

S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

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

APPLICATION TO FILE AMICUS CURIAE BRIEF AND
PROPOSED AMICUS CURIAE BRIEF OF
SANTA CLARA COUNTY BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS
CHALLENGING THE MARRIAGE EXCLUSION

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INTRODUCTION

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the Santa Clara County Bar Association (“SCCBA”) respectfully requests leave to file the attached brief in support of Respondents.

STATEMENT OF INTEREST AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

Formed in 1917, the SCCBA is a nonprofit association of legal professionals in Santa Clara County, with a membership of approximately 3400 attorneys. The SCCBA is committed to promoting the fair administration of justice and equality under the law. The SCCBA strives to improve the administration of justice by, among other things, promoting advances in the judicial system and by promoting an independent judiciary. (SCCBA Bylaws, art. II, § 1, subds. (b)(1), (3).) The SCCBA also serves the public by promoting full and equal access to the legal system by all individuals. (SCCBA Bylaws, art. II, § 1, subd. (c)(3).)

In pursuit of these goals, the SCCBA has taken the lead in opposing discrimination against gay men and lesbians and has consistently supported measures to reduce discrimination and to advance the goal of full equality. In 2005, the SCCBA Board of Trustees (“Board”) adopted a resolution in favor of marriage equality and in opposition to proposed constitutional amendments seeking to preclude gay and lesbian individuals from marrying. In 2007, the Board voted to support a resolution sponsored by

the American Bar Association's Section of Individual Rights and Responsibilities amending the ABA's Goal IX to include persons of differing sexual orientations and gender identities in promoting full and equal participation in the legal profession. The ABA House of Delegates voted to adopt the proposed amendment in August 2007. The Board also approved the filing of an amicus brief in this coordinated action in support of marriage equality.

The SCCBA writes to address the confusion and uncertainty created by the State's attempt to confer marital "rights and duties," but not marital status, on members of same-sex couples, and the detrimental effect of such uncertainty on same-sex couples and the legal system. The SCCBA also explains why future amendments to the domestic partnership scheme cannot adequately address these problems going forward. Indeed, only full marriage equality can end the confusion created by the State's exclusionary marriage laws and remedy the constitutional defects inherent in a separate system. The SCCBA therefore urges the Court to follow the reasoning of *Perez v. Sharp* (1948) 32 Cal.2d 711, 715, and hold that under the California Constitution, lesbian and gay individuals cannot be denied the fundamental right to marry the person of one's choice. (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 (observing the right to marry is protected by the express right to privacy found in article 1, section 1 of the California Constitution); *Perez v. Sharp, supra*, 32 Cal.2d at 715

(concluding marriage is a fundamental right protected by the Fourteenth Amendment to the United States Constitution); *see also People v. Belous* (1969) 71 Cal.2d 954, 963 (acknowledging the rights related to marriage).)

CONCLUSION

For the foregoing reasons, the SCCBA respectfully requests that the Court accept the attached brief for filing in the California Marriage Cases.

Dated: September 26, 2007

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INTRODUCTION

California's marriage law unconstitutionally denies gay men and lesbians the fundamental right to marry the person of one's choice. California's domestic partnership scheme, although an important step towards equality, cannot remedy this constitutional violation and imposes an unreasonable degree of legal uncertainty and confusion on same-sex couples and the courts. This Court has the opportunity to end this discrimination and to hold California's exclusionary marriage law unconstitutional. The SCCBA urges this Court to do so.

The State of California and the Attorney General (collectively, the "State") contend that denying same-sex couples the right to marry is constitutional so long as the Legislature ensures all rights and benefits enjoyed by married couples are also made available to same-sex couples through the State's domestic partnership scheme. (Reply of the State of California and Attorney General to Supplemental Briefs (hereafter, "State Supp. Reply"), pp. 2-3.) The State further contends the Legislature has made all such rights and benefits available (State's Supplemental Brief Pursuant to Court Order Dated June 20, 2007, pp. 1-2), and any "problematic" differences between marriage and domestic partnership can be corrected with new legislation. (State Supp. Reply, pp. 6-7.)

