decree of adoption for the non-birth parent or obtain (if they can) an adjudication that the non-birth parent is a co-parent before they relocate. Such redundancy should be unnecessary. While recognition of a couple's marriage cannot be assured in other states whose laws prohibit marriage for same-sex couples, the recognition of joint parentage for children of a married couple is so widely supported that joint parentage appears more likely to be upheld if the couple is married.

The issue is just as acute for a same-sex couple who marry in Massachusetts or Canada or Mexico, have children, move to California and then seek to dissolve their relationship and determine parentage and child custody. If F.C. §308.5 is upheld by this Court, then the couple's marriage is invalid and not recognized by California. Will these children have two parents – i.e., the parents they thought they had – or only the birth parent? Such children will be the children of both spouses if this Court recognizes that F.C. §7611(a) or (b) applies, but such interpretation has not yet been made. This Court has not ruled that F.C. §7611 applies uniformly to same-sex couples. Logically, this Court would so find, but why should the uncertainty or disparate treatment exist? There is no rational justification to deny the validity of these marriages and the consequent automatic recognition of parentage of the children.⁹

⁹ For a thoughtful discussion generally of the problems of interstate recognition, see Andrew Koppelman, *“Interstate Recognition of Same-Sex*

Consider the situation of out-of-state couples who register in California. Although California provides a forum for resolving the rights of couples who registered in California as domestic partners even if they reside in other states, this forum is unlikely to protect children of registered domestic partners who reside outside California, since child custody is determined according to the residence of the child. F.C. §3421 The jurisdiction over child custody determinations will be the residence of the child regardless of whether parents registered in California while California residents or while residents of another state. Given the very different laws of the different states on the subject of same-sex parentage, the fact of residence could be outcome-determinative.

These problems are more than theoretical. Although they have not yet arisen in California courts, in one case involving a lesbian couple, one of whom resided in Vermont and the other in Virginia, it took four years of litigation and a decision by both the Vermont Supreme Court and the Virginia Intermediate Appellate Court before a Vermont trial court finally dissolved the couple's civil union and determined the custody of the parties' child.¹⁰ The economic and emotional costs of such prolonged litigation cannot but harm the children involved.

Marriages and Civil Unions: A Handbook for Judges, 153 U. Pa. L. Rev. 2143 (2004-2005).

¹⁰ *Miller-Jenkins v. Miller-Jenkins* (Va.Ct.App. 2006) 637 S.E.2d 330, 49 Va.App.88; *Miller-Jenkins v. Miller-Jenkins* (2006) 2006 VT 78 (912 A. 2d 951), www.glad.org/GLAD_Cases/MillerJenkins_Timeline.html.

This vulnerability is unthinkable for married couples, but it is a harsh reality for same-sex parents, including those who have registered as domestic partners. The consequences to their children are likewise harsh. A child whose second parent is not recognized may be separated from him or her involuntarily in the event of the recognized parent's death or disability and forced into foster care, thus violating California's public policy of fostering stability for children.¹¹

If and to the extent that one of a child's same-sex parents is not legally recognized, the harm to the child is not only the deprivation of that parent's care and companionship, it is also the deprivation of the financial support and attendant benefits such as health and life insurance and Social Security benefits that harms the child. Although California recognizes a parent's "first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life" (F.C. §4053(a)), a child whose second parent is not recognized is deprived of support from that person. The interdependency of parents and arrangement of their lives so as to allow one parent to be the primary income earner and the other the primary care giver can have devastating financial consequences if the primary income earner is found not to be the child's parent. But for this Court's decision in *Elisa B. v. Superior Court, supra*, the couple's children, one of whom had severe medical problems, would have been dependent on the State for support.

¹¹ See, e.g., F.C. §7800 and Prob. C. §1610(a).

This vulnerability would be substantially lessened if the partners were simply accorded the right of every other adult in our society to marry the person of his or her choice. *Perez v. Sharp* (1948) 32 Cal.2d 711. Marriage is universally recognized, and children of a married couple – even if the couple is same-sex rather than opposite-sex – are more likely to have both their parents recognized as such than children of registered domestic partners.

