

No. S147999
(Judicial Council Coordination Proceeding No. 4365)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES.

ON APPEAL from 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. BS088506
Hon. Richard A. Kramer, Judge

**BRIEF OF AMICI CURIAE EQUALITY FEDERATION
and GAY AND LESBIAN ADVOCATES & DEFENDERS
IN SUPPORT OF RESPONDENTS
(Including Application for Leave to File)**

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

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF
CALIFORNIA:

Pursuant to Rule 8.520(f)(1) of the California Rules of Court, *amici curiae* Equality Federation and Gay & Lesbian Advocates & Defenders (“GLAD”) respectfully seek the permission of the Chief Justice to file an *amicus curiae* brief in support of respondents in the present matter.

Amicus Equality Federation is a network of state organizations committed to securing full civil rights for lesbian, gay, bisexual, and transgender citizens in every U.S. state and territory. Equality Federation helps state groups to reach this goal by strengthening statewide organizing, providing coordination and networking opportunities among state organizations, and facilitating the exchange of critical ideas and information. The Equality Federation member organizations are: Equality Alabama; Equality Fund of Alabama; Arizona Human Rights Fund & Foundation; Arkansans for Human Rights; Equality California; Equal Rights Colorado; Love Makes a Family (Connecticut); Gay & Lesbian Activists Alliance (District of Columbia); Equality Florida; Georgia Equality; MEGA Family Project (Georgia); Your Family, Friends & Neighbors (Idaho); Equality Illinois; Indiana Equality; Equality Iowa; One Iowa; Kansas Unity and Pride Alliance; Kentucky Fairness Alliance; Equality Maine; Equality Maryland; MassEquality; The Freedom to Marry Coalition of Massachusetts; Massachusetts Gay & Lesbian Political Caucus; Triangle Foundation (Michigan); Michigan Equality; Outfront Minnesota; PROMO (Missouri); Pride, Inc. (Montana); New Hampshire Freedom to Marry Coalition; New Jersey Lesbian & Gay Coalition; Garden State Equality (New Jersey); Equality New Mexico; Empire State Pride

Agenda (New York); New York Association for Gender Rights Advocacy; Equality North Carolina; Equality Ohio; Basic Rights Oregon; The Center for Lesbian & Gay Civil Rights (Pennsylvania); The Pennsylvania Gay and Lesbian Alliance; Marriage Equality of Rhode Island; South Carolina Equality Coalition; South Dakotans Against Discrimination; Tennessee Equality Project; Tennessee Transgender PAC; Equality Texas; Equality Utah; Vermont Freedom to Marry Task Force; Equality Vermont; Equality Virginia; Equal Rights Washington; Action Wisconsin; and LGBT Center Advocates/Milwaukee LGBT Center.

Amicus Gay & Lesbian Advocates & Defenders is New England's leading legal rights organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. In addition to GLAD's litigation on workplace discrimination, parenting issues, access to health care, public accommodations and services, and myriad other issues in law, GLAD has sought marriage equality in cases in several states. Most notably, these cases include GLAD's role as counsel in *Goodridge v. Dep't of Public Health* (2003) 440 Mass. 309, 798 N.E.2d 941; *Baker v. Vermont* (1999) 170 Vt. 194, 744 A.2d 864; and *Kerrigan v. Dep't of Public Health* (Conn.) No. 17716, which is currently pending before the Connecticut Supreme Court. GLAD has also appeared as *amicus* in other marriage-related litigation throughout the United States.

Prospective *amici* respectfully submit that the following brief will be useful to the Court because GLAD stands in perhaps the best position among the various *amici* to apprise the Court of the effects that the institution of marriage equality has had on the law and society in Massachusetts and other jurisdictions, as well as the lack of adverse effects that marriage equality has had on heterosexual marriage. As the umbrella organization of state lesbian and gay equality organizations, Equality Federation has a unique national perspective on recent progress toward

legal respect for same-sex couples, as well as the impact that this Court's decision will have on future efforts.

For the foregoing reasons, and in light of *amici's* interests and experience in the subject of the present matter, *amici curiae* Equality Federation and Gay & Lesbian Advocates & Defenders respectfully request that permission be granted for them to file the following *amicus curiae* brief in support of respondents.

I. INTRODUCTION

This case raises the question whether it violates the California Constitution to deny state licensed marriage to same-sex couples, and -- more specifically -- whether it is constitutional to deny marriage where the state does not argue that there is anything about same-sex couples that disqualifies them from marriage and, through its domestic partnership statute, has determined that gay and lesbian couples have the same legal needs and should be subject to the same duties as heterosexual couples, but has created a separate legal status for this minority group. *Amici* agree with respondents that the California Constitution cannot tolerate a result in which people who are found to be similarly situated to others are nonetheless treated differently and separated into distinct classes. (See *Romer v. Evans* (1996) 517 U.S. 620, 623 [“One century ago, the first Justice Harlan admonished this Court that the Constitution ‘neither knows nor tolerates classes among citizens.’ Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake.”] [quoting *Plessy v. Ferguson* (1896) 163 U.S. 537, 559 (dis. opn. of Harlan, J.)].)

California has historically been a bellwether for the nation; the rest of the country looks to California (and to this Court) for leadership. A

ruling from this Court in favor of marriage will further progress toward equality in other parts of the country, just as the achievement of marriage equality in Massachusetts did. The marriage equality movement has raised the bar and increasingly has made the provision of legal protections to same-sex couples (e.g., through domestic partnerships and civil unions) seem the floor for what the states should provide.

