NO. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re Marriage Cases

Judicial Council Coordination Proceeding No. 4365

On appeal from a decision of the Court of Appeal
First Appellate District, Division Three

Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506

Honorable Richard J. Kramer, Judge

APPLICATION TO FILE BRIEF AMICI CURIAE; BRIEF OF AMICI CURIAE JOHN COVERDALE, SCOTT FITZGIBBON, MARTIN R. GARDNER, KRIS W. KOBACH, EARL M. MALTZ, LAURENCE C. NOLAN, AND JOHN RANDALL TRAHAN, PROFESSORS OF LAW IN SUPPORT OF APPELLEES

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

I. INTEREST OF AMICI CURIAE

Amici Curiae include John Coverdale, Scott FitzGibbon, Martin R. Gardner, Kris W. Kobach, Earl M. Maltz, Laurence C. Nolan, and John Randall Trahan, professors of law with a professional interest and expertise in U.S. family law, constitutional law, and conflicts of law.

John Coverdale, J.D., is Professor of Law at Seton Hall University School of Law, having previously served as an associate professor of history at Northwestern University and an assistant professor of history at Princeton University. He has published on the treatment of marriage and family in the tax code. Missing Persons: Children in the Tax Treatment of Marriage, 48 Case Western Reserve Law Review 475 (1998).

Scott FitzGibbon, J.D., B.C.L., is Professor of Law at Boston College Law School and also a member of the American Law Institute and the International Society of Family Law. He has published a number of articles in the field jurisprudence and legal philosophy, with special attention to friendship and marriage in the Aristotelean tradition. He is the author of Marriage and the Good of Obligation, 47 American Journal of Jurisprudence 41 (2002), Marriage and the Ethics of Office,

18 Notre Dame Journal of Law, Ethics, and Public Policy 89 (2004), "A City Without Duty, Fault or Shame," in Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution (Robin Fretwell Wilson, ed., Cambridge University Press, 2006); and The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage and the Family, 4 Ave Maria L. Rev. 581 (2006).

Martin R. Gardner, J.D., is Steinhart Foundation Professor of Law at the University of Nebraska College of Law. He is the author of Children and the Law: Cases and Materials (with Anne Dupre) (Lexis/Nexis Publishers 2002, 2d ed. 2006); and Understanding Juvenile Law (Lexis/Nexis Publishers 1997, 2d ed. 2003), as well as various articles including Adoption by Homosexuals in the Wake of Lawrence v. Texas, 6 Journal of Law and Family Studies 19 (2004).

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Laurence C. Nolan, J.D., is Professor of Law at Howard University School of Law, where she teaches courses in Family Law and Wills, Trusts, and Estates. Her scholarship includes *Fundamental Principles of Family Law* (with Lynn D. Wardle) (Hein 2002, 2d ed. 2006) and *Equality and Marriage, from Loving to Zablocki*, 41 Howard L.J. 245 (1998).

John Randall (Randy) Trahan, J.D., is James Carville Associate Professor of Law at the Louisiana State University Paul M. Hebert Law Center where he teaches courses in Persons & Family, Property, Security Devices, and Successions & Donations. His publications include (2005) *Glossae on the New Law of Marital*

Donations 65 La. L. Rev. 1059, and (2007) *Glossae on the New Law of Filiation* 67 LA. L. REV. 387.

II. REASONS FOR GRANTING THE APPLICATION

The State of California and Governor Schwarzenegger have noted that the California marriage laws are part of a national (indeed, global) marriage tradition and consistent with those of every state save Massachusetts, recognizing marriage as the union of a husband and wife. (State Answer Br. at pp. 43-44; Gov. Answer Br. at p. 29.)[1] The Attorney General specifically observes that too radical a change in the marriage laws of one state may produce a backlash both within the state and throughout the country. (State Answer Br. at p. 44.)

Drawing upon our shared expertise, we seek to present additional analysis in support of these arguments, specifically arguing that the interstate conflicts of laws which would result if this Court were to mandate same-sex marriage would likely both (a) mislead same-sex couples regarding the extent to which their unions will be recognized in other states; and (b) narrow, rather than broaden, the scope of interstate recognition to which California same-sex couples are currently entitled.

