Case No. S147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF ALL RESPONDENTS

TO THE HONORABLE RONALD D. GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 8.520 of the California Rules of Court, the Anti-Defamation League, the Desert Pride Center, Lighthouse Community Pride Center, the Los Angeles Gay and Lesbian Center, the Sacramento Gay and Lesbian Center, the San Diego Lesbian, Gay, Bisexual and Transgender Community Center, and the San Francisco LGBT Community Center respectfully request leave to file the accompanying brief of amicus curiae in support of Respondents.

STATEMENT OF INTEREST OF AMICI CURIAE

Applicant Anti-Defamation League ("ADL") was founded in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, it is one of the world's leading civil and human rights organizations combating all types of prejudice, discriminatory treatment and hade. ADL has filed amicus briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, including many of the United States Supreme Court's landmark cases in the area of civil rights and equal protection. Drawing upon the lessons of history, the ADL strongly objects to laws that single out same-sex couples for discrimination.

Applicant Los Angeles Gay and Lesbian Center ("Los Angeles Center") provides a broad array of services for the LGBT community of Los Angeles. The Los Angeles Center offers legal, social, cultural, and educational services, and provides unique programs for seniors, families and youth, including a 24-bed transitional living program for homeless

youth. The Los Angeles Center's Family Services Program provides support, education, advocacy and an array of social and educational programming to LGBT parents and their children, as well as to prospective parents, singles and couples interested in creating a family. Examples of activities and services include family days, support groups for LGBT parents, hosting meetings of the Los Angeles Unified School District's LGBT Parent Advisory Group, and organizing family retreats. The Los Angeles Center's primary goal is to build a stronger community, one family at a time. As a result of its extensive involvement in the lives of same-sex couples and their families, the Los Angeles Center is keenly aware of the difficult decisions same-sex couples must make with regard to protecting their relationships, as well as the burdensome trade-off unique to same-sex couples who must choose between legal protections and informational privacy.

Applicant Sacramento Gay and Lesbian Center ("Sacramento Center") serves same-sex couples and LGBT persons in the City and County of Sacramento. Founded in 1986, the Sacramento Center is the heart of Sacramento's LGBT community. The Sacramento Center sponsors community events, provides meeting space for LGBT-related organizations and hosts programs for same-sex families. Especially in light of recent hate crimes affecting its community, the Sacramento Center is particularly concerned with the public disclosure of one's sexual orientation required by the marriage ban and the domestic partnership scheme it has necessitated.

Applicant San Diego Lesbian, Gay, Bisexual and Transgender Community Center ("San Diego Center") serves the LGBT community of San Diego by providing activities, programs, and services that create community, empower community members, provide essential resources, advocate for civil and human rights, and embrace, promote and support the cultural diversity of the San Diego LGBT community. The San Diego

Center sponsors Family Matters, the LGBT parenting group of San Diego, a program which serves over 1,000 families. The San Diego Center assists same-sex households with adoption, hosts infant and toddler playgroups and childcare, and conducts parenting workshops. The San Diego Center also provides referrals to social and legal services providers. It is a goal of the San Diego Center, through its Marriage Equality and Education Project, to educate all Californians on issues of marriage equality and the rights of same-sex couples, as well as to advocate for full marriage rights.

Applicant San Francisco LGBT Community Center ("San Francisco Center") provides San Francisco with a vast array of programs and services for LGBT people, their friends and families. The San Francisco Center serves tens of thousands of LGBT persons in the San Francisco area and particularly caters to same-sex couples with families. The San Francisco Center's Children, Youth, and Families Programs specifically are designed to meet the needs of LGBT parents in handling both the common challenges of parenting and the specific challenges of parenting in the face of the social, economic and legal barriers they face as LGBT people. Among these barriers are the Family Code's marriage restrictions and the risks associated with public disclosure of one's sexual orientation through domestic partnership registration. The San Francisco Center is deeply concerned with the restrictions placed on marriage and is eager to see those restrictions overturned for the benefit of its constituents.

