

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX COUNTY

No. SJC-11010

AMY E. HUNTER,
Plaintiff-Appellee

v.

MIKO ROSE,
Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE ESSEX COUNTY
PROBATE AND FAMILY COURT

**BRIEF AMICUS CURIAE OF CALIFORNIA PROFESSORS
OF FAMILY LAW IN SUPPORT OF
PLAINTIFF-APPELLEE AMY E. HUNTER**

Neil Jacobs (BBO #
249300)
Mary J. Edwards (BBO #
654872)
Darren Griffis (BBO #
675627)
Wilmer Cutler Pickering
Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Ilona M. Turner
Catherine P. Sakimura
National Center for
Lesbian Rights
870 Market St.
Suite 370
San Francisco, CA 94102
(415)392-6257

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF INTEREST OF AMICI 1

FACTS 1

ARGUMENT 5

I. THE PARTIES HAVE ALL THE RIGHTS AND RESPONSIBILITIES OF MARRIAGE UNDER CALIFORNIA LAW THROUGH THEIR REGISTERED DOMESTIC PARTNERSHIP. 9

 A. Origins of California's Registered Domestic Partnership Laws. 10

 B. Extension of All the Rights and Responsibilities of Marriage to Registered Domestic Partners Through A.B. 205. 10

 C. Notice to Registered Domestic Partners About A.B. 205. 12

 D. A.B. 205 Applies to the Parties' Domestic Partnership. 17

 E. The California Supreme Court Has Held That Same-Sex Couples Must Be Accorded All of the Rights and Responsibilities Extended to Married Spouses. 19

II. THE TRIAL COURT PROPERLY EXTENDED COMITY TO THE PARTIES' CALIFORNIA REGISTERED DOMESTIC PARTNERSHIP. 20

III. HUNTER AND ROSE ARE BOTH [J] AND [M]'S LEGAL PARENTS. 24

 A. Hunter Is [J]'s Legal Parent and Rose Is [M]'s Legal Parent Because Hunter and Rose Each Consented in Writing to the Other's Insemination. 25

 B. Hunter and Rose Are Both Legal Parents of [J] and [M] Because the Parties Were Registered as Domestic Partners at the Time the Children Were Born. 28

CONCLUSION 31

RULE 16(k) CERTIFICATION.....	34
ADDENDUM	35

TABLE OF AUTHORITIES

Federal Cases

<i>In re Rabin</i> , 359 B.R. 242 (B.A.P. 9th Cir. 2007)	27
<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).....	20

State Cases

<i>Cote-Whitacre v. Dep't. of Pub. Health</i> , 446 Mass. 350 (2006)	6, 21
<i>Dawn D. v. Superior Court of Riverside County</i> , 952 P.2d 1139 (Cal. 1998).....	30
<i>Elisa B. v. Superior Court</i> , 117 P.3d 660 (Cal. 2005).....	30
<i>In re Domestic Partnership of Ellis</i> , 76 Cal. Rptr. 3d 401 (Cal. Ct. App. 2008).....	10
<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008).....	10, 19
<i>In re Marriage of Freeman</i> , 53 Cal. Rptr. 2d 439 (Cal. Ct. App. 1996).....	30
<i>In re Salvador M.</i> , 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003).....	30
<i>Inhabitants of Medway v. Inhabitants of Needham</i> , 16 Mass. 157 (1819).....	7, 21
<i>Goodridge v. Dep't of Pub. Health</i> , 440 Mass. 309 (2003).....	8, 22, 25
<i>McDonald v. McDonald</i> , 6 Cal. 2d 457 58 P.2d 163 (1936).....	8
<i>Paternity of Cheryl</i> , 434 Mass. 23 (2001)	29
<i>People v. Sorensen</i> , 68 Cal.2d 280, 437 P.2d 495 (Cal. 1968).....	27

<i>Richardson v. Richardson</i> , 246 Mass. 353 (1926)	7
<i>In re Opinions of the Justices to the Senate</i> , 440 Mass. 1201 (2004).....	22, 25
<i>Strauss v. Horton</i> , 207 P.3d 48 (Cal. 2009) ..	10, 21, 22
<i>T.F. v. B.L.</i> , 442 Mass. 522 (2004)	27
<i>Velez v. Smith</i> , 48 Cal. Rptr. 3d 642, (Cal. Ct. App. 2006).....	13

State Statutes

Cal. Fam. Code § 297.5	<i>passim</i>
Cal. Fam. Code § 298	14, 17
Cal. Fam. Code § 299	13
Cal. Fam. Code § 299.2	8, 25
Cal. Fam. Code § 299.3	3, 14, 20
Cal. Fam. Code § 308	8, 25
Cal. Fam. Code § 7540	31
Cal. Fam. Code § 7611	31, 33
Cal. Fam. Code § 7613(a)	6, 28, 29
Cal. Fam. Code § 7650	32
G.L. c. 209C, § 6	30
G.L. c. 4, § 6	6
G.L. c. 46, § 4B	6, 27, 28

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly recognized the legal spousal relationship between the parties.
2. Whether the trial court properly concluded that both parties are legal parents to each child.

