

Case No. S147999

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**IN RE MARRIAGE CASES,**

Judicial Counsel Coordination Proceeding No. 4365

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AFTER A DECISION BY THE COURT OF APPEAL  
FIRST APPELLATE DISTRICT, DIVISION THREE  
NOS. A110449, A110450, A110451, A110463, A110651, A110652  
SAN FRANCISCO SUPERIOR COURT NOS. JCCP4365, 429539, 429548, 504038  
LOS ANGELES SUPERIOR COURT NO. BC088506  
HONORABLE RICHARD A. KRAMER, JUDGE

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
AND BRIEF OF PROFESSORS OF INTERNATIONAL LAW AND  
THE UNIVERSITY OF TORONTO, FACULTY OF LAW  
INTERNATIONAL HUMAN RIGHTS CLINIC AS AMICI CURIAE  
IN SUPPORT OF RESPONDENTS  
CHALLENGING THE MARRIAGE EXCLUSION**

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## **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND STATEMENT OF INTEREST OF AMICI CURIAE**

Pursuant to California Rule of Court, Rule 8.520, amici curiae hereby respectfully apply for leave to file an amicus curiae brief in support of Respondents.

This brief is submitted in the consolidated California marriage cases by professors of international law (listed below) and the University of Toronto, Faculty of Law International Human Rights Clinic (IHRC). Amici are experts in the fields of comparative constitutional law and international human rights law and are familiar with legal developments outside the United States, including developments concerning the rights of same-sex couples to marry. This Court has recognized that comparative law analysis may provide helpful guidance when addressing constitutional issues of first impression. (See, e.g., *People v. Anderson* (1972) 6 Cal.3d 628, 654-656 [reviewing laws of other states and nations in analyzing whether death penalty violated California Constitution].) Accordingly, Amici respectfully submit this Brief to apprise the Court of the experiences of foreign states that have recognized the rights of same-sex couples to participate in state-sanctioned marriages.

The Amici Curiae law professors are:

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## **BRIEF OF AMICI CURIAE**

### **SUMMARY OF ARGUMENT**

This Court should consider the constitutionality of the denial of marriage to same-sex couples with the benefit of foreign experiences. Applying the same or similar fundamental rights to nearly identical facts, democracies around the world have concluded that marriage is an essential social institution and that the refusal to allow same-sex couples the right to marry violates well-established equality principles. From Canada to Spain to South Africa, courts and legislatures have determined that excluding gays and lesbians from the fundamental right to marry causes grave harm to their human dignity and freedom. The experience of these foreign states provides support for the conclusion that the continued exclusion of same-sex couples from the institution of marriage violates the California Constitution.

Equally important, these foreign states have addressed and rejected arguments proffered by the proponents of the continued exclusion of same-sex couples from marriage in the instant cases: that a separate institution called civil unions or registered domestic partnerships for same-sex couples constitutes an adequate alternative to marriage and that marriage honors procreation and therefore should be limited to heterosexual couples. Canadian and South African courts have held that each of these claims was wholly insufficient to justify continued denial of access to the institution of civil marriage for same-sex couples. And as government spokespersons in Belgium, the Netherlands and Spain observed upon passage of marriage equality legislation: freedom, dignity and equality demand nothing less. Taken together, these developments reflect a growing trend in foreign and comparative law in favor of extending the right of civil marriage to same-sex couples.

## ARGUMENT

### I. AS THIS COURT HAS RECOGNIZED, THE EXPERIENCES OF FOREIGN STATES CAN PROVIDE HELPFUL GUIDANCE WHEN CONSIDERING CONSTITUTIONAL ISSUES OF FIRST IMPRESSION

Developments in foreign law have provided guidance to this Court in previous cases deciding constitutional questions of first impression, including issues involving fundamental human rights. (See, e.g., *People v. Anderson* (1972) 6 Cal.3d 628, 654-656 [reviewing practices of numerous countries and identifying a “world-wide trend towards abolition” as factor supporting conclusion that penalty at issue was impermissibly “unusual” under California Constitution]; *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 268, fn. 12 [citing blood alcohol limits of “several foreign countries” in addressing constitutional challenge to statute prohibiting driving under the influence]; *In re Lynch* (1972) 8 Cal.3d 410, 424, 427 [“compar[ing] . . . the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision” and concluding that penalty at issue “shocks the conscience and offends fundamental notions of human dignity”].)

