IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA, Appellant/defendant, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent/plaintiff,	)	Supreme Court Case No. S147999

First Appellate District, Case Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco County Superior Court Case Nos. CGC-04-429539, CGC-04-504038, CGC-04-429548, CPF-04-503943, CGC-04-428794
Los Angeles County Superior Court Case No. BS-088506

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF STATE OF CALIFORNIA AND THE ATTORNEY GENERAL

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Pursuant to California Rules of Court, rule 8.520, Leland Traiman and Steward Blandón respectfully request leave to file the attached brief of amici curiae in support of the appellants, the State of California and the Attorney General. This application is timely made within thirty days after the filing of the last Reply Brief on the merits.

THE AMICI CURIAE AND THEIR INTEREST

The amici curiae, Leland Traiman and Stewart Blandón, are a same-sex couple who live, work and raise their children in the State of California. They have been registered domestic partners with the City of Berkeley since 1991 and with the State of California since 2000. Mr. Traiman and Mr. Blandón were married in San Francisco in 2004, only to have their marriage declared void by this court's decision in Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055, a decision which they fully expected at the time they married.

Additionally, Leland Traiman was the chairman of the Berkeley Domestic Task Force in 1984 when that organization wrote the first domestic partner policy ever enacted by a governmental

body. The Task Force's proposal was enacted by the Berkeley Unified School District's Board of Trustees and then by the Berkeley City Council in August and December of 1984. The 1984 Task Force's policy has become the template for domestic partner policies in the United States. Indeed, California's current domestic partner policy has much of the same wording as the Task Force's original 1984 proposal. The 1984 domestic partner policy, and indeed, all domestic partner policies since, was and are designed to confer as many of the rights and responsibilities of marriage that the jurisdiction passing the policy had the power to confer. Those like Mr. Traiman, who worked closely with the 1984 Berkeley Domestic Partner Task Force, are uniquely qualified to comment on the issue of marriage vs. domestic partner policy.

Mr. Traiman, Mr. Blandón and their family have been, are and will continue to be personally affected by legislation and judicial decisions in California with respect to the rights of same-sex couples. They believe that, unfortunately, many members of the gay and lesbian community in California have been misled as to the important issues now pending before this court. Therefore, they believe it is

vitally important that their voices be heard and their position be considered.

The amici believe their brief will provide valuable assistance to this Court in its consideration of the important issues raised in these cases.

CONCLUSION

For all the foregoing reasons, amici curiae respectfully request that the court accept the accompanying brief for filing and consideration in this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF STATE OF CALIFORNIA AND THE ATTORNEY GENERAL

Amici Curiae Leland Traiman and Stewart Blandón submit the following Amicus Curiae Brief in support of appellants the State of California and the Attorney General.

INTRODUCTION

We support the position of the State of California and the Attorney General and urge the Court to deny the petitioners' request to allow same-sex marriage in California. We urge the Court to rule that even though domestic partnerships and marriage are not the same, the benefits of marriage are appropriately provided for by California's domestic partners laws. We further urge the Court to direct the legislature to equalize any discrepancies which exist between marriage and domestic partnerships in California if any are discovered.

QUESTION PROPOUNDED BY THE COURT

This court has propounded the following question to the parties:

> What differences in legal rights or benefits and legal obligations or duties exist under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses? Please list all of the current differences of which you are aware.

The answer is this: There is only one difference under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses: that is the requirement that domestic partners share a common residence. (Fam.Code §297, subd. (a)(1).) Married couples, in contrast, are not required to share a common residence. This "common residence" requirement was originally devised by the 1984 Berkeley Domestic Partner Task Force to help avoid fraud.[1] The

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[1] As is set forth in the accompanying Application for Leave to File Amici Curiae Brief, amicus curiae Leland Traiman was the chairman of the Berkeley Domestic Task Force in 1984 when that organization wrote the first domestic partner policy ever enacted by a governmental body. That policy has since been used as a template for many other domestic partner policies across the United States, including California's.

