Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al., Petitioners,

v.

MARK B. HORTON, State Registrar of Vital Statistics, etc, et al., Respondents;
DENNIS HOLLINGSWORTH, et al., Intervenors.

ROBIN TYLER, et al., Petitioners,

v.

THE STATE OF CALIFORNIA, et al., Respondents;
DENNIS HOLLINGSWORTH, et al., Intervenors.

CITY AND COUNTY OF SAN FRANCISCO, et al., Petitioners,

v.

MARK B. HORTON, et al., Respondents;
DENNIS HOLLINGSWORTH, et al., Intervenors.

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS WATCH *ET AL.* IN SUPPORT OF PETITIONERS

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

Pursuant to California Rule of Court 8.200(c), Human Rights Watch and the affiliated *amici curiae* request leave of this Court to file the attached *amicus curiae* brief in support of Petitioners. Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. It is the largest U.S.-based international human rights organization. Since its founding in 1978, Human Rights Watch has worked tenaciously to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world.

The Human Rights Watch California Committee North is a network of members and opinion leaders in the Bay Area, from a variety of backgrounds, who support Human Rights Watch's work. The committee is part of the Human Rights Watch Council, a network of committees across thirteen cities in Europe, Canada and the United States.

The Human Rights Watch California Committee South is an informed and engaged constituency of members who support Human Rights Watch in Los Angeles through outreach and advocacy. The California Committee South is part of the Human Rights Watch Council, a network of committees across thirteen cities in Europe, Canada and the United States.

Scott Long serves as the Director of the Lesbian, Gay, Bisexual, and Transgender Rights Program at Human Right Watch.

Elizabeth J. Marsh serves as the Director of the Human Rights Watch California Committee North.

Darian W. Swig serves as the Chair of the Human Rights Watch California Committee North and a Member of the Board of Directors, Human Rights Watch.

David J. Keller serves as the Co-Chair of the Human Rights Watch California Committee North and the Chair of the Human Rights Watch Advocacy Subcommittee.

Amy J. Rao serves as the Co-Chair of the Human Rights Watch California Committee North.

Martin N. Krasney serves as the Vice Chair of the Human Rights Watch California Committee North.

Joan R. Platt serves as the Vice Chair of the Human Rights Watch California Committee North.

Hava Manasse serves as the Director of the Human Rights Watch California Committee South.

Shari Leinwand serves as the Co-Chair of the Human Rights Watch California Committee South.

Sid Sheinberg serves as the Co-Chair of the Human Rights Watch California Committee South and a Member of the Board of Directors, Human Rights Watch.

The proposed *amicus* brief will assist the Court by providing important contextual information regarding the fundamental rights at issue in the case as viewed from a global perspective. Other nations with similar histories, legal traditions, and political cultures have recognized the fundamental nature of the rights at issue in this matter and the implications thereof: Foreign and international courts considering questions similar to those presented here have recognized the fundamental nature of the right to marry and have rejected laws that would exclude gays and lesbians from the institution of marriage. This Court should consider these international opinions.

Because this Court's decision will have a significant impact on the fundamental human rights of many citizens, both within California and through its potential impact as precedent around the world, *amici curiae* Human Rights Watch and the affiliated parties described above request leave to file the attached brief.

DATED: January 15, 2009

PERKINS COIE LLP

By: _____
Philip A. Leider

Attorneys for *Amici Curiae*
HUMAN RIGHTS WATCH *et al.*

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BRIEF OF *AMICUS CURIAE*

I. INTRODUCTION

The question presented in this case is both clear and extraordinarily consequential: Can individuals falling within a suspect classification (here, gays and lesbians) be deprived of a fundamental right (here, the right to marry) by means of a voter initiative purporting to amend the state constitution? *Amici curiae* Human Rights Watch and affiliated parties respectfully submit that the principles of international law, as well as the precedents from other countries addressing the question of equality in civil marriage, require that this question be answered in the negative. Equality is a fundamental principle of human rights, and international law defines sexual orientation as a status protected against discrimination. A bare majority of voters should not be permitted to enshrine in a state constitution unjust discrimination that the law would not otherwise allow. The clear tendency of human rights protections is to ensure that marriage remains subject to strictures against discrimination, including discrimination based on sexual orientation.

