IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

B. Birgit Koebke, et al., Plaintiff and Appellant, **v.** **Bernardo Heights Country Club,** Defendant and Respondent.	S124179

Fourth Appellate District, Division One, No. D031058
San Diego County Superior Court No. GIC 767256
The Honorable Charles R. Hayes, Judge

BRIEF OF AMICUS CURIAE BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

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BRIEF OF BILL LOCKYER, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE SUPPORTING APPELLANTS

TO THE HONORABLE RONALD B. GEORGE, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Bill Lockyer, Attorney General of the State of California, respectfully submits the following brief as *amicus curiae* in support of appellants.

INTEREST OF THE ATTORNEY GENERAL

The Attorney General is constitutionally designated as the chief law officer of the state, and has the duty to see that the laws of the state, including the Unruh Civil Rights Act, (Civ. Code, § 51, et seq.) "are uniformly and adequately enforced." (Cal.Const., Art. V, § 13.) The Attorney General exercises broad civil enforcement powers to prevent and remedy unlawful discrimination under the Unruh Civil Rights Act (Civ. Code, § 52, subd. (c)).

By virtue of his duties and responsibilities, the Attorney General is uniquely situated to assist the Court in resolving the key issue in this case, which concerns whether the Unruh Civil Rights Act prohibits businesses from arbitrarily discriminating between married couples and registered domestic partners.

INTRODUCTION

Pursuant to its bylaws, Bernardo Heights County Club (Club) allows its members to share club privileges, including the right to play golf, with the member's spouse and children. The Club refuses to extend the same privileges to a member's registered domestic partner. Appellant Koebke is a long-time member of Club. Appellant French has been Koebke's registered domestic partner for over a decade. The Court of Appeal below held that Club's policy discriminates on the basis of "marital status," construing that phrase to contrast married persons against all "unmarried persons" (see *Koebke v. Bernardo Heights Country Club* (2004) 10 Cal.Rptr.3d 757, 775), including friends or "significant others." But the lower court further held that the Unruh Civil Rights Act (Civ. Code, § 51, hereafter "Unruh Act" or "Act") does not preclude discrimination on the basis of marital status, relying on this Court's decision in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 (*Harris*), and that Club's policy does not discriminate on the basis of gender or sexual orientation.

In this Court, appellants contend that the Unruh Act does prohibit discrimination on the basis of marital status. They also argue that the Act's recognized prohibition against discrimination based on gender or sexual orientation precludes Club from restricting benefits to legally married couples when California law denies couples of the same sex the opportunity to marry.

Amicus Curiae Attorney General contends that the Unruh Act precludes

discrimination by business establishments between interpersonal relationships that are expressly recognized by law, treating one more favorably than the other. Amicus contends that, because the institution of "registered domestic partnership" was created effective January 1, 2000 (Stats. 1999, ch. 588), the Unruh Act has covered differential treatment of married couples and registered domestic partners even prior to January 1, 2005. But Amicus submits that any dispute on that point must necessarily be ended effective that date. In 2003, the Legislature and the Governor enacted the California Domestic Partner Rights and Responsibilities Act of 2003 (hereafter, 2003 Act). (Stats. 2003, ch. 421, effective Jan. 1, 2005.)[1] The Legislature declared that the 2003 Act is to be "construed liberally in order to secure to eligible couples who register as domestic partners the *full range of legal rights, protections and benefits*, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties, and to the state, as the laws of California extend to and impose on spouses." (*Id.*, § 1, emphasis added.) The 2003 Act is one of the most progressive, if not the most progressive, and far-reaching attempts by any state to provide committed same-sex couples an alternative legal status to the institution of marriage, through which they may enjoy, to the greatest extent possible, all the rights, benefits, and responsibilities that are enjoyed and shouldered by married couples.

