S122865

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

BARBARA LEWIS, CHARLES McILHENNY, and EDWARD MEI,

Petitioners,

v.

NANCY ALFARO, County Clerk of the City and County of San Francisco in her official capacity,

Respondent.

APPLICATION TO FILE BRIEF OF AMICUS CURIAE; BRIEF OF AMICUS CURIAE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rule of Court 29.1(f), Bay Area Lawyers for Individual Freedom respectfully requests leave to file the attached brief in support of Respondents. This application is timely made within the period set forth in this Court's Order dated March 11, 2004.

INTEREST OF AMICUS CURIAE

Bay Area Lawyers for Individual Freedom ("BALIF") is a minority bar association in the San Francisco Bay Area. BALIF was founded in 1980, and currently has a membership of nearly 600 lesbians, gay men, bisexuals, transgenders and their supporters in the legal community, including judges, lawyers, legal workers and law students. BALIF provides a forum for the exchange of ideas and information of concern to members of the lesbian, gay, bisexual and transgender legal community. One of BALIF's primary purposes is to discuss and take action on questions of law and justice that affect the lesbian, gay, bisexual and transgender community. BALIF and its members share the objective of combating all forms of discrimination.

The issues presented in this case implicate the equality of gay and lesbian individuals under the law and their access to marriage, one of society's most revered social institutions. Resolution of these issues will directly and profoundly impact the lives and professions of BALIF members, as well as the lesbian, gay, bisexual and transgender community generally. For this reason, amicus curiae has a substantial interest in the present matter.

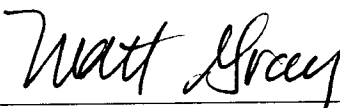
HOW THIS BRIEF WILL ASSIST THE COURT

The attached brief specifically addresses the portion of this Court's March 11, 2004 order enjoining same-sex marriages in San Francisco "[p]ending this court's determination of this matter or further order of this court." Amicus curiae BALIF believes this brief will assist the Court in determining whether that injunction should be vacated. To this end, the brief sets out some of the hardships the injunction works on same-sex couples, and gives the Court the perspectives of some individuals who intended to marry and, but for the Court's injunction, would have married.

DATED: March 25, 2004

Respectfully submitted,

BINGHAM McCUTCHEN LLP

By: 

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I. INTRODUCTION

As of March 11, 2004, well over 2,500 same-sex couples had appointments to be married at San Francisco City Hall. Countless others no doubt had made plans to marry in the coming weeks and months. Their objectives were no different than those of scores of different-sex couples before them. All sought to have their relationships legally recognized and to provide security for themselves and their children. They sought to signal their commitment to a shared set of universally held ideals about support, fidelity, and family. They sought to celebrate publicly—in a way recognized everywhere—their deeply personal commitments to each other.

On that day, however, this Court enjoined Respondents from continuing to marry same-sex couples "[p]ending this court's determination of this matter or further order of this court." Respondents have filed a Supplemental Opposition to Application for Immediate Stay and Peremptory Writ of Mandate in the First Instance arguing that San Francisco officials acted within their authority when they recognized the equal protection rights of same-sex couples and issued them marriage licenses. Respondents urge the Court to defer ruling on the issue of San Francisco's authority to marry same-sex couples until the lower courts can rule on the underlying constitutional questions. Should the Court so defer—or if it determines as a matter of law that the City had the authority to issue marriage licenses to same-sex couples—amicus curiae Bay Area Lawyers for Individual Freedom joins Respondents in respectfully urging this Court to immediately lift its

injunction against San Francisco's continued issuance of marriage licenses.

The State claims that the potential for uncertainty among same-sex couples about the affect of marriage licenses pending the outcome of litigation is irreparable injury justifying the Court's injunction. But some uncertainty is a necessary byproduct of legal change. And no amount of uncertainty can countenance the severe hardship that flows from having *dis*continued them. Indeed, it is the *State's* historic refusal to accord same-sex couples access to the rights, privileges, and dignity that marriage affords that creates dangerous uncertainty in the lives of same-sex couples and their families, forcing them to turn to an unreliable patchwork of contracts and domestic partnership registration in an effort to approximate marriage. It is the denial of marriage—not uncertainty as to its legal effect during litigation—that causes the only appreciable injury here. And that injury requires lifting the Court's injunction, not maintaining it.