Some may raise fears that striking down the domestic partnership statute and vindicating the constitutional rights of the respondents will deter the passage of similar domestic partnership or civil union legislation in states where there is no meaningful access to legal protection for same-sex couples' relationships. The extraordinary progress in this country over the past 15 years toward legal respect for same-sex relationships shows that the opposite is true. Fifteen years after a state supreme court for the first time refused to dismiss a constitutional challenge by same-sex couples to a marriage statute,¹ seven years after *Baker v. Vermont* led to the nation's first civil union law,² and just four short years after the achievement of marriage equality in Massachusetts,³ civil unions today are widely regarded as a politically non-controversial, compromise position. These cases have brought about an unprecedented awareness of the lives of same-sex couples and their need for equal treatment in the law. Most significantly, far from impeding advances in other states, it is precisely because Massachusetts

¹ See *Baehr v. Lewin* (1993) 74 Haw. 530, 852 P.2d 44, discussed *infra* at pp. 6-7.

² See *Baker v. Vermont* (1999) 170 Vt. 194, 744 A.2d 864, discussed *infra* at p. 8.

³ See *Goodridge v. Dep't of Public Health* (2003) 440 Mass. 309, 798 N.E.2d 941, discussed *infra* at pp. 9-10.

(and five nations throughout the world)⁴ have established equality as the true benchmark for our treatment of same-sex couples that incremental gains such as civil unions have been feasible in an increasing number of states.

In the end, the aspiration of lesbian and gay couples in this country to eradicate discrimination in marriage will be undercut, not protected, by any ruling from this Court upholding a separate and unequal legal status for same-sex couples. A ruling from this Court ending the exclusion of same-sex couples from marriage will advance the goals of all lesbian and gay citizens for equal treatment under the law -- in California as well as in states that follow by implementing marriage equality, and in states that take important, but incremental, steps on the road to equality.

⁴ Marriage for same-sex couples has been brought about by judicial decision in Canada (*Reference re Same-Sex Marriage* [2004] SCC 79, later codified by *Civil Marriage Act*, Bill C-38 (July 20, 2005)) and South Africa (*Lesbian and Gay Equality Project v. Minister of Home Affairs* (Const. Court of S. Africa 2005) [2005] ZACC 20, later codified by *Civil Union Act* (Act 17 of 2006)), and by legislation in Spain (*Civil Code*, art. 44, as amended by Law 13/2005 of 1 July 2005), the Netherlands (*Civil Code*, art. 30, as amended by Act of 21 December 2000), and Belgium (*Civil Code*, art. 143, as amended by Law of 13 February 2003).

II. ARGUMENT

A. A RULING FROM THIS COURT ENDING THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE WILL ADVANCE PROGRESS TOWARD EQUALITY ELSEWHERE IN THE COUNTRY.

1. Today, Civil Unions Are A Position Of Compromise As A Result Of The Remarkable Advances In The Fair Treatment Of Lesbian And Gay Couples Under Law.

The achievement of marriage equality in Massachusetts and elsewhere has spurred significant advancement towards equality in other parts of the nation. In the span of fewer than fifteen years, the legal landscape of equality for same-sex couples has shifted dramatically. The lesbian and gay community continues to fight discriminatory marriage laws, but a growing number of states have come to embrace civil union and domestic partnership laws as the minimum course for protecting same-sex relationships. As Professor Carlos Ball has observed “[w]hat was to many, only a few years ago, a radical idea (that lesbians and gay men should have the same rights and benefits afforded to married couples under state law, albeit under the auspices of an alternative legal regime), has now, in effect, become a mainstream alternative to same-sex marriage.” (Ball, *The Backlash Thesis and Same-Sex Marriage: Learning From Brown v. Board of Education and its Aftermath* (2006) 14 Wm. & Mary Bill Rts. J. 1493, 1531.) The solid foothold of civil unions in numerous states leaves little risk that they will be jeopardized if additional states join Massachusetts in implementing marriage equality.

Three watershed legal decisions chart the course of the journey towards fairness for lesbian and gay couples. First, in 1993, the Hawaii Supreme Court held in a groundbreaking decision that the exclusion of same-sex couples from marriage discriminates on the basis of sex, and the

state's sex-based classification would thus have to be justified under a strict scrutiny standard. (*Baehr, supra*, 852 P.2d at pp. 60-61, 67-68.) At trial after remand, experts testified on the state's childrearing justification for excluding same-sex couples from marriage, and resulted in a finding that there were no material differences between the quality of parenting by gay people and non-gay people that would justify a ban on marriage. (*Baehr v. Miike* (Haw. Cir. Dec. 3, 1996) 1996 WL 694235 at *4, *10.) As the first decision to hold open the prospect of marriage equality for same-sex couples, the Hawaii Supreme Court and trial court decisions garnered widespread national attention and stimulated a significant new wave of awareness about the needs of lesbian and gay couples. (See Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA* (2000) 22 U. Haw. L. Rev. 185, 200-13.)⁵

After 1993, states and municipalities increasingly began grappling with the idea of fair treatment for lesbian and gay people and began taking first steps toward addressing the harsh legal void in which same-sex couples lived. For example, understanding that unmarried same-sex partners shared the same love and commitment and had the same needs for economic protection as married heterosexual couples, some states and municipalities began offering domestic partner health insurance benefits to public employees, a trend that continues to this day.⁶ Similarly, many

⁵ Hawaii amended its constitution in 1998 to moot the pending lawsuit. (Haw. Const. art. I, § 23 [legislature may define marriage narrowly to exclude same-sex couples]; *Baehr v. Miike* (Haw. Dec. 9, 1999), Civ. No. 20371, slip op. at pp. 5-8 [taking notice of constitutional amendment].)

