Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

First Appellate District, Case Nos. A110449, A110450, A110451, A110463, A110651, A110652

San Francisco County Superior Court Case No. 504-038
The Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION AND [PROPOSED] *AMICUS* BRIEF

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Pursuant to Rule 8.200(c) of the California Rules of Court, Bay Area Lawyers for Individual Freedom, Children of Lesbians and Gays Everywhere, The Disability Rights Education and Defense Fund, Family Pride, Freedom to Marry, Human Rights Campaign, Human Rights Campaign Foundation, Legal Aid Society - Employment Law Center, Lesbian and Gay Lawyers Association of Los Angeles, Marriage Equality USA, The National Lesbian and Gay Law Association, Parents, Families & Friends of Lesbians and Gays, Inc., People For the American Way Foundation, Pride At Work, SacLEGAL, and Tom Homann Law Association request leave of the Court to file the attached *amici curiae* brief in support of Respondents.

Applicants are each committed to protecting the rights of gay men and lesbians, and are familiar with the discrimination faced by those groups. Each of the applicants has extensive experience with the issues presented in this case. In its brief, the State has suggested that it has satisfied its constitutional obligations toward gay men and lesbians by providing for domestic partnership benefits. Applicants believe that additional briefing on the intangible differences between marriage and domestic partnerships would be helpful in assisting the Court in determining whether the State has in fact met its obligations under the California Constitution. Because of their familiarity with the concerns of gay men and lesbians and the principles of equal protection, applicants are

particularly able to expound on those differences, and the effect they have on gay men and lesbians, same-sex couples, and all Californians.

For these reasons, Applicants respectfully seek leave to file a brief as *amici curiae* in support of Respondents.

Bay Area Lawyers for Individual Freedom ("BALIF") is the nation's oldest and largest bar association of lesbians, gay men, bisexuals, and transgendered ("LBGT") persons in the field of law. BALIF serves to take action on questions of law and justice that affect the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in the Bay Area; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community.

Founded in 1990, **Children of Lesbians and Gays Everywhere** ("COLAGE") engages, connects and empowers people to make the world a better place for the millions of children who have one or more LGBT parents and families in the United States. Representing and working in partnership with over 10,000 youth and family member contacts and 42 chapters in 28 states (including in particular our largest membership in California), COLAGE possesses over 15 years of expertise in LGBT

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regardless of gender or sexual orientation.

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Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where gay, lesbian, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is equal access for same-sex couples to marriage and the related protections, rights, benefits and responsibilities. HRC has over 600,000 members, including more than 142,000 in the State of California, all committed to making this vision of equality a reality.

Human Rights Campaign Foundation ("The Foundation") is an affiliated organization of the Human Rights Campaign. The Foundation's cutting-edge programs develop innovative educational resources on the many issues facing lesbian, gay, bisexual and transgender individuals, with the goal of achieving full equality regardless of sexual orientation or gender identity or expression. The Foundation's Family Project is the most comprehensive and up-to-date resource for and about lesbian, gay, bisexual and transgender families. It provides legal and policy

information about families and provides public education in a range of areas, including marriage and relationship recognition.

Legal Aid Society – Employment Law Center ("LAS-ELC") is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, the LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, sexual orientation, and national origin. The LAS-ELC has represented, and continues to represent, clients faced with discrimination on the basis of disability, including those with claims brought under the ADA and the Fair Employment and Housing Act (FEHA). The LAS-ELC has also filed amicus briefs in cases of importance to persons with disabilities. In 2000, the LAS-ELC sponsored the Prudence Kay Poppink Act, which clarified the scope of California's disability nondiscrimination laws. The LAS-ELC has particular expertise in the interpretation and application of state and federal civil rights statutes, including their similarities and differences.

Lesbian and Gay Lawyers Association of Los Angeles ("LGLA") was formed in 1979 for the purposes of providing a strong leadership presence of and for lesbian, gay, bisexual and transgender persons in the legal profession and in the community at large, through education, legal advocacy and participation in political and civic activities

and social functions. The association, consisting of lawyers, judges, law students and other legal professionals, is an affiliate of the Los Angeles County Bar Association. For more than a quarter century, LGLA has served as a leader in efforts to advance civil and human rights and it has submitted and/or joined *amicus* briefs in many cases important to the gay and lesbian community.

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(NLGLA), founded in 1988, is the national association of LGBT and allied

lawyers, judges and other legal professionals, law students, activists and affiliated LGBT legal organizations. NLGLA is the national bar association that educates the legal bar about issues of concern to LGBT legal professionals and students. NLGLA works to promote justice in and through the legal profession for the LGBT community by supporting affiliated political and legal advocacy organizations; disseminating public information on legal issues of concern to LGBT people; convening the only annual national LGBT legal issues conference; and hosting the only annual national career fair for LGBT law students. Since its inception, NLGLA has advocated for the full equality of all LGBT people, including the ability to participate in the institution of civil marriage.

Parents, Families & Friends of Lesbians and Gays, Inc. ("PFLAG") is a national, nonprofit family organization, founded in New York in 1973 by heterosexual mothers and fathers, now with a grassroots network of approximately 500 chapters throughout the nation (40 in California) and over 200,000 members and supporters nationwide (including approximately 39,060 Californians). PFLAG's members and supporters are predominantly heterosexuals who promote the health and well-being of gay, lesbian, bisexual, and transgender persons, their families, and their friends through support, education, and advocacy to promote full civil rights, responsibilities, and legal protections for all Americans.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has more than 1,000,000 members and other supporters across the country, including more than 175,000 in California. PFAWF has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect and advance the civil rights of gay men and lesbians. PFAWF regularly participates in civil rights litigation, and has participated in litigation in other states to secure the right of same-sex couples to marry. PFAWF joins this brief in order to help vindicate that right in this case.

Pride At Work is a constituency group of the American Federation of Labor and Congress of Industrial Organizations. Its membership is comprised of both union and non-union workers in a variety of public and private sector employment settings, including school, college and university employees, state and local municipal employees, health care workers, workers in the manufacturing, utilities and building trades. Its purpose is to mobilize mutual support between the organized Labor Movement and the lesbian, gay, bisexual and transgender community in order to achieve social and economic justice. Pride At Work strives to attain equality for lesbian, gay, bisexual and transgender workers in their

workplaces and unions. It also seeks to create a Labor Movement that cherishes diversity, encourages openness, and ensures safety and dignity.

SacLEGAL is a voluntary bar association, an affiliate of the Sacramento County Bar Association and an affiliate of the National Lesbian and Gay Law Association. SacLEGAL's membership is comprised of, but not limited to, Sacramento area gay, lesbian, bisexual, transgendered and queer ("GLBTQ") attorneys, law students and paralegals. The membership also includes attorneys, law students and paralegals who are colleagues, friends and allies of the GLBTQ community. SacLEGAL's mission is to achieve equality and to provide a leadership presence for gays, lesbians, and bisexuals through advocacy, legal education and participation in professional legal activities. SacLEGAL hopes to achieve this mission by making the Constitution and the laws of the United States and the State of California applicable to all citizens in this state.

Tom Homann Law Association ("THLA") is a California non-profit corporation and is committed to securing the basic human rights guaranteed to all citizens by the Constitution and the laws of the United States and the State of California. THLA's membership is comprised, primarily (although not exclusively), of gay, lesbian, bisexual and transgendered (GLBT) attorneys, paralegals and law students. THLA's attorney members represent a significant segment of the GLBT community

in legal matters, which include matters involving familial relations between same sex couples.

Amici are all dedicated to eliminating discrimination against gay men and lesbians, and all have extensive experience with the legal and social discrimination suffered by individuals on the basis of their sexual orientation.

Accordingly, *amici* respectfully requests this Court to accept, file, and consider the enclosed *amicus curiae* brief.