II. DISCUSSION

A. Equality is a Fundamental Principle of International Human Rights, and Sexual Orientation Is a Status Protected Against Discrimination

Adopted in 1948, the Universal Declaration of Human Rights ("UDHR") is the foundational document of the modern human rights

system, providing for "the promotion of universal respect for and observance of human rights and fundamental freedoms." UDHR, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 12, 1948) (*available at* http://www1.umn.edu/humanrts/instree/b1udhr.htm (last accessed January 14, 2009).). Equality is fundamental to the values enshrined in the UDHR and in the subsequent human rights treaties and instruments. Thus Article 1 of the Declaration provides that "[a]ll human beings are born free and equal in dignity and rights." Id. Article 2 of the UDHR provides that all human beings are "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Id.

Likewise, Article 2 of the International Covenant on Civil and Political Rights ("ICCPR") commits each State party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International Covenant on Civil and Political Rights, Art. 23(1), Dec. 19, 1966, 999 U.N.T.S. 172 (*available at* http://www.hrweb.org/legal/cpr.html (last accessed January 14, 2009).) Article 3 further mandates that States parties "undertake to ensure the equal right of men and women to the enjoyment of

all civil and political rights set forth in the present Covenant." Id. Article 26 guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law" and that all persons are to be free from discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Id.

The United Nations Human Rights Committee, which authoritatively interprets the ICCPR and evaluates states' compliance with its provisions, has emphasized the importance of equal treatment as a norm running throughout the Covenant: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. . . . Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant." U.N. Human Rights Committee (HRC), "CCPR General Comment No. 18: Non-discrimination," 10 November 1989, at ¶¶ 1 & 2 (*available at* http://www.unhcr.org/refworld/type,GENERAL,,,453883fa8,0.html (last accessed January 15, 2009).).

The Human Rights Committee has held that the mandate of equal protection applies to sexual orientation as a status protected under the Covenant's provisions. In Toonen v. Australia, Communication No.

488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (*available at* http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5 (last accessed January 14, 2009).), the Human Rights Committee held invalid a statute in the Australian state of Tasmania outlawing consensual homosexual conduct. The Committee held that the law violated not only article 17 of the Covenant (protecting the right to privacy) but also its protections against discrimination. Toonen, at ¶ 9-11. The Committee determined that the reference to "sex" in articles 2 and 26 of the ICCPR should be taken to include sexual orientation. Id. at ¶ 8.7. Since that time, the Committee has reaffirmed this holding, both in subsequent decisions and in its recommendations to States.[1]

In the Universal Declaration—again, the founding text of modern human rights—equality is closely tied to the Declaration's conception of the dignity of human beings. The Preamble to the Declaration states that

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[1] See, *inter alia,* U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Poland, 66th Session, U.N. Doc. CCPR/C/79/Add.110, at 23 (*available at* http://www.unhchr.ch/tbs/doc.nsf/0/a61db0e519524575802567c200595e9c ?Opendocument (last accessed January 15, 2009).): the Committee urged the inclusion of constitutional protections against sexual-orientation-based discrimination. In the case of Trinidad and Tobago, the Committee urged that it "extend the provisions" of anti-discrimination legislation "to those suffering discrimination on grounds of age, sexual orientation, pregnancy or infection with HIV/AIDS." Concluding Observations of the Human Rights Committee: Trinidad and Tobago, U.N. Doc. CCPR/CO/ 70/TTO, November 3, 2000, at 11 (*available at* http://www1.umn.edu/humanrts/hrcommittee/tobago2001.html (last accessed January 15, 2009).).