The same trend is observable in federal court. The U.S. Supreme Court has affirmed the value of international jurisprudence in providing interpretive guidance on the rights and liberties protected by the U.S. constitution. In *Lawrence v. Texas* (2003) 539 U.S. 558, the U.S. Supreme Court relied on comparative and international precedents to find that the criminalization of homosexual consensual intimacy rendered *Bowers* out of step with the current norms accepted in liberal democracies. (*Id.* at 576-578, overruling *Bowers v. Hardwick* (1986) 478 U.S. 186.) The Lawrence Court stated succinctly: “To the extent *Bowers* relied on values we share with a wider civilization, it should

be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.” (*Id.* at p. 576.)<sup>1</sup>

Other courts that have addressed the rights of same-sex couples to marry have recognized the utility of engaging in comparative law analysis in reaching their decisions. For example, in *Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941, 969, the Massachusetts Supreme Court cited and relied on *Halpern v. Canada* (Ont. Ct. App. 2003) 65 O.R.3d 161 (*Halpern*), in concluding that the common-law meaning of marriage must be refined to include same-sex couples. In turn, the South Africa Supreme Court of Appeal cited *Goodridge* when holding South Africa’s marriage exclusion laws unconstitutional. (*Fourie v. Minister of Home Affairs* (S. Afr. Ct. App. 2005) (3) BCLR 241, ¶ 18 (hereafter *Fourie I*).

Amici submit that the experience of other countries provides particularly useful guidance in this case. As shown below, states with comparable constitutional provisions and laws that protect fundamental human rights have addressed issues concerning the rights of same-sex couples to marry that are analogous to the issues before this Court. The experiences of those other countries, and their conclusions that excluding same-sex couples from the fundamental institution of marriage violates human dignity and freedom, provide helpful authority supporting the same conclusion in these cases.

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<sup>1</sup> Leading scholars of comparative and international law contend that transjudicial migration is inevitable. (See Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse* (2004) 65 Mont. L.Rev. 15 [analyzing the role of transnational human rights in U.S. jurisprudence]; Waters, *Mediating Norms and Identity: The Role of Transjudicial Dialogue in Creating and Enforcing International Law* (2005) 93 Geo. L.J 487, 492 [“courts are engaging each other out of a developing sense that they are part of a common enterprise”].)

## II. MARRIAGE RIGHTS FOR SAME-SEX COUPLES ARE INCREASINGLY RECOGNIZED BY COMMON LAW COURTS ENFORCING BROADLY PHRASED WRITTEN CONSTITUTIONS, AS WELL AS THROUGH THE LEGISLATIVE ACTS OF WESTERN DEMOCRACIES

Recent judicial decisions in Canada and South Africa, as well as the legislative acts of several Western democracies, are increasingly recognizing the constitutional right to marry the person of one's choice.

### A. Canadian Courts Have Recognized Marriage Rights For Same-Sex Couples

In Canada's three most populous provinces, a trio of landmark decisions known as *Halpern*, *EGALE*, and *Hendricks* found in favor of full marriage equality for same-sex couples. (See *Halpern*, *supra*, 65 O.R.3d 161; *EGALE Canada, Inc. v. Canada* (B.C. Ct. App. 2003) 225 D.L.R.4th 472 (*EGALE*); *Hendricks v. Québec* (Que. Super. Ct. 2002) R.J.Q. 2506 (*Hendricks*), app. disp. *Catholic Civil Rights League v. Hendricks* (Que. Ct. App. 2004) 238 D.L.R.4th 577 (*Catholic Civil Rights League*).)<sup>2</sup> These three decisions each held that the traditional definition of marriage that excluded same-sex couples violated the Canadian Charter of Rights and Freedoms.

In *Halpern*, the Ontario Court of Appeal (the highest court in the province) concluded that excluding same-sex couples from the "fundamental societal institution [of] marriage" discriminated against gay men and lesbians in a manner that offended human dignity:

The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the

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<sup>2</sup> Copies of all available cited foreign law materials are attached as exhibits to the Motion for Judicial Notice, filed herewith.

claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships [and is therefore discriminatory].

(*Halpern, supra*, 65 O.R.3d at pp. 189-190, ¶ 107.)<sup>3</sup>

In the same vein, in *EGALE*, the highest court in British Columbia examined the connection between the importance of marriage as an institution and the resulting impact on an individual's dignity, finding that "[t]he evidence supports a conclusion that 'marriage' represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core." (*EGALE, supra*, 225 D.L.R.4th at p. 501, ¶ 90.) Likewise, as described by the Quebec Court of Appeal in *Catholic Civil Rights League*, the Superior Court in *Hendricks* "ruled that the legislative provisions prohibiting the marriage of homosexuals violated the Canadian Charter of Rights and Freedoms." (*Catholic Civil Rights League, supra*, 238 D.L.R.4th at p. 581, ¶ 6 [dismissing intervenor's appeal].)

Six other provinces and territories followed quickly followed suit.<sup>4</sup> Thus, when confronted with the question of whether same-sex couples should

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<sup>3</sup> As the Canadian Supreme Court explained, the purpose of the equal protection provision of the Canadian Charter of Rights and Freedoms is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." (*Law v. Canada* (Can. 1999) 1 S.C.R. 497, 529.)

