Nos. A110449, A110450, A110451, A110463, A110651, A110652

IN THE

COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

Lancy Woo,

Respondents,

v.

State of California, et. al.,

Appellants.

SAN FRANCISCO CASE NO. 504038
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365
HONORABLE RICHARD A. KRAMER, JUDGE

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF *AMICI CURIAE* CHILDREN OF LESBIANS AND GAYS EVERYWHERE, MASSEQUALITY, THE NATIONAL GAY AND LESBIAN TASK FORCE, AND FREEDOM TO MARRY IN SUPPORT OF RESPONDENTS

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the National Gay and Lesbian Task Force, and Freedom to Marry

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APPLICATION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS AND STATEMENTS OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 13, subdivision (c), amici curiae, Children of Lesbians and Gays Everywhere (COLAGE), MassEquality, the National Gay and Lesbian Task Force (the Task Force), and Freedom to Marry hereby respectfully apply for leave to file an *amici curiae* brief in support of the Respondents. The proposed *amici curiae* brief is attached to this Application. COLAGE, MassEquality, the Task Force, and Freedom to Marry are familiar with the questions presented by this case. They believe that there is a need for further argument, as discussed below.

STATEMENTS OF INTEREST

Founded in 1990, **Children of Lesbians and Gays Everywhere** (COLAGE) engages, connects and empowers people to make the world a better place for the millions of children who have one or more lesbian, gay, bisexual and/or transgender (LGBT) parents and families in the U.S. Representing and working in partnership with over 10,000 youth and family member contacts and 42 chapters in 28 states (including in particular our largest memberships in California and Massachusetts), COLAGE possesses over 15 years of expertise in LGBT family matters. Through youth leadership and development, community organizing, public

education and policy advocacy, COLAGE creates a world in which all families are valued, protected, reflected, and embraced by society and all of its institutions; in which all children grow up loved and nurtured by kinship networks and communities that teach them about, connect them to, and honor their unique heritage; and in which every human being has the freedom to express sexual orientation, gender identity and self.

COLAGE has participated as an amicus curiae in numerous cases in the California courts concerning the rights and duties of lesbian and gay parents, and the needs of their children. See, e.g., Elisa B. v. Superior Court 37 Cal.4th 108 (2005); K.M. v. E.G. 37 Cal.4th 130 (2005); Kristine H. v. Lisa R. 37 Cal.4th 156 (2005); Sharon S. v. Superior Court 31 Cal.4th 417 (2003).

COLAGE has an interest in this case and seeks to participate as an amicus curiae on behalf of the thousands of California children with gay or lesbian parents who are affected adversely because their parents are denied the freedom to marry. The 2000 United States Census shows that there are nearly 100,000 same-sex-couple-headed households in California. BRADLEY SEARS, *SAME SEX COUPLES AND SAME SEX COUPLES WITH CHILDREN, DATA FROM CENSUS 2000*, 4 (2004), published by UCLA School of Law and available at <https://www.law.ucla.edu/williamsproj/publications/CaliforniaCouplesReport.pdf>. Over 28% of these households reported that they included one

or more of the couple's "own" children (the biological, adoptive, and/or step-children of the "householder," or the person filling out the Census form.) Id. The number of these children totaled 58,600. Id. In addition, same-sex couples are raising 11,900 children that are not legal children of the householder, either because they are his or her partner's children, foster children, or because for some other reason the householder is not recognized as a legal parent. Id. Thus, approximately 32.3% of same-sex couple households in California include children under 18, and approximately 70,500 of California's children are affected by the inequality of the marriage laws that discriminate against same-sex couples. Id. Since it is estimated that 16-19% of same-sex couples did not identify themselves as such on the 2000 Census, it is likely that these numbers are undercounts of the true numbers of same-sex couples and same-sex couples with children in California. Id. at p. 4.

On behalf of these children, including its many California-resident members, COLAGE urges the Court to affirm the judgment of the Superior Court below.

