S147999

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES

BRIEF IN SUPPORT OF RESPONDENTS CHALLENGING THE MARRIAGE EXCLUSION BY AMICUS CURIAE THE NATIONAL GAY AND LESBIAN TASK FORCE FOUNDATION

AFTER DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION THREE
Nos. A110449, A110450, A110451, A110463, A110651, A110652

San Francisco Superior Court Nos. JCCP 4365, 429539, 429548, 504038
Los Angeles Superior Court No. BS088506
Honorable Richard Kramer, Judge

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice and Associate Justices:

Under Rule 8.200(c) and 8.520(f) of the California Rules of Court, the National Gay and Lesbian Task Force Foundation respectfully requests permission of this Court to file the accompanying amicus curiae brief in support of Respondents Challenging the Marriage Exclusion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

The National Gay and Lesbian Task Force Foundation (the "Task Force"), founded in 1973, is the oldest national lesbian, gay, bisexual and transgender (LGBT) civil rights and advocacy organization. With members in every U.S. state, the Task Force works to build the grassroots political power of the LGBT community by training state and local activists and leaders; conducting LGBT-related research and data analysis; and organizing broad-based campaigns to advance pro-LGBT legislation and to defeat anti-LGBT referenda. As part of a broader social justice movement, the Task Force works to create a world in which all people may fully participate in society, including the full and equal participation of same-sex couples in the institution of civil marriage.

THE ASSISTANCE AFFORDED BY THE PROPOSED AMICUS BRIEF

The Task Force believes that its views about the state's distinction between marriage and domestic partnership can supplement, and not duplicate, the arguments already before the Court in these consolidated appeals.

Specifically, the Task Force draws on its extensive knowledge of civil rights law and advocacy to make two arguments that are not the full focus of any other brief yet submitted. This amicus brief argues that the state's dual framework for recognizing relationships violates the California Constitution's equal protection guarantee in two ways: (1) it denies same-sex couples access to marriage's unique social value; and (2) it expresses an impermissibly disfavoring message about the worth of same-sex couples relative to different-sex couples. The Task Force concurs with other arguments made by Respondents Challenging the Marriage Exclusion, and their amici, but does not repeat those arguments here.

Because the Task Force represents the interests of many Californians whose well being could be adversely affected by the Court's decision in this case, and because it has developed an argument that is not made in this way in briefing already before the Court, the Task Force wishes to assist the Court in its consideration of the important questions presented. Accordingly, the Task Force requests leave to file the accompanying brief amicus curiae.

The proposed brief follows this application.[1]

Dated: September 26, 2007

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[1] The Task Force appreciates the invaluable assistance of the students of Columbia Law School's Sexuality and Gender Law Clinic, including Amos Blackman and Eddie Jauregui.

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I.
INTRODUCTION AND SUMMARY OF ARGUMENT

By reserving marriage to heterosexuals while providing a separate relationship status to lesbian and gay couples, the state violates the equal protection guarantee of the California Constitution in two distinct ways: (1) it denies same-sex couples access to marriage's unique social value, and (2) it expresses an impermissibly disfavoring message about the worth of same-sex couples relative to different-sex couples.[2]

As to the first point, the constitutional problem arises from the state's role as gatekeeper of legally recognized marriage: Its rules allow some couples to access marriage's unique social value while barring other similarly situated couples from doing so. This is so regardless of whether the state created marriage's social value. Thus, the possibility that the state may not have given marriage *all* of its current social value does not render the state's marriage rules any less unconstitutional. Indeed the state can no more abdicate constitutional responsibility by maintaining that it did not create marriage's social value than it could justify separating shoreline access for same-sex and different-sex couples on the ground that it had not given California's beaches their unique social value.