<sup>4</sup> See *Reference re Same-Sex Marriage* (Can. 2004) 3 S.C.R. 698, 725 at ¶ 66 (noting that "the opposite-sex requirement for marriage has also been struck down in the Yukon, Manitoba, Nova Scotia and Saskatchewan"); CBC News, *Newfoundland Legalizes Same-Sex Marriage* (December 21, 2004) <[http://www.cbc.ca/canada/story/2004/12/21/samesex-newfoundland\\_041221.html](http://www.cbc.ca/canada/story/2004/12/21/samesex-newfoundland_041221.html)> (as of Sept. 26, 2007); CBC News, *New Brunswick Ruling Clears Way*

have the right to marry, Canadian courts have unanimously answered in the affirmative.

**B. The Highest Courts in South Africa Have Recognized Marriage Rights For Same-Sex Couples**

On December 1, 2005, South Africa's Constitutional Court, that nation's highest court, joined Canada in ruling that the exclusion of same-sex couples from the institution of civil marriage was unconstitutional. (*Minister of Home Affairs v. Fourie* (S. Afr. Const. Ct. 2006) (3) BCLR 355 (*Fourie II*), affg. *Fourie I, supra*, (3) BCLR 241.) In both *Fourie* decisions, the courts held that a definition of marriage that excludes same-sex couples violates the constitutional rights to human dignity and equality and that these rights require access to the institution of marriage for all couples, regardless of sexual orientation.

In *Fourie I*, the Supreme Court of Appeal found that the exclusion of same-sex couples from an institution of fundamental social significance "undermines the values which underlie an open and democratic society based on freedom and equality." (*Fourie I, supra*, (3) BCLR 241, at ¶ 16, citation omitted.) On appeal, the Constitutional Court concurred, holding that the exclusion of same-sex couples from civil marriage "represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples." (*Fourie II, supra*, (3) BCLR 355, at ¶ 71.)

Like the courts of Canada, the South African Constitutional Court held that anything less than full marriage equality contravenes the fundamental precepts of equal protection.

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*for Gay Marriage* (June 23, 2005) <<http://www.cbc.ca/canada/story/2005/06/23/nb-marriage-050623.html>> (as of Sept. 26, 2007).

**C. These Judicial Decisions Are Part Of A Broader Trend Prohibiting Discrimination Based On Sexual Orientation, Including Discrimination Regarding Marriage Rights**

This increasing recognition of marriage for same-sex couples has also gained momentum in the legislative sphere. Canada and South Africa codified their respective decisions through legislative acts, and an increasing number of Western democracies are following suit by enacting comparable legislation.

Specifically, several European countries have amended their civil marriage laws to recognize marriage by same-sex couples. On April 1, 2001, the Parliament of the Netherlands became the world's first legislature to recognize in law that the right to civil marriage applied equally to same-sex couples and opposite-sex couples. This recognition gained formal expression through the passage of the "Act of 21 December 2000, amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)." (Sumner & Warendorf, *Family Law Legislation of the Netherlands: a translation including Book 1 of the Dutch Civil Code, procedural and transitional provisions and private international law legislation* (2003) pp. 36-38.) The Civil Code was amended to read "[a] marriage may be entered into by two persons of a different or of the same sex." (*Id.* at 36.)<sup>5</sup>

The Parliament of Belgium soon became the second legislature to open marriage to same-sex couples in 2003.<sup>6</sup> Thus, the Belgian perspective reinforces the proposition that marriage is of such great symbolic value and

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<sup>5</sup> In the Netherlands, the move to create equal marriage was one among several statutory initiatives that seek to ensure equality in the public sphere, including a bill granting same-sex couples the right of adoption. (See Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison* (2001) 18 *Ariz. J. Int'l & Comp. L.* 141.)

<sup>6</sup> See Simon, *Parliament Approves Gay Marriages*, *N.Y. Times* (Jan. 31, 2003) <<http://query.nytimes.com/gst/fullpage.html?res=9907EEDD1738F932A05752C0A9659C8B63>> (as of Sept. 26, 2007).

importance to society, that to exclude same-sex couples from it would stigmatize the relationships of same-sex partners as being separate and unequal in comparison to those of heterosexual couples.

In July 2005, Spain joined the Netherlands and Belgium and became the third European country to pass legislation permitting same-sex couples to marry.<sup>7</sup> The Spanish legislation fully equates marriage by same-sex couples to heterosexual marriage, without exception, including full adoption and inheritance rights. The actions of Spain, an overwhelmingly Catholic country, reflect an emerging realization that marriage is not a closed institution, available only to heterosexual couples, but a compact open to all unions, regardless of sexual orientation.