"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Declaration identifies in the Preamble the origins of the United Nations itself in the "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women."

This linking of dignity with equality is testament to an evolving belief, underpinning the human rights system, that dignity no longer signifies (as it had in older lexicons) an "honorific, aristocratic valence of status, rank, and social worth" but instead denotes a valid claim of each human being to an equal measure of respect. Reva B. Siegel, "Dignity and the Politics of Protection," 117 Yale L.J. 1694, n. 129 (2008). Two scholars write that, in the contemporary era, nations agreed to treat dignity as a "trait of all human beings and a marker of equality. Twentieth century human rights law embodies these premises through proclamations and agreements committing governments to respecting the dignity of all people." Judith Resnik & Julie Chi-hye Suk, "*Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*," 55 Stan L Review, note 118 at 1924 (2003).

These twin themes—the centrality of equality and its connection to dignity—are also reflected in the jurisprudence of many jurisdictions around the world. In its landmark decision in Maneka Gandhi, India's

highest court found equality to belong within a complex of deep principles underlying the express protections of the Constitution:

> Articles dealing with different fundamental rights . . . do not represent entirely separate streams of rights. . . . They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual). . . . Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection. Maneka Gandhi v. Union of India, Supreme Court of India, [1978] 2 SCR 621 ("Maneka Gandhi") (*available at* http://www.manupatrainternational.in/supremecourt/1950-1979/sc1978/s780133.htm (last accessed January 14, 2009).).

Equality, the Court held, is "a founding faith of the Constitution" and "the pillar on which rests securely the foundation of our democratic republic": "No attempt should be made to truncate its all-embracing scope and meaning for . . . [e]quality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits." Id.

Similar observations regarding equality as a critical value underpinning a range of rights protections—as well as equality's essential link to human dignity—are found in the decision by the Constitutional Court of South Africa overturning that country's apartheid-era laws against

consensual homosexual conduct. The Court held that even a majority's deeply-held prejudices toward a particular class could not justify infringing upon equality protections, stating that "such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation." National Coalition for Gay and Lesbian Equality et. al. v Minister of Justice et. al., 1999 [1] SA 6 (S. Afr. Const. Ct.), at 38 (*available at* http://www.saflii.org/za/cases/ZACC/1998/15.html (last accessed January 14, 2009).). Indeed, the Court found that the minority status of lesbian and gay people—their potential exclusion from recourse to the legislature or the ballot box for effective remedy or protection—rendered Constitutional protections even more vital for them: "The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favorable legislation for themselves." Id. at 25.

The South African Constitutional Court further noted that "in particular circumstances, the rights of equality and dignity are closely related." Id. at 27. The Court found this particularly true in the circumstances at bar since the questions of sexuality and sexual orientation touch upon "a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships" whereas discrimination against lesbian and gay people "degrades and devalues." Id. at 30, 32, 28.

In a concurring opinion, Justice Sachs elaborated:

> [T]he equality principle and the dignity principle should not be seen as competitive but rather as complementary. . . . The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. . . . In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group. . . To penalize people for being what they are is profoundly disrespectful of the human personality and violatory of equality. Id. at 94-97.

"Although the Constitution itself cannot destroy homophobic prejudice," Justice Sachs reasoned, "it can require the elimination of public institutions which are based on and perpetuate such prejudice." Id. at 97. He added that "in my view the implications of this judgment extend well beyond the gay and lesbian community. It is no exaggeration to say that the success of the whole constitutional endeavor in South Africa will depend in large measure on how successfully" equality protections will be extended to a minority despite its unpopularity—so that, as he put it, "sameness and difference are reconciled." Id. at 98.