STATEMENT OF INTEREST OF AMICI

Amici are California family law professors whose scholarship and expertise include the rights and responsibilities of same-sex couples under California law, as well as interstate recognition of marriages, domestic partnerships, and parent-child relationships. Amici submit that their expertise can be useful to this Court in evaluating the application of California law to this case.

Amici include: Professors of Law Scott Altman, Grace Ganz Blumberg, Janet Bowermaster, Jan C. Costello, Barbara J. Cox, Deborah L. Forman, Joan Heifetz Hollinger, Lisa Ikemoto, Courtney Joslin, Herma Hill Kay, Lawrence Levine, Maya Manian, John E.B. Myers, Douglas NeJaime, Shelley Saxer, Michael S. Wald, D. Kelly Weisberg, and Lois Weithorn

FACTS

The parties in this case, Miko Rose and Amy Hunter, were in a committed relationship with each other for over seven years. They met in Massachusetts

and began dating in February 2001. A.821. In the spring of 2002, they moved to California so that Rose could establish in-state residency and attend medical school in California. *Id.* From the beginning of their relationship, Rose and Hunter discussed having children together. *Id.* In the spring and summer of 2003, while living in California, they began trying to conceive a child through assisted insemination with the hope that, if possible, Hunter would be the birth mother. A.824. In September 2003, shortly after they began trying to have children, they executed a Declaration of Domestic Partnership, which was registered with the state of California in October 2003. A.822. In September 2003, the Governor of California signed A.B. 205, which, upon its effective date of January 1, 2005, expanded the rights and obligations of registered domestic partners ("RDPs") to mirror those of married couples, including recognition of both RDPs as legal parents of children born to either of them during their registered domestic partnership. As provided in A.B. 205, upon its effective date, it would apply to all RDPs who were already registered with the state and who remained registered on January 1, 2005. Prior to and just after that date, the California Secretary of State sent three separate written notices to every existing RDP informing them of the upcoming changes in the law and

advising them to terminate their registered domestic partnership if they did not want to be accorded all the rights and obligations of married spouses. Cal. Fam. Code § 299.3.

The trial court found that Hunter and Rose each had actual notice of the scope of A.B. 205 before it went into effect on January 1, 2005. A.823. Neither of them took any steps to terminate their registered domestic partnership prior to that date. *Id.* Moreover, neither of them took any steps to terminate their registered domestic partnership while they lived in California or at any time thereafter until they separated in 2008. *Id.*

For three years, the couple's efforts to conceive were unsuccessful. A.824-825. In the late summer of 2006, a year and a half after A.B. 205 went into effect, they decided that Rose would attempt to conceive through assisted insemination. A.825. In November, she became pregnant with their first child, [REDACTED]. A.827.

When Rose was approximately six months pregnant, the couple moved from California to the East Coast -- initially to Rhode Island, and then in July 2007, to Massachusetts. A.829. They moved to the East Coast so that Rose could complete a medical school rotation and the couple could obtain insurance coverage that would

cover Hunter's efforts to conceive their second child through in vitro fertilization ("IVF"). A.829, 856. On August 6, 2007, while they were living in Massachusetts, Rose gave birth to the couple's older child, [REDACTED]. A. 830.

When [REDACTED] was about six months old, Hunter became pregnant through IVF using the same sperm donor they both had selected for Rose to use when she conceived [REDACTED]. A.857. The couple separated in August 2008, when [REDACTED] was approximately one year old and Hunter was four months pregnant with [REDACTED]. A.830, 838, 857.

Two months after they separated, Rose took [REDACTED] to Oregon. A.843. When she left, she said that her trip to Oregon was for a brief, four-to-six week medical rotation, after which she would return to Massachusetts. A.840, 843, 857. Shortly after arriving in Oregon, however, Rose cut off all communication between Hunter and [REDACTED]. A.844.

Hunter gave birth to [REDACTED] on January 19, 2009 in Massachusetts. A.857. Rose was not present for the birth, has expressed little interest in [REDACTED], and states that she does not love her and does not want physical or legal custody of her. A. 857-858.