This legislative momentum soon spread to those common law states whose courts had struck down marriage laws excluding gay and lesbian couples. In Canada, the federal government chose not to appeal any of the provincial decisions that had ruled in favor of marriage equality. The Canadian Parliament thereafter proposed a bill in which marriage was defined as the lawful union of two people, and referred the proposed bill to the Canadian Supreme Court for guidance as to the bill's constitutionality. In 2004, the Supreme Court of Canada ruled that the bill was constitutional, holding that "the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the [s. 15(1)] rights of another." (*Reference re Same-Sex Marriage, supra*, 3 S.C.R. at p. 719, ¶ 46.) Following passage of Bill C-38 in the House of Commons, Canada's new *Civil Marriage Act* became law on July 20, 2005.<sup>8</sup>

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<sup>7</sup> See McLean, *First Gay Couples Apply for Marriage Under New Spanish Law*, N.Y. Times (July 5, 2005) <<http://www.nytimes.com/2005/07/05/international/europe/05spain.html>> (as of Sept. 26, 2007).

<sup>8</sup> *Civil Marriage Act (An Act respecting certain aspects of legal capacity for marriage for civil purposes)*, S.C. 2005, c. 33.

On November 14, 2006, the South African Parliament voted to legalize marriages for same-sex couples, thereby implementing the Constitutional Court's ruling and making the Republic of South Africa the most recent country to codify the removal of legal barriers to gay and lesbian marriages.<sup>9</sup>

Thus, the legislative and judicial developments in Canada, the Netherlands, Belgium, Spain, and South Africa reflect a steady trend towards permitting same-sex couples equal access to the globally recognized institution of marriage.<sup>10</sup>

**III. THESE FOREIGN LAW DEVELOPMENTS ARE BASED ON FUNDAMENTAL RIGHTS AND PRINCIPLES THAT ARE RECOGNIZED BY CALIFORNIA LAW AND THEREFORE PROVIDE PERSUASIVE AUTHORITY FOR THIS COURT TO PROHIBIT DISCRIMINATION AGAINST SAME-SEX COUPLES IN MARRIAGE**

Legal developments in other countries that share key characteristics with California are particularly germane when examining issues of fundamental human rights arising under the California Constitution. California shares a common law tradition with several democracies that trace their heritage to English law and that empower courts to strike down laws found to be unconstitutional. Moreover, the same fundamental rights that are enshrined in the California Constitution and protected by California law have been adopted by democracies the world over. Like the constitutions of other nations, the protections provided by the California Constitution are rooted in

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<sup>9</sup> Civil Union Act 17 of 2006 s. 1, 11 (S. Afr.). In South Africa, the term "civil union" now refers to a couple's choice of a "marriage" or a "civil partnership".

<sup>10</sup> Joining this growing trend, Israel's highest court recently determined that same-sex couples presenting a valid marriage certificate acquired abroad must now be permitted to register as married couples in Israel. (See Associated Press, *Israel's Supreme Court Approves Same-Sex Marriages Performed Abroad*, Int'l Herald Trib. (Nov. 21, 2006) <[http://www.iht.com/articles/ap/2006/11/21/africa/ME\\_GEN\\_Israel\\_Same\\_Sex\\_Marriages.php](http://www.iht.com/articles/ap/2006/11/21/africa/ME_GEN_Israel_Same_Sex_Marriages.php)> [as of Sept. 26, 2007].)

an understanding of the connection between protecting equality and preserving the dignity and self-worth of the individual. By using comparative jurisprudence to interpret internationally shared legal principles such as “equality,” “dignity,” “personal autonomy,” and “discrimination,” this Court can benefit from the experience of other nations that have addressed similar issues. The reasoning of foreign courts on issues of equality and dignity provides useful authority supporting recognition of a right under the California Constitution for same-sex couples to marry.

**A. Based On Rights And Principles Identical To Those Recognized Under California Law, Foreign Jurisdictions Have Concluded That Discrimination Against Same-Sex Couples In Marriage Impermissibly Undermines Human Dignity, Privacy, And Personal Autonomy**

The fundamental rights protected by the California Constitution are closely analogous to those that foreign jurisdictions have concluded afford same-sex couples the right to enter into state-sanctioned marriages. This is true both in terms of the constitutional clauses being interpreted and the fundamental rights recognized under those constitutions.

First, the Canadian courts that recognized marriage rights for same-sex couples based their holdings on an equality provision in the Canadian Charter of Rights and Freedoms that is nearly identical to article I, section 7, subdivision (a) of the California Constitution. (See *Halpern, supra*, 65 O.R.3d at pp. 178-190, ¶¶ 58-108; *EGALE, supra*, 225 D.L.R.4th at pp. 496-501, ¶¶ 81-90; *Catholic Civil Rights League, supra*, 238 D.L.R.4th at p. 581.) The relevant provision of the Canadian Charter, section 15, subdivision (1), provides:

“Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race,

national or ethnic origin, color, religion, sex, age or mental or physical disability.”