This reasoning bears striking similarities to the reasoning of the majority in two U.S. Supreme Court decisions with clear relevance to the

present case. In Romer v. Evans, 517 U.S. 620 (1996), the U.S. Supreme Court addressed a situation in which the voters of a state attempted to withdraw fundamental rights from gays and lesbians. The Supreme Court struck down the constitutional amendment in Romer, as we urge this Court to do in the current instance. The Court reasoned that, even under the least stringent standard of review, the Colorado voter initiative failed on two independent grounds: (1) it had "the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation"; and (2) "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests." Romer, 517 U.S. at 632. In words particularly resonant here, the Court emphasized that "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Id. at 633.[2]

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[2] Notably, the Court did not hold and did not even suggest that the voters of Colorado could accomplish the same exclusion of gays and lesbians sought in Amendment 2 by garnering a higher percentage of votes or employing a more deliberative procedure. To the contrary, the Court emphasized categorically that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.

In Lawrence v. Texas, 539 U.S. 558 (2003), the U.S. Supreme Court struck down a Texas statute making it a crime for two individuals of the same sex to have sexual relations. Significantly here, the Court did not limit its holding to the equal protection principles earlier enunciated in Romer, as Justice O'Connor would have done. See id. at 579-585 (O'Connor, J., concurring in the judgment).[3]

The majority in Lawrence went further than Romer, holding that the petitioners "were free as adults to engage in the private conduct [i.e., sodomy] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." Id. at 564. In concluding that the rights at issue were grounded in substantive due process, and not just equal protection, the Court emphasized that the due process guarantee of liberty "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Id. at 562. Crucially,

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A State *cannot* so deem a class of persons a stranger to its laws." Id. at 635-36 (emphasis added).

[3] Justice O'Connor would have held that "[m]oral disapproval of a group [i.e., homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." Id. at 582 (citing, inter alia, Romer, 517 U.S. at 634-35). In other words, Justice O'Connor would have based her decision solely on the distinction between *homosexual* "sodomy" and *heterosexual* "sodomy," without addressing—as did the majority opinion—the broader question of an adult individual's right to engage in consensual relations as an aspect of their liberty, personality, and dignity. See id. at 584-85 (O'Connor, J., concurring) ("Whether a sodomy law that is neutral both in effect and application . . . would violate the substantive component of the Due Process Clause is an issue that need not be decided today").

although it acknowledged that the "formal recognition" of a gay relationship was not presented in the case at bar, id. at 578, the Court further warned that the principles of substantive due process "should counsel against attempts by the State, or a court, to define the meaning of the relationship *or to set its boundaries* absent injury to a person or abuse of an institution the law protects." Id. at 567 (emphasis added).

The guarantees of equality and dignity reflected in international law and in jurisprudence from around the globe have clear parallels in the affirmations of equal protection and substantive due process found in U.S. jurisprudence. International law strongly affirms that these guarantees apply to sexual orientation.

B. International Law Constrains Local Authority from Abridging Fundamental Human Rights

The normative validity of fundamental rights is neither dependent on a particular legal regime or instrument, nor conditioned on notions of sovereignty. See Judge Edward D. Re, "The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts," 33 Cal. W. Int'l L.J. 137, 140 (2003).

Most notably, international law does not treat a constitutional amendment as either a privileged or unassailable means of restricting fundamental rights, as Romer itself suggests. For example, the Inter-American Court of Human Rights struck down a proposed amendment to

the naturalization provision of the Constitution of Costa Rica that would have provided preferential treatment to women over men marrying for purposes of naturalization. See Inter-American Court of Human Rights, Advisory Opinion OC-4/84 (Jan. 19, 1984) (*available at* http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.pdf (last accessed January 14, 2009).). The Court took cognizance of Article 15 of the UDHR, which states that "everyone has the right to a nationality," and Article 20(1) of the American Convention on Human Rights, which similarly guarantees the fundamental right to nationality, and noted that "[i]t is generally accepted today that nationality is an inherent right of all human beings." IACHR Opinion OC-4/84 at 9. In this light, the Court held that the power of nation states to regulate matters bearing on a fundamental right via their national constitutions "cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure full protection of human rights." Id. Even though the Court concluded that the proposed constitutional amendment did not eliminate rights already recognized in Costa Rican law, it nevertheless invalidated the changes because they had a discriminatory effect upon the fundamental right to nationality.