DATED: September 26, 2007

MUNGER, TOLLES & OLSON, LLP
JEROME C. ROTH
DANIEL J. POWELL

By: _____
DANIEL J. POWELL

Attorneys for *amici curiae*

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I. INTRODUCTION

For over half a century it has been bedrock law in this State as in this nation that "separate but equal" treatment does not satisfy the constitutional guarantee of equal protection. Courts, and society more generally, have come to recognize that the very concept is a contradiction in terms. As the Supreme Court of the United States found in the seminal decision of *Brown v. Board of Education*, the promise of true "equality" is necessarily breached by the act of "separation," which serves no purpose but to isolate, and thereby stigmatize and disadvantage, the segregated class.

Yet the State now turns its back on these longstanding core values. It insists that it may exclude a class of people—same-sex couples—from marriage, the established institution by which the State recognizes loving, committed adult relationships. It claims that same-sex couples should content themselves instead with a separate and by definition inferior legalistic relationship consisting of a laundry list of rights scattered throughout the statute books. And echoing the refrain traditionally used by the majority to deprive minority groups of their rights, the State's sole justification for officially declaring same-sex couples unworthy of marriage is that it has always been that way.

As a matter of clear constitutional law there is no justification for, and much to be feared from, this invidious discrimination. The blanket

exclusion of gay men and women from the right to marry inflicts on them both tangible and intangible harms. Relegating same-sex couples to the separate and second-class status of domestic partnership sends a loud and clear message, broadcast directly from the Statehouse, that the loving, committed relationships of lesbian and gay people are less worthy, that their obligations to each other and to the State are less meaningful, and that the children they raise together in families are less valued, than those of their heterosexual neighbors. This unconscionable, destructive discrimination, which brands an entire class of citizens as inferior, cannot be tolerated under the Constitution.

As the concurring Judge of the Court of Appeal recognized, "[t]he inequalities of the current parallel institutions should not continue if one group of citizens is being denied state privileges and protections attendant to marriage because they were created with a sexual orientation different from the majority, if we are to remain faithful to our Constitution." And while Judge Parrilli "hope[s] they are equal," by any measure California's system of domestic partnerships is *not* equal to marriage. As explained below, the legal, societal, and psychological harm visited on gay and heterosexual citizens alike by this explicitly segregated regime is intolerable under the California Constitution and must be rejected by this Court. It is only by making marriage available to gay and lesbian couples that this Court can be faithful to the promise of true equality, and

ensure their full participation in the institutions of civil society.

II. INTEREST OF THE *AMICI CURIAE*

Bay Area Lawyers for Individual Freedom ("BALIF") is the nation's oldest and largest bar association of lesbians, gay men, bisexuals, and transgendered ("LBGT") persons in the field of law. BALIF serves to take action on questions of law and justice that affect the LGBT community; to strengthen professional and social ties among LGBT members of the legal profession; to build coalitions with other legal organizations to combat all forms of discrimination; to promote the appointment of LGBT attorneys to the judiciary, public agencies and commissions in the Bay Area; and to provide a forum for the exchange of ideas and information of concern to members of the LGBT legal community.

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III. LEGAL BACKGROUND

A. "Separate But Equal" Is Inherently Unequal, As It Stigmatizes the Separated Class.

The road from *Plessy v. Ferguson* (1896) 163 U.S. 537, which gave constitutional approval to the invidious practice of providing different classes of citizens with separate but supposedly equal facilities, to *Brown v. Board of Education* (1954) 347 U.S. 483, 488, which unanimously rejected "separate but equal" as constitutionally intolerable, reflected the maturing of the nation as it confronted the damage inflicted on its people by exclusion of a class of citizens from political, social and educational institutions. The decisions reached by the United States Supreme Court in the first decades of the twentieth century, culminating in *Brown*, emphasized in particular the intangible differences between the

separate albeit theoretically equal treatment afforded the majority and minority classes. As the Court ultimately recognized, there are invariably immeasurable—but still very real—differences between separate institutions. (See, e.g., *Sweatt v. Painter* (1950) 339 U.S. 629, 634 [noting that "the [all-white] Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school"].)

As *Brown* found in the context of education, because of the "feeling of inferiority" that inevitably accompanies such differential treatment, separate facilities "are inherently unequal." (*Brown*, 347 U.S. at pp. 494, 495.) In one decision after another, courts have recognized that separate is never equal when imposed for the purpose of maintaining distinction between groups, and that the inevitable effect of invidious segregation of a minority group is stigmatization of the minority class. (See, e.g., *Mayor and City Council of Baltimore v. Dawson* (1955) 350 U.S. 877 [public beaches and bathhouses]; *Holmes v. City of Atlanta* (1955) 350 U.S. 879 [public golf courses]; *Gayle v. Browder* (1956) 352 U.S. 903 [public transportation]; *New Orleans City Park Improvement Assn. v. Detiege* (1958) 358 U.S. 54 [public parks]; *Peterson v. City of Greenville* (1963) 373 U.S. 244 [restaurants]; *Brown v. Louisiana* (1966) 383 U.S. 131, 139 [public libraries]; *accord In re Opns. of the Justices to the Sen.*

(Mass. 2004) 802 N.E.2d 565 [marriage].)

Nor has this recognition been limited to racial classifications. The United States Supreme Court relied on many of the intangible differences between segregated schools recognized in *Sweatt* to invalidate Virginia's categorical exclusion of women from the Virginia Military Institute ("VMI"), and its establishment of a separate school for female cadets. (*United States v. Virginia* (1996) 518 U.S. 515.) Although the record showed that, as is typical with segregated facilities, there were significant material differences between VMI and the separate facility created for female students/cadets, the Court again primarily relied on intangible differences in concluding that the two schools were not equal. (*Id.* at p. 554 [quoting *Sweatt*, 339 U.S. at p. 634].) Just as all-white schools in the segregated South offered unique educational opportunities to their students:

> VMI, too, offers an educational opportunity no other Virginia institution provides, and the school's 'prestige'—associated with its success in developing 'citizen-soldiers'—is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a 'parallel program,' with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization. *Cf. Sweatt*, 339 U.S., at 633. VMI, beyond question, 'possesses to a far greater degree' than the VWIL program 'those qualities which are incapable of objective

> measurement but which make for greatness in a . . . school,' including 'position and influence of the alumni, standing in the community, traditions and prestige.' *Id.*, at 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth's obligation to afford them genuinely equal protection.

(*Id.* at p. 557.)

In addition, both legislatures and courts have recognized that, under many circumstances, excluding people with disabilities from access to the same classrooms, services, and opportunities made available to others constitutes "separate and unequal" treatment. (See, e.g., *National Federation of the Blind v. Target Corp.* (N.D. Cal. 2006) 452 F.Supp.2d 946, 951 ["'Discrimination' under the [Americans with Disability Act] encompasses . . . providing the disabled with separate, but unequal, goods or services. *See* 42 U.S.C. § 12182(b)(1)(A)(i-iii)."]; see also Individuals with Disabilities Education Act (20 U.S.C. § 1412(a)(5)(A) [obligating states to assure that, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled" and that children are not removed from the regular classroom unless they cannot be satisfactorily educated there with the use of "supplementary aids and services"]; Melvin II, *The Desegregation of Children with Disabilities* (1995) 44 DePaul L.Rev. 599, 606 [noting that "[c]onstitutional theories of equal educational opportunity for children with disabilities are rooted in the

United States Supreme Court's [rejection of separate but equal] in *Brown v. Board of Education*"].)