MassEquality is a coalition of local and national organizations defending equal marriage rights for same-sex couples in Massachusetts. It works to protect the Massachusetts Supreme Judicial Court's decision in Goodridge v. Dep't of Public Health 798 N.E.2d 941, 958 (Mass. 2003), which required marriage equality for same-sex couples, and to defeat any

discriminatory amendment to the Massachusetts Constitution. MassEquality seeks to participate as an amicus curiae here to urge the Court to consider the historical doomsday predictions of the downfall of marriage in other civil rights contexts, to recognize that those predictions were unfounded, and to appreciate the societal acceptance of ever-increasing legal protections for same-sex couples, including marriage, as reflected in, among other things, the experiences in Massachusetts.

The **National Gay and Lesbian Task Force** (the Task Force), founded in 1973, is the first 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 strength of the LGBT community at the local, state and national levels in order to eliminate prejudice, violence and injustice against LGBT people. The Task Force conducts its work organizing in local communities, working at all levels of government to promote equitable laws and public policies, hosting the largest annual LGBT activist conference, and producing research, policy analysis and strategies to advance greater understanding of, and equality for, LGBT people. 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.

Freedom to Marry is the gay and non-gay partnership working to end marriage discrimination nationwide. Freedom to Marry is a non-profit coalition, based in New York, and has participated as amicus curiae in several marriage equality cases in the US.

Amici are familiar with the issues before the Court. Amici believe that further briefing is necessary to address matters not fully addressed by the parties' briefs. Specifically, amici will set forth, and will explain:

1. How Appellants' representation of marriage as a historically static institution fails to consider its evolution into today's vibrant institution that is free from government-enforced race and gender discrimination, and that permits divorce, despite doomsday predictions; and

2. How legal protections for same-sex couples have been expanding in California for years with constantly increasing social acceptance, and, similarly, how support for equal marriage rights for such couples has increased steadily in California, and, finally, how a strong majority in Massachusetts has come to support equal marriage rights now that same-sex couples have been marrying in that state for more than a year.

For the foregoing reasons, COLAGE, MassEquality, the Task Force, and Freedom to Marry respectfully request leave to file the attached brief.

DATED: January 9, 2006

Respectfully submitted,

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Freedom to Marry

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INTRODUCTION AND SUMMARY OF ARGUMENT

Marriage as an institution has been evolving for centuries. Each time the courts or the legislature prepared to remove a discriminatory restriction, opponents have objected, claiming that the change would lead to dire consequences. Each time, marriage survived.

The same is true here. Appellants Campaign for California Families ("CCF") and Proposition 22 Legal Defense And Education Fund ("Prop 22 LDEF") contend that Californians will be far worse off if the marriage limitation that discriminates against same-sex couples is invalidated. But California's experience expanding domestic partnership rights and that in Massachusetts where same-sex couples have been marrying since May of 2004, demonstrate that there will be no dire consequences when California permits same-sex couples to marry.

California should not shy away from enforcing its constitution to strike down discriminatory marriage restrictions. California has a proud history of being at the forefront of eliminating unconstitutional marriage restrictions, as evidenced by the landmark decision in Perez v. Sharp, 32 Cal. 2d 711 (1948), striking down the state's anti-miscegenation statute. Ending marriage discrimination against same-sex couples will not interfere with any legitimate state interest. Quite to the contrary, providing gays and lesbians with the equal right to marry will serve important societal goals.

And just as Californians have grown to accept and embrace this state's comprehensive domestic partnership laws as assisting some without harming any, the California public will even more strongly support the move toward greater equality and inclusion when California allows same-sex couples to marry and the public similarly sees that there is not a limited supply of either equality or marriage licenses.