⁶ According to the Human Rights Campaign, the following states have implemented domestic partner health insurance benefits for same-sex partners of public employees: Vermont (1994); New York (1995); Oregon (1998); California (1999); Connecticut (2000); Maine (2001); Rhode Island (2001); Washington (2001); Iowa (2003); New Mexico (2003); Illinois

courts and legislatures throughout the country began addressing the reality that gay and lesbian couples increasingly conceive and raise children by allowing same-sex couples to adopt jointly or as second parents.⁷ These initial steps, while helpful, provided neither the comprehensive protections nor the respect and dignity accorded by marriage equality.

The second watershed event occurred in Vermont. On November 18, 1998, the Vermont Supreme Court heard oral argument in *Baker v. Vermont* (1999) 170 Vt. 194, 744 A.2d 864, a case challenging the exclusion of same-sex couples from the protections of marriage based on state constitutional guarantees of liberty and equality. Responding to the state attorney's claim that "[w]hat's going on here is a request that's never

(2004); New Jersey (2004); and Montana (2005). And since 1993, 124 municipalities nationwide have established such benefits. (Human Rights Campaign Database of Employers that Offer Domestic Partner Health Benefits (follow links for "State Governments" and "City and County Governments") <<http://tinyurl.com/38nqt5>>.)

⁷ See, e.g., *Adoption of Tammy* (1993) 416 Mass. 205, 619 N.E.2d 315 (concluding same-sex couple may jointly adopt); *Adoptions of B.L.V.B. & E.L.V.B.* (1993) 160 Vt. 368, 628 A.2d 1271; *In re Jacob & In re Dana* (1995) 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716; *In re M.M.D. & B.H.M.* (D.C.App. 1995) 662 A.2d 837 (holding adoption statutes do not prohibit unmarried couples from adopting); *In re Petition of K.M. & D.M.* (1995) 274 Ill.App.3d 189, 653 N.E.2d 888 (permitting unmarried couples to jointly adopt regardless of sexual orientation); *Holden v. N.J. Dep't of Hum. Servs.* (N.J.Super. Ch. Div. 1997) No. C-203-97, slip op. at p. 5 (permitting joint adoptions of children in custody of Division of Youth and Family Services); Or. Admin. R. 413-120-0200(3); *In re Adoption of R.B.F.* (2002) 569 Pa. 269, 803 A.2d 1195; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417; *In re Infant Girl W.* (Ind.App. 2006) 845 N.E.2d 229 (allowing same-sex couples to jointly adopt); *Adoption of M.A.* (Me. 2007) 2007 ME 123, ___ A.2d ___, 2007 WL 2446019 (allowing unmarried couples to jointly adopt); see also Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood* (2006) 54 Am. J. Comp. L. 125, 135 (noting approximately fifty percent of the states allow same-sex partners to adopt their partner's children).

been done anywhere before,” Justice Denise Johnson invoked this Court’s momentous decision in *Perez v. Sharp* (1948) 32 Cal. 2d 711, by declaring: “Well someone had to be first even in the interracial marriage case, right?” A few moments later, Justice John Dooley responded to the state’s assertion of the historic man-woman definition of marriage by asking, “So what does that show other than how long standing the alleged discrimination was?”⁸ The *Baker* court’s groundbreaking declaration that “plaintiffs are entitled... to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples” (*Baker, supra*, 170 Vt. at p. 224, 744 A.2d at p. 886) led to the nation’s first civil union law in 2000. Nevertheless, the court stopped short of requiring full equality, stating that it would leave for a later day the question whether “notwithstanding equal benefits and protections under Vermont law – the denial of a marriage license operates per se to deny constitutionally protected rights.” (*Id.*)⁹

Efforts to attain full protection and respect for same-sex couples were transformed by the third watershed event, the Massachusetts Supreme Judicial Court’s important decision in *Goodridge v. Dep’t of Public Health* (2003) 440 Mass 309, 798 N.E.2d 941. The *Goodridge* court’s simple, powerful declaration that same-sex couples are entitled to nothing short of equality in marriage broke a historic barrier and forever changed the

⁸ Videotape: Vermont Supreme Court: *Baker v. State* Oral Arguments (Justices Open Captioned), November 18, 1998 (Middlebury Community Television) (on file at Middlebury Community Television Station).

⁹ The *Baker* court allowed the legislature to decide how to remedy the problem. (*Baker, supra*, 170 Vt. at pp. 197-98, 744 A.2d at p. 867.) Significantly, the court understood the claims before it to be “focused primarily upon the consequences of official exclusion from the statutory benefits, protections and security incident to marriage.” (*Id.*, 170 Vt. at p. 224, 744 A.2d at p. 886.

standard by which all future efforts to treat lesbian and gay citizens fairly will be judged.