[1] For clarity of reference, the State of California and Attorney General will be referred to collectively as the "State." Governor Arnold Schwarzenegger and State Registrar of Vital Statistics will be referred to as the "Governor," and the various groups challenging the marriage laws will be referred to collectively as the "Petitioners."

Additionally, we note that the judicial rejection of domestic partnerships would at a national level mitigate against compromise on this contentious issue, sending a message to sister states that civil union or domestic partnership provisions themselves place a state's marriage laws in fresh constitutional jeopardy.

Under a rational basis standard of review, the marriage statutes must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644.) We seek leave to present additional justification for the state marriage statutes which is complementary to, and not repetitive of, argument presented by the State of California and Governor Schwarzenegger.

SUMMARY OF ARGUMENT

What rational reason could the state legislature have for creating a distinct legal structure called "domestic partnership" that conveys the identical legal incidents as marriage within the state of California?

One important answer: Calling same-sex unions "marriages" (rather than "domestic partnerships") would mislead—to their detriment—same-sex couples about the degree of legal protection the state of California can provide through union recognition, as well as

create unnecessary and potentially confusing conflicts with sister states and federal law.

Forty-eight of our forty-nine sister states, as well as the federal government, recognize marriage only as the union of a husband and wife, 26 by state constitutional amendment. Forty-one states have passed so-called "defense of marriage" acts, which preclude courts from recognizing same-sex marriages performed in California. California has no power to convey the legal incidents of marriage to same-sex couples once these couples step outside of its borders, as most California citizens do on occasion. These conflicts of laws create real and serious potential dangers for same-gender couples who might rely on a California marriage, especially with regard to establishing their legal status as parents. Calling these unions "domestic partnerships" provides more accurate notice to same-sex couples of the underlying legal reality: legal recognition of same-sex unions is a recent innovation in the law, and the way these unions will be treated in other states is not yet well-established, creating real, unique legal risks for same-gender couples that they may wish to consider in financial, parenting and related legal planning.

Moreover, while the legal situation is uncertain, domestic partnerships are likely to provide stronger legal protection than would same-sex marriages when couples step outside of California's borders,

especially in the nine states in which marriage is constitutionally defined as the union of husband and wife, but recognition of domestic partnerships or civil unions are not constitutionally precluded. In these states, California domestic partnerships are more likely to provide legal protection for same-sex couples than same-sex marriages, which are clearly contrary to state public policy in sister states with DOMA statutes and state marriage amendments.

Civil unions thus offer broader legal protection than same-sex marriages would, and also offer better notice to same-sex couples of the need to consider additional legal mechanisms (such as second-parent adoption) to protect their legal interests in the likely event they, or their children, travel outside of California's borders.

The state of California should not be faulted by this Court for its effort to extend important new legal protections to same-gender couples while minimizing confusion and legal conflicts created by laws outside of its jurisdiction and control. Nor should California be faulted for recognizing the legal reality that same-sex unions are a legal innovation, and not part of our established marriage tradition.

For this court to find that civil unions represent unconstitutional "animus" would have a chilling effect on legislative efforts to bring broader relationship protections to gay couples across the country. Doing so would give opponents of domestic partnerships an important

new argument: passing broad domestic partnership laws would endanger states' marriage laws in court.

ARGUMENT

I. Recognizing same-sex unions as "marriages" would mislead gay and lesbian couples as to the scope of legal protections which can be offered by the state of California.

Forty-eight of our sister states recognize marriages only between a man and a woman. In recent years, forty-five states have adopted specific statutory or constitutional provisions recognizing marriage as only the union of a husband and wife.[2] Twenty-six states have passed constitutional amendments defining marriage as the union of husband and wife.[3] Forty-one states have passed "defense of marriage" acts (by statute, constitutional amendment, or both) explicitly prohibiting courts

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[2] Two more states have reached the same conclusion by judicial interpretation of existing statutes. See *Hernandez v. Robles* (N.Y. 2006) 855 N.E. 1; *Lewis v. Harris* (N.J. 2006) 908 A.2d 196.