C. A Growing Number of Jurisdictions Recognize that the Right to Marry Must be Accorded with Equality and Protected From Discrimination on the Basis of Sexual Orientation

This Court's affirmation of the fundamental right to marry in In re Marriage Cases is consistent with the law of other nations, as well as with long-standing and recognized principles of international human rights.

The basic documents of the international human rights system recognize that the right to marriage and family is a fundamental right. The Universal Declaration of Human Rights (UDHR), says in article 16:

> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The International Covenant on Civil and Political Rights (ICCPR) states in article 23:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

The American Declaration of the Rights and Duties of Man, adopted in 1948, states that "every person has the right to establish a

family, the basic element of society, and to receive protection therefor." American Declaration of the Rights and Duties of Man, O.A.S. 9th Int'l Conf. of American States (1948), OEA/Ser.L.V/ II.82 doc.6 rev.1 at 17 (1992) (*available at* http://www.hrcr.org/docs/OAS_Declaration/oasrights.html (last accessed January 14, 2009).). The American Convention on Human Rights also affirms the right to marry and raise a family under "conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention." American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (1978), OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (*available at* http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm (last accessed January 15, 2009).).[4]

It is worthy of note that, while these instruments guarantee rights to all men and women of age, there is no express definition of marriage as *between* a man and woman. On this point, the Constitutional Court of South Africa has cogently observed:

> The reference to 'men and women' is descriptive of an assumed reality rather than prescriptive of a normative structure for

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[4] Last year, in the 60th Anniversary of the Charter of the Organization of American States ("OAS"), the OAS General Assembly unanimously adopted a resolution on "Human Rights, Sexual Orientation and Gender Identity."

all time. Its terms make it clear that the principal thrust of the instruments is to forbid child marriages, remove racial, religious, or nationality impediments to marriage, ensure that marriage is freely entered into, and guarantee equal rights before, during, and after marriage.

The statement . . . that the family is the natural and fundamental group unit in society, entitled to protection by the state, has in itself no inherently definitional implications. . . . Nor need it by its nature be restricted intrinsically, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family which is the fundamental unit of society must be constituted according to any particular model. Indeed, even if the purpose of the instruments was expressly to accord protection to a certain type of family formation, this would not have implied that all other modes of establishing families should for all time lack legal protection.

Indeed, rights by their nature will atrophy if frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. . . . When the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena, embodied in the laws of the so-called civilized nations, and blessed by as many religious leaders as they were denounced. . . Severe chastisement of women was tolerated by family law and international legal instruments then, but is today considered intolerable. Similarly, though many of the values of family life have remained constant, both the family and the law relating to the family have been utterly transformed. Minister of Home Affairs and Another v. Fourie, (CCT 60/04) [2005] ZACC 19 at 100-102 (*available at* http://www.saflii.org/za/cases/ZACC/2005/19.html (last accessed January 14, 2009).).

Acknowledging this progressive development in the understanding of rights, the European Charter of Fundamental Rights, in its comparable article 9, omits all reference to sex in its definition of marriage, stating: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

Charter of Fundamental Rights of the European Union (2000/C 364/01) (*available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last accessed January 15, 2009).).

International human rights bodies have shown respect for evolving definitions of the family. The U.N. Human Rights Committee has noted that "the concept of the family may differ in some respects from State to State, and even from region to region within a State, and . . . it is therefore not possible to give the concept a standard definition." General Comment 19: Protection of the family, the right to marriage and equality of the spouses, U.N. Human Rights Committee, HRI/GEN/1/Rev.2, at 2 (*available at* http://www.unhchr.ch/tbs/doc.nsf/0/6f97648603f69bcdc12563ed004c3881?Opendocument (last accessed January 15, 2009).). The U.N. Committee on the Rights of the Child states: "When considering the family environment, the Convention [on the Rights of the Child] reflects different family structures arising from various cultural patterns and emerging family relationships." Report on the Fifth Session, Committee on the Rights of the Child, UN Doc. CREC/C/24, Annex V (*available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e3b44ec94c642eb2412561510038867 9/$FILE/G9415734.pdf (last accessed January 15, 2009).).