The State is wrong. Uncertainty about how to apply the laws governing marriage to domestic partners and the experience of domestic

partners in the courts contradict the State's position. The Legislature has not succeeded in ensuring that domestic partners were provided all rights and benefits enjoyed by married couples. (Rymer Respondents' Supplemental Brief, pp. 1-17.) Even if it had, this would not justify excluding same-sex couples from marriage. No amount of legislative correction can erase the fact that the domestic partnership scheme consigns same-sex couples to a second-class status. The time has come to grant gay and lesbian individuals full marriage equality.

Recent court decisions show that the status of marriage matters. Lower courts have not consistently followed the Legislature's mandate that domestic partners shall have the same rights and duties as spouses. (*See* Fam. Code § 297.5; *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1172-74; *Garber v. Garber* (Super. Ct. Orange County, 2007, No. 04D006519) (G039050, app. pending).) Such decisions illustrate the impossibility of separating the "rights and duties" of marriage from the "status" marriage affords. The State's attempt to confer marital "rights and duties" without their accompanying status has led to uncertainty and confusion regarding the rights and duties of domestic partners. Such confusion is intertwined with cultural beliefs about the status of "domestic partnership," as compared to "marriage" – beliefs currently enshrined by the State's refusal to confer the status of marriage on same-sex couples.

The State cannot confer the rights and duties of marriage on gay and

lesbian individuals if it withholds the title and status of marriage from them. The State's failure to grant full equality is not just symbolic. The confusion and uncertainty resulting from the State's separate system imposes tangible costs upon gay and lesbian individuals and the judicial system. Such uncertainty and its accompanying costs will continue unless and until the State's failure to grant full marriage equality is remedied. Accordingly, the SCCBA urges the Court to reverse the Court of Appeal and grant full marriage equality to same-sex couples.

LEGAL DISCUSSION

I. ALTHOUGH THE LEGISLATURE PURPORTED TO CONFER THE SAME RIGHTS AND DUTIES ON DOMESTIC PARTNERS AS ARE GRANTED TO AND IMPOSED UPON SPOUSES, ITS ATTEMPT TO SEVER THOSE RIGHTS FROM THE STATUS OF MARRIAGE HAS FAILED.

The Domestic Partner Rights and Responsibilities Act of 2003 (hereafter "DPRRA" or "AB 205") dramatically expanded the rights and responsibilities previously available to domestic partners. (Stats. 2003, ch. 421.) In AB 205, the Legislature stated its intent to grant domestic partners the same rights as spouses, subject to certain exceptions:¹

¹ Exceptions include the following: (1) DPRRA does not modify eligibility for long-term care plans pursuant to Chapter 15 of Part 3 of Division 5 of Title 2 of the Government Code; and (2) DPRRA does not modify provisions of the California Constitution or any provision of any statute adopted by initiative. (Fam. Code § 297.5, subds. (g), (i).) In addition, DPRRA does not grant same-sex couples standing to seek any of the federal rights associated with marriage or to claim a right to recognition by

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, *whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law*, as are granted to and imposed on spouses.

(Fam. Code § 297.5, subd. (a) (emphasis added); *see also id.*, subds. (b)-(j).)

Nevertheless, the Legislature did not grant domestic partners a status equivalent to that of married spouses. (*See Knight v. Superior Court (Schwarzenegger)* (2005) 128 Cal.App.4th 14, 19.) This is evident from the uncodified statement of purpose of AB 205, which provides:

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 1 of the California Constitution* by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.

(Stats. 2003, ch. 421, § 1, subd. (a) (emphasis added).) In acknowledging that AB 205 was intended to help California “move closer” to fulfilling constitutional requirements, the Legislature recognized its domestic partnership scheme did not actually satisfy the demands of the California

other states based on settled principles of comity requiring states to honor marriages validly entered in other jurisdictions.

Constitution. Observing the “numerous dissimilarities” between marriage and domestic partnership, *Knight* similarly concluded the Legislature had not created “marriage” by another name. (*Knight v. Superior Court, supra*, 128 Cal.App.4th at 30-31.)

Ignoring these facts, the State and Governor Schwarzenegger assert the State has granted “legal recognition comparable to marriage.” (Answer Brief of Governor Arnold Schwarzenegger and State Registrar of Vital Statistics Teresita Trinidad on the Merits (“Governor’s Answer Brief”), pp. 29-32 (*citing Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 845); Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits (“State’s Answer Brief”), pp. 47-48 (*citing Koebke v. Bernardo Heights Country Club, supra*, 36 Cal.4th at 845).) The State and the Governor contend “legal recognition comparable to marriage” is sufficient to satisfy the demands of the California Constitution.