B. Laws That Stigmatize a Class of Citizens Violate the California Constitution's Equal Protection Clause.

Courts repeatedly have found that laws which serve to stigmatize a particular class, even where neutrally drawn, violate the promise of the equal protection of the laws. For instance, in *Parr v. Municipal Court* (1971) 3 Cal.3d 861, this Court considered an ordinance that made it unlawful for individuals to climb trees or sit on public property that was not meant for that purpose, and contained various other restrictions on the use of public property. As the "Declaration of Urgency" that accompanied the ordinance made clear, the law was intended to protect the city from an influx of "hippies" and the property damage they purportedly caused. Despite the facial neutrality of the ordinance, supposedly confirmed by the fact that the defendant in *Parr* was acknowledged not to be a hippie, this Court concluded that the ordinance violated the Equal Protection Clause.

This Court focused on two concerns with the ordinance: its stigmatizing effect on hippies and the potential for increased private discrimination against them. According to the Court, "[b]y using official Municipal Code language to single out a social group and stigmatize its

members as 'undesirable' and 'unsanitary,' the city council violated the constitutional guaranty of the equal protection of the laws." (*Id.* at p. 868.) In addition, because of the stigmatizing effect of the ordinance, the Court also expressed concern at the prospect of private discrimination. (*Id.* at p. 869.) Because the City Council "branded hippies as an undesirable group of transients whose presence threatened the well-being of the city" "public spirited citizens are likely to read the ordinance . . . as a mandate for perfervid private efforts calculated to deny other services to the 'offenders.'" (*Id.* at p. 870.) Accordingly, this Court concluded that the ordinance violated the Equal Protection Clause.

Similarly, in *Strauder v. West Virginia* (1879) 100 U.S. 303, the United States Supreme Court concluded that a law barring non-white citizens from serving on grand or petit juries violated the Equal Protection Clause of the Fourteenth Amendment. Instead of focusing on the jury trial right of the criminal defendant, the Court instead relied on the harm to black citizens in being denied the ability to serve on a jury:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to

> individuals of the race that equal justice which the law aims to secure to all others.

(*Id.* at p. 308.) Accordingly, the Court ordered that the state permit minority jurors to be part of the venire.

Laws that stereotype a particular group are routinely found to be invalid under the principles of equal protection. This is true despite governmental claims that the law in question was supposedly intended to help the group being stereotyped. In *Orr v. Orr*, the United States Supreme Court invalidated a law that provided that a woman, but not a man, could receive alimony payments following a divorce. Despite the state's argument that the statute in fact benefited women, the Court nevertheless concluded it violated the Equal Protection Clause due to the stereotyping effects of the law. In so holding the Court recognized that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection." ((1979) 440 U.S. 268, 283.)

Similarly, courts have recognized that given the historic discrimination against people with disabilities, courts must be particularly vigilant when analyzing laws or practices that impact such persons. Numerous judicial opinions and legislative findings have highlighted the

discrimination suffered by persons with disabilities. (See, e.g., *Bd. of Trustees of the Univ. of Alabama v. Garrett* (2001) 531 U.S. 356, 377 (Breyer, J., dissenting) [noting that in enacting the Americans with Disabilities Act, "Congress compiled a vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities"].) Indeed, persons with a broad range of disabilities—cognitive, motor, sensory and psychiatric—have been victims of intentional and irrational state-sponsored discrimination and exclusion from the basic rights and citizenship in every aspect of public and private life, including employment, housing, the judicial system, marriage, parenting, and education. Because of this "powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments. . . .[t]here is no particular reason to believe that [persons with disabilities] are immune from the 'stereotypic assumptions' and pattern of 'purposeful unequal treatment' that Congress found prevalent" in enacting the ADA. (*Id.* at p. 378.)

This Court has acted to protect the rights of the disabled against state-sponsored discrimination and stigmatization, including in the realm of marriage. In the case of *In re Marriage of Carney*, the Court upheld the right of a father with a spinal cord injury to continue to parent his children, recognizing that disability in itself should not constitute a legal

barrier to custody. ((1979) 24 Cal.3d 725.) In reaching this decision, this Court held that persons with disabilities are entitled to full participation in society, acknowledging that "[n]o less important to this policy [of non discrimination] is the integration of the handicapped into the responsibilities and satisfactions of family life, cornerstone of our social system." (*Id.* at p. 741.)

In a multitude of areas, this Court and others have similarly noted the inherent harm of laws that stigmatize. (See *Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 20 [invalidating law barring women from working as bartenders and noting that "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage"]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974 [prosecutor's closing argument that "invited the jury to give in to their prejudices and to buy into the various stereotypes that the prosecutor was promoting" regarding defendant's religion violated defendant's equal protection rights].) As these cases make clear, laws that stigmatize a particular class of citizens or encourage private individuals to form stereotypes or discriminate against members of that class violate the Equal Protection Clause.

C. The Teachings of *Brown* and Related Cases Provide the Appropriate Framework to Analyze Laws That Deprive Same-Sex Couples of the Right to Marry.

Although state governments have come to recognize the

inherent inequality of separate institutions designed to maintain the social isolation of a historically excluded and stigmatized group, one realm of state-sponsored separation lacking any rational basis persists: marriage. Here too, however, courts and society as a whole have begun to realize that separate-but-equal has no place in our jurisprudence.

The Supreme Judicial Court of Massachusetts relied on the inexorable truths underlying *Brown* and its progeny in concluding that the Massachusetts Constitution forbade the creation of a separate institution for recognizing the relationships of gay and lesbian couples. After the Massachusetts high court ruled in *Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941, that excluding same-sex couples from the right to marry violated the state constitution, the State Senate filed an action with that court seeking a determination whether a civil union statute—providing same-sex couples with all of the state-conferred rights and responsibilities of married spouses but through a different and separate institution—would be constitutionally adequate. (See *In re Opns. of the Justices to the Sen.* (Mass. 2004) 802 N.E.2d 565.) The Supreme Judicial Court squarely answered the question in the negative. As the court explained: "The bill's absolute prohibition of the use of the word 'marriage' by 'spouses' who are the same-sex is more than semantic. The dissimilitude between the terms 'civil marriage' and 'civil union' is not

innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. . . . The bill would have the effect of maintaining and fostering a stigma of exclusion that the [Massachusetts] Constitution prohibits." (*Id.* at p. 570.) The court thus recognized that *Brown*'s promise of equality endures to protect *all* citizens, including gay men and lesbians.

The inherent inequality of civil unions was also the focus of the debate between Justices of the New Jersey Supreme Court in a recent decision requiring that state to grant marriage or civil unions to same-sex couples. The Court unanimously concluded that the state's constitution required extending the same benefits to same-sex couples as married couples, but by a 4-3 vote, concluded that the Legislature could either grant same-sex couples marriage or civil unions. In a powerful dissent, Chief Justice Poritz argued that civil unions were constitutionally unacceptable, and that only allowing same-sex couples to marry would pass constitutional muster:

> When we say that the Legislature cannot deny the tangible benefits of marriage to same-sex couples, but then suggest that "a separate statutory scheme, which uses a title other than marriage," is presumptively constitutional, we demean plaintiff's claim. What we "name" things matters, language matters.
>
> . . . .

> We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage.

(*Lewis v. Harris* (2006) 908 A.2d 196, 226-227 (Poritz, C.J., concurring in part and dissenting in part).) The majority's sole response to this argument was to rely on the presumption of the constitutionality of any statutory scheme passed by the Legislature, and to find that the issue of the constitutionality of civil unions was not before the Court. (*Id.* at p. 460.)[1]

Moreover, numerous decisions from other nations have incorporated *Brown*'s promise of truly equal protection and concluded that civil unions or domestic partnerships were insufficient to secure that promise for same-sex couples. For instance, a Québec court concluded that a version of domestic partnerships was invalid under Canada's Charter of Rights and Freedoms, concluding that "offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of

[1] As discussed, *infra,* at pp. 50-51, New Jersey's subsequent experience with civil unions has underscored the defects in this separate and unequal regime.

the separate but equal doctrine." (*Hendricks c. Québec* (Québec Super. Ct.) [2002] R.J.Q. 2506 ¶ 134, at p. 19.) Similarly, the British Columbia Court of Appeal, in invalidating that province's prohibition against marriage by same-sex couples, concluded that "any other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality." (*EGALE Canada Inc. v. Canada (Attorney General)* (British Columbia Ct. App. 2003) 225 D.L.R. (4th) 472, ¶ 156, p. 522.) So too did the South African Constitutional Court reject the argument that a civil union regime, which it referred to as a "separate but equal" institution, would satisfy the dictates of the South African constitution, concluding that it was a "threadbare cloak for covering distaste for. . . the group subjected to segregation." (*Minister of Home Affairs v. Fourie* (S. Africa 2006) 3 B.C.L.R. 355, ¶ 150.)