The U.N. Special Rapporteur on Violence Against Women has noted that strict prescriptions of what families should be not only limit diversity but, by enshrining discrimination, can also encourage violence:

> Throughout the world, there exist divisions between the dominant, normative ideal of the family and the empirical realities of family forms. Whether the ideal is the nuclear family or a variation of the joint or extended family, such ideals in many cases are not wholly consistent with the realities of modern family forms. [...]
>
> Despite such differences, however, the culturally-specific, ideologically dominant family form in any given society shapes both the norm and that which is defined as existing outside of the norm and, hence, classified as deviant. Thus, the dominant family structure—whether it is dominant in fact or merely in theory—serves as a basis against which relationships are judged. Further, it serves as the standard against which individual women are judged and, in many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality. . . . Such demonization fuels and legitimates violence against women in the form of sexual harassment, rape, domestic violence, female genital mutilation, forced marriages, honour killings and other forms of femicide. U.N. Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/1999/68, March 10, 1999, at 8-9 (*available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/72e640b38c51653b8025675300566722?Opendocument (last accessed January 15, 2009).).

As the South African Constitutional Court has summarized: "International human rights law imposes obligations upon states to respect and protect marriage and family life [and] clearly recognizes the importance of marriage and a state obligation to protect the family." Dawood v. Minister of Home Affairs, Constitutional Court of South Africa,

[2000] 5 LRC 147, at 33 (*available at* http://www.saflii.org/za/cases/ZACC/2000/8.html (last accessed January 14, 2009).). Straightforward application of international protections against unequal treatment would mandate that gay and lesbian couples, no less than heterosexual couples, enjoy the fundamental right to marry and found a family.

A growing number of States recognize that the right to marry cannot be subject to discriminatory enjoyment on the basis of sexual orientation—clearly indicating the direction in which international understandings of this right presently trend.

Abroad, seven countries have now recognized the fundamental right of same-sex couples to marry. Several have done so by legislative action. In 2001, the Netherlands amended its marriage law to state that "a marriage can be contracted by two people of different or the same sex." Dutch Civil Code, Art. 1:30. In 2003, Belgium similarly amended its laws to affirm that "two persons of different sexes or of the same sex may contract marriage." Belgian Civil Code, Art. 143 (Book I, Title V, Chapter I). In 2005, Spain enacted legislation mandating that "matrimony shall have the same requisites and effects regardless of whether the persons involved are of the same or different sex." Codigo Civil art. 44 (2005). In 2006, Canada's Civil Marriage Act went into effect, extending "the legal capacity for marriage for civil purposes to same-sex couples in order to reflect

values of tolerance, respect and equality." Statutes of Canada, ch. 33 (2005) (*available at* http://laws.justice.gc.ca/en/showdoc/cs/C-31.5///en?page=1 (last accessed January 14, 2009).)[5] On January 1, 2009, Norway's new law codifying equal access to civil marriage for same-sex and opposite-sex couples went into effect. See Norwegian Ministry of Foreign Affairs, "Norway Introduces New Marriage Act" (Jun. 24, 2008) (*available at* http://www.norway.org/policy/gender/ekteskapslov.htm (last accessed January 14, 2009).).