(Governor’s Answer Brief, pp. 29-32; State’s Answer Brief, pp. 43-54.)

The State’s effort to divorce the “rights and duties” of marriage from the “status” of marriage requires courts to adjudicate property and other rights in the face of contradictory messages about the status of domestic partners. “[M]arriage is a civil contract “of so solemn and binding a nature . . . that the consent of the parties alone will not constitute marriage . . . *the consent of the state is also required.*” [Citation.]” (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274 (*quoting Nieto v. City of Los Angeles* (1982) 138

Cal.App.3d 464, 470-471).) On one hand, the State refuses to consent to marriage between people of the same sex, sending the unmistakable message that same-sex couples occupy a second-class status in the eyes of the government. (*See Opns. of the Justices to the Senate* (2004) 440 Mass. 1201, 1207 [802 N.E.2d 565].) On the other hand, the State asserts that registered domestic partners shall enjoy the same rights and duties as spouses. (Fam. Code § 297.5, subds. (a)-(f).)

The State's refusal to grant same-sex couples the status of marriage affects the degree to which their rights will be recognized and understood by the courts. Such difficulties necessarily accompany any attempt to replicate the rights and responsibilities of marriage in a separate system. *See* Sally F. Goldfarb, *Granting Same-Sex Couples the "Full Rights and Benefits" of Marriage: Easier Said Than Done* (2007) 59 Rutgers L. Rev. 281, 281 (discussing New Jersey law and observing that making rights available to same-sex couples "requires rethinking a host of legal rules and doctrines that either were not crafted with same-sex couples in mind or were designed specifically to exclude them"). Here, the State's effort to carve out the rights and duties of marriage and apply them under another name to domestic partners has created problems, even as it has given same-sex couples some protection under the law.

II. THE STATE'S SEPARATE SYSTEM HAS CREATED LEGAL UNCERTAINTY AND CONFUSION, WHICH THE JUDICIAL BRANCH MUST UNTANGLE.

A. Despite The Legislature's Express Statement That Domestic Partners Shall Have The Same Legal Rights And Duties As Spouses, The First District Court of Appeal Was Uncertain Whether The Legislature Intended The Putative Spouse Doctrine To Apply To Domestic Partners.

Even though the Legislature attempted to confer the same rights on domestic partners as spouses enjoy, the existence of a separate status undercuts this intention and inevitably causes confusion on the part of courts about how to apply the law. In *Velez v. Smith*, for example, the First District considered whether the “putative spouse doctrine” could apply in parallel fashion to a domestic partner who believed in good faith, albeit incorrectly, that the domestic partnership was valid. (*Velez v. Smith, supra*, 142 Cal.App.4th at 1172-74.) Appellant Lena Velez and her partner Krista Smith filed a declaration of domestic partnership with the City and County of San Francisco in 1994. (*Id.* at 1159.) Thereafter, they held themselves out as domestic partners, living together, purchasing property together, and maintaining joint bank accounts. (*Ibid.*) Through Smith’s employer, Velez obtained health coverage and was listed as an alternate payee of Smith’s retirement benefits. (*Ibid.*) The couple never registered their partnership with the State of California. (*Ibid.*)

In 2004, Smith filed with the San Francisco County Clerk and sent to

Velez a “Notice for Ending a Domestic Partnership.” (*Velez v. Smith*, *supra*, 142 Cal.App.4th at 1159.) Velez then filed a petition for dissolution in the Mendocino County Superior Court. (*Ibid.*) Smith objected that the petition was “procedurally defective,” contending the court had no jurisdiction to proceed. (*Ibid.*) The court granted Smith’s motion to strike the petition, finding the petition lacked a legal basis. (*Id.* at 1160.) The First District agreed, finding the superior court lacked jurisdiction over the dissolution proceeding because no valid domestic partnership was ever registered with the Secretary of State, and in any event, Smith had terminated it before the effective date of AB 205. (*Id.* at 1167-69.)