The Court's injunction imposes hardships on couples who were turned away that cannot be overstated. It does more than merely suspend a municipal function. It blocks same-sex couples' access to the security and legitimacy afforded by the imprimatur of marriage. It threatens to forever deny to same-sex couples critical protections for their families that will be available should the courts find that the banning of same-sex marriage is unconstitutional. The Court's injunction interferes with rights too fundamental to be shelved while litigation wends its way through the courts. And it marks same-sex couples and their families as somehow unworthy of the very tangible benefits conferred uniquely by marriage.

II. FACTUAL BACKGROUND.

On February 12, 2004, the City of San Francisco began issuing marriage licenses and performing weddings for same-sex couples. Following expedited hearings on February 17 and 20, respectively, Superior Court Judges James L. Warren and Ronald Evans Quidachay each denied separate requests for an immediate stay or other interim relief that would stop the City from marrying same-sex couples.[1] On February 25, 2004, three California residents filed an original action in this Court, *Lewis v. Alfaro* (S122865), requesting that the Court halt the marriages and declare that City officials were acting in violation of the California Constitution by performing the same-sex marriages. On February 27, 2004, the California Attorney General filed an original action in this Court, *Lockyer v. City and County of San Francisco* (S122923), seeking similar relief.

The number of people seeking marriage licenses was truly overwhelming. In the first five days the City offered marriage licenses to same-sex couples—which included a long holiday weekend—over 2,200 couples married, and stood in long lines (some even camping out overnight) to do so.[2] Starting February 23, the City began requiring couples

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[1] *See* Order Denying Stay and Granting Alternative Writ in *Proposition 22 Education and Legal Defense Fund v. City and County of San Francisco* (S.F. Sup. Ct. case no. CPF-04-503943) (attached as Exhibit A to Opposition to Original Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief; Opposition to Request for Immediate Cease and Desist Order and/or Stay filed by Proposed Intervenor-Respondents Del Martin *et al.* on February 26, 2004) and Order Denying Temporary Restraining Order and Granting Order to Show Cause in *Thomasson v. Newsom*, (S.F. Sup. Ct. case no. 428794) (*id.*, Ex. B).

[2] Chiang & Podger, *S.F. Set to Defend Same-Sex Marriage*, San Francisco Chronicle (Mar. 18, 2004) p. A1 (available on Westlaw).

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to make an appointment for a marriage license, and limited the number of appointments to 56 per day.[3] Although couples were allowed to make an appointment no more than 90 days in advance, appointments for months ahead were promptly filled.

On March 11, 2004, this Court issued orders in both the *Lewis* and *Lockyer* cases requiring Respondents to show cause why a writ of mandate should not issue to directing the City, Mayor Newsom, the County Clerk, and the Assessor-Recorder to abide by the provisions of the Family Code that, if constitutional, prohibit same-sex marriages. The Court ordered San Francisco to refrain from issuing marriage licenses that do not comply with those Family Code provisions pending the Court's determination of the matter.

Before this Court issued its injunction, 4,037 same-sex couples married, and over 2,500 couples had pending appointments for marriage licenses.[4] Among the couples who had appointments or who otherwise planned to marry in the coming weeks are:

Marcia Raymond & Anna Gruver: Marcia and Anna have been together for 10 years. Anna gave birth to their son, Joaquin Alexander Gruver-Raymond, on February 17, 2004, just five days after the City started issuing same-sex marriage licenses. Marcia and Anna want to marry to give their son a "sense of security, pride, and confidence

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[3] Dolan, *Stakes Raised in Fight on Gay Unions*, Los Angeles Times (Feb. 24, 2004) p. B1 (available on Westlaw).