C. Children Are Adversely Affected Socially by their Parents' Inability to Marry.

California's statutory limitation on marriage to opposite-sex couples has the effect of stigmatizing children of same-sex couples, who cannot help but wonder why their parents are not allowed to marry. In the history of this country, only one other group of people has been denied altogether the right to marry: African-American slaves. Even prisoners are entitled to marry. *Turner v. Safley* (1987) 482 U.S. 78. (Curiously, because of the co-residency requirement for registered domestic partners that does not exist for heterosexual couples intending to marry, homosexual prisoners can neither marry nor register as domestic partners.) Children of same-sex couples live in a situation socially analogous to children the law formerly labeled as illegitimate. Regardless of whether their parents form families that are indistinguishable in their habits from what their community regards as normal, children of same-sex couples do not enjoy equal treatment due to societal disapproval of their parents' sexual

orientation.¹² Given the venerated status of marriage in our society,¹³ the fact that their parents are “outlaws” in marriage is especially stigmatizing. Civil unions and domestic partnerships send a message of second-class citizenship, that these relationships are unworthy of the term “marriage.”¹⁴

The children of the parties to this case recognize their second-class status in the eyes of the community at large, and they actively want their families to have the social recognition accorded married couples. Michael Allen Queneville “bugged” his parents to get married. He felt that “two people who love each other should be able to get married, be able to have that respect and equality and that they should be the same as everyone else in the eyes of the law.” RA, Case No. A110449, Vol. II, at p. 317. When his parents married at City Hall, he felt joy at their being able to “formalize a commitment that they had made to each other for nearly 20 years.” *Id.*, at p. 317. “My parents

¹² According to a national survey conducted in 2000, 74 percent of lesbians, gay men and bisexuals reported having been subject to verbal abuse because of their sexual orientation and 32 percent reported being the target of physical violence. Henry J. Kaiser Family Foundation, *Inside-Out: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s View on Issues and Policies Related to Sexual Orientation* (2001) pp. 3-4 (www.kff.org/kaiserpolls).

¹³ “Marriage is a coming together for better or worse, hopefully enduring, and intimate to the point of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” *Griswold v. Connecticut* (1965) 381 U.S. 479, 486.

¹⁴ Michael S. Wald, “Same-Sex Couple Marriage: A Family Policy Perspective,” 9 Va. J. Soc. Policy & Law 291.

deserve the same treatment as everybody else.” *Id.*, at p. 317. Marina Gatto lives in fear because, if something were to happen to her birth parent, she might end up in foster care because her other mom would be seen as a legal stranger. *Id.*, at p. 327. Her fears are reinforced by the fact that her second mom is in the United States on a student visa from another country and could lose her right to remain in the United States if her parents cannot marry. *Id.*, at p. 327. To Ericka Sokolower-Shain, whose parents have been together for over 30 years, the denial of her parents’ right to marry “sends a message that my family is not as good or as deserving of respect as other families.” *Id.*, Vol. I, at p. 0168.

For Christopher Bradshaw, it is painful to know that he, as a heterosexual, is free to marry a person of his own choosing, and thus has a legal right that is denied to his mother, “solely because she is a lesbian.” *Id.*, Vol. I, at p. 0165. His standard for his own future marriage derives in part from the role his two mothers play in helping each other reach her potential and be a better person in all aspects of their lives. *Id.*, at p. 0164.

As noted by the Supreme Judicial Court of Massachusetts in permitting marriage for same-sex partners:

Marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of

one's parentage. *Goodridge v. Dept. of Pub. Health* (2003) 798 N.E.2d 941,957.

There is simply no good answer to a child's question of why his or her parents cannot marry.

If registered domestic partnership were truly the same as marriage, there would be no need to give it a separate name. If the term "marriage" by itself were not important, this lawsuit would not have happened. The designation of a different class by itself highlights the inherent inequality, and there is no doubt in anyone's mind which class is inferior. "Marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership." *Knight v. Superior Court, supra*, 128 Cal.App.4th at 31. Registered domestic partnership is the social equivalent of seating in the back of the bus or separate but equal schools. Such distinctions have been recognized by the courts as inherently unequal. *U.S. v. Virginia* (1996) 518 U.S. 515.