Velez argued unsuccessfully that she had standing to proceed with her dissolution action as a putative domestic partner. Under the putative spouse doctrine, if a marriage is invalid due to some legal infirmity, but one or both the parties believed in good faith that the marriage was valid, a court may declare the party or parties to have the status of a putative spouse. (Fam. Code § 2251, subd. (a)(1).) Thus, a party to an invalid marriage may be entitled to quasi-marital property rights if he or she can establish status as a “putative spouse” pursuant to Family Code section 2251. (Fam. Code § 2251, subd. (a)(2).) The putative spouse doctrine serves to “protect expectations in property acquired through the parties’ joint efforts.” (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 108.) The State affords to putative spouses protection similar to that afforded married

couples, in contrast to unmarried cohabitants, who receive no such protection. (*Elden v. Sheldon, supra*, 46 Cal.3d at 274-75 (quoting *Nieto v. City of Los Angeles, supra*, 138 Cal.App.3d at 470-471).)

The *Velez* court was reluctant to recognize a putative domestic partner status in the absence of any statutory authority showing the Legislature intended such rights to apply to domestic partners, despite the Legislature's mandate that domestic partners would share the same rights and duties as spouses under the law "whether they derive from statutes, administrative regulations, court rules, government policies, common law, or other provisions or sources of law." (See *Velez v. Smith, supra*, 142 Cal.App.4th at 1173-74; Fam. Code § 297.5, subd. (a).) The court did not hold merely that the putative spouse doctrine did not apply based on the particular facts in the case; rather, the court held the doctrine would not be applicable under any set of facts, stating:

The Domestic Partner Act seeks to create 'substantial legal equality between domestic partners and spouses,' but ***nothing in the statutory scheme includes within the enumerated rights granted to domestic partners any form of putative spouse recognition.*** [Citation.] Despite the most recent amendments to the domestic partnership laws, domestic partners are not in all respects treated the same as spouses.

(*Velez v. Smith, supra*, 142 Cal.App.4th at 1173 (emphasis added).) The court went on to conclude, "***given the different and less stringent requirements*** for formation of a domestic partnership, the Legislature may not have wanted to create a putative domestic partnership status" (*Id.*

at 1174 (emphasis added).)

The *Velez* case illustrates the difficulty of applying the rules governing marriage to something that is not marriage. The Legislature did not specifically address whether it intended the putative spouse doctrine to apply to domestic partners. Even so, the Legislature's statements in Family Code section 297.5 are a strong mandate to treat domestic partners the same as spouses under California law, unless specifically noted otherwise. Nevertheless, the *Velez* court was uncertain whether the Legislature intended to create an analogous "putative domestic partner" doctrine in the absence of specific legislative guidance on this point.

The *Velez* court also focused on the "different and less stringent" requirements for formation of domestic partnerships as an indication that the Legislature did not intend the putative spouse doctrine to apply to domestic partners. This reasoning confirms the second-class status of domestic partnership, and presents even greater potential for confusion and uncertainty if it were followed in other instances where the Legislature did not specifically state that a particular right applied. By focusing on the "less stringent" requirements as a reason to deny rights to domestic partners, the court affirmed that domestic partners enjoy a lesser status than married couples, and accordingly, fewer rights.

This issue is likely to present itself again. As the Rymer Respondents note, the reasoning of *Velez* is already being challenged in

another case pending before the Fourth District, *Ellis v. Arriaga* (Super. Ct. Orange County, 2007, No. 06D008042) (G038437, app. pending). (Rymer Respondents' Consolidated Supplemental Reply Brief, pp. 5-6, fn. 5.) As long as the State continues to exclude same-sex couples from marriage and allow them only domestic partnership, courts will remain confused about how to apply the law governing marriage to individuals who are not married. Only if same-sex couples are allowed to marry will this uncertainty be resolved.

B. Despite The Legislature's Express Statement That Domestic Partners Shall Have The Same Legal Rights And Duties As Spouses, The Orange County Superior Court Concluded Domestic Partnership Is "The Functional Equivalent Of Cohabitation."

Courts do not treat domestic partnership as seriously as they do marriage. In *Garber*, the Orange County Superior Court was asked to determine whether a marital settlement agreement ("MSA") should be set aside on the ground that ex-wife Melinda failed to disclose her registration as a domestic partner, thereby cutting off ex-husband Ronald's obligation to pay spousal support. (*Garber v. Garber* (Super. Ct. Orange County, 2007, No. 04D006519) (G039050, app. pending).) Following dissolution of a marriage, a party's obligation to pay spousal support terminates upon the death or remarriage of the other party, unless otherwise agreed in writing. (Fam. Code § 4337.) In contrast, if the party entitled to support does not remarry but merely cohabitates with "a person of the opposite

sex,” the obligation to pay support does not terminate automatically. In that circumstance, the court has discretion to modify or terminate support upon a showing that the circumstances have changed. (Fam. Code § 4323, subd. (a)(1).) The party seeking to modify or terminate support has the benefit of a presumption of a decreased need for support, but the automatic termination provision of section 4337 does not apply. (See Fam. Code §§ 4323, subd. (a)(1), 4337.)