The Attorney General contends that, after January 1, 2005, there can be no reasonable doubt of the Legislature's expectation that California's premier

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1. The question whether Appellants are entitled to any prospective relief against the continued enforcement of the County Club's policy must be determined in accordance with the law at the time this Court issues its opinion. (*Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 526-528, 45 P.2d 972; see also *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) Accordingly, the applicable statutory scheme for disposing of the instant dispute is the California Domestic Partner Rights and Responsibilities Act of 2003, and its associated statutes, as they read effective January 1, 2005.

civil rights act, the Unruh Civil Rights Act, would ensure the equal treatment of married couples and registered domestic partners by business establishments. Part of this state's heritage since shortly after statehood (see Stats. 1897, ch. 108), the legislative protections now included in the Unruh Act have been applied to scrutinize discrimination based on unconventional dress or physical appearance (*In re Cox* (1970) 3 Cal.3d 205), and to scrutinize discrimination based on having a family of young children (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721; *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790 [limiting residency to persons over 18 years of age].) The Act[2] has even been applied to scrutinize exclusion of a patron from a horse racing track for "immoral character." (*Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734).) Where, as in this case, the Legislature has acted so deliberately to establish an institution ("registered domestic partnership") that gives the express sanction of law to an interpersonal relationship, and has declared in such sweeping terms its intent that the institutions of marriage and registered domestic partnership be accorded substantially equivalent dignity under the law, it would be anomalous to suggest that unequal treatment by business establishments of spouses and registered domestic partnerships is not cognizable as a matter of law under the Unruh Civil Rights Act.

Nor does anything in this Court's *Harris* decision foreclose a finding of unlawful discrimination in this case. *Harris* rejected the sweeping proposition that the Unruh Act was intended by the Legislature to preclude even arguably arbitrary presumptions of inability to pay for goods and services. But *Harris* did not purport to define the universe of *non-financial* bases of discrimination that would be cognizable under the Act. And *Harris* surely did not purport to

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2. In this brief "The Act" refers to the Unruh Civil Rights Act and its statutory predecessors.

suggest that the Unruh Act would not cover discrimination against a class of persons expressly defined by the Legislature for remedial purposes and with an eye towards equality of rights and privileges under law.[3/]

The Attorney General respectfully submits that treating registered domestic partners differently from married couples in the provision of any accommodation, advantage, facility, privilege, or service by a business establishment, without a legitimate business reason for such differentiation, is a violation of the Unruh Civil Rights Act. The judgment of the Court of Appeal should therefore be reversed.

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3. As an example, California recognizes a *legal* relationship of parent and child established by the statutorily prescribed process of adoption, and it is the policy of this state to give an adopted child the same status as a biological one. (*In re Heard's Estate* (1957) 49 Cal.2d 514, 519; Fam. Code, § 8616). Few would doubt that Club's "family membership" policy would be subject to scrutiny under the Unruh Act if it offered membership benefits only to the natural-born children of a member, to the exclusion of adoptive children.

ARGUMENT

I.

TREATING REGISTERED DOMESTIC PARTNERS DIFFERENTLY FROM MARRIED COUPLES IN THE PROVISION OF ANY ACCOMMODATION, ADVANTAGE, FACILITY, PRIVILEGE, OR SERVICE BY A BUSINESS ESTABLISHMENT, WITHOUT A LEGITIMATE BUSINESS REASON FOR SUCH DIFFERENTIATION, IS A VIOLATION OF THE UNRUH CIVIL RIGHTS ACT.

A. The Unruh Act Has Consistently Been Understood to Proscribe Discrimination Between Favored and Disfavored Classes of Persons in the Provision of Advantages and Privileges by a Business Establishment.

The parties focus on the question whether the Unruh Act proscribes discrimination on the basis of "marital status," as did the Court of Appeal. But if use of the phrase "marital status discrimination" is a convenience in describing discrimination between married persons and unmarried persons (cf, e.g., *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143 [refusal to rent to unmarried co-habiting couple]), the convenience is misleading, because all "unmarried persons" may not be similarly situated under the law. It is one thing to inquire whether Club's exclusion of "friends" or even "affianced couples" from its "family membership" privileges offends the Unruh Act; it is quite another to inquire whether Club's exclusion of registered domestic partners from those benefits does so.

The defect in the analysis proceeds from giving the specific conduct at issue here an ambiguous, generic label – "marital status discrimination" – and then assessing whether discrimination *of such a type* is cognizable under the Unruh Act. But the label is of no legal consequence, and the Court should look behind the label to discern the precise nature of the discrimination that occurred

here. (Cf., *Quelimane Co. v. Stewart Title Co.* (1998) 19 Cal.4th 26, 38 ["If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer."]; *Buxbom v. Smith* (1944) 23 Cal.2d 535, 542 ["The subject matter of an action and the issues involved are determinable from the facts alleged rather than from the title of the pleading or the character of damage recovery suggested in connection with the prayer for relief."].)