The trial court found that Hunter and Rose were equally committed to their joint endeavor to start a

family and raise children together. A.827, 856. Among many other things, this was evidenced by their joint participation in the decision to use assisted reproductive technology to conceive, by their mutual choice of the same sperm donor for each child, by the timing of their efforts to conceive, and by the many consent forms they both signed with respect to the conception of both children through assisted reproductive technology. See A.824-827, 856. Hunter and Rose together made the decision to have children and both intended to parent the children together. A.824-825, 827, 831, 856-857.

ARGUMENT

Amy Hunter and Miko Rose were California registered domestic partners (RDPs) when both of their children were conceived through assisted reproductive technology and when both children were born. At the time of each child's conception and birth, California RDPs were accorded all of the rights and responsibilities of marriage under California law, including the same parental rights and obligations accorded to married spouses with respect to children born into their relationship. The trial court found that the parties were aware of the scope of the rights and obligations of RDPs prior to the children's conception. Despite this awareness, the parties

remained registered as RDPs at the time of the conception and the birth of each of their children.

The trial court correctly applied the doctrine of comity to recognize the parties' status as registered domestic partners and, accordingly, to extend to them all of the marital rights and responsibilities accorded to legally married couples. A.894-899. In particular, when a married spouse consents to his wife's insemination, under Massachusetts law he is treated as the legal parent of the child born to his wife.¹ G.L. c. 46, § 4B; G.L. c. 4, § 6 (in construing statutes, "words of one gender may be construed to include the other gender"). Because the parties are entitled to all of the rights and responsibilities of married spouses under Massachusetts law, the court correctly found that both Hunter and Rose are legal parents of both [redacted] and [redacted]. A.901-902.

The purpose of comity is to promote convenience, justice, and mutual respect between states. See *Cote-Whitacre v. Dep't. of Pub. Health*, 446 Mass 350, 368 (2006). In order to protect the rights of its citizens, Massachusetts courts long have extended comity to marriages entered in another state or country even if

¹ As explained in more detail herein, the result would be the same under California law. See Cal. Fam. Code § 7613(a).

those marriages could not have been entered into in Massachusetts. *Id.* As this Court has previously recognized, one important justification for extending comity to out-of-state marriages is to protect children who were born into those marriages. *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 160 (1819). *Cf. Richardson v. Richardson*, 246 Mass. 353, 355 (1926) (marriage rights will be upheld wherever possible in order "to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring"). Failing to extend comity to familial relationships established under the laws of other states would create considerable uncertainty about the legal status and security of families that move from one jurisdiction to another. Children would be particularly vulnerable to this uncertainty.

Consistent with the well-established law in Massachusetts, California likewise extends comity to familial relationships entered into in other states. In particular, California extends all marital rights and responsibilities to same-sex couples who have married or entered into other comprehensive legal relationships in other states. Cal. Fam. Code § 308 (providing recognition for marriages from other

jurisdictions)²; Cal. Fam. Code § 299.2 (providing recognition for domestic partnerships and civil unions from other states).

Just as California would extend all marital rights and responsibilities to same-sex couples who married in Massachusetts, Massachusetts should extend the same courtesy to California couples who registered as domestic partners. Not only is this consistent with the underlying purposes of comity, but failing to accord this recognition to California RDPs would be utterly inconsistent with this Court's rulings that excluding same-sex couples from the vast network of critical marital rights and protections violates the Massachusetts Constitution. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (2003).

Refusing to extend comity would cause irreparable damage to this family. Under California law, Hunter and Rose are both legal parents to both of their children. A refusal by Massachusetts courts to extend comity would leave this family as well as similar families and their children very vulnerable and deprive them of critical legal protections. Amici urge this

²See, e.g., *McDonald v. McDonald*, 6 Cal. 2d 457, 459, 58 P.2d 163, 164 (1936) (concluding that under an earlier version of Family Code § 308, which codifies the common-law rule of comity, a valid Nevada marriage of a 16-year-old must be recognized in California, even though it could not have been entered in California in the first instance).

Court to clarify that California registered domestic partners should be accorded all the rights and obligations of married spouses under Massachusetts law.

I. THE PARTIES HAVE ALL THE RIGHTS AND RESPONSIBILITIES OF MARRIAGE UNDER CALIFORNIA LAW THROUGH THEIR REGISTERED DOMESTIC PARTNERSHIP.