Applicant Billy DeFrank LGBT Community Center ("Billy DeFrank Center") provides community, leadership, advocacy, support and services to Silicon Valley's lesbian, gay, bisexual and transgender ("LGBT") people and allies. Founded in 1981 in response to the repeal of local laws that prohibited discriminatory housing practices, the Billy DeFrank Center provides a wide range of services to same-sex couples and their families, including recreational activities, public forums, educational venues, support

groups and senior services. It is the Billy DeFrank Center's mission to support LGBT families and advocate for laws that protect them.

Applicant The Gay and Lesbian Center of Greater Long Beach ("Long Beach Center") was founded in 1977 and serves the Greater Long Beach community. The Long Beach Center serves over 21,000 people per year and provides an array of services including support groups, youth services, legal assistance, employment referrals, rental and roommate referrals, a hate crimes hotline, mental health referrals, women's health programs, cultural and social activities, educational forums, and HIV prevention and support programs. The Center advocates on behalf of same-sex couples and their families through the Marriage Equality Project.

Applicant Desert Pride Center serves the LGBT residents of the Coachella Valley, which includes Palm Springs. Desert Pride Center assists and supports same-sex couples and their families and conducts community education and outreach. It is Desert Pride Center's mission to encourage LGBT individuals to celebrate the full diversity of their lives by providing services, education, cultural events and activities to all members of the community. Desert Pride Center has continuously advocated for increased protection of same-sex couples and their families as such protections are a necessary part of promoting the wellness of the LGBT community.

Applicant Lighthouse Community Pride Center serves same-sex couples and their families in Hayward through advocacy, community outreach and providing family services. Marriage rights would provide crucial protections for members of the Lighthouse Community Pride Center and would permit same-sex couples in the Hayward community to live their lives without fear of the consequences of disclosing their sexual orientation on a publicly-available domestic partnership affidavit.

Applicant The Pacific Center, which serves the East Bay and Greater Bay Area, was founded in 1973 in response to a brutal anti-gay hate crime committed in Oakland. The Pacific Center supports same-sex couples and their families by providing social events, educational programs, counseling and senior citizen programs. The Pacific Center strongly advocates on behalf of gay men and lesbians, as well as same-sex couples and families.

Applicant Stanislaus Pride Center serves the LGBT community of the City of Modesto, as well as the counties of Stanislaus, Calaveras, Merced, San Joaquin, and Tuolumne. The Stanislaus Pride Center was founded in 2005 in order to provide a resource "hub" for the LGBT community in a region of California that historically has been hostile to LGBT persons. The Stanislaus Pride Center is concerned that the marriage ban relegates same-sex couples to a system in which they must repeatedly disclose their sexual orientation in everyday situations for no good reason, and that the Domestic Partnership Registry provides a convenient means of targeting LGBT persons for harassment and violence. This is of particular concern to residents of less LGBT-friendly parts of the State such as Stanislaus County.

THE ACCOMPANYING BRIEF WILL ASSIST THE COURT IN DECIDING THIS MATTER

This brief will assist the Court in deciding this matter by addressing two serious constitutional deficiencies in California's current dual system of recognizing committed relationships. First, the dual system of recognizing committed relationships unconstitutionally conditions marriage upon surrender of critical aspects of the right to autonomy. Second, by sorting couples into the separate categories of "marriage" and "domestic partnership," the dual system unconstitutionally requires members of same-sex couples to publicly disclose their sexual orientation in innumerable

situations in which sexual orientation and the sex of one's partner are irrelevant. Such disclosures subject members of same-sex couples to potential discrimination, harassment and violence. Both of these burdens, neither of which may be the price of legal recognition of committed relationships, would be alleviated by uniform recognition of marriage.

The parties have not thoroughly briefed the issues raised in this brief. Furthermore, the issues have not been briefed from the unique perspective of Applicants, who advocate every day on behalf of same-sex couples and their families, provide services to them, assist them in raising their children, and witness the effects of hatred and violence directed at them.

For these reasons, Applicants respectfully request leave to file a brief as amicus curiae in support of Respondents.