[3] Ala. Const., amdt. 774; Alaska Const., art. I, § 25; Ark. Const., amdt. 83; Colo. Const., art. II, § 31; Ga. Const., art I, § 4, par. 1; Idaho Const., art. III, § 28; Kan. Const. art. 15, § 16; Ky. Const., § 233A; La. Const., art. XII, § 15; Mich. Const., art. I, § 25; Miss. Const., § 263-A; Mo. Const., art. I, § 33; Mont. Const., art. 13, § 7; Neb. Const., art. I, § 29; Nev. Const., art. I, § 21; N.D. Const., art. XI, § 28; Ohio Const., art. XV, § 11; Okla. Const., art. 2, § 35; Ore. Const., art. XV, § 5a; S.C. Const., art. XVII, § 15; S.D. Const., XXI, § 9; Tenn. Const., art. XI, § 18; Tex. Const., art. I, § 32; Utah Const., art. I, § 29; Va. Const., art. I, § 15-A; Wis. Const., art. XIII, § 13.

from recognizing same-sex marriages performed in other jurisdictions.[4] Conflicts scholars agree: Few, if any, of these states will recognize marriage licenses granted to same-sex couples.[5]

Because many California couples travel outside California borders at least occasionally, reliance on a same-sex marriage performed in California may prove detrimental to the interests of same-sex couples and their children. As the Petitioners acknowledge, legal rights which arise automatically in California will not survive in other

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[4] In addition to the twenty-six states with constitutional amendments (see note 2, *supra*), fifteen states have adopted marriage recognition provisions by statute only. Ariz. Rev. Stat. Ann. § 25-101; Cal. Fam. Code § 308.5; Del. Code Ann. tit. 13, § 101; Fla. Stat. § 741.212; Haw. Rev. Stat. § 572-3; 750 Ill. Comp. Stat. 5/212; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Me. Rev. Stat. Ann. tit. 19-A, § 701; Minn. Stat. § 517.01; N.H. Rev. Stat. Ann. §§ 457:1 to 3; N.C. Gen. Stat. § 51-1.2; Pa. Cons. Stat. § 1704; Wash. Rev. Code § 26.04.020; W. Va. Code § 48-2-603.

An additional four states have adopted definitional provisions which do not address marriage recognition. Conn. Gen. Stat. Ann. § 46b-38nn; Md. Code § 2-201; 15 Vt. Stat. Ann. § 8; Wyo. Stat. Ann. § 20-1-101.

[5] See, e.g., "Full Faith and Credit, Family Law, and the Constitutional Amendment Process," testimony of Professor Lea Brilmayer, Yale Law School, *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts* Goodridge *Decision and the Judicial Invalidation of Traditional Marriage Laws: Hearing Before the Constitution, Civil Rights, and Prop. Rights Subcomm. of the S. Judiciary Comm.*, 108th Cong., 2004 WL 406849 (March 3, 2004); Linda Silberman, *Same-Sex Marriage: Refining the Conflicts of Laws Analysis*, (2005) 153 U. Pa. L. Rev. 2195; L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?* (1998) 32 Creighton L. Rev. 29, 37.

states if that state chooses not to recognize the California union as a marriage. (See, e.g., Rymer Opening Br. at p. 26; City Opening Br. at pp. 48-49.) Thus, for same-sex couples, estate planning, medical decisionmaking, name changes, and even parental rights may all hinge on the existence of a will, health care proxy, court order or adoption, rather than simply a marriage or domestic partnership registration.