[4] Herel, *et. al.*, *Numbers Put Face on a Phenomenon: Most Married Couples Are Middle-Aged, Have College Degrees*, San Francisco Chronicle (Mar. 18, 2004) p. A1 (available on

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because he would grow up knowing his parents were equal to other married couples." The Court's injunction cancelled Anna and Marcia's planned wedding, and continues to deny them the chance to give their son the security of his parents' marriage. (*See* Exhibit A, *infra*.)

Paul Fishman & Mike Kurokawa: Paul and Mike have been together for 20 years and have a seven year-old son, Danny. Paul (who is Danny's biological father) and Mike co-parent with Danny's biological mother, Joanne, and her partner of 18 years, Ellen. Danny's two moms and two dads have all struggled with how best to legally protect their relationships with their son. Paul and Mike, along with Joanne and Ellen, made an appointment to be married on March 15, 2004. Danny "was looking forward to being our ring bearer, musician (he planned to play his violin) and poet (he composed a poem that includes the line "love is when two souls hold hands" that he intended to recite)." Their appointment was cancelled as a result of the Court's injunction. (*See* Exhibit B, *infra*.)

Ronald P. Flynn & Neal Schwartz: Ron and Neal, who have been in a committed relationship for 16 years, were issued a marriage license on March 10. They planned to be married in a ceremony away from City Hall in the coming weeks. Before they could even pick a date, the Court's injunction prevented them from solemnizing their relationship. Friends have suggested that Ron and Neal proceed with a symbolic ceremony despite the fact it would not be legally recognized. But Ron notes that he has never known

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an opposite-sex couple who has had a "symbolic" wedding and chosen not to legally marry. He feels strongly that his relationship "deserves the same solemnity, dignity, and respect as any other couple's marriage." That validation is not available to Ron and Neal as a result of the Court's injunction. (*See* Exhibit C, *infra*.)

Ross Ladouceur & Stuart Sanders: Ross and Stuart had an appointment to be married at 3:30 p.m. on March 11, 2004. Upon arriving at City Hall, they were shocked to learn that, as of 2:33 p.m. that day, the Clerk had stopped performing weddings for same-sex couples as directed by this Court. Ross and Stuart were devastated; photographs of them in tears appeared on the front pages of local and national newspapers. (*See* Exhibit D, *infra*.)

Steven LaFrance & Todd Feeley: Steve and Todd were "elated" when they were able to make an appointment to be married at San Francisco City Hall on March 31, 2004. After 15 years together, it took them three weeks of standing in line, calling the clerk's office, and then going on-line to get an available appointment. "We felt as though we were being given the chance to even further deepen our love for each other, as we saw marriage as a responsibility and opportunity to reflect on what it means to spend our lives together." They were devastated when this Court's injunction cancelled their wedding plans. (*See* Exhibit E, *infra*.)

Donald Robinson & Randall Gess: Don and Randall will celebrate their tenth anniversary this summer. They have homes in both the San Francisco Bay Area, where Don works, and Utah, where Randall is a professor of linguistics at the University of Utah. Don and Randall have tried to take all available steps to protect their relationship legally,

through documents like wills and powers of attorney. Because Utah does not recognize domestic partnership, it is not clear to Don and Randall that they qualify for domestic partnership benefits. Don and Randall feel so strongly about securing for themselves the protections of a marriage recognized by the State that they are considering immigrating to Canada where they can be legally married. (*See* Exhibit F, *infra.*)

Diana Correia & Cynthia Correia: Dianna and Cynthia live in Berkeley with their nine-year-old son Nicolo and almost seven-year-old daughter Lena. They had an appointment to marry on March 26, 2004 at San Francisco City Hall. "When we heard that we would not be allowed to get a marriage license, we were shocked and disappointed. It was such a profound emotional blow to our family. After fourteen years of commitment and two amazing children, we deserve the same support, respect, and recognition from our community and government as other couples." (*See* Exhibit G, *infra.*)