The point is not that gay and lesbian couples – or any couples, for that matter – have a constitutional right to a particular social value, just as

[2] Although this brief endorses the arguments of other briefs that domestic partnership and marriage do not provide equivalent tangible rights and benefits, it does not restate those points. Instead, the argument here assumes for the sake for argument that the two statuses have equivalent tangible value but does so to show that the State's distinction between them would be invalid even if the tangible benefits were actually equal.

neither women nor men have a right to the social benefits derived from attending a military training institute. (Cf. *United States v. Virginia* (1996) 518 U.S. 515 [116 S.Ct. 2264, 135 L.Ed.2d 735].) But when the state wholly controls a status that confers these types of benefits, it cannot deny them to a class of its citizens merely because society may have played a role in creating that unique value. (Cf. *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 176-77 [48 Cal.Rptr.2d 106, 906 P.2d 1260] [recognizing that constitutional due process protection reaches factors, such as concerns with dignity and alienation, that derive their value from society rather than government].)

Second, the state's unusual effort to create a separate legal institution (domestic partnership) to replicate the functions – but not the social meaning – of an existing one (marriage) inescapably and impermissibly denigrates same-sex couples. It does this because the distinction between marriage and domestic partnership conveys that the couples in each status differ for purposes of state recognition. Yet, at the same time, the state recognizes that the couples are similarly situated, treating them as functionally indistinguishable for purposes of rights and benefits. (See *In re Marriage Cases* (2006) 143 Cal.App.4th 873 [49 Cal.Rptr.3d 675, 724 n.33], review granted Dec. 20, 2006, S147999 [149 P.3d 737, 53 Cal.Rptr.3d 317].) Consequently, there can be no plausible, non-arbitrary explanation for creating a new legal status that is the material equivalent of an existing status other than to express that same-sex couples are not worthy of the status of marriage even if they are otherwise worthy of equal

treatment. Well-settled equal protection jurisprudence forbids precisely this sort of status denigration.

Only by providing the opportunity for the same legal recognition to both California's same-sex and different-sex couples can the state remedy these constitutional defects.

II.
ARGUMENT

Undoubtedly, the state has provided its same-sex couples with valuable benefits through domestic partnership. If all the Constitution required of the state were that California provide "virtually all of the same rights" (*In re Marriage Cases*, *supra*, 143 Cal.App.4th at p. 719), and "move closer to fulfilling the promises of ... equality" (California Domestic Partner Rights and Responsibilities Act of 2003, Stats. 2003, ch. 421, § 1(a)), then perhaps the Family Code might survive Respondents' challenge. But the California Constitution does not have a "virtually equal protection" clause. Instead, the Constitution prohibits the state from "den[ying] equal protection of the laws" (Cal. Const., art. I, § 7), a guarantee unqualified by "substantially," "virtually," or "comparabl[y]" (*In re Marriage Cases*, *supra*, 143 Cal.App.4th at p. 719).

By providing different-sex couples access to marriage and withholding it from same-sex couples, the state has directly contravened this equal protection guarantee. Even if California's Family Code successfully granted all couples access to the same material benefits and obligations (which it does not, as Respondents and other amici in support of Respondents demonstrate), the distinction between domestic partnership

and marriage is nonetheless unconstitutional. The state's placement of different-sex couples on one side of the marriage line and same-sex couples on the other denies same-sex domestic partners the unique, particular value of marriage and denigrates their worth relative to different-sex married couples.

A. Because the State Wholly Controls Legal Entry to Marriage, It Is Constitutionally Liable for Excluding Same-Sex Couples from Access to Marriage's Unique Value.

The state misconceives the constitutional inquiry when it seeks to avoid liability for excluding same-sex couples from the valuable social connotations of marriage on the ground that it did not endow marriage with that benefit. Allocating the various sources of marriage's value is, as a constitutional matter, beside the point. Even if one makes the unreasonable assumption that the state's imprimatur has not added value to marriage, the constitutional problem remains because the state is actively exercising complete, and impermissibly selective, control over access to that socially valuable status.

Considering the state's monopoly over the licensing function in a different context may help to clarify. If we assume that being a lawyer carries social value beyond any of the lawyers' rights and obligations as set out by the state, the state cannot disclaim constitutional accountability for its rules regarding allocation of licenses to practice law. So, too, here. Even if marriage's social value derives from sources other than state sanctification, the state cannot avoid constitutional scrutiny when it puts itself in the position of allowing some couples but not others to marry.