Task Force was concerned that someone might falsely claim a domestic partner in order to bestow health benefits on that person. Although it is rare, people sometimes marry for the sole purpose of health benefit coverage. Marriages for the purpose of attaining health benefits are not, technically, fraud. However, we would all agree that is not why the marriage laws were devised. In devising a domestic partner policy the Task Force was proposing a new way to achieve the benefits of marriage. Therefore, the Task Force wanted tight requirements to help protect the system from abuse. However, the Task Force did not want the requirements to be overly burdensome on the individuals who wished to register. The State of California has followed the Berkeley Task Force's lead and incorporated that requirement into its law.

CALIFORNIA ALREADY GRANTS ALL THE BENEFITS OF MARRIAGE TO SAME-SEX COUPLES

California already grants to same-sex couples all of the rights and responsibilities of marriage that it has the power to convey. California Family Code section 297.5, subdivision (a) states, in pertinent part:

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

The same is true of former domestic partners, surviving domestic partners. (Fam. Code §297.5, subds. (b) and (c).) Thus, Family Code 297.5 offers comprehensive domestic partner coverage but it is not same-sex marriage.

RELABELING DOMESTIC PARTNERSHIPS AS 'MARRIAGES' WILL HURT, NOT HELP, SAME-SEX COUPLES AND THEIR FAMILIES

Nevertheless, the petitioners are asking the Court to grant to same-sex couples, under the title of "marriage", all the same rights and responsibilities that they already possess in California as "domestic partners". This is not an appropriate request because the voters of California, as well as the Legislature, in concert with the

Governor, have expressly rejected the concept of same-sex marriage.[2]

What the petitioners seek is full legal recognition of all of the rights and responsibilities of marriage for same-sex couples and their children: A noble goal. However, neither California, nor any individual state, has the power to provide that recognition because that power is vested, in large part, in the federal government; it is not vested in the word "marriage". Changing the title from "domestic partnership" to "marriage" in California will not change the fact that California cannot dictate federal law. Case in point: the federal rights granted to California's "domestic partners" and to Massachusetts's "same sex marriages" are identical: zero. Indeed, in the face of the federal "Defense of Marriage Act", no state government can grant

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[2]

The voters expressed their will in Proposition 22, now codified as Family Code section 308.5, which provides, "Only marriage between a man and a woman is valid or recognized in California". The initiative was ratified by an overwhelming majority of California voters, prevailing by a 23-point margin. Statewide, 4,618,673 votes were cast in favor of the proposition, comprising 61.4% of the total vote. Opponents garnered 2,909,370 votes, for 38.6% of the vote. (Source: Marriagewatch.org website:http: //www. marriagewatch. org/media/prop22.htm.)).

The Legislature and Governor rejected same-sex marriage when they enacted and signed into law AB 205, the Domestic Partner Registration Act (codified at Fam. Code §§297, et seq.)

federal marital rights.[3] Thus, despite the petitioners' assertions to the contrary, merely renaming the rights, benefits and obligations granted under California's domestic partner policy as "marriage" will not change the nature or number of rights, benefits and obligations which currently exist in this state for same-sex couples.[4]

It is generally accepted that the petitioners speak for the lesbian/gay community, but they do not speak for the entire community. Since the domestic partners policy first passed in Berkeley in 1984 the lesbian/gay community has made steady progress in achieving the rights of marriage under the titles "domestic

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[3] The "Defense of Marriage Act", (1 USC 7), enacted by Congress in 1996, provides, in pertinent part:

> 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.

[4] However, if, at some point, a federal domestic partner policy was enacted which mirrored California's, then same-sex couples would obtain federal rights, although not under the title of "marriage."

partners" and "civil unions". However, the push for those same rights under the title of "marriage" has created a backlash hurricane. John D'Emilio, a long time gay activist, author, historian and professor at University of Illinois at Chicago, who was cited in the majority opinion in Lawrence vs. Texas 539 U.S. 558, 568, 123 S.Ct. 2472, 2479, 156 L.Ed.2d 508 (2003), noted in his November 2006 article, "The Marriage Fight is Setting Us Back":

> The campaign for same-sex marriage has been an unmitigated disaster. Never in the history of organized queerdom have we seen defeats of this magnitude. The battle to win marriage equality through the courts has done something that no other campaign or issue in our movement has done: it has created a vast body of new antigay laws.