The fulfillment of marriage equality in even one state has shown that the predictions of negative social consequences were ill-founded. Consequently, this change has, as Professor Ball observed, “moderated the views of many Americans on the broader issue of whether same-sex relationships deserve some form of legal recognition.” (Ball, *supra*, n. 5, at p. 1527.) After Connecticut passed a civil union law in 2005, Anne Stanback, president of the Connecticut marriage equality organization Love Makes a Family, observed that, “[t]he bar had been raised” by marriage equality in Massachusetts, and civil unions had become a “compromise.” (Salzman, *Tying the Half Knot*, N.Y. Times (Apr. 17, 2005) section 14CN, p. 1.) Senator Frank Morse, a Republican legislator who voted for Oregon’s domestic partnership law, which was enacted in 2007 and goes into effect in July 2008, was reported as saying that Oregon must find a way to treat all citizens with dignity and respect, regardless of sexual orientation. (Law, *Oregon’s Gay Couples Win Marriage-Style Benefits*, Salem (Ore.) Statesman Journal (May 3, 2007) p. 1.) In numerous states, providing protections to same-sex couples through domestic partnership or civil unions has come to be seen as the floor for what states should provide. This is what the California Legislature has concluded in granting domestic partners most of the legal protections that marriage provides in order to “move closer” to equality and by further recognizing, in two marriage bills that passed both houses of the Legislature, that domestic partnership does not reach the goal of equality.

As Professor Ball notes, while there will remain implacable opponents to any form of relationship recognition for same-sex couples, “more open-minded citizens are likely to be persuaded of the moral legitimacy behind claims for gay equality by simply observing and getting

to know lesbian and gay couples as married couples.” (Ball, *supra*, n. 5, at p. 1527.) He concludes that as a result of the pursuit and achievement of marriage equality, “[t]he political debate in a growing number of states is no longer whether lesbian and gay couples deserve legal recognition; instead, the debate is about what type of legal recognition they deserve. That in and of itself represents considerable progress for gay rights proponents.” (*Id.*, at p. 1532.)

Nothing reflects the deepening understanding that same-sex couples deserve equal legal protections and the growing consensus in numerous parts of the country that civil unions are a floor for protecting such couples more than their endorsement by six of the eight current Democratic presidential candidates, with the remaining two supporting marriage for same-sex couples.¹⁰ And, tellingly, in the 2004 election, President Bush endorsed civil unions as a way of protecting families. (Bumiller, *The 2004 Campaign: Same-Sex Marriage; Bush Says His Party is Wrong to Oppose Gay Civil Unions*, N.Y. Times (Oct. 26, 2004) p. 21.)

Indeed, just a few years after the implementation of civil unions in Vermont, Rep. Barney Frank of Massachusetts noted: “[A] year ago civil unions were the most divisive issue in history. Now they are boring to

¹⁰ Six out of the eight Democratic candidates (Clinton, Dodd, Edwards, Obama, Richardson and Biden) support civil unions while the remaining two (Kucinich and Gravel) support marriage for same-sex couples. (The Pew Forum on Religion and Public Life: *The Candidates on Gay Marriage* <<http://tinyurl.com/3bu8y9>>.) In addition, all Democratic candidates for President support the repeal of the provision in the federal Defense of Marriage Act defining marriage as between a man and a woman for federal purposes. (Defense of Marriage Act, Pub.L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C; Sweet, *Obama Now Opposes Defense of Marriage Act*, Chicago Sun-Times (June 6, 2007) p. 30 [noting “all the Democrats running for president [are] for the repeal [of Sec. 3 of DOMA].”].)

anyone who isn't in one.” (Levi, *Toward a More Perfect Union: The Road to Marriage Equality For Same-Sex Couples* (2004) 13 Widener L.J. 831, 853 [quoting Rep. Frank].) On the five-year anniversary of the civil union law in Vermont, ABC News remarked: “Perhaps the strongest measure of how far the issue has come is that civil unions, considered so radical in 2000, are now the ‘conservative’ compromise – providing benefits but still not ‘real’ marriage -- offered by politicians grappling with similar proposals elsewhere.” (Lewin, *Vermont Marks Five Years of Civil Unions*, ABC News (Apr. 26, 2005) <<http://tinyurl.com/2udwrm>>.)

2. Progress Toward The Fair Treatment of Lesbian And Gay Couples Accelerated After *Goodridge*.

From a historical perspective in which not a single state offered civil unions or domestic partnerships before 2000, the number of states adopting critical, but incremental, protection for same-sex couples in the aftermath of *Goodridge* reflects an extraordinary development in a very short period of time that was stimulated by the realization of marriage equality in Massachusetts. Prior to the *Goodridge* decision in 2003, Vermont was the sole state extending all state-based tangible benefits of marriage to same-sex couples. Just one other state, Hawaii, had provided a limited number of benefits for same-sex couples.¹¹

In the three years immediately following *Goodridge*, however, five additional states -- Connecticut (2005), California (2005),¹² New Jersey

¹¹ See Haw. Rev. Stat., § 572C-1 to C-7 (establishing reciprocal beneficiaries); Human Rights Campaign, *Hawaii Marriage/Relationship Recognition Law* <http://www.hrc.org/laws_and_elections/state/898.htm> (summary of benefits flowing from reciprocal beneficiaries law).

¹² For a discussion of the statutory progression of California's domestic partnership law, see Comment, *Reaching Backward While Looking*

(2006), New Hampshire (2007), and Oregon (2007) -- passed laws implementing systems parallel to marriage that granted all state-based tangible rights of marriage to same-sex couples.¹³ While these laws are grounded in years of work to secure the fair treatment of lesbian and gay citizens, their timing leaves no doubt that setting the bar at marriage equality in Massachusetts played a critical role. These laws did not pass after Vermont became the first state to implement civil unions; they passed after Massachusetts became the first state to implement marriage. Standing for equality in marriage indisputably advances progress across the board.