Meanwhile, in Fourie, the South African Constitutional Court squarely recognized the application of the principle of equality in the context of same-sex marriage. In 2005 it held that the equality protections of South Africa's post-apartheid constitution required that marriage rights be afforded to same-sex couples: "It is clear that the exclusion of same-sex

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[5] The Canadian Supreme Court confirmed the validity of this legislation, noting that it was framed in "response to the findings of several courts that the opposite-sex requirement for civil marriage violates the equality guarantee enshrined" in the Canadian Charter of Rights and Freedoms. Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 2004 SCC 79 at 41 (*available at* http://csc.lexum.umontreal.ca/en/2004/2004scc79/2004scc79.html (last accessed January 14, 2009).). See also Egale Canada Inc. v. Canada, 225 D.L.R. (4th) 472 (B.C. Ct. App. 2004) (*available at* http://www.canlii.org/en/bc/bcca/doc/2003/2003bcca251/2003bcca251.htm l (last accessed January 14, 2009).) (recognizing the right of same-sex couples to marry in British Columbia); Halpern v. Toronto, 225 D.L.R. (4th) 529 (Ontario Ct. App. 2003) (*available at* http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.pdf (last accessed January 14, 2009).) (recognizing the right of same-sex couples to marry in Ontario).

couples from the status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law." Minister of Home Affairs v. Fourie, at 48. In so holding, the Court recognized that the dictates of equal protection "go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law." Id. at 49. The Court further observed: "What is at stake . . . is how to respond to legal arrangements of great social significance under which same-sex couples are made to feel like outsiders who do not fully belong in the universe of equals." Id. at 61.

In language worth quoting in full, the Constitutional Court resoundingly endorsed the application of principles of equality and dignity to gay and lesbian couples seeking to marry:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. . . . Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, and stigma. At best, it celebrates the vitality that difference brings to any society. . . . The acknowledgement and acceptance of difference is

particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognizing and accepting people with all their differences, as they are. . . . Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. Id. at 61 and 60.

As early as 1999, South Africa's Constitutional Court had observed that recognition of the familial dimension of same-sex partnerships was a global trend, noting Canadian, Israeli, British and U.S. precedents. National Coalition, 2000 (1) BCLR 39 (CC), at 48. That body of jurisprudence, Justice Ackermann observed, "give[s] expression to norms and values in other open and democratic societies based on human dignity, equality and freedom which, in my view, give clear expression to the growing concern for, understanding of, and sensitivity towards human diversity in general and to gays and lesbians and their relationships in particular." Id.

That trend continues. In a November 2008 ruling, the Supreme Court of Nepal required the newly democratic Nepalese government to enact broad protections against discrimination based on sexual orientation and gender identity. Citing South African jurisprudence, the U.S. decision

in Lawrence v Texas, and precedents from the United Nations system, the Supreme Court held: "Any provision that hurts the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights point of view. The fundamental rights of an individual shall not be restricted on any grounds such as religion, culture, customs, values, etc." Sunil Babu Pant v Nepal Government, Supreme Court, Division Bench, Order Writ no. 917 of the year 2064 (2007 AD). The Court ordered, inter alia, that the government must form a committee to develop legislation regarding the equal access of same-sex couples to marriage, noting that "it is an inherent right of an adult to have marital relations with another adult with her/his free consent and according to her/his will." Id.

In addition to the seven countries that ensure equal access to civil marriage for same-sex couples, numerous other countries afford recognition and at least some of the rights of marriage to same-sex couples under other rubrics.[6] Many of these states have done so by instituting a special legal status for same-sex relationships, often called a "civil union" or "registered partnership."

However, even when a "civil union" or "registered partnership" affords the same rights and benefits to same-sex couples as does heterosexual marriage, it nevertheless reinforces stigma through the

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[6] These states include Brazil, Colombia, Costa Rica, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Israel, New Zealand, and Sweden.

separation—implying that gay and lesbian partnership do not deserve the dignity of the same name for their relationships. Even if the rights promised by civil unions or registered partnerships correspond exactly to those entailed in civil marriage on paper, the insistence on a distinct nomenclature means that the mark of second-class status will still cling to those relationships, not only in law but in the realm of popular perception where prejudice most powerfully dwells.