Unfortunately, leaders in the lesbian/gay community have engaged in a mostly successful campaign to convince the lesbian/gay community of the myth that achieving the rights and benefits of marriage under the title of "marriage" will automatically confer the 1,138 federal benefits of marriage. For example, the Human Rights Campaign website declares, in an article titled "Rights and Protections Denied Same-Sex Partners":

> Because same-sex couples are denied the right to marry, same-sex couples and their families are denied access to the more than 1,138 federal rights, protections and responsibilities automatically granted to married heterosexual couples.[5]

Similarly, the following statements appear on a chart posted on Human Rights Campaign's website under the title, "Why aren't civil unions enough?"[6]:

Marriage:	Civil Unions:
Couples receive legal protections and rights under state and federal law	Couples receive legal protections and rights under state law only
Couples are recognized as being married by the federal government and all state governments.	Civil unions are not recognized by other states or federal government

The National Center for Lesbian Rights' website has a similar misstatement of facts under the title, "Why Aren't Civil Unions or Domestic Partnerships Enough?" It states:

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[5] http://www.hrc.org/issues/5478.htm

[6] http://www.hrc.org/issues/5517.htm

> Contrary to popular myth, "marriage" and "civil unions" are not the same; changing the term drastically changes the meaning as well. As mentioned above, marriage is approximately 1,500 reciprocal rights, privileges and obligations, 1,000 from the feds and about 500 from the state. A civil union, on the other hand, is a term coined by the Vermont legislature to avoid granting the "m" word to gay and lesbian couples. Because federal law does not recognize civil unions, a civil union provides only the 500 state conferred rights, privileges and obligations associated with marriage with none of the 1,000+ federal benefits.[7]

The Court should not turn a blind eye to the political and social realities of our time. The word 'marriage' is very powerful and stirs up great passions for both heterosexuals and homosexuals. The Court should take those passions and the resulting political winds into account. But those passions should not obscure the paramount issue, which is "Are citizens being treated equally before the law?" We agree with California's Attorney General that California's domestic partner laws do make same-sex couples and their families equal before the law. Although the average lesbian or gay man would be in favor of the right to marry if it included all of the rights of marriage,

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[7] http://www.nclrights.org/site/DocServer/1500reasons-0304.pdf?docID=901

most lesbians and gay men would probably agree that the rights of marriage are more important than the word. This is where, it seems, the average lesbian or gay Californian and the petitioners part company. While the petitioners speak abstractly of the inequality of marriage and domestic partnership, the average lesbian or gay person simply wishes to be treated equally before the law and they also desire the security of knowing that their benefits cannot be taken away. Unfortunately, the average member of lesbian/gay community has not been told the truth by its community leaders with regard to the campaign for same-sex marriage.

That as it may be, the Court should be mindful of the fact that forty-five states have passed laws, (California among them), or constitutional amendments banning same-sex marriage. Most of the twenty-seven states that have passed Constitutional amendments passed them after the 2004 Massachusetts law allowing same-sex marriage. Indeed, Massachusetts has had four state constitutional conventions in as many years trying to undo its same-sex marriage laws. Conversely, there have been no successful direct challenges to statewide domestic partner or civil union policies. Domestic partner

and civil union policies have been overturned only when they were included in ballot propositions whose primary purpose was to ban same-sex marriage. Indeed, because of the reaction against same-sex marriage, one-hundred-million Americans live in states which bans both same-sex marriage and domestic partner/civil union policies. There have been over 48 million votes cast on the issue of same-sex marriage in 29 states and of these, almost 32 million, almost two-thirds, voted against same-sex marriage.[8] Thus, there has already been, in effect, a national referendum on same-sex marriage and it has lost overwhelmingly. For most of the United States this is already settled law.