For example, while a same-sex marriage in California may, by operation of law or legal presumption, make a woman the legal parent of her partner's biological child for this state's purposes,[6] such parental status resting only on the marital status may not be recognized in a state whose public policy or state constitution forbids recognition of same-sex marriage. In such cases, the strongest legal act protecting parental status for the nonbiological parent in a same-sex couple is likely not marriage but a second-parent adoption; adoption, as a judicial act, is entitled to higher protection under the U.S. Constitution's full faith and credit clause than marriage records. (U.S. Const. art. IV, § 1; see also *Finstuen v. Crutcher* (10th Cir., August 3, 2007) ___ F.3d ___, 2007 WL 2218887 (Case Nos. 06-6213, 06-6216); *Russell v. Bridgens* (Neb. 2002) 647 N.W.2d 56 (both cases requiring recognition of a foreign adoption which would not have been permitted in the forum state).) In

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[6] See, by analogy, Cal. Fam. Code §§ 7540, 7611 (expressing a presumption of legitimacy regarding children born during marriage).

Finstuen, the U.S. Court of Appeals for the 10th Circuit recently highlighted the distinction: "In applying the Full Faith and Credit Clause, the Supreme Court has drawn a distinction between statutes and judgments. Specifically, the Court has been clear that although the Full Faith and Credit Clause applies unequivocally to the judgments of sister states, it applies with less force to their statutory laws." (*Finstuen v. Crutcher*, *supra*, at p. *10 (citations omitted).)

Moreover federal statutes and international treaties also require interstate recognition of adoption in some circumstances. (See Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (seen September 7, 2007); The Intercountry Adoption Act of 2000, 42 U.S.C. § 14901 et seq,; and 22 C.F.R. §§ 96-98 (2006)).

Similarly, while a same-sex marriage would make the partners next of kin for purposes of medical decisionmaking in case one partner is incapacitated within California, only a validly executed advance health care directive will protect those rights for same-sex couples traveling outside California. As a prominent Boston probate litigation and elder law attorney counseled in the November/December 2004 issue of the Boston Bar Journal, even in Massachusetts where the law permits

same-sex marriages, numerous other estate planning devices remain necessary for same-sex couples:

> What will happen when same-sex couples who marry in Massachusetts vacation out of state, travel between different states, visit out-of-state relatives, and relocate to a new state? . . . [T]he predictability and portability of marriage can only be approximated for same-sex spouses by executing a well-considered estate plan. Given the uncertainty in the law, and in light of the critical need and expense of executing estate planning documents to proximate marital rights and protections available to opposite-sex couples, many lesbians and gay men question whether there is any truly appreciable benefit to marriage.

(Lisa M. Cukier, *Marriage and Estate Planning: Under* Goodridge v. DPH (Nov./Dec. 2004) 48 Boston Bar Journal 14.)

As participants recently noted in a symposium on New Jersey civil unions,[7] legal practitioners have become skilled in putting together a package of legal protections for unmarried couples. The adoption of marriage legislation may signal, falsely, to many couples that these independent legal devices are now unnecessary. Couples who rely solely upon their legal status in California may later find, to their detriment, that their protections evaporate upon leaving the state. (See Diana Sclar, *New Jersey Same-Sex Relationships and the Conflict of*

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[7] Symposium, "Same Sex Couples & 'The Exclusive Commitment' Untangling the Issues & Consequences," Rutgers Law School – Newark, November 10, 2006 (presentation of Debra E. Guston) (available at http://law-library.rutgers.edu/feeds/06ssm.php).

Laws (2007) 59 Rutgers Univ. L. Rev. 351 (noting that parenting relationships based on an adoption decree are more likely to be recognized in other states than parenting relationships based solely on a civil union relationship).)

Other voices suggest that same-sex marriage provides same-sex couples with federal recognition not available to civil union partners.[8] This is simply false under current federal law. (1 U.S.C. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").)

For same-sex couples to rely on the ordinary understanding that the rights attached to the word "marriage" now apply to them could prove dangerous to their children and their interests. Creating a new separate status of "domestic partners" more accurately conveys to these

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[8] See, e.g., E.J. Graff, "The Connecticut Half-Step," Boston Globe, April 24, 2005 ("Civil unions offer less than half of marriage's full protections and obligations; they don't trigger any of marriage's federal rights and responsibilities, and it's not clear whether they travel beyond the state's borders. Since Massachusetts, right next door, stands as a proud example of how full legal recognition helps many families and hurts no one, Connecticut's half-measure was opposed by the advocacy group Love Makes a Family.").

couples the underlying legal reality: same-sex unions are a legal novelty, whose consequences outside the state of California cannot be known with legal certainty when California citizens travel (or when they move) outside of California's borders.