Irrespective of whether Melinda failed to disclose her status, the court expressly found:

A Registered Domestic Partner is not the equivalent of a marriage. It is the *functional equivalent of cohabitation*.

(Statement of Decision, *Garber v. Garber*, attached as Exh. 3 to City and County of San Francisco’s Supplemental Request for Judicial Notice (hereafter “CCSF Supp. RFJN”) (emphasis added).) As a result of this finding, Ronald’s Motion to Set Aside Judgment and MSA would have to be analyzed under Family Code section 4323, not section 4337.² (*Id.*, Exh.

² Campaign for California Families (“CCF”) suggests the dispute in *Garber* revolved around a contractual issue, specifically, the meaning of the “no modification” clause in the MSA. (Campaign for California Families’ Supplemental Brief In Response to June 20, 2007 Order, p. 4, fn. 1.) Therefore, CCF concludes, *Garber* does not signify a gap in the rights of married couples and registered domestic partners. (*Id.*, p. 4, fn. 1.) CCF overlooks the fact that to reach the issue of whether Ronald waived his rights under Family Code section 4337 by signing the MSA, the court first had to determine whether section 4337 applied. Since the court found that it did not, there was no need to decide whether Ronald waived his rights under section 4337. Thus, CCF is incorrect that *Garber* signifies no

3 to CCSF Supp. RFJN.) The court ultimately ordered Ronald to continue paying support. (Dolan, *Alimony Provides a Same-Sex Union Test*, L.A. Times (July 22, 2007), available at <http://www.latimes.com/news/local/la-me-gaywed22jul22,1,5066981.story?page=1&ctrack=1&cset=true&coll=la-headlines-california>.)

As in *Garber*, courts may confuse the status of registered domestic partners with that of unmarried cohabitants, in the absence of express language that the law in question applies to domestic partners. But, the Legislature did not draft (and could not have drafted) AB 205 in this manner; courts often have only Family Code section 297.5 to rely on in determining if spousal rights and duties apply to domestic partners. Nevertheless, as illustrated by *Velez* and *Garber*, the existence of a separate legal status for same-sex couples sends an inherently contradictory message that has caused, and will continue to cause, judicial confusion.

The confusion evident in *Velez* and *Garber* naturally results from the attempt to sever marital “rights” from marital “status.” The common understanding of “marriage” includes not only property and other substantive rights but also intangible benefits associated with the State’s bestowal of marital status. (See *Goodridge v. Dept. of Public Health* (2004) 440 Mass. 309, 322-26 [798 N.E.2d 941] (discussing the tangible

difference in rights. In any event, *Garber* and *Velez* are significant primarily because they demonstrate the courts’ uncertainty about how to apply the law to domestic partners.

and intangible benefits of marriage).) By refusing to marry same-sex couples and allowing them only domestic partner registration, the State bestows a different and lesser status upon them. The State's deliberate withholding of marital status allowed the court in *Garber* to conclude that domestic partnership was akin to cohabitation. If Melinda Garber had married her same-sex partner, no such confusion would have existed.

III. UNLIKE MARRIAGE, DOMESTIC PARTNERSHIP IS NOT UNIVERSALLY UNDERSTOOD.

Confusion over domestic partnership appears everywhere, not just in the courts. Domestic partnership is confusing to citizens and businesses alike, because it is not immediately recognized and understood, as marriage is. Individual members of same-sex couples report that they desire marriage in part because other marriage-like relationships are not universally understood by others in society, or given the same level of respect. (Rymer Respondents' Appendix, Case No. A110451, p. 89, ¶ 11 [Rymer Decl.], p. 107, ¶¶ 11-12 [Adams Decl.], p. 136, ¶¶ 15-16 [Davis Decl.] & p. 144, ¶ 24 [Beach Decl.]; *see also* Kelley, *Equality Elusive Under New Jersey Civil Union Law*, New York Times (Apr. 13, 2007) Westlaw, 2007 WLNR 7046089 (after being told customer was having a civil union, saleswoman inquired, "Oh, is that some kind of business dinner?").) This basic lack of understanding creates difficulties for same-sex couples, who must constantly explain their relationships to others.