Despite the above facts which prove that the strategy for same-sex marriage has been a complete failure, the leadership of the lesbian/gay community perpetuates another myth: that full rights and benefits of marriage, including the federal rights, is achievable under the title of "marriage." As we have observed, this is not true even for

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[8] Human Rights Campaign website (http://www.hrc.org/) and See USA Today article by Marisol Bello, published June 19, 2007, entitled "Unmarried Couples Lose Legal Benefits." (http:// www. usatoday.com/news/ nation/2007-06-19-domestic-couples_N.htm).

same-sex married couples in Massachusetts. Lesbian and gay leaders are free to ignore these facts (even if, by doing so, they endanger the community they claim to represent), but the Court cannot.

Lesbians and gay men who have rejected this myth and have tried to move on to the more successful policies of domestic partners and civil unions have faced social and political ostracism. This was documented by Associate Press reporter Ray Henry in his March 17, 2007 article entitled "Activists Switch Strategies in Gay-Marriage Effort." (published in The Edge, Boston, March 19, 2007) The Washington state legislature was considering a domestic partner policy nine years after that state had outlawed same sex marriage. Mr. Henry reports:

> It's very new,' said Washington state Sen. Edward Murray, a gay man who represents a heavily gay area in Seattle where his constituents until recently frowned on anything but marriage. 'If I had suggested this strategy a year or two years ago, I would have been run out of my district.

The proposed domestic partner law was offered by Sen. Murray who had been a member of the legislature for over eleven years.

California's domestic partner laws operate well for all our citizens. They have the support of a majority of Californians. Most importantly, they add stability and protection to the children being raised in same-sex relationships. There is no evidence to suggest that those children will be protected any better if the labels on their parents' domestic partnerships are changed to marriage. Same-sex marriage will not add one more benefit or right for same-sex couples than we already have under current domestic partner policies (unless one considers the ability to get married and not share a common residence a benefit of marriage).

If the Court rules that the benefits of marriage must be offered to same-sex couples under the title of marriage then we fear, and it is reasonable to predict, that California will experience the same type of political and social convulsions that Massachusetts and Michigan have experienced. Michigan's ban on same-sex marriage also included a ban on the benefits of marriage being offered under any other title. Many Michigan families who were previously protected under domestic partner policies, lost their health insurance, clearly, a

destabilizing factor to the children and the adults in those families.[9] We must ensure that a similar backlash does not occur in California.

CONCLUSION

This court is respectfully requested to hold that California has fulfilled its obligation to lesbian and gay citizens by its domestic partner laws and that equal protection under the law already exists here. How that equal protection is labeled should be decided in the court of public opinion. If the court labels these rights as "marriage" the lesbian/gay community will have won the battle but lost the war

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[9] See USA Today article by Marisol Bello, June 19, 2007, "Unmarried Couples Lose Legal Benefits." (http://www.usatoday.com/news/nation/2007-06-19-domestic-couples_N.htm).

in that such action will almost certainly result in political upheaval and legislative backlash that will threaten the very families the petitioners claim to represent.

Respectfully submitted,

DATED: _____ MAZUR & MAZUR

Janice R. Mazur
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By:_____
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CERTIFICATE OF WORD COUNT

The text of this brief consists of 3046 words as counted by the Corel WordPerfect word-processing program used to generate this brief.

DATED:_____ _____

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I am employed in the State of California, County of San Diego. I am over the age of eighteen and not a party to this action. My business address is 13465 Camino Canada, No. 106-103, El Cajon, CA 92021.

On September 21, 2007, I mailed documents described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF STATE OF CALIFORNIA AND THE ATTORNEY GENERAL** via the United States mail in Whitefish, Montana in postage prepaid envelopes to interested parties in this action addressed as following:

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. Executed at Whitefish, Montana on this 21st day of September, 2007.

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