Civil Case No. A110449, A110450, A110451, A110463, A110651, A110652

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 3

COORDINATION PROCEEDING SPECIAL TITLE (RULE 1550(b))
MARRIAGE CASES

LANCY WOO AND CHRISTY CHUNG, et al.,

Respondents,

v.

STATE OF CALIFORNIA, et al.,

Appellants.

Appeal from the Superior Court of the State of California,
County of San Francisco, Case No. 504-038
The Honorable Richard A. Kramer, Judge

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND [PROPOSED] *AMICI CURIAE* BRIEF

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Pursuant to Rule 13(c) of the California Rules of Court, Bay Area Lawyers for Individual Freedom, Family Pride, Human Rights Campaign, Human Rights Campaign Foundation, The National Lesbian and Gay Law Association, Parents, Families & Friends of Lesbians and Gays, Inc., 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 applications 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, 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 *amicus 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.

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orientation.

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professionals, law students, and affiliated lesbian, gay, bisexual, transgender, and intersex ("LGBTI") legal organizations. Established in 1988 and an affiliate of the American Bar Association since 1992, NLGLA has rapidly become the national voice for lesbians, gay men, bisexuals, transgender, and intersex persons in the legal profession. NLGLA exists to promote justice in and through the legal profession for the lesbian and gay bisexual, transgender, and intersex community in all its diversity.

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paralegals. The membership also includes attorneys, law students and paralegals who are colleagues, friends and allies of the GLBT 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.

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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: January 9, 2006

MUNGER, TOLLES & OLSON LLP

By: Jerome C. Roth /djp
JEROME C. ROTH

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. As the result of an evolving equal protection jurisprudence, society now recognizes that the very concept is a contradiction in terms. As the Supreme Court of the United States found in the seminal case of *Brown v. Board of Education*, (1954) 347 U.S. 483 [74 S.Ct. 686], the promise of true "equality" is necessarily breached by virtue of the "separation," which serves no purpose but to isolate — and thereby stigmatize and disadvantage — the segregated class.

Yet the State argues here against these longstanding core values. Rather, the State argues that it should be permitted to exclude a class of people — same-sex couples — from the established institution by which the State recognizes committed adult relationships, and offer them instead a separate and by definition inferior institution to legalize their relationships, simply because same-sex couples have always been excluded from marriage.

Contrary to the State's position, however, there is no constitutionally sufficient justification for this distinction. In addition to depriving same-sex couples of tangible rights and protections, the exclusion of lesbian and gay couples from the right to marry inflicts significant intangible harms as well. Relegating same-sex couples to the separate and

inferior status of domestic partnership sends a clear message that the loving relationships of lesbian and gay people are less worthy, that their obligations to each other and to the State are less significant, and that the children they raise together in families are less valued, than those of their heterosexual neighbors.

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, just as California courts historically have rejected other laws that serve no purpose but to discriminate against and stigmatize a class of Californians.

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 ("LGBT") 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 San Francisco Bay Area; and to provide a forum for the

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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 [16 S.Ct. 1138], which gave Constitutional approval to the insidious practice of providing different classes of citizens with separate but supposedly equal facilities, to *Brown, supra,* 347 U.S. 483, which unanimously rejected "separate but equal," is widely recognized as a reflection of the maturing of the nation as it came to terms with the damage inflicted by the 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. Thus, despite states' claims to provide substantially equal though segregated education for black

students, the Supreme Court eventually recognized that such differential treatment violated the Equal Protection Clause. As the Court determined, , there are invariably immeasurable—but still very real—differences between segregated institutions. (See, e.g., *Sweatt v. Painter*, (1950) 339 U.S. 629, 634 [70 S.Ct. 848] [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 different treatment, separate facilities "are inherently unequal." *Brown*, *supra,* 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 distinctions between groups, that the State must have a legitimate interest for creating separate institutions, 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 [76 S.Ct. 133] [public beaches and bathhouses]; *Holmes v. City of Atlanta*, (1955) 350 U.S. 879 [76 S.Ct. 141] [public golf courses]; *Gayle v. Browder*, (1956) 352 U.S. 903 [77 S.Ct. 145] [public transportation]; *New Orleans City Park Improvement Assn. v. Detiege*, (1958) 358 U.S. 54 [79 S.Ct. 99] [public parks]; *Peterson v. City of Greenville*, (1963) 373 U.S. 244 [83 S.Ct. 1119] [restaurants]; *Brown v. Louisiana*, (1966) 383 U.S. 131

[86 S.Ct. 719] [public libraries]; accord *Opinions of the Justices to the Senate* (Mass. 2004) 802 N.E.2d 565, 570 [440 Mass. 1201].)