II. MARRIAGE PROVIDES MORE FINANCIAL BENEFITS THAN DOMESTIC PARTNERSHIP.

The institution of marriage provides vastly more financial benefits to those who marry, and, as a consequence, to their children than does the recently-created institution of registered domestic partnerships.

To its credit, the State of California has attempted to confer as many as possible of the legal rights and obligations of marriage upon registered domestic partners. The Act has provided undeniable improvements in many realms: automatic joint parentage for children born to registered domestic

partners; community property rights; inheritance rights; access to Family Court and to attorneys fees in the event of dissolution of the partnership; spousal and child support; and recognition in California courts of substantially-equivalent relationships formed in other jurisdictions (F.C. §299.2).

Nonetheless, in a host of different ways, registered domestic partnership falls short of providing the rights and benefits conferred upon married couples. As will be demonstrated below, registered domestic partners and their children are deprived of financial benefits accruing to married couples and their children. For a more detailed discussion of the differences, *see* Kirkland, Lurvey, Richmond & Wagner, *California Family Law Practice and Procedure II* (2007) Matthew Bender, *Chapter 3: California Domestic Partner Rights and Responsibilities Act*.

The major obstacles to financial equality between registered domestic partners and married spouses are that domestic partners are treated as strangers rather than as spouses for purposes of federal tax law. These differences are severe and pervasive. To begin with, any transfers between spouses are tax-free (I.R.C. §1041), while transfers between registered domestic partners are either taxable gifts (I.R.C. §2502) even if they are pursuant to a duty to support each other during the partnership or taxable sales. As such, they are heavily taxed. I.R.C. § 2001(c). Spouses who dissolve their marriage and registered domestic partners who dissolve their partnerships are each subject to an equal division of their community property under F.C. §2550; however, spouses can divide their

property between them without tax consequences while registered domestic partners are likely to have a series of recognizable sales between them. Spouses who dissolve their marriage and divide ERISA retirement plans such as 401(k) plans are entitled to do so by Qualified Domestic Relations Orders, by which the non-employee spouse receives his or her share directly from the plan and is able to defer taxes until retirement.¹⁵ Such plan divisions are unavailable to registered domestic partners because they are not defined as spouses under federal law. 1 U.S.C. §7.

Spouses and registered domestic partners owe each other the duty of support during marriage. F.C. §720. Spouses may satisfy this duty by transferring money freely between themselves, without fear of any tax consequences: by contrast, registered domestic partners may incur federal gift and/or income tax by doing so.¹⁶ In the event of dissolution, both spouses and registered domestic partners may owe their former spouse/partner spousal support; but for the former spouse, the payor is entitled to a federal tax deduction and the recipient must usually report the payment as taxable income. I.R.C. §71. By contrast, the payor former registered domestic partner is not entitled to the federal tax deduction, but the recipient might nonetheless be obligated to pay tax on the support received. I.R.C. §61(a)(8) or (12).

¹⁵ Kirkland, Lurvey, Richmond & Wagner, *supra*, at 3.09.

¹⁶ *Ibid.*

Registered domestic partners' state tax returns will conflict with their federal tax returns on each of these subjects.

In each of these respects, registered domestic partners are not treated as equal to married spouses. They pay more taxes and receive none of the tax benefits accorded spouses. To be sure, it is beyond the purview of this court to effect any changes in federal law. However, until same-sex couples are eligible to marry, they are unlikely to be able either to effect changes in federal legislation through Congress or to obtain standing to challenge them in court. See, e.g., *Smelt and Hammer v. County of Orange* (9th Cir. 2006) 447 F.3d 673. This is no small matter: California same-sex partners must be married before they can directly challenge the federal laws that discriminate against them.