Even individual members of same-sex couples do not necessarily understand what domestic partnership entails. As the *Velez* case illustrates, some individuals may fail to grasp the significance of state registration as opposed to registration with a municipality, leading them to believe they have more rights than they actually do. Conversely, because domestic partnerships are viewed as less substantial relationships than marriage, some individuals may fail to appreciate the seriousness of registering and the complexity involved in dissolving the partnership. (*See* Brevetti, *Dissolving Partnerships is Complicated Process*, San Mateo County Times (Jan. 14, 2007) Westlaw, 2007 WLNR 775584 (partner had “no clue” what a serious step domestic partnership was until dissolution).)

The State’s construction of separate systems for marriage and domestic partnership fosters confusion regarding the scope of domestic partnership rights in business contexts as well. It is not always clear whether employers must extend the same benefits to domestic partners as they do to spouses. (Cal. Domestic Partnerships (Cont.Ed.Bar 2007) § 8.2, p. 255 (“Counsel who advise clients concerning rights and obligations under employee benefit plans must carefully examine plan provisions and the requirements of state and federal law to determine whether extension of rights to domestic partners is mandatory, permitted, or prohibited, rather than relying on the broad mandate of DPRRA[.]”).) Confusion about how the law applies to domestic partners may also lead escrow officers and title

companies to resist the efforts of registered domestic partners to take title as “community property.” (Cal. Domestic Partnerships (Cont.Ed.Bar 2007) § 7.22, p. 233; *see also* Pender, *Marriage and Money – Unfamiliar Territory*, San Francisco Chronicle (June 24, 2007), p. C-1, (question from reader whose escrow officer was not sure whether “community property with right of survivorship” was available to domestic partners).)

The lesser status accorded to domestic partnerships may also lead to discrimination by health care providers and hospital staff, who do not understand that registered domestic partners are supposed to enjoy the same rights and duties as spouses. (*See, e.g.,* Hagedorn, *Couple: Hospital’s Refusal of Visit Was Discrimination*, The Bakersfield Californian (Mar. 7, 2007), *available at* <http://www.bakersfield.com/619/story/103906.html> (reporting that an emergency room security guard at San Joaquin Community Hospital refused a registered domestic partner access to her and her partner’s child).) Such misunderstanding is particularly harmful because it affects the ability of registered domestic partners to care for their children. Discrimination by health care providers and hospital staff is likely to continue as long as the State refuses to allow same-sex couples to marry, because the State’s exclusionary marriage laws invite others, such as the San Joaquin Community Hospital security guard, to question the rights of domestic partners.

These examples illustrate that domestic partnership is not universally

understood, increasing the likelihood of future litigation and the difficulty of resolving such litigation. Even Assemblymember Jackie Goldberg, the author of AB 205, recently acknowledged that domestic partnership is confusing, and continues to pose new problems:

It puts gay couples in a distinct system that is *inferior and confusing*. Without the universal, understandable and esteemed status of ‘marriage,’ same-sex couples are not treated equally.

...

This session, the Legislature is considering three bills to resolve other gaps, ambiguities and inequalities—and that’s not unusual. We have needed multiple pieces of legal patchwork every year since 2001, when domestic partnerships went into effect.

I am convinced that it is time for the obvious solution: Give same-sex couples equal access to civil marriage.

(Goldberg, *A Wedding Sure Beats a Contract*, Los Angeles Times (Aug. 10, 2007, Westlaw, 2007 WLNR 15486714) (emphasis added).)

Assemblymember Goldberg’s conclusion that equal marriage rights must replace domestic partnership is unavoidable. It is unfair to require same-sex couples to litigate their rights, and courts to adjudicate them, in the face of such uncertainty.

IV. THE UNCERTAINTY AND CONFUSION CREATED BY THE STATE’S SEPARATE SYSTEM UNFAIRLY BURDENS SAME-SEX COUPLES AND THE COURTS, AND CANNOT BE CORRECTED THROUGH FUTURE LEGISLATION.