Notably, these recent civil union bills have passed by wide margins. In Connecticut, the House of Representatives passed the civil union bill by a vote of 85-63, with the Senate approving it 26-8.¹⁴ The New Jersey Assembly approved that state's civil union bill 56-19, with the Senate tally

Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act (2006) 54 UCLA L. Rev. 185, 186-196 (Part I).

¹³ See Conn. Gen. Stat., §§ 46b-38nn; N.J. Stat. Ann., § 37:1-28; Fam. Code, § 297 (California); N.H. Rev. Stat., § 457-A:1 et seq. (eff. Jan. 1, 2008); and Oregon Family Fairness Act, House Bill No. 2007 (74th Leg., 2007 Reg. Sess.) (eff. Jan. 1, 2008). Other states have begun taking real, but more modest, measures recognizing gay and lesbian families and moving in the direction of equality. (See Me. Rev. Stat. Ann. tit. 22, §2710 [establishing Maine's domestic partner registry]; Equality Maine, *Maine's Domestic Partner Law* <<http://tinyurl.com/3cl5to>> [domestic partner registry provides intestacy and inheritance rights to domestic partners]; "An Act Relating to Protecting Individuals in Domestic Partnerships," Subst. Sen. Bill No. 5336 (60th Leg., 2007-2008 Reg. Sess.) (establishing Washington's domestic partner registry), Equal Rights Washington, *The Legal Rights of Registered Domestic Partners in Washington State* (2007) <<http://equalrightswashington.org/pdfs/dpbrochure.pdf>> [summary of extensive domestic partner benefits].)

¹⁴ Final Connecticut House voting tally on Senate Bill No. 963 (Apr. 13, 2005, 2005 Reg. Sess.) <<http://www.cga.ct.gov/2005/vote/h/2005HV-00076-R00SB00963-HV.htm>>.

23-12.¹⁵ The Oregon domestic partnership law passed 34-26 in the House and 21-9 in the Senate.¹⁶ Most remarkably, the New Hampshire civil union law went from committee consideration to passage in just two months, with votes of 243-129 in the House and 14-10 in the Senate.¹⁷

Just as states have grappled with conflict of laws issues regarding marriages of different race couples, of consanguineous and underage marriages celebrated in a foreign jurisdiction, as well as remarriage following divorce where the remarriage is prohibited in the state granting the divorce, states are also now grappling with marriages of same-sex couples who married in Massachusetts or Canada and live elsewhere or have relocated. For example, in New York, the Attorney General, Comptroller, Department of Civil Service, and several municipalities have affirmed that fundamental standards of comity and fairness require respect for out-of-state marriages between same-sex couples.¹⁸ Similarly, the

¹⁵ Assem. Bill No. 3787 (Dec. 14, 2006, 2006-2007 Reg. Sess.) 18 Leg. Digest 45, p. 6.

¹⁶ House Bill No. 2007 (74th Leg., 2007 Reg. Sess.) (eff. Jan. 1, 2008) (enacted). (See Oregon Bill History System <<http://www.leg.state.or.us/07reg/pubs/hsemh.html>>.)

¹⁷ N.H. General Court, House Bill No. 437 Docket, <<http://tinyurl.com/3dt6vc>> (showing that first public hearing was held Feb. 22, 2007, and bill was passed Apr. 26, 2007).

¹⁸ See *Spitzer Files Gay Marriage Bill*, 365 Gay (Apr. 27, 2007) <<http://www.365gay.com/Newscon07/04/042707spitzer.htm>> (announcement by Department of Civil Service that it will respect out of state marriages of same-sex couples for purposes of extending spousal insurance benefits to current and retired employees of state and local governments.); Ops. N.Y. Atty. Gen. 1 No. 1 (2004), 2004 WL 551537 (stating that New York will recognize marriages of same-sex couples legally performed elsewhere); Letter from Alan Hevesi, N.Y. Comptroller, to Mark Daigneault (Oct. 8, 2004) <<http://www.prideagenda.org/pdfs/>

Attorney General of Rhode Island has issued letter opinions affirming respect for out-of-state marriages.¹⁹

At the same time, fears on the part of some that the availability of marriage in Massachusetts, Canada, and some other international jurisdictions would lead to large numbers of same-sex couples traveling to these jurisdictions and then initiating litigation seeking recognition of their marriages in their home states have been proven false. The great majority of lesbian and gay people wish to achieve marriage equality in their own communities and states. They understand that, while the availability of marriage in California will be a tremendous boost for equality throughout the country and the world, it will not immediately alter the fact that many states already have statutes or constitutional amendments barring recognition of marriages of same-sex couples. In short, the hundreds of thousands of lesbian and gay people represented by the *amici* in this case strongly support full equality in marriage for same-sex couples in California because such an outcome is mandated by fairness and equality and will contribute enormously to the struggle to achieve full dignity and respect for same-sex couples and their families -- not because they labor under any misconception that it will eliminate the need to continue laying a political and legal foundation for the eventual achievement of such equality in other states.

Beyond the realm of relationship recognition, the achievement of marriage equality in Massachusetts has also helped demonstrate the need

Hevesi%20Letter_100804.pdf> (confirming that state retirement system will recognize a Canadian marriage as a marriage for purposes of determining eligibility for retirement and pension benefits); *Godfrey v. Spano* (N.Y. Sup. 2007) 15 Misc. 3d 809, 836 N.Y.S.2d 813.