In this case, Club declined to extend to a member and her registered domestic partner the same privileges and advantages of membership as are extended to members and their spouses. Club has chosen to treat two statutorily-recognized forms of interpersonal relationship differently, with no apparent business justification for doing so.

1. **The Unruh Act has historically been broadly applied to scrutinize arbitrary classifications of consumers.**

The Unruh Act provides, in part:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodation, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(Civ. Code, § 51, subd. (b).) In 1970, this Court summarized the lengthy history of the Act and clarified that the statute's enumeration of proscribed bases for discrimination was not intended to be exclusive:

> [A]lthough primarily invoked in recent years to prohibit racial discrimination, [the Act] does not limit itself to racial discrimination; both its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the act specifies particular kinds of discrimination--color, race, religion,

ancestry, and national origin--serves as illustrative, rather than restrictive, indicia of the type of conduct condemned.

(*In re Cox* (1970) 3 Cal.3d 205, 212 (*Cox*).) Thus, the Act had previously been construed by this Court to cover expulsion of a race-track patron based on his "immoral character" (*Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734 (*Orloff*)); and discrimination against homosexuals in bars and restaurants (*Stoumen v. Reilly* (1951) 37 Cal.2d 713). *Cox* itself recognized that the Act covers discrimination based on hair length or unconventional clothing. (See *Cox, supra,* 3 Cal.3d at pp. 215-217.) Following *Cox*, the Court recognized that the Act covered discrimination against families with children (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721(*Marina Point*)) and age-restrictions for condominium residency (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790 (*O'Connor*) [limiting residency to persons over 18 years of age]).

2. *Harris* Poses No impediment to applying the Unruh Act to different treatment of married couples and registered domestic partners.

This historical understanding of the Unruh Act's scope was confirmed by the Court in 1991. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156 (*Harris*).) And, in *Harris*, the Court reconfirmed that the Legislature did not intend the enumerated bases for discrimination found in Civil Code section 51 to be exclusive. (*Id.* at pp. 1155-1156.)[4] However, the

4. Although the Court observed that "were it writing on a clean slate," the Legislature's enumeration of specific classifications "would represent a highly persuasive, if not dispositive, factor in our construction of the Act" (*Harris, supra,* 52 Cal.3d at p. 1159), it nevertheless acknowledged the Legislature's consistent assent to the courts' broader interpretation of the Act's scope. (*Id.* at p. 1156.) In effect, *Harris* implicitly recognized that, had the Legislature ever intended the enumerated bases of coverage to be exclusive, it could easily have added the word "only" immediately preceding the enumeration. But, despite the expansive construction of the Act by this Court over the decades, the Legislature has never seen fit to do so.

Court in *Harris* also held that the Act did not proscribe "a landlord's requirement that prospective tenants have gross monthly incomes of at least three times the rent to be charged." (*Id.* at p. 1148.)

In *Harris*, the Court did not purport to define the outer limits of the universe of discriminatory conduct that may be reachable under the Unruh Act. Rather the Court expressly stated its concern to be the narrower question whether "the Act proscribe[s], as economic discrimination, a landlord's requirement that prospective tenants have gross monthly incomes of at least three times the rent to be charged . . . ." (*Harris, supra*, 52 Cal.3d at p. 1148.) Central to the Court's analysis was the threshold repudiation of the sweeping language previously used by the Court in *Cox*, to the effect that the Act proscribes "all arbitrary discrimination by a business enterprise." (*Cox, supra,* 3 Cal.3d at p. 212.) Acknowledging that the Legislature had long acquiesced in broad judicial construction of the Act, the Court in *Harris* declined to read into that acquiescence, "any presumption of legislative acquiescence in the broad concept of 'arbitrary discrimination.'" (*Harris, supra,* 52 Cal.3d at p. 1155-1156.) In particular, the Court stated that it could find no support in legislative history for an endorsement of the broad language. (*Id.,* at p. 1157, fn. 6; but see now, Stats. 1991, c. 1202, § 22 [legislative finding: "(a) A business establishment which sells or transfers firearms shall comply with Section 51 of the Civil Code *that prohibits all arbitrary discrimination.*" (emphasis added)].) To decide the specific question before it, the Court reasoned that "the Unruh Act is best understood by considering what the Legislature has actually done in response to our decisions." (*Harris, supra*, 52 Cal.3d at p. 1158.) In that regard, the Court noted that, despite the sweeping language of *Cox*, amendments to the Unruh Act following *Cox* continued to reflect attention to categories of discrimination. (*Id.* at pp. 1158-1159.)