This is precisely what happened when Massachusetts permitted same-sex couples to marry. Many who initially had resisted marriage equality for same-sex couples eventually acknowledged that their resistance had been unfounded. Indeed, as noted by a Republican senator in Massachusetts who initially had opposed the elimination of marriage discrimination against gays and lesbians, Massachusetts' non-gay citizens suffered no ill effects at all after same-sex couples were permitted to marry in that state, and life improved considerably for those gay and lesbian residents who came to stand as civil equals under law for the first time.

The same will be true here. Amici respectfully request that this Court affirm the trial court's decision striking down the different-sex restriction in the California marriage statute because it unconstitutionally infringes upon the rights of lesbian and gay Californians.

I.

MARRIAGE IS NOT A STATIC INSTITUTION

Appellants assert that marriage should be enjoyed only by different-sex couples because the "fundamental right to marry is the right to enter a legal union of a man and a woman." (Appellant Proposition 22 Legal Defense And Education Fund's Opening Brief ("Prop 22 LDEF Brief"), at p. 8, ¶ 3.) Setting aside the critically important individual liberty interest in making the profound personal choice to marry, Appellants further contend that because marriage as an institution has *historically* been a union between a man and a woman, it necessarily follows that same-sex couples should *today* be precluded from participating in that institution and its privileges and benefits. (State Appellants' Opening Brief ("State Brief") at 37.) Appellants also assert that because the right to marry for same-sex couples is not "deeply-rooted" in our culture, and because "history and tradition" demonstrate that marriage has been heretofore "defined as the union of a man and a woman," there is no room to "alter" the meaning of marriage. (State Brief at 40, ¶ 2; Opening Brief of Campaign for California Families ("CCF Brief") at 9, ¶ 2.)

Appellants' selective recollection of history and circular reasoning is neither accurate nor convincing. Appellants gloss over the ever-changing parameters of marriage as demonstrated by our nation's, and this State's,

historical refinement of the institution to eliminate race-based and sex-based inequities, and to permit divorce. Indeed, there has been a long tradition by the courts of altering the regulations and boundaries of the institution of marriage to reflect relevant societal and legal norms.

Marriage has not stopped evolving. Yet each time a restriction in marriage has been removed, or is threatened to be removed, doomsayers have predicted that terrible things would transpire and that society would crumble. But life, nonetheless, has continued, and marriage remains vibrant.

Indeed, enhancing equality by stripping out invidious restrictions has allowed the institution to keep pace with society's understanding of liberty and equality before the law. Accordingly, confirming that same-sex couples in California are equally entitled to exercise their fundamental right to marry will adhere to the deeply-rooted American and California traditions of continually refining marriage by faithful application of core liberty and equality principles. Marriage will go on, again improved.

A. Marriage Has Matured Into An Institution Free From Government-Enforced Racial Discrimination.

At the end of World War II, thirty-one states had anti-miscegenation laws. James Trosino, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U.L. Rev. 93, 98 (1993). Many at that time

feared that interracial marriage would tear apart the very fabric of society. (Id.) By example, one Tennessee judge wrote:

> [W]e might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a state or country where they were not prohibited. The Turk or the Mohammedan, with his numerous wives, may establish his harem at the doors of the capital, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

State v. Bell, 66 Tenn. 9 (1872). See also Scott v. State, 39 Ga. 321 (1869) (opining that "amalgamation of the races" is not only unnatural, but also productive of deplorable results because "offspring of these unnatural connections are generally sickly and effeminate, and []they are inferior in physical development and strength"); Robert J. Sickels, Race, Marriage, and the Law (1972) (describing racist views and history of anti-miscegenation laws); *see generally* E.J. Graff, What Is Marriage For? 157-58 (2d ed. 2004) (describing history of hostility for interracial marriage).