¹⁹ See Lynch, *Patrick Lynch: My Ruling on Mass. Same-Sex Ties*, The Providence Journal (June 21, 2007) <<http://tinyurl.com/37g6ff>>.

for general legal protections for gay and lesbian citizens across the country. For example, while a total of eighteen states have added sexual orientation to their basic nondiscrimination laws since Wisconsin led the way in 1982,²⁰ a disproportionately larger percentage of those states -- one-third -- did so in just the last four years and *after* the *Goodridge* decision.²¹

Increased progress has also occurred in the private sector. By 2006, more than one-half of Fortune 500 companies offered domestic partner benefits to employees compared to just 25 percent of the Fortune 500 in 2000.²² And by 2006, 77 percent of the Fortune 100 largest corporations offered health benefits to domestic partners of employees.²³ Beyond the nation's largest corporations, surveys of all businesses regardless of size

²⁰ See Wis. Stat., § 230.18 (1982); Mass. Gen. Laws, ch.151B, § 4 (1989); Conn. Gen. Stat., § 46A-81C (1991); Haw. Rev. Stat., § 378-2 (1991); Gov. Code, §12920 (1992) (California); N.J. Stat. Ann., § 10:5-12 (1992); Vt. Stat. Ann., tit. 21, §495 (1992); Minn. Stat., §363A.08 (1993); R.I. Gen. Laws, § 28-5-7 (1995); Nev. Rev. Stat., § 613.330 (1006); N.H. Rev. Stat. Ann., § 354-A:7 (1997); Md. Code Ann., art. 49B, § 16 (2001). The District of Columbia added sexual orientation to its non-discrimination laws as early as 1973. (D.C. Code, § 2-1402.11.)

²¹ See N.M. Stat., § 28-1-7 (2003); 775 Ill. Comp. Stat., 5/1-102 (2005); Wash. Rev. Code, § 49.60.180 (2006); Me. Rev. Stat. Ann., tit. 5, § 4572 (2005); Iowa Sen. File No. 427 (82nd Gen. Assem., 2007 1st Reg. Sess.); and Oregon Family Fairness Act, House Bill No. 2007 (74th Leg., 2007 Reg. Sess.) (eff. Jan. 1, 2008).

²² Badgett, *The Wedding Economy*, N.Y. Times (Jan. 7, 2007) <<http://tinyurl.com/2u5ks9>>; Human Rights Campaign Foundation, *The State of the Workplace of Gay, Lesbian, Bisexual and Transgender Americans 2005-2006*, <http://dev.hrc.org/documents/SOTW20052006.pdf> at p. 7.

²³ *The State of the Workplace*, *supra*, at p. 9, n. 34, fig. 3.

make clear that the trend toward acknowledging and respecting lesbian and gay relationships is strong and accelerating.²⁴

This acceleration is not a coincidence. It followed immediately upon the shift to allow marriage equality in Massachusetts in 2003 and consistent legal changes in Canada and other countries in the same time period, which have permitted ever increasing awareness that gay and lesbian people are part of the fabric of society and deserve equality and fair treatment.

Moreover, the trend toward fair and equal treatment of same-sex couples will only continue. The Pew Research Center reported in 2006 that opposition to marriage for same-sex couples, which had briefly spiked amidst anti-gay rhetoric following the *Goodridge* decision, “has ebbed to a new low.”²⁵ Pew reported based on national polling that “the atmosphere surrounding the issue of gay marriage has cooled off, and public intensity has dissipated compared with two years ago... After peaking during the 2004 election, opposition to allowing gays and lesbians to marry has faded in recent years,” with the sharpest declines among seniors, Catholics, non-evangelical Protestants and Republicans.²⁶ The national poll showed that 51% opposed legalizing marriage, down from 63% just two years earlier, while the percentage in favor of allowing same-sex couples to marry increased from 29% in 2004 to 39% in 2006. In California, support for allowing gay and lesbian couples to marry increased from 38% in 2000 to

²⁴ Luther (Human Rights Campaign), *Domestic Partner Benefits* (2006) <<http://tinyurl.com/2lt2sc>> at p. 3 (table 1).

²⁵ Pew Research Center, *Less Opposition to Gay Marriage, Adoption and Military Service*, <<http://people-press.org/reports/display.php3?ReportID=273>>.

²⁶ *Id.* Among people age 65 and over, for example, strong opposition to gay marriage jumped from 36% in 2003 to 58% in 2004, but then fell to 33% in 2006. (*Id.*)

44% in 2006.²⁷ Indeed, increasing numbers of Americans favor ending marriage discrimination and a majority of Americans favor civil unions.²⁸

B. THE ASPIRATION OF LESBIAN AND GAY COUPLES TO ERADICATE THE DISCRIMINATORY EXCLUSION FROM MARRIAGE WOULD BE DRAMATICALLY UNDERCUT BY A DECISION FROM THIS COURT RULING THAT A SEPARATE AND UNEQUAL STATUS CAN STAND UNDER THE CALIFORNIA CONSTITUTION.

1. This Court Should Not Acquiesce To Official Separation Of Citizens Based On Sexual Orientation.

For all of the progress that civil unions and domestic partnerships represent, they are only a starting point and not an ending point on the path to equality. True equality cannot be achieved by affirming and acquiescing in a legal mechanism of official separation. Indeed, the assertion that separate systems for classes of citizens can satisfy constitutional equality guarantees as long as identical legal rights are conferred invokes the long-repudiated reasoning in *Plessy v. Ferguson* (1896) 163 U.S. 537. In that case, the Court upheld separate railway cars for African-Americans because

²⁷ Baldassare, *Californians and the Future*, Public Policy Institute of California Statewide Survey (Sept. 2006) at p. 29.