III. THE COURT SHOULD LIFT ITS INJUNCTION AND ALLOW THE CITY TO CONTINUE MARRYING SAME-SEX COUPLES.

Issuance of a preliminary injunction "is the exercise of a delicate power." (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 355.) Interim injunctive relief ought to be granted only where a petitioner establishes that irreparable injury would result in the absence of such relief. (*Cohen v. Board of Supervisors* (1986) 178 Cal.App.3d 447, 453.) And where, as here, the actions of a public official are involved, there must be a higher showing of "significant" irreparable injury. (*Tahoe Keys Prop. Owners Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 [injunction seeking to prohibit public officials attempting to preserve degradation of Lake Tahoe caused by

development denied].) Even where such "significant" irreparable injury would result, the injunction still should not issue—or, in this case, should not continue to stand—where the injury would be outweighed by hardships resulting from the injunction.[5] (*White v. Davis* (2003) 30 Cal.4th 528, 554.) The Court may dissolve any previously issued injunction—like the one here—at any time where "continued enforcement in its present form would effect an injustice." (*Wooks v. Corsey* (1948) 89 Cal.App.2d 105, 113.)

As noted above, two San Francisco Superior Court judges previously rejected separate requests to order the City to immediately stop marrying same-sex couples. Those decisions were made with the benefit of declarations identifying some of the many

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[5] A petitioner must also show a reasonable probability that it will succeed on the merits. (*White v. Davis* (2003) 30 Cal.4th 528, 554.) The merits of the ultimate constitutional issues in this action, as noted by the Respondents, require resolution by the Superior Court in the first instance upon the development of a full record replete with evidence and factual determinations. Those merits are not addressed in this brief. Notably, three state high courts have recently considered the underlying equal protection issue, and all have held that limiting marriage to opposite-sex couples constituted unconstitutional discrimination. (*Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309 [denying same-sex couples marriage licenses violates equal protection and due process provisions of Massachusetts Constitution]; *Baker v. Vermont* (1999) 170 Vt. 194 [concluding marriage statute violated Vermont Constitution's common benefits clause]; *Baehr v. Lewin* (1993) 74 Haw. 530 [concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanding case to lower court for further proceedings]; *see also Opinions of the Justices to the Senate* (2004) 440 Mass. 1201 [advisory opinion informing the Massachusetts Senate that "civil unions" with all benefits, protections, rights and responsibilities of marriage, but preventing same-sex couples from marrying, would violate equal protection and due process provisions of Massachusetts Constitution].) Those cases strongly suggest that excluding same-sex couples from marriage in California is unconstitutional; at minimum, they counsel against enjoining same-sex marriages as the constitutional issues are being litigated. More importantly, and as detailed in this brief in particular, the lack of *any* congizable harm to the Petitioners is so manifest—and the hardship inflicted on those denied the right to marry so great—that the ends of justice require that the Court's

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hardships that would result from an injunction. If reviewed on direct appeal in this Court, those denials of injunctive relief would be reviewable only for an abuse of discretion. (*City of Signal Hill v. Owens* (1984) 154 Cal.App.3d 118, 121 [denial of preliminary injunctions reversed on appeal "only if there is demonstrated a clear abuse of discretion"].) They should not be stripped of the deference otherwise due them simply because the State and the *Lewis* petitioners now seek the same relief by a different procedural mechanism in this Court.

A. There Is No Irreparable Injury, Actual or Threatened, That Justifies Continuing to Deny Marriage Licenses to Same-Sex Couples.

In the injunction context, "irreparable injury" has been defined as "'that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other.'" (*Fretz v. Burke* (1967) 247 Cal.App.2d 741, 746 [citing *Anderson v. Souza* (1952) 38 Cal.2d 825, 834] [preliminary injunction granted; irreparable harm present where one "overbearingly assumed dominion over" the property of another].) In other words, irreparable harm is "a wrong . . . deemed insufferable because it constitutes an overbearing assumption by one person of superiority and domination over the rights and property of others." (*Ibid.*) Irreparable injury must be demonstrated with specific facts showing just how—and how much—petitioners will be harmed; speculation and generalized assertions will not suffice. (*Volpicelli v. Jared Sydney Torrance Memorial*

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injunction here be lifted.

Hosp. (1980) 109 Cal.App.3d 242, 267 [injunction denied; movant did not adequately set forth facts showing irreparable harm without injunctive relief].)