The risk noted here is not insubstantial. Even experienced practitioners skilled in estate planning devices for gay and lesbian couples find it difficult to stay abreast of the complex and evolving world of interstate conflicts of law as applied to same-sex relationships.[9] Much more are same-sex couples likely to be unaware of their need for extrinsic and independent estate planning devices, precisely because they assume "Everyone knows what a marriage is." Most couples who marry do not obtain legal counsel beforehand.

Domestic partnerships, perhaps despite other flaws, at least have the merit of honesty, in that while being identical to marriage within the state, they do not mislead with respect to their effect elsewhere.

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[9] As one author notes:

> A final concern when drafting elder plans - the most difficult to grasp and solidify - is the varied treatment that gay, lesbian, and non-traditional elders will receive in the varying jurisdictions of our legal system. The extent to which a gay, lesbian, or non-traditional elder will be given the same rights, privileges, and protections as a traditional elder varies depending upon the jurisdiction. [This] may negatively impact gays [or the attorney] who know nothing about conflicts of laws.

Matthew R. Dubois, *Note: Legal Planning for Gay, Lesbian, and Non-Traditional Elders* (1999) 63 Alb. L. Rev. 263, 285-86.

II. "Domestic partnerships" are more widely recognized, and less widely precluded by the laws of sister states, and thus may offer California same-sex couples broader protections in other jurisdictions than would same-sex marriages.

Regardless of what the California legislature calls same-sex unions, interstate legal distinctions between same-sex unions and opposite-sex marriages will endure. Even if California were to label these unions "marriages," the Legislature could do little to resolve the conflicts between its own laws and those of other jurisdictions.

In adopting domestic partnerships, on the other hand, California maximizes the likelihood that its same-sex couples will have their relationships recognized in sister states. The states of Oregon, Washington and Maine, as well as the District of Columbia, have already adopted broad domestic partnership protections for same-sex couples,[10] and the New England states of New Jersey, New Hampshire, Connecticut and Vermont have adopted similar provisions under the rubric of "civil union."[11] In addition, a number of other state and local governments across the nation (including, for example, Atlanta, GA,

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[10] 2004 District of Columbia Laws 15-309; 2006 District of Columbia Laws 16-79; 2001 Me. Legis. Serv. Ch. 347; 2004 Me. Legis. Serv. Ch. 672; 2007 Oregon Laws Ch. 99; 2007 Wash. Legis Serv. Ch. 156 (eff. July 22, 2007).

[11] Conn. P.A. 05-10; 2007 N.H. Laws, Ch. 58:1 (eff. Jan. 1, 2008) (codified at N.H. Rev. Stat. § 457-A); 2006 N.J. Session Law Ch. 103 (eff. Feb. 19, 2007); 1999 Vt. Stat. No. 91 (Adj. Sess.) (codified at 15 Vt. Stat. Ann. § 1201 et seq.).

Broward County (Ft. Lauderdale), FL, Cook County (Chicago), IL, Kansas City, MO, Madison, WI, Minneapolis, MN, New Orleans, LA, New York City, NY, Philadelphia, PA, and St. Louis, MO) have "domestic partnership" structures already in place, conferring varying degrees of relationship recognition even in states where same-sex "marriages" would go unrecognized.[12]

Although formal recognition provisions are not spelled out in many jurisdictions, California domestic partnerships are likely to be recognized at least in Oregon, Washington, and Maine, and perhaps also in New Jersey, New Hampshire, Connecticut and Vermont as well.[13] Significantly, in none of these states would a same-sex "marriage"

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[12] *See* Human Rights Campaign Domestic Partner Database available at http://www.hrc.org/Template.cfm?Section=Domestic_partners1 (last visited August 8, 2007).