Those warnings notwithstanding, the California Supreme Court in 1948 struck down California's anti-miscegenation law. In Perez v. Sharp, 32 Cal. 2d 711, 716 (1948), the California Supreme Court noted that the "right to marry is the right of individuals, not of racial groups." The Court found that since "the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry." (Id. at 717.) In dire language, the

dissent admonished that society would be imperiled because "the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock." (Id. at 756 (Shenk, J., dissenting).) Of course, nothing of the sort came to pass. Instead, California has continued to thrive with enhanced respect for individual equality and liberty, and the Supreme Court's leading condemnation of race discrimination in marriage has become a matter of state pride for many.

The United States Supreme Court followed the Perez majority, although not until nineteen years later, in Loving v. Virginia, 388 U.S. 1 (1967) (holding that anti-miscegenation laws were impermissible race-based discrimination against individuals, notwithstanding that they were imposed "equally" on whites and other races as classes). And as history has demonstrated, despite predictions in the bitter dissent in *Perez* that ending race discrimination in marriage would inevitably lead to doom, both society and the institution of marriage have flourished.

B. Traditional Gender Inequalities Have Been Rejected By Contemporary Marriage Laws.

The traditional common law of marriage placed women in an inferior legal position. One author has noted that:

> For much of this country's early history, government enforced the common law rule of "coverture" when it came to

> marriages. This doctrine, by which a woman's identity was "covered" by that of her husband—essentially reducing her to his chattel or property—grew out of civilization's agrarian period, when a family was dependent on all of its members to make the family business, the farm, work effectively and efficiently. To maintain social order at a time when only men could vote, society gave husbands the preeminent authority at home as well.
>
> The husband's absolute authority required that his wife give up all of hers upon exchanging vows. Any property she owned, whether she acquired it before or after the marriage, became his. And because the husband was the sole representative of his family unit, married women also lost their rights as citizens to sign contracts or to sue or be sued individually.

Evan Wolfson, Why Marriage Matters 63 (2004); see also Hendrik Hartog, Man & Wife in America: A History 115-22 (2000) (providing historical view of coverture).

As women joined the workforce, America moved towards a less male-dominated view of marriage, and the doctrine of coverture met a slow demise via various married women's property laws and judicial intervention. As was true in the racial context, as these laws were enacted, doomsayers predicted that these developments would lead to increased immorality and the destruction of the institution of marriage and the family. For example, according to Brandeis University's E.J. Graff:

> One 1844 New York legislative committee insisted that allowing married women to control their own property would lead "to infidelity in the marriage bed, a high rate of divorce, and increased female criminality," while turning marriage from "its high and holy purposes" into something arranged for "convenience and sensuality."

Graff, *supra*, at 30-31. Of course, equality for women did not spawn these evils. Marriage has evolved into an institution of legal parity between the parties, even though some may continue to object.

C. Marriage Laws Have Changed To Accommodate Divorce.

As our nation began to embrace the contractual ideology of the Declaration of Independence, the laws preventing divorce evolved and legislators began to provide select relief for unhappy spouses. *See generally* Nancy F. Cott, Public Vows: A History of Marriage and the Nation 47-52 (2000)(describing history of American divorce laws). These proposals to permit divorce, like proposals to value love and the liberty of individual choice over conventional mandates, were met with doomsday forecasts that divorce would destroy the nation. One such prediction was offered by Yale University President Timothy Dwight:

> Within a moderate period, the whole community will be thrown, by laws made in open opposition to the Laws of God, into general prostitution . . . To the Eye of God, those who are polluted in each of these modes [divorce and prostitution], are alike, and equally impure, loathsome, abandoned wretches; and are the offspring of Sodom and Gomorrah.

Timothy Dwight, Theology: Explained and Defended in a Series of Summons 427 (5th ed., New York: Carvill, 1828), III, as cited in Nelson Manfred Blake, The Road to Reno: A History of Divorce in the United States 58-59 (1962).

Since marriage was able to evolve to allow for termination without the Apocalypse, surely ending the discrimination now preventing devoted same-sex couples from participating in the institution in this state will not shake civilization.

II.