The differences between spouses and registered domestic partners cause confusion and uncertainty with regard to the application of state law as well.¹⁷ For example, unless otherwise agreed in writing, spousal support ends on remarriage. F.C. §4337. By application of F.C. §297.5(b), registered domestic partners are to be treated the same as former spouses. It follows that if a supported former spouse registers as a domestic partner with a third person, he or she should no longer be entitled to spousal support from his or her former spouse. After all, why should registered domestic partners be entitled to continued spousal support when remarried former spouses' support absolutely

¹⁷ Jackie Goldberg, "Going Past Domestic Partnership," *Los Angeles Times*, August 9, 2007, www.latimes.com/news/opinion/commentary/la-oe-goldberg9aug09.

ends? On the other hand, if marriage *per se* is required to terminate the spousal support obligation, then the obligor is faced with the anomalous situation of owing spousal support to a former spouse who is, under California law, to be assigned the same obligations of a former spouse. A trial judge who recently grappled with this circumstance found the registration was cohabitation, not remarriage; as a consequence, the former spouse had to continue to pay spousal support.¹⁸ This anomaly would not exist if same-sex partners were simply permitted to marry.

Another legal anomaly occurred recently in Oregon, where two former domestic partners who had named each other as beneficiaries on their pensions found themselves unable to change their beneficiaries after the termination of their relationship. The Oregon PERS Board ruled that, under applicable law, only married couples could remove beneficiaries and then only after a formal divorce. Since same-sex couples could not marry, they could not divorce; therefore, they could not change their beneficiaries.¹⁹

Other examples are bound to follow, and California should not have to draft correcting legislation for each anomaly as it is discovered.

¹⁸ *Los Angeles Times*, July 22, 2007, www.latimes.com/news/printedition/la-me-gaywed22jul, referencing *Melinda Garber v. Ronald Garber*, Orange County Superior Court No. 04D006519.

¹⁹ “*Oregon Pension Plan Ties Hands of Gays*,” www.365gay.com/Newscon07/08/080707orpen.htm.

III. THE RIGHT TO MARRY *PER SE* CREATES BENEFITS THAT SHOULD BE AVAILABLE TO SAME-SEX PARTNERS AND THEIR CHILDREN.

Because California has attempted to provide as many as possible of the rights and responsibilities of spouses to registered domestic partners, the question is purely posed before this Court of whether denial of the right to marry *per se* discriminates against same-sex partners and their children. Civil marriage by itself— the status and the title – conveys benefits to couples that are not replicated by registered domestic partnership. Marriage is an expression of emotional support and public commitment, with spiritual significance; these features are by themselves sufficient to form a constitutionally protected status. *Turner v. Safley* (1987) 482 U.S. 78, 95-96 (granting prisoners the constitutional right to marry).

Marriage is universally recognized, understood and respected. “Marriage commands greater respect from popular opinion and implies a greater commitment than ‘living together.’ The position of legal marriage above comparable relationships resists toppling. Contestation over same-sex marriage has, ironically, clothed the formal institution with renewed honor.”²⁰ By contrast to marriage, registered domestic partnership is little-known, not well understood and not accorded the sanctity, *gravitas* or social respect of marriage. As discussed above, the petitioners in this action and their children,

²⁰ Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000) Harvard University Press.

as well as their families, recognize registered domestic partnership as an institution inferior to marriage, as indeed it is.

“(S)igmatization of homosexuality is perpetuated by discrimination in marriage denial and that, in turn, perpetuates a vicious circle. Because they are not being allowed to marry, same-sex couples often experience commitment ambiguity marked by uncertainty about the extent of mutual obligations in the relationship; uncertainty about the recognition of the partnership by family, friends, and others; and uncertainty about when the relationship is over.”²¹

“What gay couples cannot get is legal and social recognition of their relationships.”²² Marriage, like no other institution, creates kinship. Granted, anyone can declare that any other person is a member of his or her family; but nothing unites two unrelated families as does a marriage. Weddings are public events that pull together not only the individuals to be married, but also their extended relatives. Weddings thus introduce the newly-created families and announce to the community the couple’s deep commitment to each other.

Marriage confers status: to be married, in the eyes of society, is to be grown up. Marriage creates stakes: someone depends on you. Marriage creates a safe harbor for sex. Marriage puts two heads together, pooling experience and braking

²¹ *Same-Sex Marriage: Mental Health Perspectives*, *Psychiatric Times*, August 1, 2006 . See also Gilbert Herdt and Robert Kertzner, “*I Do, But I Can’t: The Impact of Marriage Denial on the Mental Health & Sexual Citizenship of Lesbians and Gay Men in the United States*,” 3 *J. Sexuality Res. & Soc. Pol’y.* 33 (2006).

²² Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (2000), Doubleday.

impulsiveness. Of all the things a young person can do to move beyond the vulnerability of early adulthood, marriage is far and away the most fruitful. We all need domesticating, not in the veterinary sense but in a more literal, human sense: we need a home. We are different people when we have a home: more stable, more productive, more mature, less self-absorbed, less impatient, less anxious. And marriage is the great domesticator.²³

Marriage provides “a critical form of social insurance,”²⁴ in that it creates a duty of each married partner to care for the other when ill, which in turn lessens the duty of the State to do so.

There is a substantial body of research that indicates married couples enjoy greater physical and emotional health and longevity than do either single people or cohabiting couples.²⁵ “(R)esearch also shows that cohabitation itself is a different institution than marriage, with different expectations and effects on the individual. For both of these reasons, cohabitation does not confer the

²³ Jonathan Rauch, *Gay Marriage* (2004) Times Books, Henry Holt and Company, LLC.

²⁴ Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Policy & L. 291 (Fall 2001).

²⁵ See, for example, Waite and Gallagher, *supra*; Catherine E. Ross and John Mirowsky, “*Family Relationships, Social Support and Subjective Life Expectancy*,” *Journal of Health and Social Behavior*, vol. 43, no. 4 (December 2002), pp. 469-489; Shelia R. Cotton, “*Marital Status and Mental Health Revisited: Examining the Importance of Risk Factors and Resources*,” *Family Relations*, vol. 48, no. 3 (July 1999), pp. 225-233; and Robin M. Mathy and Barbara A. Lehmann, “*Public Health Consequences of the Defense of Marriage Act for Lesbian and Bisexual Women: Suicidality, Behavioral Difficulties, and Psychiatric Treatment*,” *Feminism & Psychology* (2004) 14:187, <http://fap.sagepub.com>.

same kind of health benefits to either men or women as does marriage.”²⁶

While it might be argued that registered domestic partnership confers the same level of obligation and commitment as does marriage, the institution is too new to provide any data and – critically – domestic partnership is perceived as less of a commitment or obligation than marriage. It is partly the commitment to be the “first responder” and companion through illness, life crises, and the debility of aging that may explain this research. One takes no vows of “in sickness and in health” when registering as domestic partners.

To answer this Court’s question of what are the minimum constitutionally-guaranteed attributes or rights that are embodied in the constitutional right to marry, they include: 1) the ability to “marry,” to participate in the same ceremony, license and attendant social, psychological and health benefits as any other individual; 2) the ability to marry the person of one’s choice; and 3) the ability to participate in the rights and obligations of marriage as defined by the State. California has, to date, granted only the third of these guarantees to same-sex couples, by permitting them to become registered domestic partners.

What is missing until now are the first two of these guarantees, which are but two expressions of the same right and should be inextricably bound to each other. The argument that gays or lesbians can marry a person of the opposite sex affords them only the opportunity to form a sham marriage. This

²⁶ Waite & Gallagher, *supra*.

argument dishonors the institution of marriage itself and discredits the fundamental issue of choice. Anyone advancing that argument need only ask himself what it would feel like to be able to marry only someone he would never choose to marry. As demonstrated above, marriage *per se* (as distinguished from the attendant legal rights and responsibilities or a relationship of some other name, such as domestic partnership) confers unique benefits. The ability to make the commitment of marriage, even when one or both of the spouses cannot consummate the marriage or otherwise live together as a married couple, is constitutionally protected. *Turner v. Safely, supra*. The fundamental component of choosing one's marital partner is part of this constitutional protection. *Perez v. Sharp* (1948) 32 Cal.2d 711, 725 (recognizing the importance of an individual being able to marry the person "of his choice and that person to him may be irreplaceable").