The purported injuries from same-sex marriages that petitioners identify fall into two broad categories: alleged financial and administrative burden to the State, and the potential for uncertainty among same-sex couples regarding their legal rights. None of the purported "injuries" petitioners identify involves the "superiority or domination" by same-sex couples over the rights of others. The only rights subject to domination here are those of the same-sex couples who have been denied access to the tangible and intangible benefits of marriage by the Court's injunction.

1. The State Itself Will Not Suffer Any Substantiated Irreparable Injury.

Both the State and the *Lewis* Petitioners allude to administrative and financial burdens they say will result from uncertainty about whether and how same-sex marriage licenses will be recognized while litigation on the constitutional issues is pending. Lockyer Petition at pp. 27-31; Lewis Petition at pp. 2, 4, 5. The Attorney General claims that continuing to issue marriage licenses to same-sex couples could cause: a) a reduction in "the amount of revenue collected by the State" if same-sex couples mistakenly file taxes jointly; and b) a slower processing time for name change applications by the California Department of Health. Lockyer Petition at pp. 28-30.

The Attorney General offers neither evidence nor specific facts establishing that the irreparable injuries they allege will actually occur. Or that those injuries would be significant, much less "insufferable." (*Fretz, supra*, 247 Cal.App.2d at p. 746.) For

example, the State simply asserts that review of marriage certificates submitted as evidence of a name change—a requirement imposed by the federal Social Security Administration, not by San Francisco or married same-sex couples—will require a "dramatically increased workload." Lockyer Petition at p. 30. This increased workload is not quantified. Nor is it translated into an estimate of how many additional days an individual might have to wait for a name-change as a result. *Ibid.* Even if the State had tried to substantiate the point, it would be unpersuasive. An incrementally "increased workload" for a state agency and a longer wait for a *name change* are not "insufferable" injuries akin to the prospect of being forced to wait months—or perhaps years—for access to marriage and the rights, protections, and human dignity it affords. (*See Fretz, supra,* 247 Cal.App.2nd at p. 746.)

The *Lewis* petitioners argue that marrying same-sex couples has created legal "chaos" and disrupts the "orderly system of government," thus justifying the Court's injunction. Lewis Petition at pp. 5, 17. Notably, over four thousand marriage licenses have been issued to same-sex couples. (*See* footnote 2, *ante,* p. 6.) To the extent the *Lewis* petitioners are alleging injury based on the public or private resources that may be required to resolve the "chaos" and "disruption" they perceive, they do not establish, or even argue, that the resources required to resolve any such "chaos" will increase with the number of couples who are married. The *Lewis* petitioners' ill-defined notions of "chaos" and "disruption" do not begin to approach either in nature or severity the hardship wrought by the continued denial of marriage to same-sex couples.

2. Same-Sex Couples Suffer Irreparable Injury From The Denial of Marriage; Not From Any Uncertainty Once It Is Allowed.

The State also claims that "uncertainty surrounding the validity and effect of these marriage certificates" will lead same-sex couples to "make decisions—for themselves and their families—in reliance on respondent's recognition of marital status" and thereby cause irreparable injury. Lockyer Petition at p. 18. The State notes that same-sex couples will be at risk of "increased tax liability . . . including interest and potential penalties" should they impermissibly file their taxes jointly. (*Ibid.* at p.28). And it speculates that some may elect not to execute a will, thinking that because they are now married they are entitled to inherit from spouses intestate. (*Ibid.* at p.31).

First, the State has pronounced that it will not recognize the marriages of same-sex couples for any purpose while the constitutional issues are being litigated. Lockyer Petition at pp. 3, 16. The State itself has therefore eliminated much of the "uncertainty" it claims exists pending resolution of the litigation. Moreover, the City's same-sex marriage license application form contains a caution: "Marriage of lesbian and gay couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer. If you are a same-gender couple, you are encouraged to seek legal advice regarding the effect of entering into marriage."[6] Couples like Don Robinson and Randall Gess, Marcia Raymond and Anna Gruver, and

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[6] Romney, *Defiant San Francisco Marries Dozens of Same-Sex Couples*, Los Angeles Times (Feb. 13, 2004) p. A2 (available on Westlaw).