LEGAL PROTECTIONS FOR SAME-SEX COUPLES HAVE BEEN EXPANDING FOR YEARS WITH INCREASING SOCIETAL ACCEPTANCE AS THE BENEFITS OF INCLUSION CAN BE SEEN.

Years ago, California municipalities created legal domestic partnerships for same-sex couples, and the rights and responsibilities available to such couples have been expanding in California ever since. Last year, both houses of the California Legislature passed Assembly Bill 849 ("AB 849"), which would have amended the California Family Code to permit same-sex couples to marry. With each expansion, public sentiment in California in favor of providing rights and protections to same-sex couples has increased.

And where same-sex couples already are able to marry, California's experience has been amplified. Contrary to the doomsday predictions, public support in Massachusetts has increased into strong majority support

as same-sex couples have begun to marry, with no adverse consequences for anyone else.

A. Protections for Same-Sex Couples Have Been Evolving Through Domestic Partnerships in California.

Registered domestic partnerships have existed as a distinct legal status granted by certain California cities and counties for twenty years. The first domestic partnership registry was created by the City of West Hollywood in 1985. Currently, at least eighteen California cities or counties permit couples to register with those jurisdictions as domestic partners, including San Francisco, Sacramento, Long Beach, Los Angeles County, Santa Barbara, Oakland and Palm Springs.[1]

These local efforts paved the way for California's statewide domestic partnership system, which began in 1999, when the California State Legislature enacted AB 26, Domestic Partnership Act, Chapter 588, Statutes of 1999, *codified as* Cal. Fam. Code § 297. The Domestic Partnership Act created a statewide domestic partnership registry, provided registered domestic partners with the right to visit their hospitalized partner,

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[1] Jon W. Davidson, AB 205 (The Domestic Partners Rights and Responsibilities Act of 2003) and its Impact on Cities, at 1 & n.2 (Lambda Legal Defense and Education Fund, Inc., Sept. 18, 2004), at http://www.lambdalegal.org.

and provided for health benefits to domestic partners of certain state employees. (See 1999 Stats. ch. 588.) The Legislature expanded the rights of registered domestic partners steadily in the following years.[2] These efforts culminated in the California Domestic Partner Rights and Responsibilities Act of 2003, AB 305, Chapter 421, Statutes of 2003, adding Cal. Fam. Code §§ 297.5, 299.2 and 299.3 and amending or repealing various other code sections.[3]

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[2] For example, Senate Bill 2011, Chapter 1004, Statutes of 2000 made registered domestic partners eligible for specially designed housing for senior citizens. See 2000 Stats. ch. 1004, *amending* Cal. Civ. Code §§ 51.2 –51.3. Assembly Bill 25, Chapter 893, Statutes of 2001, granted twelve new rights and benefits, including the rights to sue for wrongful death, to use employee sick leave to care for an ailing partner or partner's child, to make medical decisions on behalf of an incapacitated partner, to receive unemployment benefits if forced to relocate because of a partner's job, and to adopt a partner's child as a stepparent. See 2001 Stats. ch. 893, adding Cal. Civ. Code § 1714.01 and amending various code sections. In 2002, Assembly Bill 2216, Chapter 447, Statutes of 2002, granted intestacy rights to registered domestic partners. See 2002 Stats. ch. 447, *amending* Cal. Prob. Code §§ 6401-6402.

[3] The Act "recast all of the previous legislation relating to domestic partnerships and extended to registered domestic partners substantially all rights, benefits and obligations of married persons under state law," excepting the rights, benefits and obligations accorded only to married persons by federal law, the California Constitution or initiative statutes. Assembly Bill No. 849, Bill Analysis, Senate Judiciary Committee, at 3, at http://www.legalinfo.ca.gov; see also 2003 Stats. ch. 421. In addition, AB 205 provided that California will recognize substantially equivalent legal unions, other than a marriage, of two people of the same sex that was validly formed in another jurisdiction, whether or not

[Footnote continued on next page]