D. California Courts Have Been More Proactive Than Federal Courts in Protecting the Rights of Minorities.

This state has a long and proud heritage of combating inequality. No less than the other branches, California courts historically have been extremely receptive to equal protection claims, often more so than federal courts. As this State's courts repeatedly have recognized, the federal courts' interpretation of provisions of the United States Constitution is not binding on state courts' construction of parallel clauses in the California Constitution, which are often found to provide additional and

greater protection to Californians. (Cal. Const., art I, § 24; *Gay Law Students Assn. v. Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d 458, 469.) California courts thus have been in the forefront of protecting minorities and other groups of unpopular individuals against discrimination, often well in advance of their federal and sister state counterparts. Californians are deservedly proud that their state's courts were the first to recognize that anti-miscegenation laws are odious to principles of equal protection, and in 1948—almost 20 years before the United States Supreme Court acted—struck down California's ban on interracial marriage. (*Perez v. Sharp* (1948) 32 Cal.2d 711.)

So too in addressing challenges to segregation, California courts have taken the lead in ensuring that individuals are treated equally regardless of their race. For instance, courts have interpreted the California Constitution to prohibit a school district from pursuing policies that result in segregated schools, even if those policies are facially neutral and adopted for race-neutral reasons. (*Crawford v. Bd. of Education* (1976) 17 Cal.3d 280, 289.) No such limitation has been found in the federal Constitution. (See *Washington v. Davis* (1976) 426 U.S. 229, 239 ["But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."].)

California courts have also been far more resolute than federal courts in protecting the rights of gay men and lesbians. More than fifty years ago, this Court became the first in the nation to apply a civil rights statute to claims of discrimination on the basis of sexual orientation. (See *Stoumen v. Reilly* (1951) 37 Cal.2d 713.) This state's courts recognized decades ago that the Equal Protection Clause of the California Constitution protects gay men and lesbians from discrimination. (*Gay Law Students Assn., supra,* 24 Cal.3d at p. 465.) Further, California courts have been in the vanguard of the recognition of parental rights of gay men and lesbians. (See, e.g., *Nadler v. Super. Ct.* (1967) 255 Cal.App.2d 523, 525 [holding that custody may not be determined based on sexual orientation]; *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031 [holding that parent's sexual orientation is not a proper basis for granting or limiting visitation rights]; see generally *Elisa B. v. Super. Ct.* (2005) 37 Cal.4th 108, 119 [discussing cases and confirming that there is "no reason why both parents of a child cannot be women."].) In short, the courts of this State have acted to protect all of its citizens, including gay men and lesbians, even when other states have not.

IV. ARGUMENT

In defending as constitutional California's exclusion of same-sex couples from the right to marry, the State argues that gay and lesbian

couples are permitted to enter into registered domestic partnerships that entitle them to many of the same state-conferred rights, protections, and benefits as are available to heterosexual married spouses. The State essentially asserts that, because it has provided same-sex couples with a smorgasbord of the rights and responsibilities to which heterosexual married couples are entitled, the segregated legal regime it has put in place satisfies the requirements of equal protection.

As an initial matter, the fact that California provides more basic protections to gay individuals than do most other states does not excuse it from adhering to the dictate of the California Constitution that no one be denied the equal protection of the laws. (Cal. Const., art. I, § 7.) Moreover, the benefits provided by California's domestic partnership law are *not* equivalent to marriage and do *not* satisfy constitutional requirements. (See Respondent's Supplemental Brief, dated Aug. 17, 2007 at pp. 1-17 (hereafter Respondent's Supp. Br.) [describing differences between domestic partnership and marriage].) Nor are these legal differences insignificant: as the Court of Appeal noted in *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 31, they "indicate marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership." While the level of respect other jurisdictions will afford California registered domestic partners remains uncertain as they

travel about the country and around the world, there is no question they enjoy a lesser degree of legal protection than do married couples traveling outside of California.

In addition to denying same-sex couples important tangible rights and protections, relegating same-sex couples to the distinct, and lesser, status of domestic partnership also inflicts substantial intangible harms. These harms are similar to those that have resulted from other separate but equal regimes. Although the state and the court below euphemistically refer to domestic partnership and marriage as "parallel" rather than "separate," (See *In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 721), the fact remains that opposite-sex couples can marry while same-sex couples cannot. The import of this distinction cannot be overrated. Marriage is a foundational institution of our society, with a unique place in the traditions of virtually every culture of the globe, including our own. By shutting the doors of that institution to gay and lesbian couples, the State deprives them of the most significant means of acknowledging, supporting, and nurturing their relationships, and simultaneously stigmatizes gay and lesbian individuals. In other contexts, these types of intangible harms have prompted courts, including California courts, to reject governmental schemes that provide for separate but purportedly "equal" benefits to minority classes.

A. Marriage Occupies an Important Place in Our Common Heritage.

As important as the legal advantages that flow from the institution of marriage may be, the simple status of being married is itself a central benefit of marriage. As the United States Supreme Court has noted, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486.) Marriage is far more than a mere bundle of legal rights and responsibilities: it is a time-honored and fundamental institution that signifies to family, friends, and the community a loving commitment between two people and a promise by society to respect that commitment. The United States Supreme Court has repeatedly recognized the importance of the emotional and symbolic nature of marriage. (See *Turner v. Safley* (1987) 482 U.S. 78, 95 [recognizing that marriage is an "expression[] of emotional support and public commitment"].) (See also *Goodridge*, *supra*, 798 N.E.2d at p. 954 ["[C]ivil marriage 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."].)

Further, as all the parties agree, marriage occupies a unique

place in our culture, central to the formation of human relationships for millennia. While the contours of marriage have dramatically changed over the course of time, the core of the institution of marriage—the loving commitment of two individuals—has not. Because of its unique status, marriage is more than a bundle of legal rights; were it otherwise, there would be no national debate about who is entitled to use the word marriage. As the Campaign for California Families put it, "[w]hile a rose by any other name might smell as sweet, marriage by any other name would cease to be marriage, no matter what substantive rights, benefits, and obligations are included in the new relationship. . . . The term 'marriage' is not merely a label that can be removed and attached to an ever-changing bundle of rights, but is a universally recognized social construct that is constitutionally significant wholly apart from whatever rights or benefits a particular group might assign to it." (Campaign for California Families' Supplemental Brief in Response to June 20, 2007 Order at pp. 23, 27.)

By excluding same-sex couples from the right to marry, the State has chosen to bar gay men and lesbians from participation in an institution that is "central to personal dignity and autonomy." (*Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 851.) Just as domestic partnership fails to provide all of the concrete legal protections afforded married couples, it also withholds from same-sex couples the

emotional and symbolic benefits that are part of what makes marriage so foundational an institution in our society and around the world. Many Californians, and most people outside of this State, have never heard of the concept of domestic partnership and have no cultural reference point with which to associate it. Friends and family of most same-sex couples have no experience celebrating or supporting domestic partnerships. The euphoria many people experience when they get married—as well as the joy and human closeness they feel when they see others getting married—is impossible to compare with the ministerial function of "registering" one's awkwardly-titled "domestic partnership," a legalistic relationship defined principally by a list of rights in the statute books.