(*EGALE, supra*, 225 D.L.R.4th at p. 496, ¶ 81, quoting Canada Act, 1982, pt. I (Canadian Charter of Rights and Freedoms), § 15.)<sup>11</sup>

Second, when Canadian courts ruled against the marriage exclusion that existed there, they did so based on an equal protection provision and a body of precedent prohibiting certain forms of discrimination based on sexual orientation that are analogous to the constitutional provision and precedent at issue in these cases. Just as the equal protection clause in the California Constitution has been interpreted to prohibit discrimination on the basis of sexual orientation in a variety of circumstances, the analogous provision in the Canadian Charter also had been interpreted to prohibit sexual orientation discrimination. (Compare *Egan v. Canada* (Can. 1995) 2 S.C.R. 513, 528-529, ¶ 5 & 536, ¶ 22 [recognizing that sexual orientation is “analogous to the enumerated grounds” listed in Section 15 of the Canadian Charter, and that it therefore falls under that Section’s equal protection guarantee] with *Gay Law Students Assn. v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458, 474-475 [finding sexual orientation analogous to the enumerated grounds in California’s equal protection clause, and rejecting an arbitrarily discriminatory employment policy against gays and lesbians], *Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 318 [affirming that the California National Guard’s policy of discharging gays and lesbians could violate equal protection under the California Constitution], *Citizens for Responsible Behavior v.*

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<sup>11</sup> Similarly, South Africa’s equal protection clause, section 9, subdivision (1) of the Constitution, states that “everyone is equal before the law and has the right to equal protection and benefit of the law.” (Civil Union Act 17 of 2006 pmbl. (S. Afr.). Section 9, subdivision (3) provides that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” (*Ibid.*)

*Superior Court* (1991) 1 Cal.App.4th 1013, 1025-1026 [rejecting a discriminatory ballot initiative, acknowledging that the equal protection clause in the California Constitution applies to gays and lesbians].) The starting point for this Court's analysis is remarkably similar to that of Canadian courts immediately before finding in favor of marriage equality for same-sex couples.

Finally, the South Africa and Canada marriage cases are based on fundamental rights to human dignity, equality, and personal autonomy that also are recognized and protected by California law. In Canada, the *Halpern* court explained that "this case is ultimately about the recognition and protection of human dignity." (*Halpern, supra*, 65 O.R.3d at p. 167, ¶ 2.) The court relied on the Canada Supreme Court's decision in *Law v. Canada*, which had defined human dignity as meaning "that an individual or group feels self-respect and self-worth," and had held that "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." (*Id.* at p. 167, ¶ 3 [quoting *Law v. Canada, supra*, 1 S.C.R. at p. 530]; see also *EGALE, supra*, 225 D.L.R.4th at p. 501, ¶ 90 [citing *Law v. Canada* in concluding that "the equality provisions of s. 15(1) of the Charter [were] violated" because the marriage exclusion "discriminates against [same-sex couples] in a substantive sense, bringing into play the purpose of s. 15(1) . . . in remedying such ills as prejudice, stereotyping and historical disadvantage"].)<sup>12</sup> The *Halpern* court also relied on the Ontario Human Rights Code, which provides:

"[I]t is public policy in Ontario to recognize the  
dignity and worth of every person and to

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<sup>12</sup> In *Law v. Canada*, the Canada Supreme Court held that the purpose of the Canada Charter's equal protection provision (section 15, subdivision (1)) is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." (*Law v. Canada, supra*, 1 S.C.R. at p. 529.)

provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province[.]”

(*Halpern, supra*, 65 O.R.3d at p. 167, ¶ 4 [quoting R.S.O. 1990, ch. H.19, pmbl. (Ont.)].) Thus, the Canada courts grounded much of their analysis in the fundamental rights to human dignity, and the worth of the individual.

The South African marriage cases also are based on fundamental rights to human dignity and personal autonomy. In *Fourie II*, the Constitutional Court examined the profound intangible harms to human dignity from being denied both equal access to marriage and the right to choose to marry:

It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

(*Fourie II, supra*, (3) BCLR 355, at ¶ 71.) Similarly, in *Fourie I*, the Supreme Court of Appeal stated:

More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be

fully part of the community of moral equals that the Constitution promises to create for all.

(*Fourie I*, (3) BCLR 241, at ¶ 15.)

The South Africa Constitutional Court also relied on a prior opinion concerning the importance of human dignity, *National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs* (S. Afr. Const. Ct. 1999) (1) BCLR 39, at ¶ 42 (*National Coalition*).<sup>13</sup> In *National Coalition*, the Constitutional Court had held that the partners of married different-sex couples cannot be given preferential immigration status over same-sex couples. (*Id.* at ¶ 97.) The reasoning of the Constitutional Court was unequivocal—human dignity, privacy, and equality demand that same-sex couples’ relationships be afforded the same legal status as those of opposite-sex couples:

Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.

(*Id.* at ¶ 42.) As in Canada, the South Africa courts relied on fundamental constitutional rights to human dignity in holding that same-sex couples must be allowed to participate in state-sanctioned marriages.

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<sup>13</sup> See *Fourie II*, *supra*, (3) BCLR 355, at ¶ 172.