Contrary to Respondent's suggestion, the Court's task in deciding the instant dispute is not to ascertain whether the basis for discrimination constitutes a "protected category" within the *Harris* analysis. As Amicus noted earlier, the Court in *Harris* did not purport to depart from long-standing precedent by setting forth an all-purpose test for determining whether discrimination is reachable under the Unruh Act. Stated otherwise, *Harris* did not purport to decide what forms of discrimination may be found to be *included* within the Act's proscriptions; *Harris* decided only that discrimination on the basis of financial capability is *excluded* from those proscriptions.[5]

To be sure, the Court in *Harris* reflected on the nature of the prohibited bases found in the statute and surveyed the case law construing the Act, concluding that the common element was discrimination based on what the Court characterized as "personal characteristics." But the tension at issue in

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5. The Court found support in the language of subdivision (c) of section 51: "This section shall not be construed to confer any right or privilege on a person that is . . . applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, or medical condition." Acknowledging that it has found that language to be "obscure" (*Harris, supra,* 52 Cal.3d at p. 1155, citing *Cox, supra*, 3 Cal.3d 205), the Court nevertheless read the provision to "suggest" that the Act was not intended to create rights of access to public accommodations when "those rights were already extended to all persons regardless of sex, color, race, or the other listed categories." (*Ibid.*) Applied to the case at hand, the Court found that the language meant that the Act "was not intended to create a right of access to rental housing notwithstanding a landlord's policy of selection based on financial criteria, so long as the policy is applicable alike to all persons regardless of race, color, sex, religion, etc." (*Ibid.*) Such a reading, however, is confusing because, if taken as more than dicta, it would have had the effect of implicitly negating some of the very holdings that the Court had reaffirmed in *Harris* itself. For example, exclusion from a shopping mall because of long hair (*Cox*), or exclusion from a race track because of immoral character (*Orloff*), or exclusion of families with children (*Marina Point*) could all be said to amount to discrimination on the basis of a policy that is applicable alike to all persons "regardless of race, color, sex, religion, etc."

Harris was not between "personal characteristics" and "non-personal characteristics," as it were, for purposes of deciding whether a category of discrimination was proscribed by the Act. Rather, the tension at issue in *Harris* was between *personal* and *economic* classification; after all, the Unruh Act governs the conduct of *business,* in respect to which ability to pay is obviously a material concern. Thus, the Court recognized that the enumerated classifications in the Act "involve personal *as opposed to economic* characteristics . . . ." (*Harris, supra*, 52 Cal.3d at p. 1160, italics added.) And again: "The Legislature's decision to enumerate personal characteristics, *while conspicuously omitting financial or economic ones*, strongly suggests a limitation on the scope of the Unruh Act." (*Id.* at p. 1161, italics added.) Likewise, in reviewing judicial construction of the Act, the Court observed: "When courts have applied the Act to arbitrary discrimination beyond the listed categories of race, sex, religion, etc., personal characteristics *and not financial status or capability* provided the basis of decision." (*Ibid.*, italics added.) And, in summarizing its analysis, the Court explained that the minimum-income policy in dispute did not violate the Unruh Act because "it does not make distinctions among persons based on the classifications listed in the Act . . . or *similar personal traits, beliefs, or characteristics that bear no relationship to the responsibilities of consumers of public accommodations.*" (*Id.* at p. 1169, italics added.)

Harris, therefore, cannot fairly be understood to mean that denial of equal access to public accommodations to a class of patrons is unreachable under the Unruh Act *as a matter of law*, unless the classification can be said to be based on a "personal trait" or "an immutable aspect of one's personality." (See Answer Br., p. 5) The Court in *Harris* held no more than that classification based on *financial status or economic capability* is not reachable under the Act.