1. *Marriage has immense social value.*

Little ink need be spilled establishing marriage's immense social value, as the state has conceded that value and briefs on both sides agree on the point. By the state's own reasoning, the label "marriage" is recognized by and is "important" to "millions of Californians." (Answer Br. of Governor Schwarzenegger at 1; see also Answer Br. of Attorney General at 45 ["Marriage ... is a social institution of profound significance to the citizens of this state"].); *Goodridge v. Dep't of Pub. Health* (2003) 440 Mass. 309, 322 [798 N.E.2d 941, 954-55] [describing marriage as an "esteemed institution" that "bestows enormous private and social advantages on those who choose to marry"].)

2. *The state, by exercising monopoly authority over legal marriage, wholly controls access to marriage's social value.*

In California, the decision to marry is left largely to private ordering. But marriage itself is not. Marriage is a legal status, administered by the state. As the Family Code establishes, "Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division." (Cal. Fam. Code, § 300.) Among other legal requirements, couples must obtain a license in advance of their marriage ceremony (Cal. Fam. Code, § 350), and go to court to challenge a marriage's validity (Cal. Fam. Code, § 309).

As a result of these and related rules, only those authorized by the state can access "marriage" and, therefore, marriage's socially valuable connotations. Unlike some other statuses, which can be obtained without state authorization, the state's exclusive monopoly over the entry into,

incidents of, and dissolution of marriage demonstrates the existence of state action. (Cf. *Flagg Brothers, Inc. v. Brooks* (1978) 436 U.S. 149, 158-60 [98 S.Ct. 1729, 56 L.Ed.2d 185] [describing the link between state action and exclusive governmental control over particular public functions].) Simply put, the state's monopolistic role as gatekeeper of marriage puts California in control of access not only to marriage's state-sponsored benefits but also to the uniquely valuable social connotations associated with marriage.

3. *Because the state controls access to marriage and, therefore, to marriage's social value, it cannot abdicate constitutional responsibility for its discriminatory access rules by attributing that value to society or "tradition."*

Well-settled law establishes that the state cannot avoid constitutional liability by claiming that private actors, rather than the state, are responsible for the injury complained of by a party.

As the United States Supreme Court explained in *Palmore v. Sidoti* (1984) 466 U.S. 429, 433 [104 S.Ct. 1879, 80 L.Ed.2d 421], "The Constitution cannot control ... 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." Similarly, in *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 542 [50 Cal.Rptr. 881, 413 P.2d 825], aff'd, (1967) 387 U.S. 369 [87 S.Ct. 1627, 18 L.Ed.2d 830], this Court refused to "close [its] eyes or [its] ears" to the state's role in facilitating private discrimination. So, too, in *Anderson v. Martin* (1964) 375 U.S. 399, 402 [84 S.Ct. 454, 11 L.Ed.2d 430], the United States Supreme Court rejected a state's use of its power to "induce[] ... prejudice" among private individuals at the polls. And likewise, in *Parr v. Municipal Court* (1971) 3 Cal.3d 861,

870 [92 Cal.Rptr. 153, 479 P.2d 353], this Court rejected the City of Carmel's attempt to drive out hippies – even though the city had endorsed private concerns and hippies had not traditionally gathered in Carmel.[3]

The state thus cannot, contrary to this settled law, invoke privately held views as the justification for its line-drawing and then claim, because the views are privately held, that it is constitutionally unaccountable for its role in allocating marriage's social connotations.

B. The Only Plausible Explanation for the State's Parallel Relationship-Recognition Bureaucracy Is to Signal the Inferiority of Same-Sex Couples' Relationships.

1. *The state concedes that same- and different-sex couples are similarly situated yet accords each a distinct relationship status.*

The state's position that same- and different-sex couples are similarly situated[4] makes it impossible for the state to explain the marriage/domestic partnership distinction based on any functional difference between the couples. (See Answer Br. for Governor Schwarzenegger at 30, fn.22 ["It has been suggested by some, for example, that same-sex relationships are less committed or stable than are opposite-

[3] Imagine, for example, that the state had authorized interracial domestic partnerships but not interracial marriages after *Perez v. Lippold* (1948) 32 Cal.2d 711 [198 P.2d 17]. (See Eskridge, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions* (2001) 64 Alb. L.Rev. 853, 870-71.)