Although the Legislature intended to confer the same rights and duties on domestic partners as on same-sex couples, the State’s refusal to

grant the right to marry has created confusion about how those rights should be applied. Gay and lesbian individuals disproportionately bear the burden of resolving these issues through litigation. Members of opposite-sex couples do not have to fight for their rights in the same way that domestic partners do, nor do they have to try to explain to a court how their relationship can exist as “something less than marriage”³ and yet entitle them to the same treatment as spouses.

Requiring same-sex couples to litigate their rights on a case-by-case basis doubly burdens them with the cost of constantly having to adjudicate their rights in court, and the inability to plan effectively for the future. At times, same-sex couples are forced to choose between abandoning their rights and fighting a protracted court battle. For example, in *Koebke v. Bernardo Heights County Club, supra*, 36 Cal.4th at 832-36, the plaintiff domestic partners merely sought to play golf on the same terms as married couples at the Bernardo Heights Country Club. Their case went all the way to this Court. California can expect more of such litigation so long as the State’s parallel systems exist. The State’s creation of a separate, inferior status stands as an open invitation for anyone to question the rights of domestic partners. Accordingly, the State’s exclusionary marriage laws also burden the courts, which must spend precious judicial resources

³ (See *Knight v. Superior Court, supra*, 128 Cal.App.4th at 31 (concluding “marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership”).)

resolving such challenges.

The State denies gay and lesbian individuals the fundamental right to marry the person of one's choice, contending that an uncertain, separate system that marks them as second-class citizens is an adequate replacement. It is not. It has long been understood that "separate" is not truly "equal." (*Brown v. Bd. of Education* (1954) 347 U.S. 483, 493-95 (rejecting *Plessy v. Ferguson* (1896) 163 U.S. 537); see also *Mendez v. Westminster School Dist.* (D.C. Cal. 1946) 64 F. Supp. 544, 548-51 (enjoining discriminatory school segregation practices on the ground that such practices violate equal protection).) The State can only give same-sex couples who wish to marry equal rights by giving them the right to marry.

The State's suggestion that any "problematic" differences between marriage and domestic partnership can be corrected through future legislation is wrong. No amount of legislative redrafting can correct the inherently confusing message that same-sex couples shall be treated the same as spouses, yet shall not be recognized as married. Moreover, no amount of tinkering with domestic partnership will erase the fact that it creates a second-class status. (*See Opns. of the Justices to the Senate, supra*, 440 Mass. at 1207-08 [802 N.E.2d 565].) This Court should not allow the Legislature to continue attempting to perfect a system that is not capable of ever conferring true equality.

CONCLUSION

The status of marriage cannot be replicated through California's domestic partnership scheme. As cases like *Velez* and *Garber* illustrate, courts struggling with the parallel institutions of marriage and domestic partnership are uncertain how to apply the laws governing marriage to domestic partners. In addition, the practical application of the State's separate system has burdened same-sex couples with an unreasonable degree of legal uncertainty that threatens to affect every aspect of their lives. Same-sex couples should not be burdened with the need to set Supreme Court precedent in order to ensure they have access to the substantive protections afforded to married persons under California law. Nor should California courts be required to expend scarce judicial resources resolving confusion over the rights of same-sex couples, when such confusion could be avoided if the State allowed same-sex couples to marry. Such confusion will inevitably arise, so long as the State continues to impose a second-class status on same-sex couples.

This Court has the opportunity to end the uncertainty and confusion by declaring that otherwise qualified same-sex couples must be allowed to marry. For the foregoing reasons, and for the reasons stated in Respondents' briefs, this Court should reverse the First District Court of

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Appeal and affirm the judgment and writ relief granted by the San Francisco Superior Court.

Dated: September 26, 2007

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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.520(c)(1))

The text of this Amicus Curiae Brief consists of 5,581 words as counted by the word count feature of the word processing program used to generate the brief, exclusive of materials not required to be counted.

Dated: September 26, 2007

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PROOF OF SERVICE

I, Sheila Maes, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 50 W. San Fernando Street, 10th Floor, San José, California 95113.

On September 26, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND
PROPOSED AMICUS CURIAE BRIEF OF
SANTA CLARA COUNTY BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS
CHALLENGING THE MARRIAGE EXCLUSION**

- BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.
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INTERESTED PARTIES:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on September 26, 2007, at San José, California.



SHEILA MAES

SERVICE LIST

City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Court of Appeal Case No. A110451

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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.
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