Furthermore, this Court necessarily recognized that the phrase "personal characteristic" is a fluid term, extending beyond "personal trait" or "an immutable aspect of one's personality." Thus the Court recognized that, in the case of a parent seeking housing, the concept of "personal characteristic" encompasses "the presence of children in apartments and condominiums." (*Harris*, 52 Cal.3d at p. 1161, citing *Marina Point, supra*, 30 Cal.3d 721, and *O'Connor, supra*, 33 Cal.3d 790.) And, of course, in *Cox*, the plaintiff was not discriminated against because of his own personal characteristic, but because he was *associated* with someone who had long hair.[6]

The question before the Court in *Harris* was whether the Legislature reasonably contemplated that the Unruh Act would reach discrimination based on financial status or "economic capability." And the Court, considering the

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6. If discrimination between tenants with children is tantamount to actionable discrimination on the basis of a "personal characteristic" for purposes of *Harris*, see *O'Connor, supra*, 33 Cal.3d 790, then Amicus is at a loss to understand how discrimination between married couples and registered domestic partners is any less actionable discrimination on the basis of a "personal characteristic" within the meaning of *Harris*.

express terms of the statute itself and the judicial holdings to which the Legislature had acquiesced, surmised that discrimination on this basis was not what the Legislature had contemplated in enacting the Unruh Act.[7]

Most assuredly, *Harris* does not preclude a finding of coverage under the Unruh Act when the basis of discrimination is not only unrelated to financial status or economic capability, but also disfavors a class of persons that has been expressly sanctioned by the Legislature and as to whom the Legislature has unequivocally expressed its desire to ensure equality of rights and benefits as are enjoyed by married couples.

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7. As noted earlier, the central feature of this Court's *Harris* analysis was its rejection of the earlier *Cox* standard to the effect that the Unruh Act proscribes "all arbitrary discrimination." After *Harris*, then, the inquiry turns from the "open-ended" question of "whether the exclusionary conduct at issue was arbitrary" to the narrower question of "whether the discrimination at issue was based on a classification that the Legislature reasonably intends to be encompassed by the Act." Even if the classification is within the compass of the Act, there remains a second inquiry: "Whether the discrimination is 'rationally related to the services performed and facilities provided.'" (*In re Cox, supra,* 3 Cal.3d at p. 212; see also, *Harris, supra,* 52 Cal.3d at p. 1163, citing *Cox*.) The Court need not decide, in these proceedings, whether lower courts have applied *Harris* in a too restrictive manner by focusing unduly on the "personal characteristic" description of the historically recognized proscriptions against discrimination. (See Ans. Br., p. 12, fn. 4.) Thus, the Court need not decide whether the Unruh Act prohibits differential treatment of married couples and cohabiting couples, whose relationship has no legal status. (Cf., *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455.) It is enough for the Court here to decide whether anything in *Harris* would preclude a holding that the Unruh Act proscribes unequal treatment of married couples and registered domestic partners.

B. The Unruh Act Protects Domestic Partners from Being Treated Differently from Married Couples in the Provision of Accommodations, Advantages, Facilities, Privileges or Services by Business Establishments.

As noted earlier, the Unruh Civil Rights Act has been applied to safeguard the rights of persons not to be excluded from shopping centers because of unconventional dress or long hair (*Cox*), and it has been applied to safeguard the right of a racetrack customer not be arbitrarily excluded because of "immoral character" (*Orloff*). And this Court confirmed in *Harris* that discrimination based on such personalized bases, unrelated to capability as a consumer, remain cognizable under the Unruh Act. It would be anomalous indeed, then, to suggest that the Unruh Act does not apply to arbitrary discrimination between registered domestic partners and spouses in the provision of valuable benefits flowing from a country club membership.

It is also evident that the establishment of the institution of "registered domestic partnership" reflected a recognition by the Legislature that committed same-sex couples had no means of formalizing their relationship under law in a manner similar to the means by which committed heterosexual couples may do so. Indeed, creation of the institution of registered domestic partnership was expressly intended to deprive business establishments of a basis for equating committed same-sex couples who have formalized their relationship with all other "unmarried persons" in receipt of privileges and benefits afforded to spouses.

In 1999, the Legislature created the institution of "registered domestic partnership" for unmarried adult couples of the same sex. (Stats. 1999, ch. 588.)[8] Registered domestic partners establish their relationships with the State

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8. Registration as domestic partners was also made an option for senior-citizen couples of opposite sexes, who are over the age of 62 years.

of California by filing a Declaration of Domestic Partnership. (Fam. Code, § 297, subd. (b).)[9] After a series of legislative actions broadening the rights of domestic partners,[10] in 2003, the Legislature passed Assembly Bill 205,

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9. Unless otherwise indicated, statutory references to the Family Code are to the statutes as effective on January 1, 2005.