Paul Fishman and Mike Kurokawa are well aware of the ongoing court battles about same-sex marriage and the recognition of the rights it should afford. (*See generally* Exhibits A-G.)

Any uncertainty about the application of marital rights to same-sex couples pending the outcome of litigation cannot justify enjoining the issuance of marriage licenses to same-sex couples. Indeed, it does the opposite. Denial of benefits such as joint taxation and intestate succession along with scores of other benefits and rights is what constitutes, in significant part, the hardship long suffered by same-sex couples. It is the denial of those rights and the legitimacy, affirmation, and dignity they confer that makes the same-sex marriage ban—and this Court's injunction—so pernicious.

First, the "uncertainty" the State describes is nothing new to same-sex couples. Because they have been denied access to marriage, same-sex couples have for decades been forced to rely on uncertain patchworks of private contracts, wills, and domestic partnership registrations in their efforts to approximate marriage. That the State asks for an injunction to *protect* these couples from uncertainty fails to comprehend this plight.

More importantly, the "uncertainty" identified by the State cannot be attributed to the issuance of marriage certificates to same-sex couples in any event. Rather, any current uncertainty results from the endemic and pervasive discrimination against same-sex couples that has included denying them access to marriage and the benefits and human dignity it affords. The fact that recognizing the rights and human dignity of same-sex couples now stands to create momentary uncertainty cannot be the reason for

continuing to improperly deny them.

B. The Hardships from Denying Access to Marriage Are Intolerable and Require Lifting the Injunction.

1. The Right to Marry Confers a Measure of Dignity That Is Trampled By the Court's Injunction.

The freedom to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Loving v. Virginia* (1967) 388 U.S. 1, 12; *see also Perez v. Sharp* (1948) 32 Cal.2d 711, 714.) Marriage is "among life's momentous acts of self-definition." (*Goodridge v. Department of Public Health* (2003) 440 Mass. 309, 322.) Deciding to marry—and whom to marry—helps one "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *(Planned Parenthood v. Casey* (1992) 505 U.S. 833, 851.) It is a powerful and central form of human expression and is one of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy[.]" (*Lawrence v. Texas* (2003) 123 S.Ct. 2472, 2481 [quoting *Casey, supra*, 505 U.S. at p. 851].)

Marriage provides a unique framework for understanding the relationship and commitment of two individuals to one another. "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." (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486.) Marriage nurtures love, mutual support, and intimacy and lends stability by providing expectations about behavior and permanence. For many couples, marriage is "the most important relation in life." (*Zablocki v. Redhail* (1978) 434 U.S. 374, 384 [quoting *Maynard v. Hill*

(1888) 125 U.S. 190, 205].)

Marriage also serves an undeniably unique public function. It "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*, 440 Mass. at p. 322.) Marriage—unlike contractual relationships, domestic partnership or civil unions—carries with it societal recognition and understanding of the nature of a relationship. (*See generally Opinions of the Justices to the Senate* (2004) 440 Mass. 1201.) For the couple's friends and family, marriage signals a level of commitment and permanence. It even provides an instantly recognizable and well-understood description of a couple's relationship to those who do not know them. In everyday interactions with strangers at the bank, on the street, at a child's school, traveling abroad, and in myriad other places, marriage lends context and meaning to a couple's relationship. Lengthy explanations and attempts to convince a stranger of the nature and legitimacy of one's relationship are unnecessary.

Every state high court in this country to have considered the issue has recognized that denying marriage to same-sex couples deprives them of the full range of human experience. (*See* footnote 5, *ante,* p. 11.) The Massachusetts Supreme Court held last year that same-sex couples deserve the same dignity and respect as accorded their opposite-sex counterparts—access to marriage, one of the "most rewarding and cherished institutions." (*Goodridge*, *supra*, 440 Mass. at p. 313; *see also Opinions of the Justices to the Senate* (2004) 440 Mass. 1201 [advising that civil unions fall short of constitutional requirements and are not a substitute for marriage].)