While some have derided the dispute as about "who gets to use the 'm' word," *In re Opns. of the Justices to the Sen., supra,* 802 N.E.2d at p. 572 (Sosman, J., dissenting), "[t]he word (marriage) itself is something." (Hoffman, *Panel Tackles Marriage Issues* Rutland Daily Herald (Jan. 12, 2000) p. 1.) Many of the respondents in this case have attested so. For instance, according to Joshua Rymer, a plaintiff/respondent in *Woo*: "Being married is the only universally understood way we have of expressing the depth and permanence of our commitment to each other." (Declaration of Joshua Michael Rymer ¶ 11 (hereafter Rymer Decl.) in *Woo v. Lockyer*, San Francisco Super. Ct. Case No. CPF-04-504038.) Likewise,

for many same-sex couples who had waited years for the opportunity and then spent hours in cold rainy weather outside San Francisco City Hall to get a marriage license, the effort was worth it because "[i]t's different being married. Saying those words really meant something to me." (Vo, *Marital Blitz Before Hearings*, San Jose Mercury News (Feb. 17, 2004) p. 1A.) It was sentiments such as these that figured prominently in New Jersey Chief Justice Poritz's rejection of civil unions in that state. (See *Lewis, supra,* 908 A.2d at p. 226 (Portitz, C.J., concurring in part and dissenting in part) [quoting a litigant who said "When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with Alicia is immediately understood, and after that nothing more needs to be explained."].)

For many married heterosexuals who reflect on their own life experiences, "[t]he most important day of your life was when you got married. It was on that day that all your friends and all your family got together to celebrate the most important thing in life: your happiness—your ability to make a new home, to form a new but connected family, to find love that put everything else into perspective." (Sullivan, *Why the M Word Matters to Me: Only Marriage Can Bring a Gay Person Home* (Feb. 16, 2004) 163 Time 104, § 7.) That joyous celebration and public validation simply is absent from the dry, administrative process of registering one's

domestic partnership.

As with other institutions that occupy a fundamental place in our society and that we take for granted on a daily basis, it is difficult to articulate what makes marriage so special. But anyone who has attended a wedding and the related rituals understands the unique status of marriage. Everyone who has seen the joy on the face of newlyweds, and the special, accommodating way in which society reacts to married couples, understands that marriage is not just about inheritance rights, powers of attorney, or community property. In short, for many same-sex couples, like the plaintiffs in *Sweatt*, "[i]t is difficult to believe that one who had a free choice between [domestic partnership and marriage] would consider the question close." (*Sweatt, supra,* 339 U.S. at p. 634.) Even if there were no legal differences between marriage and domestic partnership, the latter by definition cannot confer on same-sex couples the status of being married.

B. Forbidding Gay and Lesbian Couples to Marry Stigmatizes Gay and Lesbian Individuals, and Encourages Discrimination on the Basis of Sexual Orientation.

Barring same-sex couples from a social institution that long has been considered fundamental to human freedom and dignity treats gay men and lesbians as second-class citizens. (*In re Opns. of the Justices to the Sen., supra*, 802 N.E.2d at p. 570.) Such stigmatization was the primary consideration in the rejection by our nations' courts of separate but equal

treatment of different racial and gender groups, and it is precisely why this Court should reject the State's separate marriage and domestic partnership regimes.

1. Barring same-sex couples from the institution of marriage stigmatizes gay men and lesbians.

The separation of gay and lesbian couples into domestic partnerships stigmatizes lesbians and gay men, just as government-sponsored segregation has stigmatized other groups in the past. (See, e.g., Riggle, Thomas, and Rostosky, *The Marriage Debate and Minority Stress* (2005) 38 Political Science & Politics 221.) Sociologists define stigmatized persons as "possess[ing] an attribute that is deeply discrediting" such that they are "viewed as less than fully human because of it." (Ainlay, *Stigma Reconsidered*, in *the Dilemma of Difference: A Multidiscriplinary View of Stigma* (1986) at p. 3 [citing Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963)].) It is clear from the historic discrimination against gay men and lesbians that many in society view being gay as "deeply discrediting." (*Cf.* Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context* (2004) 79 N.Y.U. L.Rev. 803, 817 (hereafter Lenhardt).) Relegating same-sex couples to a different legal regime separates lesbians and gay men from the rest of the society and reinforces preexisting notions that gay men and lesbians are "different"

from—and inferior to—the heterosexual majority.[2] (See *In re Opns. of the Justices to the Sen.*, *supra*, 802 N.E.2d at p. 570) [holding that requiring same-sex couples to enter into the separate and distinct institution of civil unions relegates them "to second-class status"].)

Moreover, the dehumanizing effects of providing for a separate (or "parallel") institution of recognizing the committed relationships of gay men and lesbians cannot be underestimated. Few would dispute the centrality of marriage in our society. By denying same-sex couples "one of the basic civil rights of man, fundamental to our very existence," *Loving v. Virginia* (1967) 388 U.S. 1, 12, the State sends a message to gay men and lesbians that they and their relationships are not worthy of the state's highest and most respected recognition of a committed relationship. Similar to the stigmatization of persons of color that resulted from the prohibition against interracial marriage, the prohibition against marriage by same-sex couples results in the stigmatization of gay men and

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[2] Social scientists have found that the stigmatization of a group occurs in four phases. First, a particular characteristic is identified and used to distinguish individuals. This trait then becomes associated with negative stereotypes, which are then used to justify the separation of individuals with that trait from the rest of society. Once the group is separated, the dominant group can discriminate against that group on the basis of the trait and the accompanying stereotypes. (See Link and Phalen, *Conceptualizing Stigma* (2001) 27 Annual Review of Sociology 363.) Barring same-sex couples from getting married operates to increase stigma by furthering the separation of individuals, reinforcing stereotypes, and justifying other discrimination.

lesbians.

Moreover, the effects of the exclusion of gay men and lesbians from the institution of marriage are felt not just by same-sex couples who wish to marry. Rather, they are felt by all gay men and lesbians who see how people who share their sexual orientation are treated, as well as by the rest of society, which observes how the State views the relationships of gay men and lesbians. Just as it should have been no answer to the claim in *Plessy v. Ferguson* that the stigma associated with segregated rail cars was "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it," *supra,* 163 U.S. at p. 551, neither is the stigma associated with domestic partnership the result of the perceptions of gay men and lesbians themselves. Rather, as courts have universally recognized since *Brown*, stigmatization is inherent in the act of separation itself.

2. The exclusion of same-sex couples from marriage encourages discrimination against gay men and lesbians.

Moreover, the State's separation of gay men and lesbians into a separate institution from marriage must be understood in the context of the discrimination historically suffered by gay men and lesbians. (Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. Ill. L.Rev. 455, 500-501

["[S]egregation based on identity cannot be divorced from history or social meaning."].) Despite the California Supreme Court's recognition more than 50 years ago that gay men and lesbians need protection from discrimination, see, e.g., *Stoumen v. Reilly, supra,* 37 Cal.2d at p. 713, the California Reporter is replete with cases showing the persistence of anti-gay discrimination.[3] Any attempt by the state to segregate gay men and lesbians must be viewed through the lens of such discrimination, and will be perceived by gay men and lesbians as well as the rest of society as reflecting that history. The debate is thus not simply about who gets to use the "m word," but is rather about whether gay men and lesbians at last have an equal place in society.