[4] Answer Br. for Attorney General at 34 (noting that legislature has extended rights and responsibilities of marriage to same-sex couples); *id.* at 62 (stating that definition of the relationship between a married couple is the same as that for a same-sex couple in a domestic partnership); *id.* at 9 (stating that same-sex couples have the same rights as married couples to have and raise children).

sex relationships ... [and] that same-sex marriage would place children at risk. [T]his assertion is inconsistent with California's determination to extend to registered domestic partners the 'same rights, responsibilities, and benefits' as spouses"]; cf. *In re Marriage Cases*, *supra*, 143 Cal.App.4th at p. 724, fn.33 ["[T]he Attorney General takes the position that arguments suggesting families headed by opposite-sex parents are somehow better for children, or more deserving of state recognition, are contrary to California policy"].)

Put another way, by the state's own admission, the couples are similarly situated with respect to the Family Code, and any ways in which they may be dissimilarly situated outside of the family context are irrelevant to the inquiry at hand. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [127 Cal.Rptr.2d 177, 57 P.3d 654] [Under the Equal Protection Clause, the "initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated *for purposes of the law challenged*' [citations omitted]"], italics added.)

Yet the state treats the similarly situated couples differently by granting a different relationship status to each. For the vast majority of families,[5] the Family Code establishes domestic partnerships solely for same-sex couples (Cal. Fam. Code, § 297, subd. (b)(5)(A)), and marriage solely for different-sex couples (Cal. Fam. Code § 300).

[5] Some different-sex couples may also enter into a domestic partnership if one of the partners is over the age of 62. (Cal. Fam. Code, § 297, subd. (b)(5)(B).)

2. *History teaches that separation is usually undertaken impermissibly to denote inferiority.*

History teaches that the separation of a group from a larger community of citizens is almost invariably undertaken to "denote the inferiority of the group set apart" (Karst, Law's Promise, Law's Expression (1993) p. 185 (hereafter Karst)), and, when done for that reason, is impermissible.

The most salient illustration in American history is, of course, racial segregation, which was not a neutral, administrative device but rather a means to signal the inferibority of the minority group at issue. (Cf. *Plessy v. Ferguson* (1896) 163 U.S. 537, 560 [16 S.Ct. 1138, 41 L.Ed. 256] (dis. opn. of Harlan, J.) [describing segregation as premised on the belief that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens"], overruled by *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873]; *Loving v. Virginia* (1961) 388 U.S. 1, 7 [87 S.Ct. 1817, 18 L.Ed.2d 1010] [characterizing the state's miscegenation law as an "obvious[] ... endorsement of the doctrine of White Supremacy"].) Sex segregation was likewise used to reinforce perceptions of women's lesser status relative to men. (See, e.g., *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 725 & fn.10 [102 S.Ct. 3331, 73 L.Ed.2d 1090] [describing the history of gender-based discrimination as rooted in the idea that women were "innately inferior"].)

But inferences of inferiority from group-based classifications are not limited to racial and sex-based distinctions. Legally authorized distinctions

based on mental retardation and sexual orientation have also triggered judicial suspicion about the operation of "irrational prejudices" against a target group. (See *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 450 [105 S.Ct. 3249, 87 L.Ed.2d 313] [finding the separation of people with mental retardation from others rested on fears of and discomfort with that population] (hereafter *Cleburne*); *Romer v. Evans* (1996) 517 U.S. 620, 632 [116 S.Ct. 1620, 134 L.Ed.2d 855] [identifying animus from structure that separated and imposed distinct political rules on gay men and lesbians from others]; cf. Amar, *Attainder and Amendment 2: Romer's Rightness* (1996) 95 Mich. L.Rev. 203, 224 [arguing that "the laws at issue in both *Plessy* and *Romer* are about [the] untouchability and uncleanness" of the target group]; Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection* (1997) 45 UCLA L.Rev. 453, 487-88 [arguing that the Constitution "bar[s] the state from making a general pronouncement that gays and lesbians are 'unequal to everyone else'"].)