As in other contexts, the evolution of California's domestic partnership laws was met with doomsday predictions by some. See, e.g., Bill Ainsworth, Next Step: Equality, California Journal, vol. 57, Iss. No. 13, at 6 (Jan. 1, 2004) (quoting AB 205 opponent state Senator Pete Knight (R-Palmdale) as stating that "[i]t's not in the best interests of the state to change the definition of marriage. What if three people come in and want to get married? How are you going to refuse them?"); Homosexual/'Trans' Caucus Offers New Bills in California, Concerned Women for America (Jan. 29, 2003), at http://www.cultureandfamily.org (noting that AB 205 (and a whole "raft of bills") will "create homosexual 'marriage,' and attack religious freedom, parental rights and the Boy Scouts").

Despite these alarmist predictions, however, California's domestic partnership laws did not cause any of the predicted social dislocation and harm to married heterosexual couples or society in general. To the contrary, as the Supreme Court recently observed in Koebke v. Bernardo Heights Country Club, 36 Cal. 4th 824, 846 (2005), "[e]xpanding the rights and creating responsibilities of registered domestic partners . . . further[s] California's interests in promoting family relationships and protecting

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[Footnote continued from previous page]
the legal union is called a domestic partnership, and thus provided those nonmarital same-sex unions with the same status, rights and obligations. Cal. Fam. Code § 299.2.

family members during life crises, and . . . reduce[s] [but does not eliminate] discrimination on the bases of sex and sexual orientation in a manner consistent with the requirement of the California Constitution."

B. The California Legislature Recently Passed A Bill To End Marriage Discrimination Against Same-Sex Couples – AB 849.

Not only has the California Legislature clearly demonstrated by enacting the domestic partnership laws its intent that same-sex couples be entitled to most of the tangible state-based benefits enjoyed by heterosexual married couples, but it also more recently expressed its intent that same-sex couples be allowed an equal right to marry. In 2005, the California Legislature considered and passed Assembly Bill 849, which proposed to eliminate the gender-specific definition of who may marry in California from "a personal relation arising out of a civil contract between a man and a woman" to "a personal relation . . . between two persons.". Assembly Bill No. 849, vetoed by Governor, Sept. 29, 2005 (2005-2006 Reg. Sess.) §§ 4-6.

AB 849 was supported by 215 governmental and non-profit organizations and religious institutions in addition to numerous individuals. This enormous showing of support, including support from dozens of leading non-gay civil rights groups, is a concrete measure of the public

understanding that denying marriage to same-sex couples is an issue of inequality and discrimination that has come to resonate powerfully with others who have been marginalized and excluded from basic legal rights.[4]

Although AB 849 passed both the Assembly and Senate in September 2005, Governor Schwarzenegger vetoed it on September 29, 2005.[5] The Governor explained that although he believed that "lesbian and gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationships," he was returning the bill because he views California's foreign marriage recognition statute (specifically, Family Code section 308.5, enacted by Proposition 22 in 2000) as depriving the Legislature of authority to amend the in-state marriage law, noting also that the issue of "same-sex marriage is currently

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[4] These groups include, for example, groups such as the American Civil Liberties Union; the American Jewish Congress; the Anti-Defamation League; the California National Organization for Women; the Asian Pacific American Legal Center of Southern California; the Disability Rights Education & Defense Fund; the First Amendment Project; the National Association for the Advancement of Colored People, California State Conference; National Black Justice Coalition; the Mexican American Legal Defense and Educational Fund; the Progressive Jewish Alliance; and the United Farm Workers. Id.