Furthermore, the stigmatization of gay men and lesbians by the current separate but equal marriage scheme is more pernicious than private discrimination precisely because the segregation is state-sponsored. Courts long have recognized that when the State brings the full weight of

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[3] (See, e.g., *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 [country club refused equal membership benefits to same-sex partner of a member]; *Curran v. Mount Diablo Council of Boy Scouts* (1998) 17 Cal.4th 670 [Boy Scouts barred openly gay man from becoming assistant scout master]; *Gay Law Students Assn. v. Pacific Telephone and Telegraph Co.* (1979) 24 Cal.3d 458 [employer discriminated against gay job applicants]; *Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297 [National Guard fired employee on the basis of sexual orientation]; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338 [allegations of discrimination and harassment against lesbian school teacher]; *Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289 [restaurant refused to allow lesbian couple to sit in semi-private booth].)

its power to bear against a disadvantaged class, the resulting stigma is more severe than any arising from private discrimination. (See *Brown, supra,* 347 U.S. at p. 494.) "By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples." (*Lewis, supra*, 908 A.2d at p. 226 (Poritz, C.J., concurring in part and dissenting in part).) Without such government-imposed separation, many members of society would sooner come to understand that sexual orientation is a neutral trait, such as eye color or left-handedness, that is irrelevant in categorizing individuals and determining their legal rights.

By labeling same-sex couples as different and inferior, the current marriage regime instead makes sexual orientation a legally salient characteristic and provides "cover" for those who seek to separate and treat differently gay men and lesbians on the basis of their sexual orientation. When the State provides for separate and lesser treatment of their relationships, individuals who wish to discriminate against gay men and lesbians may logically conclude that it is permissible and, in fact, encouraged, to treat them and their relationships as inferior. (See *In re Opns. of the Justices to the Sen.*, *supra*, 802 N.E.2d at p. 570 [holding that requiring same-sex couples to enter into the separate and distinct institution of civil unions relegates them "to second-class status"].) Just as

criminalizing sexual conduct between same-sex couples was "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," *Lawrence v. Texas* (2003) 539 U.S. 558, 575, so too does barring gay men and lesbians from marriage lead to further prejudice. Although some private entities would no doubt continue to discriminate against gay people if same-sex couples are granted full marriage equality, that likelihood provides no justification for state-sponsored discrimination. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Palmore v. Sidoti* (1984) 466 U.S. 429, 433.)

In light of the history of discrimination against gay men and lesbians, the State has a duty not to endorse discrimination even tacitly by branding gay men and lesbians as second-class citizens unworthy of the same commitments, duties, and recognition the State affords heterosexual couples through marriage.

3. Negative stereotypes of gay men and lesbians are created and reinforced by the exclusion of same-sex couples from the institution of marriage.

Excluding same-sex couples from the right to marry also reinforces false stereotypes that same-sex relationships are less worthy, less stable, and less valid than heterosexual relationships. These stereotypes, in

turn, often form the basis for discrimination against gay men and lesbians. Moreover, by segregating gay men and lesbians, the State causes individuals to focus on gay men and lesbian's sexual orientation to the exclusion of other characteristics. As with segregation on the basis of race, by separating and hence stigmatizing gay men and lesbians, the individual's sexual orientation,

> and all the negative connotations generally imputed to it—eventually overshadows or 'eclipses all other aspects' of his or her self, becoming all that anyone sees. [Sexual orientation] becomes a sort of mask, a barrier that both makes it impossible for the stigmatized person's true self to be seen and fixes the range of responses that others will have to that person.

(Lenhardt, *supra,* 79 N.Y.U. L.Rev. at p. 819.) Thus, whenever gay men or lesbians disclose that they are in a domestic partnership, others are likely to see them *only* as gay—and treat them accordingly—rather than viewing them as full persons entitled to the same respect and dignity given to other members of society.

4. Sociological studies confirm the harmful effects of stigma and stereotype.

These negative effects of stigmatization are not unique to gay men and lesbians, and research has shown that in other groups, they can have debilitating effects. "[M]ost victims of stigma . . . tend to accept the

version of their identities imposed by the stigma," i.e., that they are less valued by society than those who are granted full legal rights. (Karst, *The Supreme Court 1976 Term Foreward: Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv. L.Rev. 1, 7 (hereafter Karst).) Sociologists have cataloged numerous harmful effects of stigma and stereotypes on racial minorities and women. For instance, many minorities may feel what sociologists refer to as "belonging uncertainty," in which "members of socially stigmatized groups are more uncertain of the quality of their social bonds and thus more sensitive to issues of social belonging." (Walton and Cohen, *A Question of Belonging: Race, Social Fit, and Achievement* (2007) 92 J. of Personality and Social Psychology 82, 82.) This belonging uncertainty causes members of the stigmatized group to question their ability to fit in with the rest of society when they desire to do so, and may cause them to view problems and frustrations as being caused by their stigmatized status rather than being a part of everyone's experience. This in turn leads to lesser academic and professional achievement. (*Id.* at p. 94.)

In addition, sociologists have observed evidence that minorities who feel stigmatized with respect to a particular characteristic show higher levels of performance pressure in situations in which the stigma seems to them to be relevant. (Brown and Day, *The Difference Isn't*

Black and White: Stereotype Threat and the Race Gap on Raven's Advanced Progressive Matrices (2006) 91 J. of Applies Psychology 979, 979.) For instance, women may perform worse on mathematics tests because of a belief that women are generally bad at math, while African American test takers may do poorly on verbal tests because of stereotypes that they are less intelligent than their white counterparts. (*Ibid* [citing numerous studies].) When told that the same test does not implicate the stereotype or stigma (such as telling test takers that it is not diagnostic of ability, or that men and women have performed equally well), women and minorities tend to perform the same as their white, male counterparts. (*Ibid*; see also Steele, *Thin Ice, "Stereotype Threat" and Black College Students* (Aug. 1999) The Atlantic Monthly p. 44 [describing research in this area].) Stigmatized groups can respond to this stereotype threat by either dismissing the characteristic being measured (*i.e.*, believing intelligence to be unimportant, or proficiency in mathematics not to be a worthwhile skill); disassociating from the group, which "oblige[s] one to abandon previously valued aspects of identity and sources of self-esteem;" or selectively disidentifying with those aspects of one's personality that are stigmatized. (See Pronin, Steele, and Ross, *Identity Bifurcation in Response to Stereotype Threat: Women and Mathematics* (2003) 40 J. of Experimental Social Psychology 152, 153.)

Moreover, because minority groups are accustomed to being rejected by society and are often the targets of discrimination, their members are prone to internalize this societal disapproval, suffering feelings of inadequacy. (See, e.g., Karst, *supra,* 91 Harv. L.Rev. at p. 6.) For gay men and lesbians, social scientists refer to these feelings as "internalized homophobia," which often accompanies the perception of stigma associated with being identified as gay or lesbian. (See Ross and Rosser, *Measurement and Correlates of Internalized Homophobia: A Factor Analytic Study* (1996) 52 J. of Clinical Psychology 15.) Internalized homophobia can give rise to a wide-range of psychological effects, including lowered self-esteem and depression. (Herek, *Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men* (1997) 2 J. of the Gay and Lesbian Medical Association 17.) Thus, whether the act of stereotyping and stigmatizing gay men and lesbians causes them to question whether they are in fact capable of entering into committed relationships, or discourages them from participating in other aspects of larger society, it is unacceptable for the state to impose this kind of harm.

C. Married Couples Enjoy Intangible Benefits in Their Individual Lives and in Their Relationships That the State Withholds From Domestic Partners.

Apart from the stigma wrongfully imposed upon gay and

lesbian individuals, same-sex couples are also denied the many intangible benefits that marriage bestows on heterosexual couples. As discussed above, see *supra*, at Section IV.A, the term marriage long has had a unique cultural significance, so much so that it has been accorded by courts the status of a "fundamental" right under the Constitution. (See, e.g., *Perez, supra,* 32 Cal.2d at p. 714; *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal.App.4th 1288, 1303-1304.) (See also Scott, *Social Norms and the Legal Regulation of Marriage* (2000) 86 Va. L.Rev. 1901 (hereafter Scott).) The significance of the universal understanding of marriage and the effect it would have for gay and lesbian relationships cannot be overstated.