10. The domestic partnership statutes were expanded in 2001 to give domestic partners many additional legal rights. Assembly Bill 25 (Stats. 2001, ch. 893) gave domestic partners the right to use stepparent adoption procedures (Fam. Code, §§ 9000, 9002, 9004, 9005, as amended by Stats. 2001, ch. 893, §§ 5 - 8); the right to sue for wrongful death or infliction of emotional distress for the injury or death of a partner (Civ. Code, § 1714.01, as added by Stats. 2001, ch. 893, § 1, and Code Civ. Proc., § 377.60, as amended by Stats. 2001, ch. 893, § 2); the right to make medical decisions for an incapacitated partner (Prob. Code, § 4716, as added by Stats. 2001, ch. 893, § 49); the right to be treated as a dependent of a partner for purposes of group health and disability insurance (Health & Saf. Code, § 1374.58 and Ins. Code, § 10121.7, as added by Stats. 2001, ch. 893, §§ 10 & 11); the right to file for state disability benefits on behalf of a mentally disabled partner (Unemp. Ins. Code, § 2705.1, as amended by Stats. 2001, ch. 893, § 60); the right to be appointed a conservator for an incapacitated partner (Prob. Code, §§ 37 and 1813.1, as added by Stats. 2001, ch. 893, §§ 14 & 16.5 and Prob. Code, §§ 1460, 1811, 1812, 1820 - 1822, 1829, 1861, 1863, 1871, 1873 - 1874, 1891, 1895, 2111.5, 2212-2213, 2357, 2359, 2403, 2423, 2430, 2504, 2572, 2580, 2614.5, 2622, 2651, 2653, 2681 - 2682, 2687, 2700, 2803, 2805, as amended by Stats. 2001, ch. 893, §§ 14 - 16 & 17 - 48); the right to use sick leave to care for an ill partner or partner's child (Lab. Code, § 233, as amended by Stats. 2001, ch. 893, § 12); the right to use statutory form wills and be appointed as administrator of a partner's estate (Prob. Code, §§ 6240, 8461 - 8462, 8465, as amended by Stats. 2001, ch. 893, §§ 52 and 53); the right to receive unemployment benefits when moving to accompany a partner to a new job (Unemp. Ins. Code, §§ 1030, 1032, 1256, 2705.1, as amended by Stats. 2001, ch. 893, §§ 57 - 60); and the right to receive continued health insurance as a partner of a deceased state employee or retiree (Gov. Code, §§ 31780.2, as added by Stats. 2001, ch. 893, § 9.5, and Gov. Code, § 22871.2, as amended by Stats. 2001, ch. 893, § 9). The legislation also provided that the value of domestic partner health insurance coverage was not taxable as income by the state. (Rev. & Tax Code, § 17021.7, as added by Stats. 2001, ch. 893, § 56.)

which, effective January 1, 2005, confers on registered domestic partners substantially the same rights under the law as are conferred on married couples. New Family Code section 297.5 provides:

> 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 upon spouses.

(Stats. 2003, c. 421, § 4.)

The Legislature's declaration of intent in enacting Section 297.5 is sweeping and comprehensive:

> (a) 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

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The law was amended again in 2002 to, among other things, establish intestate succession rights for domestic partners. (Stats. 2002, ch. 447 [amending Prob. Code, §§ 6401, 6402].) Also, in 2002, domestic partners were included in the list of persons authorized to receive birth and death records of a registrant (Health & Saf. Code, § 103526, as added by, Stats. 2002, ch. 914, § 3); were allowed to draft wills for each other in the manner allowed for persons related by blood or marriage (Prob. Code, § 21351, as amended by, Stats. 2002, ch. 412, § 1); and were included within a new family temporary disability insurance program that provides up to six weeks of paid leave to workers who take time off to care for a seriously ill child, spouse, parent or domestic partner, or to bond with a new child. (Unemp. Ins. Code, § 3300, as added by, Stats. 2002, ch. 377, § 6.)

family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.

(b) The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together. Many of these couples have sought to protect each other and their family members by registering as domestic partners with the State of California and, as a result, have received certain basic legal rights. Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.

(Stats. 2003, c. 421, § 1.)