²⁸ See generally Pew Research Center, *Most Want Middle Ground on Abortion: Pragmatic Americans Liberal and Conservative on Social Issues* (2006) <<http://people-press.org/reports/display.php3?ReportID=283>>; Pew Research Center, *Strong Support for Stem Cell Research: Abortion and Rights of Terror Suspects Top Court Issues* (2005) <<http://people-press.org/reports/display.php3?ReportID=253>>; Pew Research Center, *GOP the Religion-Friendly Party: But Stem Cell Issue May Help Democrats* (2004) <<http://people-press.org/reports/display.php3?ReportID=223>>.

“[w]hen the government... has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized.” (*Plessy, supra*, 163 U.S. at p. 551.) Equality for gay and lesbian citizens can hardly be advanced by the resurrection of this discredited principle in California constitutional law.

Legislators in Massachusetts eloquently expressed the profound harm to both individuals and society engendered by a separate status for one disfavored minority group. After the *Goodridge* decision, in 2004, those legislators debated a proposed constitutional amendment limiting marriage to a man and woman but providing for civil unions for same-sex couples. Representative Marie P. St. Fleur, who immigrated to this country from Haiti, asserted:

You can't compromise on discrimination. You can't color it another way. Let's start with race. You have to deal with it. We had to deal with it in the Constitution, with women and immigrants. I, my friend, fit all those categories and but for the equal protections of the laws, I would not enjoy the position and freedom I enjoy today.

(2004 Const. Conv. Remarks, <http://www.massequality.org/supporters/concon2004stmts/cc2004_stfleur.html>.) Representative Shaun Kelly, talking about a legislator colleague who is a lesbian, said:

I read that we are going to compromise this out about how integrated into our society we make [Representative] Liz [Malia]. It doesn't make any sense to me. Is she eight-tenths of a citizen? 99.9? Anything less demeans the spirit of Massachusetts it seems to me.

(*Id.*, <http://www.massequality.org/supporters/concon2004stmts/cc2004_kelly2.html>.) Senator Andrea F. Nuciforo commented during the convention's debate:

Think back to the ninth or tenth grade. Chances are you read a book by Nathaniel Hawthorne called the Scarlet Letter. Apparently, the protagonist in that book had to wear a scarlet letter A. And when she wore that letter A, everyone regarded her as a little different. She herself felt different.

We have an amendment here that is going to be the public policy in Massachusetts that creates another class of citizens. And they will enjoy the class of civil unions. But folks, they are going to be different. They will be regarded as different. They will walk around and people will think that they are different and yes, even those people themselves will think that they are different.

(*Id.*, <http://www.massequality.org/supporters/concon2004stmts/cc2004_nuciforo.html>.) Finally, Senator Dianne Wilkerson reminded legislators of the painful lessons of her grandparents who lived in segregated southern Arkansas:

I oppose the amendment before us. One group of citizens cannot be almost equal to the others. I was born not far from Little Rock. . . . My parents are from Arkansas. My grandparents all lived in segregated southern Arkansas.

I can't send anyone to that place where my family fled. My grandmother would never forgive me.²⁹

2. California Is A Bellwether For The Nation.

While Massachusetts led this nation in first setting the standard for equality in marriage, California's role as a national leader in areas ranging from civil rights and other legal developments to environmental, economic and business policy, provides this Court with an unprecedented opportunity to advance equality. California is a bellwether for the nation. The policies

²⁹ *Id.*, <http://www.massequality.org/supporters/concon2004stmts/cc2004_wilkerson.html>.

promulgated by California reverberate throughout the nation; its pronouncements and policies often set the standard for other states.³⁰ This Court has established standards in precedent-setting decisions that have shaped judicial and legislative decisions across the country. See, e.g., *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 (establishing duty of mental health professional to take reasonable steps to prevent foreseeable violence towards third-parties).³¹ And most importantly, this Court has been a bold leader in establishing the equality of all citizens, regardless of the rest of the nation's progress. Its decision in *Perez v. Sharp* (1948) 32 Cal.2d 711, striking down California's ban on interracial marriage stands as one of the most respected constitutional decisions in our nation's history. As Justices Johnson and Dooley noted in the *Baker* argument, and as other courts have observed, *Perez* has become a

³⁰ See, e.g., Canine, *California Illuminates the World* (Spring 2006) OnEarth <<http://www.nrdc.org/OnEarth/06spr/cal.asp>> (noting that "Leading-edge policies and technologies that encourage efficiency have long been a California export, right along with merlot, movies and semiconductors. Energy policy makers in other states as well as in the federal government look to California's energy-conservation measures the same way political analysts view the New Hampshire presidential primary – as a bellwether for the nation."); Donahue, *As California Goes, So Goes the Nation*, U.S. Chamber of Commerce Weekly Newsletter (Mar. 14, 2006) <<http://www.uschamber.com/publications.weekly/commentary/060314.htm>> (noting that the California economy is on the "comeback trail" and "California is also a trendsetter. Good, bad or otherwise, policy approaches adopted in California often spread eastward to the rest of America.").