Nor was this recognition limited to racial classifications. For example, 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") by establishing a separate school for female cadets. (See *United States v. Virginia*, (1996) 518 U.S. 515 [116 S.Ct. 2264].) 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, the Court again primarily relied on "intangible differences" in concluding that the two schools were not equal. (*Id.* at p. 554 [quoting *Sweatt*, *supra,* 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 [Virginia Women's Institute for Leadership] 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 p. 634. Women seeking and fit for a VMI-quality education cannot be offered anything less, under the State's obligation to afford them genuinely equal protection.

(*Id.* at p. 557.)

B. Massachusetts' Highest Court Has Applied The Teachings Of *Brown* And Related Cases To Invalidate State Laws That Deprive Same-Sex Couples Of The Right To Marry.

Although state governments have come to recognize the inherent inequality of institutions segregated simply to maintain the separation of a historically excluded group, there remains an area in which state-sponsored segregation lacking any rational basis persists: marriage. Here too, however, courts have begun to realize that separate but equal has no place in our jurisprudence.

The Supreme Judicial Court of Massachusetts recently employed the reasoning underlying *Brown* and related cases to conclude that the Massachusetts Constitution forbids the creation of a separate institution for gay and lesbian couples. After the Massachusetts high court ruled in *Goodridge v. Department of Public Health*, (Mass. 2003) 798 N.E.2d 941 [440 Mass. 309], 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. (*Opinion of the Justices to the Senate*, *supra,* 802 N.E.2d, at p. 566.) The Supreme Judicial Court squarely answered the question in the negative. As that 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 guarantee of equality endures to protect *all* citizens, including gay men and lesbians, and that a state may no more deny equal rights and benefits to gay men and lesbians than it could to women or racial minorities.

C. California Courts Have Been More Protective Than Federal Courts In Protecting The Rights Of Minorities.

California courts historically have been even more receptive to the equal protection claims of minorities than the 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 construing parallel clauses in the California Constitution, which are often found to provide additional and greater protections 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 have been in the forefront of protection of minority groups against discrimination, often several steps ahead of their federal and sister state counterparts. Californians are deservedly proud that their State's courts were the first to recognize that 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. Board of Education of the City of L. A.* (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 [96 S.Ct. 2040] ["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."].)

Moreover, California courts have been far more resolute than federal courts in protecting the rights of gay men and lesbians. More than fifty years ago, the California Supreme 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 also 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.) California courts have been in the vanguard of recognizing the parental rights of gay men and lesbians. (See, e.g., *Nadler v. Superior Court* (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. Superior Court* (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 most of the rights and responsibilities of heterosexual married couples, albeit through a separate institution, its segregated legal regime is adequate to satisfy the requirements of equal protection.

As an initial matter, the fact that California provides more basic protections to gay individuals than most other states does not excuse it from adhering to the dictates of the California Constitution that no one be denied equal protection of the laws. (Cal. Const., Art. I, § 7.) As the State concedes, the benefits provided by California's domestic partnership law are not equivalent to marriage. (Appellants' Opening Brief, *Woo et al. v. Lockyer et al.*, A110451, p.3 [noting that "*substantially* all rights and benefits afforded to spouses have now been extended to registered domestic partners"].) On the contrary, there are critical differences. For example, domestic partners suffer substantial tax disadvantages because they cannot file joint tax returns, even for purposes of state tax filings, and their earned income is not treated as community property for state income tax purposes.

(See Family Code, § 297.5(g); *Knight v. Superior Court of Sac. County*, (2005) 26 Cal. Rptr.3d 687, 699.) Domestic partners are also not entitled to hundreds of federal rights and protections guaranteed to married spouses. (*Ibid.*) Moreover, while there is uncertainty about the level of respect other jurisdictions will provide California registered domestic partners as they travel about the country and around the world, they certainly enjoy a lesser degree of legal recognition and protection than married couples when they travel outside of the State.

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. 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 denying gay and lesbian couples participation in that institution, the State deprives them of the most significant means of acknowledging, supporting, and nurturing their relationships, and at the same time stigmatizes gay and lesbian individuals. In other contexts, these types of intangible harms have led courts, including California courts, to reject governmental schemes that provide for separate but purportedly "equal" benefits to minority classes. In this brief, amici address the pernicious effects of a segregated regime that excludes gay and lesbian couples from marriage and relegates them to a separate and admittedly inferior legal

status.