1. Marriage provides a common framework that strengthens relationships.

As a result of the special significance of marriage in society, the institution has a signaling effect, altering how individuals in a marriage behave toward one another, and how society behaves toward those individuals, behavior which in turn strengthens those relationships. (See Adams and Jones, *The Conceptualization of Marital Commitment: An Integrative Analysis* (1997) 72 J. of Personality and Social Psychology 1177 (hereafter *The Conceptualization of Marital Commitment*).) The importance of this signaling effect is widely recognized by the law. Just as the signing of a contract signals to all parties the seriousness of obligations imposed by the contractual relationship, the fact that two individuals are

married sends important signals to the individuals in the relationship and to those who interact with them apart from any specific legal obligations that marriage entails. (Scott, *supra,* 86 Va. L.Rev. at p. 1917.)

Married persons and the general public understand how married individuals are supposed to behave toward one another: they are to be emotionally and financially supportive, honest, and faithful. Although married couples may modify their expectations and behavior in accordance with the realities of their actual relationship and events that are an inevitable part of the human experience, they benefit by starting from a common understanding of the core of a marital relationship, gleaned from a lifetime of observation of and experience with others who are married. Married individuals can thus more easily understand their respective duties in the relationship, even if they choose to alter them in some measure.

The mere fact of marriage also affects society's behavior toward the couple in a way that is not true for domestic partnership. Because marriage is universally recognized, married couples readily are treated in a manner that reflects their legal and social status. Spouses are immediately seen as family members whose relationship society respects and supports. Married people may come to take for granted how immediately their relationship is understood and respected. When they go into a bank to open a joint account, or check into a hotel, or apply for a

credit card or a telephone number, or jointly attend a parent-teacher conference, or accompany a child on a plane flight, there is no need for explanation or documentary proof of the familial relationship.

This common understanding and recognition of marriage strengthens relationships. Because couples have a shared understanding of their responsibilities toward one another, and because society supports and encourages that understanding, married individuals can more easily meet the expectations of their spouses and know they can depend on their spouses to do the same. And, because marriage is understood to be a lifetime commitment, couples may be more willing to work through difficult times in relationships, and are more likely to be encouraged to do so by their friends and families. While the shared ideal of marriage as a long-term obligation cannot itself save a troubled relationship, it can give support to individuals as they work through temporary difficulties, and encourage couples to persist in a relationship that will, in the long run, be satisfying and worthwhile to both individuals. (See, e.g., *The Conceptualization of Marital Commitment*, 72 J. of Personality and Social Psychology at p. 1192.)

That same support and encouragement is not automatically available to registered domestic partners. Because domestic partnerships are of such recent vintage and are expressly designed to signal that same-

sex relationships are less valued than heterosexual relationships, *Knight, supra,* 128 Cal.App.4th at p. 31, many people, even those who consider themselves to support same-sex couples and their relationships, do not consider the arrangement as serious a commitment as marriage. Domestic partnership cannot be as effective a marker of family relationships because there is also no universal meaning for the term. Different jurisdictions use the words in different ways; even in California the meaning of the phrase has evolved dramatically.[4] Because the term has no universally understood significance state to state, many people are unsure about the nature of the relationship. Domestic partners, in contrast to spouses, are often met with

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[4] For instance, the City of West Hollywood enacted the first domestic partnership ordinance in the mid-1980s and San Francisco has operated its domestic partnership registry since 1990. These essentially permit public acknowledgement of the intent of two individuals, regardless of their gender, to commit to caring for one another and to be responsible for one another's basic living expenses, with very little legal effect. In 1999, California established a statewide domestic partnership registry, which granted some benefits for certain state employees and permitted domestic partners to visit each other in the hospital. In 2001, the state expanded the list of benefits available to domestic partners, including the right to sue for wrongful death, the right to use sick leave to care for one's partner, and the right to use stepparent adoption procedures. In 2002, the legislature passed a series of six bills aimed at expanding the rights of domestic partners. Finally, in 2003, the legislature enacted Assembly Bill 205, which provided domestic partners with most of the rights and duties enjoyed by married couples. (See National Center for Lesbian Rights, *The Evolution of California's Domestic Partnership Law* (Sept. 5, 2007) <http://www.nclrights.org/site/DocServer/timeline-ab205_042307.pdf?docID=1265> [as of Sept. 24, 2007].) Only students of domestic partnership law in California have been able to determine what domestic partnership has meant at any given moment.

blank stares when they refer to their status. The concept and the words have no shared societal meaning, with the result that their familial relationship is not automatically accepted. Instead, domestic partners are left to explain the intricacies of state family law to friends and sometimes-hostile strangers alike. (See, e.g., Declaration of Jewelle Gomez ¶¶ 12–13; Rymer Decl. ¶ 11; see generally the declarations of the *Rymer* Respondents.)

As the Rymer Respondents have attested, the consequences of confusion can be significant. Hospitals often refuse to allow a same-sex partner to be by a loved one's side at the moment when the couple needs to be together most. Though they may be legally required to do so, doctors (both in and out of California) may not understand that a domestic partner is permitted to make medical decisions on behalf of an incapacitated partner; even if a doctor ultimately relents after the partner establishes his or her legal rights, precious time may have been lost. Employers may not be as understanding of an employee taking time off to care for her domestic partner; a family may not understand the level of commitment of a son for his domestic partner. Such discrimination and differential treatment would be far less likely if same-sex couples could accurately refer to themselves as "married" and as husband or wife, a vocabulary that is universally understood. In short, given society's lack of experience with domestic

partnerships, domestic partners are treated differently than married couples, even by those who are accepting of gay men and lesbians and their relationships.

2. Because of the hardships already faced by same-sex couples, denying them marriage is particularly harmful.

Denying gay and lesbian couples access to society's most supportive framework for relationships poses a daunting problem for gay and lesbian couples. Because of persisting homophobia, gay men and lesbians are already likely to have less social support than their heterosexual counterparts. (See Kurdek, *Differences Between Heterosexual-Nonparent Couples and Gay, Lesbian, and Heterosexual-Parent Couples* (2001) 22 J. of Family Issues 728.) This is especially the case, for example, in families in which being lesbian or gay is more likely to be seen as taboo and where marriage (as opposed to domestic partnership) would be an important validation of the relationship of a lesbian or gay relative. Further, the difficulties faced by gay men and lesbians may add additional pressure on a relationship, as the couple encounters and tries to deal with prejudice and discrimination. The stabilizing effect of marriage could help to counter these potentially destructive influences in a way that domestic partnership—which simply does not and cannot provide the same degree of validation and support—

cannot.

D. The Experience of Other States With Civil Unions Demonstrates That Domestic Partnership Is Not Equal to Marriage.

The experience of the four states that have enacted civil unions confirms that neither the couples that enter into them nor others in society view such unions as equal to marriage. In New Jersey, for instance, where that state's Supreme Court (over the dissent of three Justices who felt that only marriage could provide equality) gave the Legislature the option of providing civil unions or marriage to same-sex couples, few couples took advantage of the civil unions that were ultimately adopted. (Kelley, *Couples Not Rushing to Civil Unions in New Jersey*, N.Y. Times (Mar. 21, 2007) p. B1 (hereafter Kelley).) That same trend has held in other parts of the country as well. (Stone, *Some Say Civil Unions Dropping Off*, USA Today (Apr. 20, 2007) p. 3A.) For the most part, couples were waiting for the real thing: marriage. As Charles Paragian, who has been with his partner of 17 years put it, civil unions were "bread crumbs." "I don't want my children to learn to settle for anything. . . . It's a Jim Crow law, it's two separate water fountains, it's not equal, and we just don't agree with it." (Kelley, at p. B1.) According to Cindy Meneghin, who referred to civil unions as "the Bermuda Triangle of relationships" a civil union "doesn't have reality to people because you're not married. It is very hurtful and

degrading that we are not really full, equal citizens in our state." (*Ibid.*) A Connecticut couple has said how they "want all the trappings that go with the word. . . . When you walk in some place and say that you are married, that means something. What would we say, that we are civilized? Unionized?" (Medina, *Gay Marriage Suit Pushes Connecticut Into New Terrain*, N.Y. Times (May 13, 2007).) Some have felt so disappointed at receiving what they consider a "learner's permit" that they don't invite guests to their civil union ceremonies that seem so clearly inferior to marriage, with its rich history, ceremony, and meaning. (Russell, *Connecticut High Court Hears Same-Sex Marriage Case*, Boston Globe (May 15, 2007) p. 3B.)