Moreover, and more materially, civil unions and registered partnerships do not carry the same possibility of recognition by other jurisdictions that marriage ordinarily implies. An international convention governs the recognition of marriages across international borders. See Hague Convention No. 26 on the Celebration and Recognition of the Validity of Marriages (1978) (*available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=88 (last accessed January 15, 2009).). Even for countries not party to this convention, however, the doctrine of comity—defined in U.S. law as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience and to the rights of its own citizens who are under the protection of its laws"—tends to lead countries to recognize marriages performed in other jurisdictions. See Clubb v Clubb, 402 Ill. 390, 399-400, 84 N.E. 2d 366 (1949) (citing Hilton v Guyot, 159 US 113,

164, 40 L. Ed. 95, 108, 16 S. Ct. 139, 143 (1895)). The burden is on governments to justify the denial of recognition to foreign marriages. The burden is usually, and unfairly, on partners in civil unions or registered domestic partners to justify their recognition abroad. In fact, even though all five Scandinavian countries had instituted registered partnerships for same-sex partners by 1995, they still needed to enact a special treaty to ensure their mutual recognition across borders in the region. See I. Lund-Andersen, "Cohabitation and the Registered Partnership in Scandinavia: The Legal Position of Homosexuals," Eekelaar and Nhlapo (eds.) The Changing Family (Oxford: Hart Publishing, 1998), at 397.

Whereas marriage is virtually universally recognized, recognition of "civil unions" and "registered partnerships" can be cut off, for example, when partners in a civil union travel to a jurisdiction that does not recognize such a status. Even a partner's right to custody over a child may be endangered. These facts confirm and reinforce the great lesson of U.S. history that separate is never equal: Preserving suspect distinctions in a context of inequality only perpetuates discrimination.

III. CONCLUSION

As South Africa's Constitutional Court has noted:

> Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives

> which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. Dawood, 5 LRC 147 at 30.

Whether or not a state treats marriage according to the principle of equality in all its aspects is not a neutral question, but one decisive for the character of that state's public sphere and the rights it guarantees to all. Ensuring equality in rights, even against a majority's attempts to restrict a minority's access to them, is in the end an affirmation of a society's basic values, signifying that it is both open to difference and bound by the rule of law. As the South African Court observed, "what is at stake" in ensuring the equal recognition of gay and lesbian relationships "is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society." Minister of Home Affairs v. Fourie, at 60. Governments committed to equality cannot legitimately reserve certain areas of civil life as exempt zones where inequality is permitted. Human rights principles, together with a growing body of precedent in the law of numerous states, demand that states end discrimination based on sexual orientation in civil marriage and open the status of marriage to same-sex couples. The Court should

accordingly GRANT the petitions and enjoin the enforcement of Proposition 8.

DATED: January 15, 2009

PERKINS COIE LLP

By: _____
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Time New Roman typeface, containing 5,810 words, including footnotes. In making this certification, I have relied on the word count function of Microsoft Office 2007.

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PROOF OF SERVICE BY MAIL

I, Sheila Merrill, declare:

1. I am over the age of 18 and not a party to the within cause. I am employed by Perkins Coie LLP in the County of San Francisco, State of California. My business address is 4 Embarcadero Center, Suite 2400, San Francisco, California 94111-4131 of San Francisco, State of California.

2. On January 15, 2009, I served a true copy of the attached document entitled

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH ET AL. IN SUPPORT OF PETITIONERS

by placing it in addressed sealed envelopes clearly labeled to identify the persons being served at the addresses set forth on the attached service list and placed said envelopes in interoffice mail for collection and deposit with the United States Postal Service at 4 Embarcadero Center, Suite 2400, San Francisco, California, on that same date, following ordinary business practices.

3. I am familiar with Perkins Coie LLP's practice for collection and processing correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 15, 2009, at San Francisco, California.

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