California law has similarly strong precedent recognizing the ties between human dignity, individual liberty, and marriage under the California Constitution, including the rights of gay and lesbian individuals and same-sex couples. For example, in *Perez v. Lippold* (1948) 32 Cal.2d 711, 714, the Court relied on the fact that marriage is a “fundamental right of free men” in striking down an anti-miscegenation law, thus framing marriage as a universal right to which every human is entitled. In *Ortiz v. Los Angeles Police Relief Association, Inc.* (2002) 98 Cal.App.4th 1288, the Court of Appeal recognized that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness” and that “[m]arriage is one of the ‘basic civil rights of man.’” (*Id.* at 1303, 1309 [quoting *Loving v. Virginia* (1967) 388 U.S. 1, 12], internal quotation marks omitted.) Thus, the fact that—like Canada and South Africa—California courts have chosen to frame the constitutional issue in terms of fundamental human rights is especially instructive, and strengthens the persuasive force of the Canadian and South African opinions.

California courts also have recognized the fundamental importance of human dignity in a variety of other contexts, including housing discrimination (*Walnut Creek Manor v. Fair Employment & Housing Commission* (1991) 54 Cal.3d 245, 286-287 [“[t]he refusal to provide housing on grounds made unlawful by FEHA is invidious not simply because the applicant is denied housing, but also because the act of discrimination itself demeans basic human dignity”]); the right to refuse medical treatment (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 737-738 [“We respect human dignity by granting individuals the freedom to make choices in accordance with their own values.”]); procedural due process (*People v. Ramirez* (1979) 25 Cal.3d 260, 268 [“when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity”]); continued

receipt of welfare benefits (*Harlow v. Carleson* (1976) 16 Cal.3d 731, 737 [the right to continued welfare benefits “is fundamental both in economic terms, and in terms of its ‘effect . . . in human terms . . . and [its] importance . . . to the individual in the life situation”]), quoting *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144); retirement disability benefits (*Strumsky v. San Diego County Employees Retirement Association* (1974) 11 Cal.3d 28, 45 [“the impact [of the benefits] in human terms of the decision is manifest”]); and disability discrimination (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160 [disability discrimination “can ‘attack[] the individual’s sense of self-worth in much the same fashion as race or sex discrimination”]), citation omitted).<sup>14</sup>

In sum, California, U.S. and foreign and comparative law are increasingly relying on human dignity as the touchstone of rights protection analyses. Because the Canada and South Africa marriage cases are built on foundations of constitutional provisions and fundamental rights that closely align with those in California, these cases provide valuable authority supporting the end of the marriage exclusion in California.

**B. Based On Rights And Principles Identical To Those Recognized By California Law, Foreign Jurisdictions Have Concluded That “Separate But Equal” Institutions Such As Civil Unions Or Domestic Partnerships Are Legally Inadequate**

The courts of both Canada and South Africa recognized that anything less than full equality demeans the dignity of same-sex couples and the self-esteem and autonomy of persons in such relationships. The California Constitution compels the same conclusion.

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<sup>14</sup> See also *People v. Crovedi* (1966) 65 Cal.2d 199, 205 (criminal defendants must be “accorded treatment consistent with human dignity”).

The judicial decisions of Canada highlight the inequality created by “separate but equal” regimes in marriage. The *Halpern* court, for example, held that privileging opposite-sex relationships over their same-sex counterparts could not serve as a justification for discrimination because it perpetuates the view that same-sex relationships are not equally capable of providing companionship. (*Halpern, supra*, 65 O.R.3d at 193, ¶ 124.) The British Columbia Court of Appeal similarly found that “[t]he evidence supports a conclusion that ‘marriage’ represents society’s highest acceptance of the self-worth and the wholeness of a couple’s relationship, and, thus, touches their sense of human dignity at its core,” and concluded that [a]ny other form of recognition of same-sex relationships, including the parallel institution of RDP’s [registered domestic partnerships], falls short of true equality.” (*EGALE, supra*, 225 D.L.R.4th at p. 501, ¶ 90 & p. 522, ¶ 156.) Likewise, the Quebec Superior Court observed that “offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine” and cautioned against reviving that doctrine “after its much heralded death in the United States.” (*Hendricks, supra*, R.J.Q. at ¶ 134.) Thus, Canada recognizes that only full marriage equality—and not some separate institution—could satisfy these fundamental precepts.

The South African Constitutional Court agreed that a “separate but equal” institution for same-sex couples was insufficient under its constitutional guaranties of dignity and personal autonomy. (*Fourie II, supra*, (3) BCLR 355, at ¶ 72.) The court cautioned against a remedy that “on the face of it would provide equal protection, but would do so in a manner that in its context and application would be calculated to reproduce new forms of marginalisation.” (*Id.* at ¶ 150.) Calling “separate but equal” regimes a “threadbare cloak for covering distaste for . . . the group subjected to segregation” (*ibid.*), it focused on the “real lives as lived by real people today”

and stressed “the importance of the impact that an apparently neutral distinction could have on the dignity and sense of self-worth of the persons affected” (*id.* at ¶ 151).