[13] Recognition in the New England states may be less certain because same-sex "domestic partnerships" do not exist in those states, necessitating recognition by analogy of domestic partnerships as "civil unions" or in Massachusetts as same-sex "marriages." In New Jersey, at least, however, a recent attorney general opinion suggests that California domestic partnerships will be recognized in that state and treated as civil unions. State of New Jersey, Office of the Attorney General, Formal Opinion No. 3-2007 (Feb. 16, 2007), available at http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf (advising State Registrar of Vital Statistics).

receive any greater recognition, and in several cases they would receive less.[14]

Equally significant is the fact that while 26 states have adopted constitutional amendments prohibiting the recognition of same-sex marriages (and 45 states have either a statute or an amendment explicitly defining marriage only as the union of husband and wife), fewer states have constitutionally precluded civil unions, leaving 32 states in which domestic partnerships either exist currently or could be recognized by legislative action or judicial interpretation.[15]

While the interstate recognition of same-sex unions (whether as marriages, domestic partnerships, or civil unions) remains an uncertain and often disputed field, in the current legislative and constitutional landscape domestic partnerships are both (a) currently recognized in

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[14] Only in Massachusetts, where the law recognizes same-sex "marriages," would a same-sex marriage be more likely to be recognized than a domestic partnership. Meanwhile Oregon, while recognizing domestic partnerships, has adopted a constitutional amendment explicitly precluding recognition of same-sex "marriages." OR. CONST. Art. XV, § 5a. Washington has reached the same conclusion by state supreme court decision, and New Hampshire and Maine by statutory provision. *Andersen v. King County* (Wash. 2006) 138 P.3d 963; N.H. Rev. Stat. Ann. §§ 457:1, 457:2, and 457:3; Me. Rev. Stat. Ann. tit. 19-A, § 701.

[15] Nine states have adopted constitutional amendments which do not expressly address the validity of domestic partnerships or civil unions. See Alaska Const., art. I, § 25; Colo. Const., art. II, § 31; Haw. Const., Art. I, § 23; Miss. Const., § 263-A; Mo. Const., art. I, § 33; Mont. Const., art. 13, § 7; Nev. Const., art. I, § 21; Ore. Const., art. XV, § 5a; Tenn. Const., art. XI, § 18.

more states than are same-sex marriages; and (b) have greater potential for widespread recognition in the near future.

To insist that same-sex unions be labeled "marriages" will not only not give them any greater interstate recognition in 48 states, but will convey a misleading expectation to the parties. To call them "domestic partnerships" reflects the overwhelming interjurisdictional recognition reality.

In recognizing "domestic partnerships," the California legislation minimizes these interjurisdictional conflicts and maximizes the likelihood that the rights of same-sex couples will be protected not only in California but in other states as well.

III. Establishing "civil unions," rather than same-sex "marriage," demonstrates a legislative intention to preserve the longstanding ethical consensus in the broader culture

In adopting the name "domestic partnership," rather than "marriage," for the institution that it created for same-sex couples, the legislature may rationally have intended to preserve from diminishment or erosion the longstanding cultural consensus that marriage is, by its nature, a union of husband and wife, even as it extends new benefits to other kinds of unions. In this way the legislature may seek to minimize the inherent risks to redefining the meaning of a basic social institution, or as the state puts it, "to avoid the social risks inherent in overly rapid

change that rends the fabric of society in ways that cannot be readily assimilated and that may prompt backlash reactions." (State Answer Br. at p. 2; see also Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage* (2005) 42 San Diego L. Rev. 1059.)

IV. Plaintiffs err in asserting an individual constitutional right to the cultural and social meanings attached to the word "marriage."

Finally, Petitioners ask this court to give them the "spiritual significance," "expression of emotional support," and "profound personal and social meaning" associated with marriage. (Rymer Opening Br. at pp. 19-20.) The petitioners do not, however, have an individual constitutional right to rewrite the common meaning of words, on the grounds they find the way the public uses them underinclusive and experience psychic harm therefrom. Under the rational basis test, the legislature is entitled to use words in the way the people of California generally use them. The legislative history, as cited by both the plaintiffs and the State, betrays no evidence of a desire to stigmatize, but a powerful desire to respect the common meaning of the word "marriage." (State's Br. at pp. 3-7; Rymer Opening Br. at pp. 27-28.)