Dated: September 25, 2007

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INTRODUCTION

Family Code sections 300 and 308.5 are incompatible with the autonomy and informational privacy protections contained in the Privacy Clause of article 1, section 1 of the California Constitution.[1] For gay men and lesbians, the current dual system of recognizing committed relationships unconstitutionally conditions marriage upon surrender of critical aspects of the right to autonomy. Further, by sorting couples into the separate categories of "marriage" and "domestic partnership," the dual system unconstitutionally requires members of same-sex couples to publicly disclose their sexual orientation in innumerable situations in which sexual orientation and the sex of one's partner are irrelevant. Both of these burdens, neither of which may be the price of legal recognition of committed relationships, would be alleviated by uniform recognition of marriage.

The Family Code unconstitutionally conditions marriage upon surrender of the Privacy Clause right to pursue familial relationships with persons of the same sex. It is settled law that when the State extends a right or benefit, it must not condition that right or benefit upon surrender of the right to autonomy without substantial justification. Such conditions are subject to heightened scrutiny and the State must show that there are no less restrictive means available. Here, the marriage restriction must be subjected to such heightened scrutiny because it penalizes Californians for exercising their privacy right to form consensual familial relationships with persons of the same sex. This Court addressed a similar situation in *Committee to Defend Reproductive Rights v. Myers* in which the State

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[1] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

conditioned Medi-Cal funding upon surrender of the right to reproductive freedom. The State could not justify its interference with autonomy in *Myers* and it cannot do so here.

This Court would not abide a dual system of family law under which couples whose members were of different races or religions were relegated to a status under which they were required, as a condition of family recognition, to register as "interracial partners" or "interfaith partners." Even if registered partners were entitled to the same statutory and common law rights as married persons, such partners still would carry with them, by virtue of their separately-named statuses, a marker of the race or religion of their spouse. Registered partners would be required in numerous interactions with government or private actors to indicate the race or religion of their partners even where race or religion are irrelevant to the interaction, or even where it would be illegal for race or religion to be taken into account.

In the same way, domestic partnerships are constitutionally inferior to marriage because they impair informational privacy. Domestic partnership requires members of same-sex couples to repeatedly and permanently "out" themselves when they complete government applications or documents, request public benefits, provide payroll information to employers, seek loans or respond to juror questionnaires. Repeatedly, on paper and over the Internet, same-sex couples must check a "domestic partnership" box, one reserved primarily for gay men and lesbians, and thereby publicly declare their sexual orientation. Appellants' and the Court of Appeal's dismissal of this issue as "largely symbolic" entirely misses the point. The demarcation of difference that California's dual system of family law imposes upon members of same-sex relationships is a form of public stigmatization and violates the Privacy Clause. Such demarcation renders domestic partners unable to limit

disclosure of sexual orientation to those contexts in which such disclosure is necessary, safe and appropriate.

Control over dissemination of information is a critical part of what Californians intended to protect when enacting the Privacy Clause. Every Californian is entitled to exercise this informational privacy right regardless of sexual orientation. One need look no farther that the Attorney General's statistics on hate crimes motivated by knowledge or perception of a victim's sexual orientation (described below) to understand why control over dissemination of such information is vital. Uniformly applying the status "marriage" to committed relationships would restore to members of such relationships control over the contexts in which those individuals must disclose their sexual orientation. Clearly, certain contexts would require a same-sex spouse to mention the name or sex of his or her spouse. However, those contexts would be limited to the ones in which heterosexual couples today reasonably are required to reveal such information.

To be clear, forced disclosure is objectionable not because there is anything wrong with being in a same-sex relationship, or because one ought to hide one's sexual orientation. Rather, what is objectionable (and what disqualifies domestic partnership from substituting for marriage) is the requirement that domestic partners disclose their sexual orientation every time they identify or describe their relationship's legal status – just as it would be objectionable to require persons in interracial or interfaith marriages to refer to their relationships by a distinct legal term.

Respondents are entitled to marry, and relegation of same-sex couples to a stigmatizing alternative contravenes article I, section 1 of the California Constitution.

ARGUMENT

I. THE MARRIAGE RESTRICTION UNCONSTITUTIONALLY CONDITIONS MARRIAGE UPON NONASSERTION OF THE RIGHT UNDER THE PRIVACY CLAUSE TO PURSUE CONSENSUAL FAMILIAL RELATIONSHIPS WITH PERSONS OF THE SAME SEX

The defense of the marriage ban offered by Appellants and the Court of Appeal turns on the contention that the ban does not interfere with the ability of Californians to enter into same-sex relationships without interference from the State. (State's Br. at pp. 65-66 [quoting Opn. at pp. 47-48].) That is the wrong analysis under California constitutional principles.