A. Marriage Occupies An Important Place In Our Common Heritage.

As important as the legal advantages that flow from the institution may be, the 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 [85 S.Ct. 1678].) Marriage is far more than simply a bundle of legal rights and responsibilities: it is a time-honored and fundamental institution that signifies to family, friends, the community, and the world a moral commitment between two people and a promise by society to respect the integrity and worth of their relationship. 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, 96 [107 S.Ct. 2254] [recognizing that marriage is an "expression[] of emotional support and public commitment"].) (*See also Goodridge*, *supra*, 798 N.E.2d at p. 954 ["Civil 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."].)

By excluding same-sex couples from the right to marry, the State has barred gay men and lesbians from participation in an institution that is "central to personal dignity and autonomy." (*Planned Parenthood of So. Pa. v. Casey*, (1992) 505 U.S. 833, 852 [112 S.Ct. 2791].) 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. Many Californians, including some same-sex couples and most people around the world, 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 match with the initiation of an awkwardly-titled legalistic relationship defined principally by a list of rights in the statute books.

While some have derided the debate as about "who gets to use the 'm' word," *Opinion of the Justices to the Senate*, *supra,* 802 N.E.2d, at p. 572 (Sosman, J., dissenting), "the word 'marriage' itself is something." (Hoffman, *Domestic Partnership Would Deny Couples*

Benefits, Committee Told, Rutland Herald (Jan. 12, 2000) p. 1.)[1] As can be attested by those same-sex couples who had waited years for the opportunity and then spent hours in cold, rainy weather outside San Francisco City Hall waiting 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.)

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*, Time (Feb. 16, 2004) p. 104.) That joyous celebration and public validation simply is absent from the dry, administrative process of registering one's domestic partnership.

Popular culture confirms the importance of the word

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[1] These sentiments are echoed by many of the parties in this case. For instance, according to Joshua Rymer, a plaintiff/respondent in *Woo v. Lockyer*, SF Super. Ct. Case No. CPF-04-504038: "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.

marriage. As noted by Susan Murray, one of the attorneys involved in the successful effort to obtain recognition of same-sex relationships in Vermont: "Nobody writes songs about registered partnerships." (Lisberg, *Lawmakers Take Up Gay Marriage*, The Burlington Free Press (January 12, 2000) p. A1.) From Shakespeare to Frank Sinatra, authors, poets, and song writers have all mused about the special significance of marriage. Quite simply, words matter.

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 fully articulate what makes marriage so special. But anyone who has witnessed a wedding and the attendant 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, power of attorney, or community property. In short, "[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. (*Opinions of the Justices to the Senate*, *supra*, 440 Mass., at p. 1207.) Such stigmatization was the primary consideration in the rejection by our nation's courts of separate-but-equal treatment of different racial and gender groups, and it is why this Court should reject the State's decision to establish a separate legal regime for the recognition of same-sex couples.

The segregation 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, (2005) *The Marriage Debate and Minority Stress*, 38 Political Science & Politics p. 221.) 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 *Opinions of the Justices to the Senate*, *supra*, at p. 570

[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

[holding that requiring same-sex couples to enter into the separate and distinct institution of civil unions relegates them "to second-class status"].) Without such government-imposed separation, sexual orientation could be seen as a neutral trait, such as eye color or left-handedness, that is irrelevant in categorizing individuals and their legal rights. By marking same-sex couples as different and inferior, however, the current marriage regime makes sexual orientation a legally salient characteristic and provides legal cover for those who seek to separate and treat differently gay men and lesbians on the basis of their sexual orientation. Although some individuals may continue to discriminate against gay people even after same-sex couples are granted full marriage equality, the likelihood of such conduct 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 [104 S.Ct. 1879].)

Indeed, the stigmatization of gay men and lesbians by the

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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*, 27 Annual Review of Sociology 363 (2001).) As described in the text, barring same-sex couples from getting married operates to increase stigma by furthering the separation of individuals, reinforcing stereotypes, and justifying other discrimination.

current segregated scheme of recognizing same-sex relationships 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 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.) The discriminatory effect of the exclusion of same-sex couples from marriage reinforces and perpetuates a long history of discrimination against gay men and lesbians. Despite the aggressive protection of gay men and lesbians by California courts dating back more than 50 years, see, e.g., *Stoumen*, *supra*, 37 Cal.3d 713, the California Reporter is replete with cases showing the persistence of anti-gay discrimination.[3] In light of this history, people in the State, including gay men and lesbians, can only conclude that their continued exclusion from marriage is similarly intended to discriminate.