The Legislature's decision to establish the institution of registered domestic partnership is rooted in a recognition that, like Club here, hospitals and health facilities claimed the absence of any basis for distinguishing between committed same-sex couples and friends or neighbors in hospital visitation privileges. As Club's policy distinguishes between spouses and everyone else, hospital visitation policies typically distinguished between spouses and blood family relations, on the one hand, and everyone else on the other. Hence the Legislature's 1999 expression of intent in establishing the institution of registered domestic partnership:

> It is the intent of the Legislature to retain the right of hospitals and other health care facilities to establish visitation policies in reasonable and appropriate circumstances. In enacting this legislation, it is the intent of the Legislature to provide hospitals and other health facilities with the authority to administer those policies in a manner that applies equally to spouses, registered domestic partners, and other immediate family members.

(Stats. 1999, ch. 588, § 1; see also, Health & Saf. Code, § 1261.) It cannot reasonably be doubted that the Legislature contemplated that arbitrary denial of equal visitation privileges to registered domestic partners would be actionable under the Unruh Act.

But as the Legislature's amendments to the domestic partnership statutes attest, the effort begun in 1999 was not limited merely to providing same-sex couples equal hospital-visitation privileges. The significance of the 1999 act and the Legislature's declaration of intent is that registered domestic partnership is a legally recognized and formalized relationship under state law which provides business establishments, including – but not limited to – hospitals and health facilities, a rational basis for distinguishing *these* particular unmarried couples from "friends," "significant others," and any other unmarried persons or couples.

The 2003 Act is hardly a retreat from the Legislature's original intent. Certainly after January 1, 2005, if not since January 1, 2000, a business enterprise has no rational basis for including registered domestic partners among the sea of "unmarried persons" who may be denied privileges and advantages that are afforded spouses.

It is axiomatic that statutes will not be construed to frustrate the Legislature's intent (*Moore v. California State Bd. of Optometry* (1992) 2 Cal.4th 999, 1012-1013 [fundamental objective of ascertaining and effectuating

the Legislature's intent overrides the *ejusdem generis* doctrine any maxim of jurisprudence, if application of the doctrine or maxim would frustrate the intent underlying the statute]) or in a manner that would lead to unreasonable or absurd results (*Harris, supra,* 52 Cal.3d at pp. 1165-1166). And it cannot reasonably be doubted that a construction of the Unruh Act to permit unequal treatment of married couples and registered domestic partners by business enterprises would frustrate the Legislature's intent in creating and developing the institution of registered domestic partnership as a legally sanctioned and recognized alternative to the marriage license for same-sex couples. The adverse consequences of such a construction are as vast and profound as the Act's coverage: Every "business establishment[] of every kind whatsoever" (Civ. Code, § 51) -- hotels, country clubs, theaters, airlines, auto rentals, restaurants, amusement parks, retail establishments of every stripe -- would be free to offer advantages or privileges to married couples and their children while denying those same advantages or privileges to registered domestic partners and their children. It is difficult to imagine an interpretation of the Unruh Act that could more decisively frustrate the Legislature's expressed intent "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 . . . ." (Stats. 2003, c. 421, § 1.)

Under any rational reading of the precedent discerning the Legislature's contemplated scope of the Unruh Civil Rights Act, it cannot reasonably be disputed that the Legislature would expect that Act to cover arbitrary differences in treatment between married couples and registered domestic partners.

C. There Is No Legitimate Business Interest in Refusing to Offer Membership Benefits to Registered Domestic Partners on the Same Basis as They Are Offered to Married Couples.

In enacting Family Code section 297.5, the Legislature expressed its view that there is no basis for distinguishing between married couples and registered domestic partners with respect to the "rights, protections, and benefits" that are enjoyed by married couples under state law, whether those rights, protections, and benefits "derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law" (Fam. Code, § 297.5.) Such a sweeping recognition of the functional equivalency of marriage and domestic partnership as respects rights, protections, and benefits of government necessarily imposes on business establishments a significant burden to demonstrate that, nevertheless, there exists a *commercial* basis for distinguishing between the two statutorily sanctioned institutions.[11]

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11. Respondent reads too much into the deletion of language relating to "marital status discrimination" in an early version of AB 205. (See Ans. Br., p. 46-47.) The provision described expressed the lack of any "legitimate state interest in denying" persons in domestic partnerships rights, benefits, responsibilities, and obligations that are provided or imposed by, among other laws, "laws prohibiting marital status discrimination." Respondent intimates that the decision to remove this language from the bill should be taken to evince a legislative choice not to extend protection against "marital status discrimination" to persons in domestic partnership. But there are literally dozens of statutes relating to the prohibition of discrimination on the basis of marital status (see, e.g., Bus. & Prof. Code, § 125.6 [refusal to perform licensed activity]; Civ. Code, § 1785.15 [consumer reporting agency reference to marital status]; Educ. Code, § 230 [sex discrimination includes rules involving marital status]; Gov. Code, § 12920 [prohibition against discrimination and housing on the basis of marital status]), and the decision to delete the provision may have been motivated by a legitimate desire not to suggest that these statutory rights are presently unavailable to persons in domestic partnerships. The language adverted to by Respondent was one piece of a larger multi-paragraph section, the whole of which was not included in the final bill. The reasoning behind this