IV. THERE IS NO RATIONAL JUSTIFICATION FOR LIMITING MARRIAGE TO OPPOSITE-SEX COUPLES.²⁷

A. To the Extent the Purposes of Marriage Are Related to the Rearing of Children, It is Irrational to Limit Marriage to Opposite-Sex Couples.

One of the core purposes of civil marriage is to encourage people to enter into a long-term stable relationship if they have children, since children

²⁷ Amici do not suggest that rational basis rather than strict scrutiny should be the basis for this Court's resolution of the Constitutional issues involved. Amici adopt and defer to the arguments of the parties challenging the marriage exclusion on that score. Amici only assert that even the minimum standard of rational basis is not met by perpetuating a prohibition on marriage to same-sex couples.

need stable environments and generally benefit from having two parents to care for them.²⁸ The economic interdependence of marriage fosters child-rearing in ways that maximize parental involvement in their children’s lives better than can a single caretaker.²⁹ This Court has recognized the desirability of a child’s having two parents for the additional physical, emotional and financial support. *Elisa B. v. Superior Court, supra*, at 123. As set forth above, nearly 100,000 same-sex households or more in California have children, and many, if not most, of these couples wish to marry. Children are already an abundant presence in same-sex households: that many of them are conceived through medical assistance rather than “procreation” does not in any way provide a reason to treat them in any way differently from children who are conceived as a consequence of sexual intercourse, especially since many children born in marriages today are themselves either adopted or conceived through medical assistance.

The Answer Brief of the State of California refers to the common theme in cases discussing marriage that “marriage serves as the gateway to lawful sexual relations, the parentage and raising of children, and the formation of family units.” (p. 7) The brief continues by stating that marriage no longer constitutes a prerequisite to lawful sexual relations, that same-sex couples have the same rights and responsibilities as spouses with regard to children, and that

²⁸ Michael S. Wald, *supra*.

²⁹ *Id.*

marriage is not the only way to form a family. As set forth above, the constitutional right to marry a person of one's choice is unrelated to the ability to consummate that relationship sexually. *Turner v. Safely, supra*. As also set forth above, the rights of parentage and child custody are nowhere near as secure for same-sex partners or their children as for spouses, and the alternative family unit of domestic partnership is not the same as the institution of marriage. One might conclude from the direction of its argument that the State might suggest – as it does not – that marriage itself is no longer necessary. To the contrary, marriage is as vital an institution as it ever has been; and same-sex couples ought to be allowed to participate in it.

Two of the states cited as having found a rational basis for denial of the right to marry for same-sex couples are Washington and New York. The high court in each of those states found rationales for prohibiting marriage between same-sex partners in childbearing and childrearing. When examined in terms of their effect on children, the flimsiness of their rationales is apparent. The New York decision rests on “the undisputed assumption that marriage is important to the welfare of children” and posits that the legislature could rationally conclude that it is more important to promote stability in opposite-sex couples than in same-sex couples because opposite-sex couples can procreate through sexual intercourse. *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1. While Amici readily accept that marriage is important to the welfare of children, it simply does not follow that children of same-sex couples cannot live in a married

family while children of opposite-sex couples can. The reasoning resurrects the differences between legitimate and illegitimate children that California was careful to eliminate by enactment of the Uniform Parentage Act. F.C. §7600 *et seq.*, particularly §7602. From the perspective of existing children and well as those who will be born in the future to same-sex couples, such reasoning cannot be regarded as even remotely conducive to promoting the welfare of children. The court in *Hernandez* found a second rational basis: “it is better, other things being equal, for children to grow up with both a mother and a father.” *Id.*, at 4. Such reasoning would offend the public policies of California, which does not discriminate on the basis of sex or sex-roles in the determination of parentage or child custody. F.C. §3040(a)(1), *In Re Marriage of Carney*, (1979) 34 Cal. 3d 725, 736-737. As succinctly stated by the New York Chief Judge in her dissent: “The State’s interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.” *Hernandez*, at 32.

The Washington Supreme Court found its rational basis for limiting marriage to opposite-sex couples by stating its legislature was entitled to believe that the limitation “furthers the well-being of children by encouraging families where children are reared in homes headed by the children’s biological parents.” *Anderson v. King County* (Wash. 2006) 138 P.3d 963. This reasoning should make even the married parents of adopted children anxious for their privacy. Like the high court in New York, the Washington high court

perpetuated disparate treatment of children based on their parents' marriage status and mode of conception.