Excluding same-sex couples from the right to marry also

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[3] (See, e.g., *Koebke v. Bernardo Heights Country Club*, (2005) 36 Cal.3d 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.*, *supra*, 24 Cal.3d 458 [employer discriminated against gay job applicants]; *Holmes v. California National Guard*, (Ct. App. 2001) 109 Cal.Rptr.2d 154 [National Guard fired employee on the basis of sexual orientation]; *Murray v. Oceanside Unified School District*, (Cal. App. 2001).95 Cal.Rptr.2d 28 [allegation of discrimination and sexual harassment against lesbian school teacher]; *Rolon v. Kulwitzky*, (Ct. App. 1984) 200 Cal.Rptr. 217 [restaurant refused to allow lesbian couple to sit in semi-private booth].)

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. The State's discriminatory actions provide further confirmation for those individuals seeking to justify their own biases against gay men and lesbians by example: since such individuals perceive that the State provides for separate and lesser treatment of gay and lesbian relationships, they naturally conclude that it is permissible and, in fact, encouraged, to treat lesbians, gay men and their relationships as inferior. (See *Opinions of the Justices to the Senate*, *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 [123 S.Ct. 2472], so too does barring gay men and lesbians from marriage lead to further prejudice.

Refusing to allow same-sex couples to marry has a direct negative impact on the daily lives of lesbians and gay men. Their exclusion from the institution of marriage reinforces feelings of alienation from society as a whole. Such alienation can, in turn, lead to feelings of isolation, decreased self-esteem, depression, increased risk of suicide, and

health problems. These effects can be especially debilitating when combined with the biases and homophobia of family, co-workers, and others.

Because minority groups are accustomed to being rejected by society and are often the targets of discrimination, their members often internalize this societal disapproval, suffering feelings of inadequacy and self-loathing. 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*, 52 J. of Clinical Psychology 15 (1996). Internalized homophobia can give rise to a wide-range of psychological effects, including lowered self-esteem, depression, and a heightened risk of suicide. Herek, *et al.*, *Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men*, 2 J. of the Gay and Lesbian Medical Association 17 (1997). These negative effects are not exclusive to same-sex couples who wish to marry. Rather, they can be felt by all gay men and lesbians who see how people who share their sexual orientation are treated. Indeed, all of society is affected, as everyone can observe how the State views the relationships of gay men and lesbians.

C. Married Couples Enjoy Intangible Benefits In Their Individual Lives And In Their Relationships That Are Not Enjoyed By Domestic Partners.

Apart from the stigma wrongfully imposed upon gay and lesbian individuals, lesbian and gay couples are also denied the many intangible benefits that marriage bestows on heterosexual couples. As discussed above, see *supra*, at 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.3d at 714; *Ortiz v. Los Angeles Police Relief Assn.*, (2002) 120 Cal.Rptr.2d 670, 679; see also Scott, *Social Norms and the Legal Regulation of Marriage*, (2000) 86 Va. L. Rev. 1901.)[4]

As a result of the special significance of marriage in society, the institution has a beneficial signaling effect, altering how individuals in a marriage behave toward one another, and how society behaves toward those individuals. See Adams and Jones, *The Conceptualization of Marital Commitment: An Integrative Analysis*, 72 J. of Personality and Social Psychology 1177 (1997). The importance of such a signaling effect is widely recognized by the law: the signing of a contract, for example,

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[4] The discussion of the importance of marriage in *Ortiz* is itself an answer to the State's incorrect contention that the case stands for the proposition that the infringement of the right to marry at issue here is subject to rational basis review. As *Ortiz* itself recognized, the right to privacy includes "the right to join in marriage with the person of one's choice." (*Ortiz*, *supra*, 98 Cal. App.4th at p. 1303.)

signals to all parties the seriousness of and obligations imposed by the contractual relationship. Similarly, the fact of marriage itself affects the way individuals in a marriage interact with each other and also how others behave toward a married couple, even apart from any specific legal obligations that marriage entails. (Scott, *Legal Regulation of Marriage*, *supra*, 86 Va. L. Rev. at p. 1917.) Couples in a relationship understand how married individuals are generally supposed to behave toward one another: they are to be emotionally and financially supportive, honest, and faithful. While 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 are treated in a manner that reflects their legal and social status. Spouses are immediately seen to be next of kin to one another, as family members whose relationship society respects and supports. In fact, married people may come to take for

granted how immediately their relationship is understood and respected. When they go into a bank and open a joint account, or check into a hotel, or apply for a credit card or a telephone number, or when a husband indicates to a school or camp administrator that his wife will pick up the children, there is no need for explanation or documentary proof of the nature 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. Because marriage is understood to be a lifetime commitment, couples may be more willing to work through difficult times in relationships, and are likely to be encouraged to do so by their friends and families. (*Goodridge*, *supra*, 440 Mass., at p. 322.) 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., Adams and Jones, *The Conceptualization of Marital Commitment: An Integrative Analysis*, (1997) 72 J. of Personality and Social Psychology 1177, 1192.)