Under settled California law, the State may not condition receipt of a public right or benefit upon an individual's nonassertion of a constitutional right, unless there is a compelling need to do so. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213; *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 270.) That restriction on the State's power applies to the legal status of marriage. Family Code sections 300 and 308.5 impermissibly condition marriage upon nonassertion of the right to pursue and maintain "consensual familial relationships" with persons of the same sex, an "interest fundamental to personal autonomy." (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34.) The restrictive definitions contained in Family Code sections 300 and 308.5 therefore are subject to heightened scrutiny, which they cannot withstand.

A. This Court Should Apply Heightened Scrutiny to the Restrictive Definition of Marriage, Which Plainly Conditions Marriage, a Public Right and Benefit, upon Nonassertion of the Privacy Clause Right to Form Consensual Familial Relationships with Persons of the Same Sex

Respondents correctly assert that State recognition of marriage is a right, subject to compliance with consanguinity restrictions and age requirements. (Resp. Supp. Br. at pp. 19-29.) Further, the legal status of marriage is a benefit as it confers advantage and promotes well-being. (See Black's Law Dict. (7th ed. 1999) pp. 150, cl. 2 - 151, cl.1 [defining "benefit" as "advantage; privilege"]; Webster's Third New Int'l Dict. (1981) p. 204, cl. 1 [defining "benefit" as "something that guards, aids or promotes well-being"].) This Court repeatedly has held that when receipt of such a public right or benefit is made contingent upon surrender or nonassertion of a constitutional right, that condition is unconstitutional unless it passes heightened scrutiny and the accompanying three-part test. (*Robbins v. Superior Court*, *supra*, 38 Cal.3d 199, 213 [applying heightened scrutiny and three-part test to statute requiring surrender of the autonomy right to choose one's living arrangements in exchange for general assistance benefits]; *Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 257 [applying heightened scrutiny and three-part test to statute conditioning the receipt of Medi-Cal benefits upon surrender of the right to reproductive choice]; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 501 [applying heightened scrutiny and three-part test to restrictions placed on freedom of expression in exchange for public employment]; *Danskin v. San Diego Unified School Dist.* (1946) 28 Cal.2d 536, 546-46 [applying heightened scrutiny and three-part test to restriction of freedom of expression in exchange for access to classrooms for after-school meetings].)

The restrictive definition of marriage triggers the unconstitutional conditions framework. Family Code section 300 declares: "Marriage is a personal relation arising out of a civil contract between a man and a woman. . . ." Marriage therefore is unavailable to those who pursue family relationships with persons of the same sex. However, the Privacy Clause indisputably guarantees the right to pursue such relationships. (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th 1, 34 [noting that the freedom to pursue "consensual familial relationships" is "an interest fundamental to personal autonomy," and that the State must demonstrate a "compelling interest" before restricting this freedom]; *Robbins v. Superior Court*, *supra*, 38 Cal. 3d 199, 212 [explaining that privacy "'is a fundamental and compelling interest [that] protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose'" (quoting ballot pamphlet for 1972 amendment)].)

Because the restrictive definition of marriage requires nonassertion of the right to form consensual familial relationships with persons of the same sex, this Court must apply heightened scrutiny and the accompanying three-part test. As discussed below, the restrictive definition of marriage fails that test.

B. The Restrictive Definition of Marriage Cannot Pass Heightened Scrutiny

Because marriage is conditioned upon nonassertion of the right to enter into a consensual familial relationship with a person of the same-sex, "the 'government bears a heavy burden of demonstrating the *practical necessity* for the limitation.' (*Bagley* v. *Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 505.)" (*Robbins v. Superior Court*, *supra*, 38 Cal.3d 199, 213, italics added.) Courts apply a three-part test to determine

whether the government has met this heavy burden. The government must demonstrate:

> (1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from the imposition of the condition manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means that could maintain the integrity of the benefits program without severely restricting constitutional rights. . . .(*Committee to Defend Reproductive Rights* v. *Myers, supra*, 29 Cal.3d 252, 265-266.)