Since 2005, California registered domestic partners have had all the rights and responsibilities of marriage under California law. Cal. Stats. 2003, ch. 421 (codified at Cal. Fam. Code § 297.5). RDPs are treated as if they were married spouses under California law for all purposes, including their rights and responsibilities with respect to children conceived or born during their relationships. Cal. Fam. Code § 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). The California Supreme Court has confirmed that this extension of equal rights to same-sex partners is in fact mandated by the California Constitution, holding that the state is required to provide the same rights and responsibilities to same-sex registered domestic partners that are granted to legally married spouses. *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009) (same-sex couples have the constitutional right to "choose one's life partner and enter with that person into a committed, officially recognized, and protected family

relationship that enjoys *all of the constitutionally based incidents of marriage*'") (quoting *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008)) (emphasis added).

A. Origins of California's Registered Domestic Partnership Laws.

In 1999, the California Legislature created a statewide domestic partnership registry that provided a limited number of specifically enumerated rights to same-sex couples. Cal. Stats. 1999, Ch. 588, §2 ("A.B. 26"). Initially, registered domestic partners had only two rights: hospitals were required to extend visitation to patients' RDPs and the partners' children and some public employers were allowed (but not required) to extend health care coverage to RDPs of employees. *Id.* Over the following three years, California expanded the rights and obligations afforded to RDPs in piecemeal fashion, with "various legislative enactments and amendments" giving RDPs "a variety of rights and responsibilities." *In re Domestic Partnership of Ellis*, 76 Cal. Rptr. 3d 401, 404 (Cal. Ct. App. 2008).

B. Extension of All the Rights and Responsibilities of Marriage to Registered Domestic Partners Through A.B. 205.

In 2003, California expanded the rights and responsibilities of RDPs to comprehensively mirror

those of married couples. California Domestic Partner Rights and Responsibilities Act, Cal. Stats. 2003, ch. 421 ("A.B. 205"). Specifically, the 2003 legislation provides that "[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses." *Id.* at § 4 (emphases added). The Legislature explicitly provided that registered domestic partners are to be treated as if they are married spouses for the purposes of determining the parentage of their children. Cal. Fam. Code § 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). Additionally, under A.B. 205, in order to terminate a registered domestic partnership, RDPS must go through a formal dissolution process that is equivalent in all respects to divorce.³ Cal. Fam. Code § 299(d). The purpose of A.B. 205 was to "provid[e] all caring and committed couples, regardless of their

³ While California provides a summary dissolution procedure for both registered domestic partnerships and marriages in certain limited cases, Cal. Fam. Code § 299(a), that summary procedure would not have been available to Hunter and Rose because they have children and their relationship lasted more than five years. A.819.

gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties." Cal. Stats. 2003, ch. 421, §1.

C. Notice to Registered Domestic Partners About A.B. 205.

A.B. 205 was signed into law on September 19, 2003 but did not go into effect until January 1, 2005.⁴ The effective date was delayed in order to ensure that there was sufficient time to give existing RDPs notice about the expanded panoply of rights and obligations they would have starting January 1, 2005 unless they terminated their registered domestic partnership prior to that date. To this end, the legislation required the Secretary of State to send multiple notices to already-registered domestic partners advising them of the imminent change in their rights and responsibilities and giving them the opportunity to terminate their domestic partnership before the changes went into effect. Cal. Fam. Code § 299.3. The Secretary of State was required to send three letters to registered domestic partners "on or before June 30,

⁴ As noted above, Rose and Hunter registered as RDPs just after A.B. 205 was signed into law. *Supra*, at page 3. At the time they registered, there was extensive media coverage about A.B. 205 and the expanded rights and responsibilities that would be accorded to all RDPs starting on January 1, 2005. See pages 13-16, *infra*.

2004, and again on or before December 1, 2004, and again on or before January 31, 2005." Cal. Fam. Code § 299.3. The three letters explained that:

Effective January 1, 2005, California's law related to the rights and responsibilities of registered domestic partners will change With this new legislation, for purposes of California law, domestic partners will have a great many new rights and responsibilities. . . . Domestic partners who do not wish to be subject to these new rights and responsibilities MUST terminate their domestic partnerships before January 1, 2005. . . . If you do not terminate your domestic partnership before January 1, 2005, as provided above, you will be subject to these new rights and responsibilities.

Id. See also *Velez v. Smith*, 48 Cal. Rptr. 3d 642, 653 n.8 (Cal. Ct. App. 2006) (noting that the Secretary of State sent these letters as required). The letters were sent individually to each registered domestic partner; not just to each couple. Cal. Fam. Code § 299.3(a). Because domestic partners are required to provide their mailing address at the time of registration, the Secretary of State had addresses on file for every registered domestic partner. Cal. Fam. Code § 298(c).