Given the central role of marriage in personal and public life, it is no surprise that couples who were thwarted in their plans to marry by the Court's injunction are devastated:

- "I was flabbergasted and frustrated to be denied the chance to marry the man I love. Although Stuart and I were not allowed to marry as planned [on March 11], we watched as opposite-sex couples were married in the Rotunda of City Hall. It simply wasn't fair. . . . I am an honest, law abiding citizen. My relationship deserves the same respect as anyone else's." – Ross Ladouceur (*See* Exhibit D, *infra.*)

- "We felt that losing the chance to be married, at least for now, diminished the security of the family and home that we provide for our child and ourselves. . . . My family wants and needs the legal protections of marriage. And we want to be recognized and validated as fully equal members of the community. I should never have to tell my son that his parents are treated as second-class citizens." – Paul Fishman, M.D. (*See* Exhibit B, *infra.*)

- "Our children Nicolo and Lena do not understand why we are not married like their friends' parents. Even at their young age, they understand that our relationship is akin to a 'marriage.' To them, being married is a gold standard and they want to be able to tell the world that their moms are married. It pains us as parents that we cannot give them that much." – Diana Correia (*See* Exhibit G, *infra.*)

- "I was initially cynical about the idea that my relationship with Randall required validation or recognition by the state. It was only when I found myself crying as I read stories about same-sex couples who married in San Francisco that I realized the issues really are discrimination and societal recognition." – Donald Robinson (*See* Exhibit F, *infra.*)

2. Marriage Confers Innumerable Tangible Rights and Benefits Upon Same-Sex Couples.

Quite apart from its unique symbolic and personal value, marriage confers a host of legal and economic benefits and responsibilities that are otherwise unavailable to same-sex couples and their children in California. Although California has offered certain limited protections to registered domestic partners, domestic partnership is not marriage; it isn't even close. And even California's most recent legislative effort, Aseembly Bill 205 ("AB 205"), does not create all of the rights conferred by marriage.

Under California's current domestic partnership law, registered partners have approximately 16 specific rights and benefits.[7] Those rights and benefits include the right to inherit a domestic partner's estate without a will, the right to sue for the wrongful death of a domestic partner, access to stepparent adoption procedures to adopt a domestic partner's child, and the right to unemployment compensation when one partner moves to accommodate the other partner's job and is then unable to find employment in the new location.

When AB 205 takes effect on January 1, 2005, registered California domestic partners will enjoy more—but not all—of the rights, benefits and obligations conferred on opposite-sex married couples by state law. For example, beginning in 2005, California registered domestic partners will be subject to community property rules, a child born to

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[7] *See generally* Stats. 1999, ch. 588 [AB 26 Migden]; Stats. 2000, ch. 1004 [SB 2011 Escutia]; Stats. 2001, ch. 893 [AB 25 Migden]; Stats. 2002, ch. 447 [AB 2216 Keeley]; Stats. 2002, ch. 914 [SB 247 Speier]; Stats. 2002, ch. 377 [SB 1265 Alpert]; Stats. 2002,

(Footnote Continued on Next Page.)

either partner will be presumed to be the child of both, death benefits for the surviving partners of firefighters and police killed in the line of duty. (California Domestic Partner Rights and Responsibilities Act of 2003 [Stats. 2003, Ch. 421]). But several state laws—and notably the laws requiring domestic partners to file as "single" taxpayers—are unchanged by AB 205. (*Ibid.*) And AB 205 will not give couples even one of the 1,138 rights, benefits and privileges married opposite-sex couples enjoy under federal law.[8]

By pronouncing that it will not recognize licenses issued to same-sex marriages while litigation is pending, the State has kept these important rights just beyond the reach of same-sex couples. But this does nothing to diminish the personal and symbolic importance same-sex couples attach to marriage. And it underscores the importance of giving same-sex couples the opportunity to marry while litigation proceeds in order to preserve future claims to the rights the State refuses to recognize now.

3. The Court's Injunction Threatens to Forever Deprive Same-Sex Couples Who Wish To Marry Now of Certain Rights to Which They Are Entitled.