[5] Press Release, Legislative Update 9/29/05, Governor's Veto Message AB 849, at http://www.governor.ca.gov.

before the Court of Appeal in San Francisco, and will likely be decided by the Supreme Court." (Id.)[6]

Notwithstanding the Governor's veto, the findings and declarations that accompany AB 849 undeniably show the Legislature's recognition that California's current marriage rule unconstitutionally discriminates against same-sex couples and that the purpose of this act was "to correct the constitutional infirmities of Section 300, which was enacted by the Legislature." Assem. Bill No. 849 § 8.[7] Specifically, the Legislature found:

> In 1977, the Legislature amended the state's marriage law to specify that, as a matter of state law, the gender-neutral definition of marriage could permit same-sex couples to marry and have access to equal rights and therefore would be changed. The gender-specific definition of marriage that the Legislature adopted specifically discriminated in favor of different-sex couples

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[6] Amici disagree with the Governor's reading of Section 308.5 and instead concur with the *Woo* Respondents concerning the scope of Proposition 22. See *Woo* Respondents' Answering Brief, *Woo v. California*, A110451, at p. 18.

[7] As noted in the Woo Respondents' Brief, AB 849 constitutes legally relevant evidence of the Legislature's understanding of the existing statute and the equality and liberty problem it contains. See Freedom Newspapers v. Orange County Employees Ret. Sys., 6 Cal.4th 821, 832 (1993) [citing Eu v. Chacon, 16 Cal.3d 465, 470 (1976) (noting that "[t]he Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute"); Irvine v. California Emp. Com., 27 Cal.2d 570, 578 (1946)].

> and, consequently, *discriminated and continues to discriminate against same-sex couples.*
>
> . . . .
>
> *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.*
>
> 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.
>
> . . . .
>
> 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.
>
> *It is the intent of the Legislature in enacting this act to end the pernicious practice of marriage discrimination in California. . . .*

Id. §§ 3(d), (f), (g), (j) & (k) (emphasis added).

In support of AB 849, the California Legislature traced the state's recognition of the important benefits of civil marriage as an institution. Id. § 3(a). The Legislature also relied on the California Supreme Court's role in upholding the state's interests in marriage, noting that the California Supreme Court was the "first state court in the country to strike down a law

prohibiting interracial marriage" in Perez v. Sharp, 32 Cal.2d 711 (1948) and remained "the *only* state court to do so until the United States Supreme Court invalidated such laws in 1967." Id. § 3(c) (emphasis added). The Legislature approved in this context the California Supreme Court's holding in *Perez* that "marriage . . . is something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. . . . Legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." Id. § 3(c) (quoting Perez, supra, 32 Cal. 2d at 714-15).

Consistent with California's interests, the Legislature also recognized a growing consensus from other jurisdictions and specifically noted that the Supreme Courts of Hawaii, Vermont and Massachusetts had held that "denying the legal rights and obligations of marriage to same-sex couples is constitutionally suspect or impermissible under their respective state constitutions." Assem. Bill No. 849 § 3(e). The Legislature noted that the "highest courts in seven Canadian provinces have similarly ruled that marriage laws that discriminate in favor of different-sex couples to the exclusion of same-sex couples violate the rights of same-sex couples and cannot stand." Id.

Although AB 849 did not become law, the Bill's legislative findings make plain the Legislature's recognition that California's marriage statutes

discriminate against same-sex couples and that such discrimination is unconstitutional. The findings also clearly show that the Legislature understands that excluding same-sex couples from the right to marry violates the California Constitution by discriminating on the bases of sex and sexual orientation and by infringing the fundamental right to marry. The Legislature's findings also demonstrate that the Legislature understands that this discrimination harms *all* Californians.

Although the Governor's Proposition 22-based veto blocked the Legislature's effort to end this discrimination, the experience in this state so far of increasing legal rights and duties for same-sex couples disproves the charge that expanding these protections will be destabilizing, and instead confirms that the public embraces fairness for these families even more warmly after having been given the chance to see its virtues.

C. Societal Support For Equal Legal Rights For Same-Sex Couples Has Increased With The Public's Opportunity To See The Benefits For Same-Sex Couples And The Lack Of Any Harm To Heterosexual Couples.

Over the past twenty years, public support in California for expanding protections for same-sex couples, and for marriage equality for