California similarly disavows “separate but equal” regimes targeted at minorities. (*Price v. Civil Service Com.* (1980) 26 Cal.3d 257, 286 [citing the persistent discrimination of minorities condoned by the “pernicious ‘separate but equal doctrine’”].) As suggested by the Court of Appeal, civil marriage is something more highly esteemed than all other relationships:

More importantly, marriage is revered as a public institution. (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-864 [250 P.2d 598].) It is valued not just for the private commitment it fosters between the individuals who marry, but also for its public role in organizing fundamental aspects of our society. (See *Maynard v. Hill* (1888) 125 U.S. 190, 213 [31 L. Ed. 654, 8 S. Ct. 723] [describing marriage as “not so much the result of private agreement, as of public ordination. . . . It is a great public institution, giving character to our whole civil polity”]; *Elden v. Sheldon, supra*, 46 Cal.3d at p. 275 [stating “[t]he policy favoring marriage is ‘rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society’”].)

(*In re Marriage Cases* (2006) 143 Cal.App.4th 873, 925.) Thus, there would seem to be no issue that the state-sponsored institutions of marriage and domestic partnerships are not truly equal at their core. Instead, they are separate and unequal.

Foreign courts also have rejected efforts to justify a “separate-but-equal” status for same-sex couples based on arguments concerning biological procreation. For example, in *Halpern*, the court dismissed the contention that the purpose of marriage is to unite the different sexes and encourage

companionship. (*Halpern, supra*, 65 O.R.3d at p. 192, ¶ 119.) While that court acknowledged that the encouragement of child rearing is an important purpose, it emphasized that this could obviously not serve as a reason to exclude same-sex couples from marriage. (*Id.* at p. 187, ¶ 94 & p. 192, ¶ 117) [“[s]tating that marriage is heterosexual because it always has been . . . is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a Charter guarantee”].) (See also *Goodwin v. United Kingdom* (Eur. Ct. H.R. 2002) App. No. 28957/95 at ¶ 98 [“the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to [marry]”].) Similarly, in *National Coalition, supra*, (1) BCLR 39, Justice Ackerman rebutted the procreative rationale for limiting marital privileges to heterosexual couples by turning to the right of privacy:

From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

(*Id.* at ¶ 51.)

The same logic applies here. Both the United States and California Supreme Courts have “repeated[ly] acknowledg[ed] . . . a ‘right of privacy’ or

‘liberty’ in matters related to marriage, family, and sex.” (*People v. Belous* (1969) 71 Cal.2d 954, 963; see *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275; *Ortiz, supra*, 98 Cal.App.4th at p. 1303; see also *Griswold v. Conn.* (1965) 381 U.S. 479, 486 [describing the marital relationship as “a right of privacy older than the Bill of Rights”].) The appellate court below even acknowledged that “the right to marry one’s chosen partner is ‘virtually synonymous’ with the right of intimate association.” (*In re Marriage Cases, supra*, 143 Cal.App.4th at p. 924, quoting *Ortiz, supra*, 98 Cal.App.4th at pp. 1303, 1306.)

*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123 is particularly instructive. In *Adamson*, this Court recognized a fundamental right to privacy that made it improper for the government to dictate what constituted a “family” in deciding who could live in a private home. (*Id.* at 130.) In so doing, the Court recognized a constitutional “right of privacy not only in one’s family but also in one’s home.” (*Ibid.*) Similarly, any efforts by Appellants to limit marriage to an institution that exists for the purposes of procreation or any other private act must be rejected as violating Respondents’ right to privacy under the California Constitution.

Thus, in light of the similar fundamental rights recognized in California, Canada, and South Africa, there can be no doubt that perpetuating a “separate but equal” institution here would abridge the personal autonomy and human dignity to which all Californians are entitled.

#### **IV. THE EXPERIENCE OF OTHER JURISDICTIONS HAS BEEN THAT RECOGNITION OF MARRIAGE RIGHTS FOR SAME-SEX COUPLES HAS NOT LED TO NEGATIVE CONSEQUENCES**

The experience of other nations is particularly useful in evaluating any potential consequences to a court’s decision to upholding the right to marry

the person of one's choice.<sup>15</sup> Here, an examination of the newly expanded institution of marriage in Western democracies reveals no detrimental effects whatsoever.

As the court in *Halpern, supra*, observed, “[a]llowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.” (65 O.R.3d at p. 195, ¶ 137.) Both the Supreme Court of Canada and South Africa’s Constitutional Court ensured that religious officials may continue to enjoy the full exercise of their beliefs by permitting clergy to refuse to solemnize marriages between people of the same sex. (*Reference re Same-Sex Marriage, supra*, 3 S.C.R. at pp. 721-723, ¶¶ 55-60; *Fourie II, supra*, (3) BCLR 355, at ¶ 98.) Thus, a decision to tear down the walls of a “separate-but-equal” statute can easily be framed in a way that retains the Constitutional division between church and state.