Since Reconstruction, courts have repeatedly held that legal separations, for purposes of diminishing a group's stature or otherwise implying group members' inferiority, violate constitutional guarantees of equality, even without regard to distribution of tangible benefits. (See *United States v. Virginia*, *supra*, 518 U.S. at p. 532 ["neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature"].) As the United States Supreme Court explained in *Heckler v. Mathews* (1984) 465 U.S. 728, 739 [104 S.Ct. 1387, 79 L.Ed.2d

646], "The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated" against but also includes a right to be free from stigma and "archaic and stereotypic notions." (See also *Strauder v. West Virginia* (1880) 100 U.S. (10 Otto) 303, 307-08 [25 L.Ed. 664]; *Brown v. Board of Education of Topeka*, *supra*, 347 U.S. at p. 494.)

3. *In this case, because the couples are functionally indistinguishable, their separation necessarily conveys the state's position that same-sex and different-sex couples are not of equal worth.*

"To understand the claim that a law harms a constitutionally protected interest, a court must pay attention to the environment in which a law operates." Karst, *supra*, at 182. Moreover, "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [Equal Protection Clause]." (See *Romer v. Evans*, *supra*, 517 U.S. at p. 633, quoting *Louisville Gas & Elec. Co. v. Coleman* (1928) 277 U.S. 32, 37-38 [48 S.Ct. 423, 72 L.Ed. 770].)

Here we have both. Inexplicably, the state has gone to the effort to duplicate an existing relationship-recognition bureaucracy *and*, then, maintain that the distinction is one without a difference.

The only possible explanation – other than complete and impermissible arbitrariness – can be concerns about equalizing the status of the two sets of couples. As the United States Supreme Court recognized in *United States v. Virginia*, *supra*, 518 U.S. at pp. 542-43, a common (and invalid) rationale for maintaining separate status is the fear that the

"traditional" institution's status will suffer if newcomers are admitted. (See also Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?* (2002) 30 Cap.U. L.Rev. 279, 286-87 [arguing that the maintaining a distinction between civil unions and marriage "deems [gays and lesbians'] lives so fundamentally inferior to or different from [heterosexuals'] that it would be deceptive or degrading to [heterosexuals] to have to participate in the same relationship institution"].)

Not surprisingly, the public commentary of Proposition 22's supporters reinforces that the measure's advocates intended to exclude same-sex couples from marriage precisely to avoid the message of full and equal inclusion in society – *the* great promise of equal protection – that would flow from granting lesbian and gay couples non-discriminatory access to marriage. (See, e.g., Worden, *SCV Newsmaker of the Week: William J. "Pete" Knight, State Senator* (Aug. 25, 2004) <http://www.scvhistory.com/scvhistory/signal/newsmaker/sg042504.htm> [as of Sept. 24, 2007] [interview with author of Proposition 22, claiming that allowing gays and lesbians to marry "deliberately trash[es]" the "institution"]; Answer Br. of Campaign for Calif. Families at 2 [stating that allowing same-sex couples to marry "will demolish ... the very institution" of marriage].)

But the broader point here is that, regardless of the position of Proposition 22's advocates, the message is inescapable: A law that separates a class but then purports to attach no meaning to that separation can be explained only as a message about the relative worth of groups on either side of the state-drawn line. And in this case, because a relationship-

recognition structure was in place and could have been used to recognize same-sex couples' relationships, the necessary conclusion from the creation of the parallel relationship track is that the same-sex couples are not worthy of the separate label (marriage) that attached to the original relationship-recognition status. (Cf. Anderson & Pildes, *Expressive Theories of Law: A General Restatement* (2000) 148 U.Pa. L.Rev. 1503, 1525 [arguing that an interpretation of law must "must make sense in light of the community's other practices, its history, and shared meanings"] (hereafter *Expressive Theories of Law*).)