An implicit—and fundamental—function of marriage is to mark time. The moment two individuals are married symbolizes the time when they mutually decide to embark on a lifetime of bearing responsibilities together. On a more practical level, the

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(Footnote Continued from Previous Page.)

ch. 412 [SB 1575 Sher]; Stats. 2002, ch. 901 [SB 1661 Kuehl].

[8] United States General Accounting Office, *Defense of Marriage Act: Update to Prior Report* (Jan. 23, 2004) (identifying "a total of 1,138 federal statutory provisions classified to the United Sates Code in which marital status is a factor in determining or receiving benefits, rights and privileges") (available at www.gao.gov/new.items/d04353r.pdf).

date on which two individuals choose to marry marks the time that the myriad benefits conferred by the State, by local governments, and by employers are triggered. Licenses issued in the coming months would serve this important purpose of marking time.

An individual denied benefits because of an equal protection violation is entitled to receive those benefits retroactively. (*See Smock v. Carleson* (1975) 47 Cal.App.3d 960, 964 [holding that classification providing level of benefits to children of married parents different than level provided to children of unmarried parents violated equal protection and required retroactive payments]; *Board of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d 81, 85 [making payment of withheld old age benefits retroactive, holding that "obligation to pay became a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid"]; *c.f. Mooney v. Pickett* (1972) 26 Cal.App.3d 431, 436-36 [making payment of general assistance retroactive, holding that the state's obligation to pay began as of the date of appellant's original application, if at the time, law should have recognized entitlement to benefits].)

A prerequisite to receiving such benefits retroactively is being able to identify the date on which one became entitled to them. For example, Ross Ladouceur and Stuart Sanders had an appointment to marry at San Francisco City Hall on the afternoon of March 11. But for the Court's injunction, they would now have a certificate establishing March 11 as their date of marriage. (*See* Exhibit D, *infra*.) Because of the Court's injunction, they must now wait indefinitely to fix the date of their marriage. In the event the courts ultimately decide that equal protection required allowing Ross and Stuart to marry, their inability to have done so during the pendency of the litigation could have

exceedingly harsh results. In particular, if either Ross or Stuart – or a member of any couple like them – were to die unexpectedly during the duration of the injunction, the surviving partner would have no marriage date:

- From which to retroactively claim any death benefits;
- Upon which to claim property divided according to the rules of intestate succession;
- Upon which to base a claim of entitlement to a tax adjustment based on marital status.

A surviving spouse's ability to tap into these rights will be permanently destroyed by the Court's injunction.

The State and *Lewis* petitioners will likely claim that enabling the retroactive recognition of benefits merely invites further "uncertainty" and stands to increase the amount of litigation surrounding same-sex marriages. But California courts have rejected such concerns when weighing important rights or benefits and choosing to make them retroactive. *(In re Retirement Cases* (2003) 110 Cal.App.4th 426, 445-46, 450.) The court in *Retirement Cases* rejected as speculative the counties' assertions that retroactivity would result in a "quagmire" of litigation, even though at least one of the affected county pensions had over 40,000 beneficiaries. (*Id.* at 464-65.) Such concerns were sidestepped altogether in *Mooney,* where the petitioner had sought the benefits by means of a writ petition on behalf of himself and all others similarly situated for payment of the improperly withheld benefits. (*Mooney, supra,* 26 Cal.App.3d at p. 431.)

More importantly, the rights and benefits currently denied (and endangered permanently) by the Court's injunction are among the very ones that make marriage so

important. They lend marriage its status. The Court ought not saddle same-sex couples with the risk that some of those rights will be permanently lost before it can be determined through litigation that those rights properly belonged to such couples all along.

IV. CONCLUSION

Based on the foregoing, in the event that the Court defers the issue of the City's authority to marry same-sex couples or finds as a matter of law that it indeed had the authority to do so, this Court should lift its injunction and allow Respondents to immediately resume marrying same-sex couples.

DATED: March 25, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the California Rules of Court, I certify that the foregoing BRIEF OF AMICUS CURIAE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS uses a proportionally-spaced 13-point Times New Roman type and contains no more than 14,000 words.

The brief contains 6,254 words. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

DATED: March 25, 2004 BINGHAM McCUTCHEN LLP

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