In addition, courts and legislatures have successfully crafted rules that promote the freedom to marry but prevent polygamy. Indeed, every court permitting same-sex couples the freedom to marry has ensured that marriage is limited to the union of two people. In both *Halpern* and *EGALE*, the courts fashioned a temporary remedy that reformulated the common law rule, substituting the words “two persons” for “one man and one woman” until the legislature had an opportunity to repair the impugned law. (*Halpern, supra*, 65 O.R.3d at p. 200, ¶ 156; *EGALE, supra*, 225 D.L.R.4th at p. 522, ¶ 158.)

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<sup>15</sup> The Court of Appeal’s decision was based in part on the unsupported assumption that “the importance of preserving the traditional understanding of marriage . . . is very important to many Californians, who fear such a fundamental change will destroy or seriously weaken the institution at the heart of family life.” (*In re Marriage Cases, supra*, 143 Cal.App.4th at p. 889.) In fact, no empirical evidence exists to support the view that marriage by same-sex couples in any U.S. state or foreign jurisdiction has had any discernible impact upon the rights or interests of opposite-sex couples or religious officials. (See Eskridge & Spedale, *Gay Marriage: For Better or for Worse?* (2006) [studying Scandinavian Registered Partnership systems; finding that different sex marriage has not suffered from the legalization of same-sex unions; and specifically rebutting the claim of journalist Stanley Kurtz that such harm has occurred].)

Through a similar definition, the South African Constitutional Court also foreclosed the possibility of polygamous marriages. (*Fourie II, supra*, (3) BCLR 355 at ¶¶ 118-123.) Thus, any purported fear of polygamy belies the experiences of other nations, and has no foundation in fact.

As the experiences of other nations demonstrate, the elimination of discrimination in marriage will not adversely impact opposite-sex couples or religion, but would greatly enrich the lives of same-sex families, while bolstering the intrinsic dignity and autonomy of all Californians. Accordingly, the Court should join the trend of Western democracies in enforcing everyone's freedom to marry the person of their choice.

### CONCLUSION

The foreign and comparative lessons on the question of marriage equality for same-sex couples are instructive. Common law courts with the power to enforce equality principles and promote the human dignity of same-sex couples by striking down restrictive definitions of marriage are doing so. In addition, several civil law systems, including the Netherlands, Belgium, and Spain, legislatures have determined that civil unions do not constitute an adequate alternative to marriage and have led the way towards full equality. Each of these states has recognized that the word "marriage" matters and that it communicates authoritative respect for the union of two people. Israel's highest court recently acknowledged as much when it determined that same-sex couples presenting a valid marriage certificate acquired abroad may now be permitted to register as married couples in Israel.

In all of these cases, changes in the definition of civil marriage have been informed by what the Spanish Prime Minister has called "two unstoppable forces: freedom and equality,"<sup>16</sup> that is, the startlingly simple

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<sup>16</sup> Spanish Prime Minister Zapatero, address to Cortes Generales, June 30, 2005, reprinted in *Diario de Sesiones del Congreso de los Diputados*


proposition that same-sex couples are worthy of the same rights afforded to their heterosexual counterparts. Amici urge this Court to find that loving, committed, same-sex relationships in California warrant the same public recognition as those in Canada, South Africa, the Netherlands, Belgium or Spain.

Dated: September 26, 2007

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No. 103, at p. 5228, excerpts translated in <<http://www.guardian.co.uk/gayrights/story/0,12592,1518144,00.html>> (as of Sept. 26, 2007).

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Curiae brief has been prepared using proportionately spaced 13-point Times New Roman font. In reliance on the word count feature of the Microsoft Word for Windows software used to prepare this brief, I further certify that the total number of words of this brief is 6763 words, exclusive of those materials not required to be counted.


I declare under penalty of perjury that this Certificate of compliance is true and correct and that this declaration was executed on September 26, 2007.

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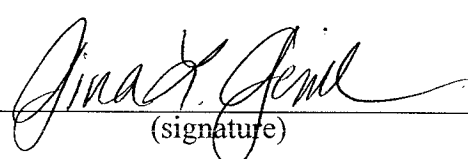
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Gina L. Gerrish  
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**San Francisco Superior Court Case No. CGC-04-429539**  
**Court of Appeal No. A110449**

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*Woo, et al. v. California, et al.*  
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*Tyler, et al. v. California, et al.*  
**Los Angeles Superior Court Case No. BS088506**  
**Court of Appeal Case No. A110450**

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*Clinton, et al. v. California, et al.*  
**San Francisco Superior Court Case No. 429548**  
**Court of Appeal Case No. A110463**

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

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*Campaign for California Families v. Newsom, et al.*  
**San Francisco Superior Court Case No. CGC 04-428794**  
**Court of Appeal Case No. A110652**

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