Neither the State of California nor the Governor nor the Court of Appeal refer to the welfare of children as part of the justification for marriage. They do not do so because, if they did, they would have to acknowledge that the welfare of children would be served by allowing their parents to marry – and disserved by preserving the existing prohibition. Although they use other arguments, the effect of their arguments is to deprive children of same-sex couples of the status, 'legitimacy' and protections of marriage.

B. Tradition Does Not Provide a Rational Basis for Denying Marriage to Same-Sex Couples.

By defining the issue as one of "same-sex marriage" rather than as one of marriage of a person of one's choice, the Court of Appeal in these consolidated cases justified the limitation, inserted in 1977 into the Family Code, of marriage as between a man and a woman. Had it defined the constitutional right involved as that of marrying the person of one's choice, as did this Court in 1948, it would have been compelled to reach a different decision. *Perez v. Sharp, supra*. This Court in *Perez* recognized that the right involved is that of individuals, not that of groups. If the right of marriage is to remain meaningful, it must include the right to choose one's partner. That right is illusory if it could only be exercised by a gay man to marry a woman, or a lesbian woman to marry a man: these are not choices either would voluntarily make.

In justifying its decision, the Court of Appeal relied on historical and traditional notions of marriage and the fact that same-sex couples have never before been allowed to marry each other. If courts were to decide constitutional issues based on the way things have traditionally been, then African-Americans would still be prohibited from marrying white Americans, married women would not be entitled to own property or to manage community property, and child custody would still be based on sex-role stereotypes.

Prior to 1977, what is now Family Code §300 did not limit marriage to only a man and a woman. The change was made *in order to* exclude same-sex couples.³⁰ Granted, before same-sex couples began to live openly as such and to have children, their right to intermarry was most likely an issue not many people seriously considered. The legal and social issue has arisen because such families are now a reality – in fact a populous reality – and the State of California has legislated that same-sex couples have as many of the same rights and obligations as married spouses as possible, if they register as domestic partners. Given that evolution, this Court is faced with the question of whether

³⁰ The historical backdrop to the rulings on interracial marriage have an interesting parallel to the present dispute. The 1977 statute was part of a wave of state legislation to try to prevent same-sex marriage once it became a social issue. Similarly, within a year of the highly controversial marriage between the African-American heavyweight boxer Jack Johnson and a seventeen-year-old white woman in 1912, fourteen state legislatures introduced bills to ban racial intermarriage. Cott, *Public Vows, supra*, at Chapter 7. This Court's decision in *Perez v. Sharp* upheld the constitutional right to marry a person of one's choice – even when social custom and tradition were strongly opposed.

the status of marriage itself can be denied to same-sex partners. For all of the reasons set forth above, the right of marriage itself is at stake. It matters deeply.

V. CONCLUSION.

Only by extending the right to marry to same-sex couples can California accord the full range of legal rights and benefits of marriage to their children. As a result of the statutes challenged in this case, the children of same-sex couples and their parents continue to be harmed and discriminated against both legally and socially. For all of the foregoing reasons, these amici curiae respectfully request that this Court re-affirm the right of individuals to marry the person of their choice and strike down the statutes that discriminate based on sexual orientation.

VI. DISCLAIMER.

This Brief represents the views of the American Academy of Matrimonial Lawyers, the Northern California Chapter of the AAML, and the California District of the American Academy of Pediatrics. This Brief does not necessarily reflect the views of any judge who is a fellow of the AAML. No inference should be drawn that any judge who is a Fellow of the AAML participated in the preparation of this brief or reviewed it before its submission. The AAML, Northern California Chapter of the AAML, and the California District of the American Academy of Pediatrics do not represent any party in this matter other than themselves, are receiving no compensation for acting as Amicus, and have done so *pro bono publico*.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the “Word Count” feature in my Microsoft Word for Windows software, this brief contains 7,752 words up to and including the signature lines that follow the brief’s conclusion.

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

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