As Justice Holmes long ago observed, "We live by symbols." (Holmes, *John Marshall*, in Collected Legal Papers (1920) p. 270.) By "preserving" marriage for heterosexuals, and granting to gays and lesbians the new status of "domestic partners," California thus impermissibly reinforces an unsupportable message of difference and unequal worth between its citizens.

C. Well-Settled Law Forbids the State From Signaling a Status Difference Between Same- and Different-Sex Couples.

In the equal protection context, courts have long rejected governmental efforts to signal a group's inequality, consistent with Justice Holmes's observation. This body of law includes instances when the classification – rather than inequality in tangible benefits – was the driving concern. As *Brown* stressed, intangible harms themselves can trigger an equal protection violation. (*Brown v. Board of Education of Topeka*, *supra*, 347 U.S at p. 493 [finding that, even where all tangible factors are made equal, segregated schools nonetheless violate the Constitution]; see also

Mississippi University for Women v. Hogan, *supra*, 458 U.S. p. 729 [holding that continuation of women-only nursing program harmed women because it perpetuated stereotypes about women's work]; cf. *Cleburne*, *supra*, 473 U.S. at p. 473 (conc. opn. of Marshall, J.) [denying equal housing opportunities to people with mental retardation reflected "a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community"].)

This concern with impermissible messaging as a consequence of government action can be seen in a variety of contexts. For example, in *Shaw v. Reno* (1993) 509 U.S. 630 [113 S.Ct. 2816, 125 L.Ed.2d 511], the Court rejected a state redistricting plan in part because the plan reinforced racial stereotypes and signaled to elected officials that they represented only a particular racial group. Likewise, in *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.* (1984) 545 U.S. 844, 860 [125 S.Ct. 2722, 162 L.Ed.2d 729], the Court barred a Ten Commandments display because of its "message to nonadherents that they are outsiders, not full members of the political community [internal citations and quotations omitted]." (Cf. *Regents of the University of California v. Bakke* (1978) 438 U.S. 265, 357-58 [98 S.Ct. 2733, 57 L.Ed.2d 750] (conc. and dis. opn. of Brennan, J.) [invoking the "cardinal principle that racial classifications that stigmatize – because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism – are invalid without more"].)

The underlying concern in the cases above, as here, is with the expressive harm "that results from the ideas or attitudes expressed through

a governmental action, rather than from the more tangible or material consequences the action brings about." (Pildes & Niemi, *Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances After* Shaw (1993) 92 Mich. L.Rev. 483, 506-07.) Even when these laws "inflict no material injuries on the target group," they are constitutionally infirm because they are "legal communications of status inferiority [that] constitute their targets as second-class citizens." (See *Expressive Theories of Law*, *supra*, 148 U.Pa. L.Rev. at pp. 1533, 1544; cf. Primus, *Equal Protection and Disparate Impact: Round Three* (2003) 117 Harv. L.Rev. 493, 567 [arguing that *Brown* "turned at least in part on the anti-egalitarian social meanings of the practices at issue"].)

Excluding lesbians and gay men from marriage exemplifies precisely this type of symbolic denigration. As Kenneth Karst has observed, proposals to legalize marriage for same-sex couples "are both supported and opposed primarily because of their expressive aspects as symbols of governmental acceptance of gay and lesbian relationships." (Karst, *supra*, at 14; see also *Lewis v. Harris* (2006) 188 N.J. 415, 467 [908 A.2d 196, 226] (con. and dis. opn. of Poritz, J.) ["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 granting "domestic partnerships" to gays and lesbians rather than "marriage," the state has effectively labeled gays and lesbians as outsiders who are not worthy, deserving, or fit for full inclusion into the community of citizens united in marriage.

III.
CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court uphold the actual California Constitution, rather than a "virtually equal" version of it, and declare that the state may no longer maintain different relationship recognition rules for same- and different-sex couples.

Dated: September 26, 2007

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CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief was produced using Microsoft Word, was prepared using a proportionately spaced typeface consisting of 13 points, and that, as determined by this software, the brief, exclusive of the cover pages, application, and tables, contains 3,945 words and is therefore in compliance with Rule 8.204(b) and (c) of the California Rules of Court.

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