That same support and encouragement is not available to registered domestic partners. Because domestic partnerships are of such recent vintage, many people, even those who consider themselves to support same-sex couples and their relationships, do not consider domestic partnerships as serious a commitment as marriage. Moreover, domestic partnership cannot be as effective an indicator of family relationships because there is no universal meaning for the term. Different jurisdictions use the term in different ways; even in California the meaning of the phrase has evolved dramatically.[5] Because the term has no universally understood

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[5] 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 being 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 AB 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. 19, 2003) available online at: http://www.nclrights.org/publications/timeline-ab205.htm). Thus, over the past 15 years alone, the term "domestic partner" has alternatively meant a local registry that granted minimal legal rights; the state-protected ability to visit a loved one in the hospital; the ability to make some decisions that married couples are able to make for each other, and the substantial legal equality under state law to married couples. Only individuals intimately familiar with domestic partnership law in California have been able to

significance, many people are unsure about the nature of the relationship. Domestic partners, in contrast to spouses, are often met with blank stares when they reference their relationship. 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.

The consequences of such confusion can be significant. For example, hospitals often refuse to allow a same-sex partner to be by his or her 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 can establish 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.[6] In short, given society's lack of experience with

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determine what domestic partnership has meant at any given moment.

[6] The declarations of the parties in *Woo* provide numerous examples of how, even in California, domestic partners are routinely treated differently than married couples. See, e.g., Declaration of Jewelle Gomez, ¶¶ 12–13; Declaration of Joshua Michael Rymer, ¶ 11.

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

The lack of an equally identifiable supporting framework for relationships poses a daunting problem for gay and lesbian couples. Because of persisting homophobia, gay and lesbian individuals 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 more conservative families, where 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 and lesbian individuals 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 — the meaning of which can be unclear to same-sex couples and society alike — cannot.

D. The California Legislature Has Recognized That Domestic Partnership Is Not The Same As Marriage And Does Not Meet The Requirements Of The California Constitution.

Although the California Legislature has been active in protecting the rights of gay men and lesbians, the Legislature has made clear that its provision of registered domestic partnerships do 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 legislative findings and conclusions accompanying Assem. Bill No. 205 (2003-2004 Reg. Sess.), 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 for 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...." (Emphasis added.)

Fulfilling its constitutional duty to ensure full equality for gay men and lesbians, on September 6, 2005, the California Legislature became the first in the nation to pass a law granting same-sex couples the right to marry. It is clear from the text of the bill, Assem. Bill No. 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. Sess.) § 3.) In vetoing the bill, Governor Schwarzenegger himself 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 the 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 Veto Message for Assem. Bill No. 849 (2005-2006 Reg. Sess.).) Nevertheless, the Legislature's conclusion that the current exclusion of same-sex couples from marriage is inadequate under the law is

entitled to deference. (See *Freedom Newspapers v. Orange County Employees Ret. Sys.*, (1993) 6 Cal.4th 821, 823.)

V. CONCLUSION

Domestic partnership is not marriage. Just as separate-but-equal treatment based on race or gender in fact was anything but equal, so too are gay men and lesbians being denied equal treatment through the State's segregated system of recognizing same-sex relationships. While California has taken steps toward guaranteeing equality for gay men and lesbians, "separate but equal" recognition of same-sex relationships through domestic partnership—a system created to extend legal rights while maintaining separation for separation's sake—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. Having been created to recognize the legitimate legal needs of lesbian and gay couples and their families, but simultaneously to maintain marriage as the exclusive province of heterosexual couples, its constitutional defect is manifest and incurable. This nation's courts, and especially this State's courts, have repeatedly

rejected governmental regimes that provide a class of people with separate but supposedly equal institutions. This Court should do no less here.

DATED: January 9, 2006

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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court 14(c))

The text of this brief, including footnotes, consists of 7,076 words as counted by the Microsoft Word word processing program used to prepare this brief.

By: _____
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I, Sophia Leshin, 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, San Francisco, California 94105.

On January 9, 2006, I served the document listed below on the interested parties in this action in the manner indicated below:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct; that this declaration is executed on January 9, 2006, at San Francisco, California.

Sophia Leshin

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