Just as the couples entering into civil unions feel like second class citizens, they are often subjected to treatment as such, despite laws barring discrimination against couples in civil unions. In New Jersey, for instance, many individuals have found that their employers will not grant their partner the same benefits as they would another employee's spouse. "In the employment sector in particular, folks don't understand civil unions, and then when they come to understand what they are they find ways to disrespect them. After all, the state has said that these relationships aren't worthy of marriage." (Schwaneberg, *Gay Couples Find Obstacles on Benefits*, The Star-Ledger (Apr. 15, 2007) p. 21.) Because employers did

not understand what civil unions were, the New Jersey Department of Banking and Insurance had to issue bulletins telling employers that they were required to grant the same benefits to couples in civil unions as married couples. (*Ibid.*)

These experiences confirm the wisdom and central message of *Brown*: that separation of a class of citizens will inevitably lead to their being perceived and treated as inferior. Regardless of any formal legal equality, the use of separate institutions brands the excluded group as subordinate and encourages further discrimination against a class already subject to hostile treatment by society.

E. The California Legislature Has Recognized that Domestic Partnership Is Not the Same As Marriage and Does Not Meet the Requirements of the California Constitution.

Even while the California Legislature has been active in protecting the rights of gay men and lesbians, it has made clear that its provision of registered domestic partnerships does not provide same-sex couples with equality. To the contrary, while recognizing that registered domestic partnerships move California closer to providing lesbian and gay Californians with equal protection and due process, the legislature has found that only full marriage equality would comply with the California Constitution. In its findings and conclusions accompanying Assembly Bill 205, the act establishing the current regime of domestic partnership

benefits, the Legislature recognized "California's interests in promoting family relationships and protecting family members during life crises," including the families of gay men and lesbians. Even while acknowledging the importance of that goal, the Legislature conceded that the statute would not grant full equality to gay and lesbian couples: "This act is intended to help California *move closer* to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article I of the California Constitution...." (Italics added.) (Assem. Bill No. 205 (2002-2003 Reg. Session) § 1.)

Fulfilling its constitutional duty to ensure full equality for gay and lesbian citizens, on September 6, 2005, the California Legislature became the first in the nation to pass a law granting gay men and lesbians the right to marry. It is clear from the text of the bill, Assembly Bill 849, that the legislature understood that domestic partnership is not the equivalent of marriage, and that anything less violates the California Constitution:

> (f) California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantee of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians.

(g) California's discriminatory exclusion of same-sex couples from marriage harms same-sex couples and their families by denying those couples and their families specific legal rights and responsibilities under state law and by depriving members of those couples and their families of a legal basis to challenge federal laws that deny access to the many important federal benefits and obligations provided only to spouses. Those federal benefits include the right to file joint federal income tax returns, the right to sponsor a partner for immigration to the United States, the right to social security survivor's benefits, the right to family and medical leave, and many other substantial benefits and obligations.

(h) Other jurisdictions have chosen to treat as valid or otherwise recognize marriages between same-sex couples. California's discriminatory marriage law therefore also harms California's same-sex couples when they travel to other jurisdictions by preventing them from having access to the rights, benefits, and protections those jurisdictions provide only to married couples.

(i) California's discriminatory exclusion of same-sex couples from marriage further harms same-sex couples and their families by denying them the unique public recognition and affirmation that marriage confers on heterosexual couples.

(j) The Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners.

> (k) It is the intent of the Legislature in enacting this act to end the pernicious practice of marriage discrimination in California.

(Assem. Bill No. 849 (2005-2006 Reg. Session) § 3.) In vetoing the bill, Governor Schwarzenegger recognized that "lesbian and gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationships." Because he believed that article II, section 10 of the California Constitution required that voters approve the law, he did not sign it, instead referring the issue to the California courts. (See Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005).) Nevertheless, the legislature's conclusion that the current exclusion of same-sex couples from marriage is inadequate is entitled to deference. (See *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 823.) Indeed, the Legislature has just this term enacted another bill that would permit same-sex couples to marry, see Assembly Bill No. 43 (2006-2007 Reg. Session), an indication of its conviction that prohibiting same-sex couples from marrying violates the California Equal Protection Clause and is the wrong policy for gay men and lesbians, their families, and for all Californians.

V. CONCLUSION

Domestic partnership is not marriage. Just as so-called separate-but-equal treatment based on race or gender cannot truly be equal,

the oxymoron of a separate and inferior legal regime for recognizing loving, committed relationships deprives gay men and lesbians of equal rights and instead serves to isolate them and separate them from their heterosexual counterparts. While California has taken steps toward guaranteeing equality for gay men and lesbians, separate and unequal recognition of same-sex relationships through domestic partnership—a regime designed to extend particular legal rights on a piecemeal basis while ultimately maintaining separation—is constitutionally deficient.

The exclusion of same-sex couples from the right to marry fosters division and prejudice. It prevents gay men and lesbians from participating in a social institution universally recognized as fundamental to society, and deprives same-sex couples of the full support of society in maintaining their relationships. Whatever the legal benefits of domestic partnership, it is not equivalent to marriage and never can be. The effort to maintain marriage as the exclusive province of heterosexual couples is constitutionally defective. This nation's courts, and especially this State's courts, repeatedly have rejected governmental regimes that provide a class of people unequal treatment before the law. This Court should do no less here. It should grant gay men and lesbians the right to marry, and declare that they and their families are entitled to the same respect, support, and love that society provides to its other members.

DATED: September 26, 2007

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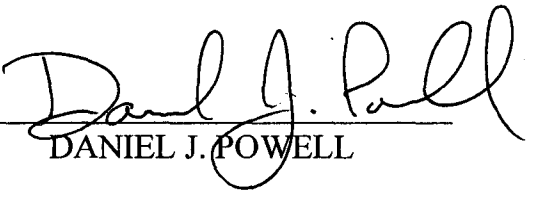
By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), counsel for *amici curiae* hereby certifies that the number of words contained in this brief, exclusive of those materials not required to be counted, is 12,489, as calculated using the word count feature of the computer program used to prepare this brief.

DATED: September 26, 2007

RESPECTFULLY SUBMITTED,

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PROOF OF SERVICE

I, Lori A. Nichols, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94105.

On September 26, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION AND [PROPOSED] *AMICUS* BRIEF

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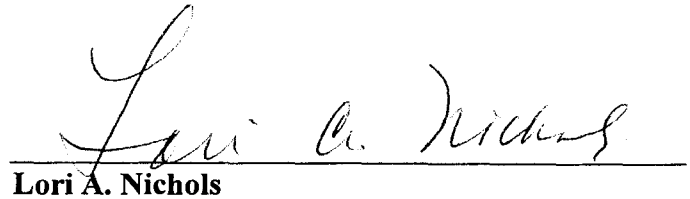

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San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
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San Francisco Superior Court Case No. 429548
Court of Appeal Case No. A110463

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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San Francisco Superior Court Case No. CGC 04-428794
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