The Club does not purport to justify on any commercial basis a distinction between married couples and registered domestic partnerships in the affording of "family membership" privileges. Rather Club justifies distinguishing between married couples and "friends" (Ans. Br., p. 35) or "single members" (Ans. Br., p. 36). Respondent does assert: "Even assuming, arguendo, that extending additional privileges to a domestic partner would also be consistent with the club's objective, this would not render the club's use of marital status unrelated to a legitimate objective." (Ans. Br., p. 37.) But Respondent does not explain what that legitimate business objective might be in distinguishing between a registered domestic partner and a spouse.

Inasmuch as registered domestic partnership is a formalized, public, and verifiable legal status (see Fam. Code, §§ 297, 298, 298.5, 299), and inasmuch as registered domestic partners incur the same contractual obligations as do spouses (Fam. Code, § 297.5, subd. (a)), it is unreasonable to compare registered domestic partners with "friends," "significant others," or even with affianced couples in assessing whether Club may treat registered domestic partners differently from married couples in respect to the benefits and privileges of equity membership.[12]

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drafting is unknown. As this Court has recognized, "At best, 'legislative silence is a Delphic divination.'" (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 418, quoting *Alabama-Tennessee Natural Gas Co. v. Federal Power Commission* (5th Cir. 1966) 359 F.2d 318, 333; and see now, Fam. Code, § 297.5, subd. (f) ["Registered domestic partners shall have the same rights regarding non-discrimination as those provided to spouses."].)

12. For this reason, Respondent's reliance on *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455, is unavailing. *Beaty* antedated the Legislature's 1999 creation of "registered domestic partnership" as a distinct legal familial status. Although *Beaty* purported to hold that the Unruh Act does not prohibit marital status discrimination, the core of its ruling was simply that, under the circumstances of that case, it was not *arbitrary* for the insurer to limit its sale of joint umbrella policies to couples with some "assurance of

For any commercially relevant purpose, there is no material distinction between a married couple and a registered domestic partnership. There being no apparent legitimate business justification for treating registered domestic partners differently from married spouses in the provision of any "accommodations, advantages, facilities, privileges or services" (Civ. Code, § 51, subd. (a)) by any business establishment, of any kind whatsoever (*ibid.*), Respondent's continued denial to appellants of membership benefits on the same basis as they are offered to married couples is a violation of the Unruh Civil Rights Act.

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permanence" and "legal unity of interest." That concern was significantly lessened by the recognition in law of the status of "registered domestic partner," and is non-existent after enactment of the California Domestic Partner Rights and Responsibilities Act of 2003. (Stats. 2003, c. 421.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: December 7, 2004.

Respectfully submitted,

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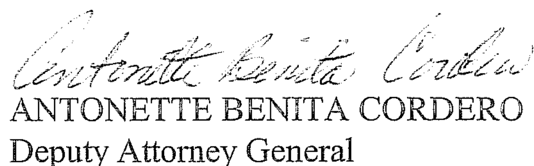

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF OF AMICUS CURIAE BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA uses a 13 point Times New Roman font and contains 6484 words.

Dated: December 8, 2004.

Respectfully submitted,

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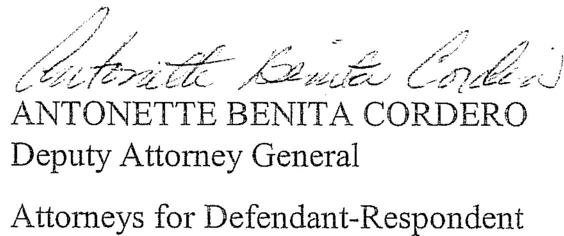

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **B. Birgit Koebke, et al. v. Bernardo Heights Country Club**

No.: **S124179**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 8, 2004, I served the attached **BRIEF OF AMICUS CURIAE BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at Los Angeles, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 8, 2004, at Los Angeles, California.

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Signature