(*Robbins v. Superior Court, supra*, 38 Cal.3d 199, 213.)

The marriage condition fails at each stage of this test. First, the government cannot – and has not even attempted to – identify any purpose of marriage that would make it uniquely suited to heterosexual couples or that otherwise would justify the exclusion of same-sex couples. (See State's Br. at pp. 7-10).[2] The only justifications offered by the State – deference to tradition and to majority preference – are unrelated to the purpose of marriage and merely re-state the restrictive definition at issue. This Court has noted:

> Unquestionably, there *is* a strong public policy favoring marriage. (*Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 9.) This policy serves specific interests "not based on

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[2] Appellants Campaign for California Families (hereinafter "Campaign") and Proposition 22 Legal Defense and Education Fund (hereinafter "Fund") also argue that excluding same-sex couples from marriage somehow furthers the state's interests in the welfare and best interests of children. (See Campaign's Answer Brief on the Merits at pp. 65-72; Fund's Answer Brief on the Merits at pp. 42-49). The Attorney General and the Governor rightly have disavowed this purported rationale as utterly inconsistent with the established public policies of this State. (See Attorney General's Answer Brief on the Merits at p. 9; Governor's Answer Brief on the Merits at p. 30, n. 22.)

> anachronistic notions of morality. The policy favoring marriage 'is rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'" (*Laws v. Griep* (Iowa 1983) 332 N.W.2d 339, 341.)

(*Koebke v. Bernardo Heights* (2005) 36 Cal.4th 824, 844, original italics [requiring country club to recognize member's domestic partner].) This Court further observed that recognizing same-sex relationships serves the same public purposes as recognizing marriage. (*Id.* at 844-846.) The State therefore falls far short of demonstrating the "practical necessity" of the marriage exclusion in relation to the purpose of marriage. (*Robbins v. Superior Court*, *supra*, 38 Cal.3d 199, 213.) As in *Myers*, the restriction here "bears no relation whatsoever" to the fundamental purposes of the Family Code; the State has failed to carry its burden. (*Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 271.)

The State likewise cannot pass the second stage of the test. The State has not demonstrated that the value accruing to the public from the imposition of the marriage restriction manifestly outweighs any resulting impairment of the constitutional right to pursue consensual familial relationships with persons of the same sex. This second stage of the test requires the Court:

> [T]o realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further the court must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is threatened or impaired, as a practical matter, by the specific statutory restrictions or conditions at issue.

(*Id* at 273-74.) Here, as explained above, the State has not demonstrated any legitimate public interests related to any purpose of the marriage statute that is served by the marriage exclusion. A "realistic assessment" of the restrictive Family Code definition reveals that it is based on nothing more than bare prejudice against same-sex couples. Because bare prejudice can never be a legitimate state interest, *Romer v. Evans* (1996) 517 U.S. 620, 634, the State's interest in maintaining this discriminatory exclusion carries little or no weight. But even if the State had demonstrated any legitimate interest served by the exclusion, this Court should conclude that the burden upon same-sex couples vastly outweighs that interest. The importance of the right to marry is indisputable. (*Perez v. Sharp* (1948) 32 Cal.2d 711, 714 [marriage "is a fundamental right of free men"].) Further, "as a practical matter" the current law completely bars same-sex couples from marriage and completely deprives them of the enormous intangible benefits and public validation that only marriage gives. (See *Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 271.) Moreover, access to marriage by same-sex couples would not threaten or impair the right of heterosexual persons to marry and would not harm marriages between persons of the opposite sex in any way.

Finally, the third stage of the test "plays no role" as the State has not identified any legitimate interests served by the marriage exclusion. (See *Com. to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d 252, 283.) Moreover, even if the Court were to accept that the State's asserted interest in "tradition" were legitimate, even despite the absence of any relationship to the substantive purposes of marriage or to any other substantive underlying rationale, excluding same-sex couples from marriage is not the least restrictive means of protecting any legitimate State interest in tradition. Rather, the State can further its interest in marriage as a valued tradition by making the institution of civil marriage available on an equal