Petitioners are free under the law to call their relationships "marriages." If they seek to change their fellow citizens' understanding of what marriage means, the democratic process, which necessarily

involves speaking to their fellow citizens, is the proper forum. It is not at all clear that the subjective psychic harm the plaintiffs complain of is greater than that of California citizens who would wake up to find their high court has labeled them irrational for caring about the nation's marriage tradition. An individual cannot have a unilateral constitutional right to transform the shared public meaning of a word.

CONCLUSION

The California legislature has demonstrated good will, not animus, towards gay and lesbian citizens in creating a new status called "domestic partnership" which conveys the identical rights and responsibilities as marriage within the state of California. This new status accurately conveys the underlying legal reality, which no act of the state of California may change: recognition of same-sex unions is a legal innovation, not part of our established marriage tradition. Because of conflicts with state and federal law, domestic partnerships both provide stronger legal protection for same-sex couples than same-sex marriage would, and also give better notice to same-sex couples of the potential need to seek additional legal mechanisms for protecting their relationships (especially with children) when they travel (or move) outside of California.

The Petitioners object to a psychic harm from having their relations acknowledged as domestic partnerships while they would prefer they be called marriages. Another set of couples, who, under the mistaken apprehension that once their unions are called marriages they will be treated as such in Arizona, travel or move out of California without additional legal protections, risking custody of children or the right to medical decision-making, might feel very differently about the legislature's judgment. The legislature is not required to make law based on individual citizens' subjective feelings of harm. It is certainly rational for the legislature to consider the likely harm from detrimental reliance that will result if it wrongly implies to California's same-sex couples that their relationships will now be treated as marriages under U.S. law.

The legislature's judgment is clearly not irrational, nor rooted in animus toward gay citizens; it is a reasonable effort to extend important new benefits to same-sex couples. For the court to punish the state for this act would be not only overstepping the court's jurisdiction, it would also put a powerful message to sister states: passing substantive new civil union laws to provide legal benefits to gay couples in itself puts a states' marriage laws in fresh constitutional jeopardy.

Perhaps in time, the case for domestic partnership vis-à-vis same-sex marriage will grow weaker. The legislature has clearly shown it can be trusted to make these sorts of legislative judgments with due consideration for both the rights and the needs of its gay and lesbian citizens.

For the foregoing reasons, amici curiae respectfully request that this Court affirm the judgment below.

Respectfully Submitted,

_____

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CERTIFICATE OF COMPLIANCE
Pursuant to California Rules of Court, Rule 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately spaced Times New Roman font, with lines double-spaced, in 13 point typeface. The brief was prepared using Microsoft Word software, and according to the Word Count feature therein, the brief contains 3,943 words, up to and including the signature lines that follow the conclusion of the brief, exclusive of cover, tables, and application for permission to file a brief amici curiae.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 25, 2007.

_____
Jeffrey N. Daly

CERTIFICATE OF SERVICE

I, Jeffrey N. Daly declare that I am over the age of eighteen years and am not a party to this action. My business address is 21091 Powder Horn Road, Hidden Valley Lake, CA 95467.

On September 25, 2007, I served the APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF JOHN COVERDALE, ET AL., on all parties listed below by depositing a true copy of the same in the United States Post Office, first class postage prepaid, addressed as follows:

See attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 25, 2007, at Hidden Valley Lake, California.

_____

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CALIFORNIA SUPREME COURT CASE NO. S147999
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CITY AND COUNTY OF SAN FRANCISCO V. STATE OF CALIFORNIA

California Court of Appeal, First Appellate District Case No. A110449
San Francisco County Superior Court Case No. CGC-04-429539

Consolidated for trial with
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San Francisco County Superior Court Case No. CGC-04-503943

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