³¹ See Lake, *Revisiting Tarasoff* (1994) 58 Alb. L. Rev. 97, 100 ("In short, *Tarasoff* has spread rapidly through American law... . Most jurisdictions consider *Tarasoff* favorably, and only one court has openly rejected its holding to date."); Mossman, *Critique of Pure Risk Assessment or, Kant Meets Tarasoff* (2006) 75 U. Cin. L. Rev. 523, 524 ("[T]hirty years after its promulgation, *Tarasoff* remains, to mental health professionals, the most influential ruling in mental disability law.").

paradigm for breaking down the barriers of enduring historical discrimination. (See § IA, *supra*, and *Goodridge, supra*, 440 Mass. at p. 328, 798 N.E.2d at p. 958 n. 16 [“Neither the *Perez* Court nor the *Loving [v. Virginia]* (1967) 388 U.S. 1] Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus.”].)

As Justice Brandeis once observed, “[o]ur government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example.” (*Olmstead v. United States* (1928) 277 U.S. 438, 485 [diss. opn. of Brandeis, J.]). Given California’s size and historic impact on the national conversation, the Court’s decision in this case will have an enormous influence on the future of equality for lesbian and gay citizens.

Amici agree with the respondents that the equality and liberty provisions of the California Constitution require that this Court end the discriminatory exclusion of same-sex couples from marriage. As organizations seeking to fulfill the hopes of lesbian and gay citizens to live as fully equal participants in society, *amici* urge this Court to fulfill the mandates of the California Constitution and thereby advance the understanding of equality for same-sex couples throughout the nation.

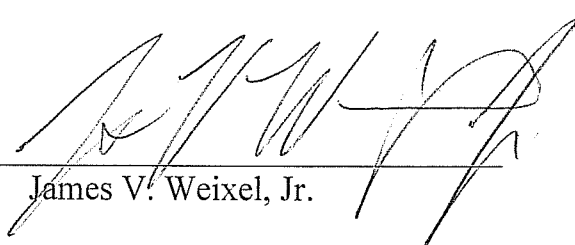
III. CONCLUSION

For the reasons set forth in this brief, *amici curiae* Equality Foundation and Gay and Lesbian Advocates & Defenders respectfully request that this Court affirm the judgment and writ relief granted by the Superior Court, requiring the State of California to issue marriage licenses to same-sex couples on the same terms as such licenses are issued to heterosexual couples.

Respectfully submitted this 26th day of September, 2007.

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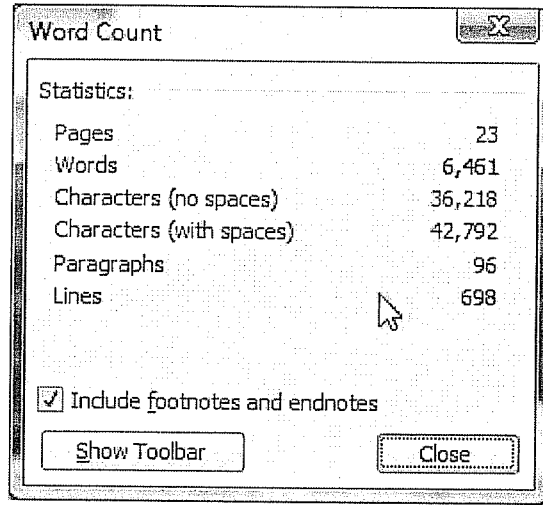
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In Support of Respondents

CERTIFICATE OF COUNSEL RE WORD COUNT

I, James V. Weixel, Jr., certify that the foregoing brief complies with Rule 8.204(c)(1) of the California Rules of Court and contain less than 14,000 words, as indicated by the word processing system used to prepare this petition:



Dated this 26th day of September, 2007.

By:

James V. Weixel, Jr.

PROOF OF SERVICE

I, James V. Weixel, Jr., declare as follows:

I am over the age of 18 at time of service and am not a party to this action. My business address is 2370 Market Street • No. 133, San Francisco, CA 94114. On September 26, 2007, I served copies of:

**BRIEF OF AMICI CURIAE EQUALITY FEDERATION
and GAY AND LESBIAN ADVOCATES & DEFENDERS
IN SUPPORT OF RESPONDENTS
(Including Application for Leave to File)**

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<p>Robert H. Tyler, Esq. ADVOCATES FOR FAITH AND FREEDOM 24910 Las Brisas Road, Suite 110 Murietta, CA 92562</p> <p>Benjamin W. Bull, Esq. Glen Lavy, Esq. ALLIANCE DEFENSE FUND 15333 North Pima Road, Suite 165 Scottsdale, AZ 85260</p> <p>Timothy Donald Chandler, Esq. ALLIANCE DEFENSE FUND 101 Parkshore Dr. #100 Folsom, CA 95630</p>	<p>Appellant Proposition 22 Legal Defense and Education Fund (No. A110651)</p>

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<p>Mary McAlister, Esq. LIBERTY COUNSEL 100 Mountain View Road Suite 2775 Lynchburg, VA 24506</p> <p>Mathew D. Staver, Esq. LIBERTY COUNSEL Second Floor 1055 Maitland Center Common Maitland, FL 32751</p> <p>Ross S. Heckmann, Esq. ATTORNEY AT LAW 1214 Valencia Way Arcadia, CA 91006</p>	<p>Appellants Campaign for California Families and Randy Thomasson (No. A110652)</p>
<p>Hon. Richard A. Kramer San Francisco Superior Court 400 McAllister Street San Francisco, CA 94102</p>	<p>Court of Appeal of California First Appellate District, Division Three 350 McAllister Street San Francisco, CA 94102</p>

and placing the same in a receptacle maintained for that purpose by the U.S. Postal Service in San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 26, 2007, at San Francisco, California.

James V. Weixel, Jr.