The changes to RDPs' rights and responsibilities were widely reported across California when the bill was signed into law in September 2003, just before Hunter and Rose registered as domestic partners. There

was a virtual barrage of media attention to the new law with information circulating in newspapers, television, radio, on the internet, and through mailings from non-profit organizations.

Many of the news stories highlighted the new responsibilities domestic partners would have with respect to children. See, e.g., Rachel Gordon, *Gay Couples Redefining Love That's Now Legal They Say New Law Gives Responsibilities As Well As Rights*, San Francisco Chronicle, Sept. 20, 2003, at A15 ("The new law grants same-sex domestic partners who register with the state . . . child custody rights [and] the right to child support"); Lisa Leff, *Davis Signs Domestic Partner Bill: State Measure Grants Same-Sex Couples Similar Rights to Spouses*, Long Beach Press-Telegram, Sept. 20, 2003, at A6 (A.B. 205 "gives both partners in a relationship equal status as parents if they have or adopt a child together"); Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, Los Angeles Times, Sept. 20, 2003, at 1; Jim Sanders, *Davis Signs Expansion of Gay Partner Rights*, Sacramento Bee, Sept. 20, 2003 at A1.

Information about the new law was also widely disseminated in press releases and newsletters from lesbian, gay, bisexual, and transgender rights organizations. See, e.g., Press Release, National

Center for Lesbian Rights, "The National Center for Lesbian Rights Hails Signing of California's Historic Domestic Partnership Bill" (Sept. 19, 2003) (available at http://www.nclrights.org/site/PageServer?pagename=press_ab205_091903) (last visited Oct. 3, 2011) (state-conferred rights, benefits, and responsibilities extended to domestic partners by A.B. 205 "include . . . custody provisions and child-support obligations").

News articles about A.B. 205 published before its enactment in 2003 and later during 2004, the year before it took effect, discussed the fact that the law would provide parental rights to both domestic partners. See, e.g., Ann Perry, *State has OK'd Some Rights for Gay Couples*, San Diego Tribune, March 7, 2004 at H-1 ("Children born into the partnership will be treated as the legal children of both partners and no adoptions will be needed."); Rona Marech, *Gays Cautious About New Partner Law; Some Opt Out, Fearing Legal or Financial Troubles*, San Francisco Chronicle, Sept. 20, 2004 at A1 ("the new law guarantees parental rights to the nonbiological parent").

Numerous articles explained that the new law would apply to already-existing registered domestic partnerships and explained that couples must terminate their registration if they did not want to accept and

be bound by the new rights and responsibilities. Kathy Kristof, *Same-Sex Couples to Gain New Rights, Liabilities in California*, Los Angeles Times, Dec. 19, 2004 at C3 ("About 29,000 couples are currently [registered as RDPs]. These individuals will be automatically covered by the law. People who don't want to be covered by the law need to remove themselves from the registry."); Lee Romney, *Though They Can't Wed, Gays May Now Divorce; Laws Expanding Rights and Responsibilities for State's Domestic Partners Takes Effect Today*, Los Angeles Times, January 1, 2005 at A1 ("[S]tarting today, the more than 26,000 couples registered with the state as domestic partners will have to divorce if they split up. If they have children, they will automatically receive a wide array of parental rights."). Many stories focused on the potential consequences for domestic partners who did not dissolve their domestic partnerships in advance of the January 1, 2005 deadline. Marech, *supra*; The Associated Press, *Many Same-Sex Partners Wary of California's New Domestic Partners Law*, Sept. 20, 2004; Romney, *supra*.

News stories specifically mentioned the letters the Secretary of State was obligated to send to RDPs in advance of, and as an advisory regarding, the upcoming changes to registered domestic partners' rights and

responsibilities and their opportunity to terminate their partnership if they wished to opt out of these changes. Perry, *supra* ("Because the new law gives domestic partners more rights and more responsibilities, the Secretary of State will notify all those registered and give them the option to end their partnership before the law takes effect next year. By taking no action, partners will be subject to the new law."); Romney, *supra* (same); The Associated Press, *supra* (same); Marech, *supra* (same). If a person in a registered domestic partnership did not receive any of the three of the letters the Secretary of State sent, the barrage of media coverage of the issue certainly would have made any reasonable person aware that important changes were coming and put them on notice that inquiring about the extent of those changes was prudent. Moreover, in this case the trial court found that both Rose and Hunter had actual notice of the changes. A.823.

D. A.B. 205 Applies to the Parties' Domestic Partnership.

Here, the trial court properly found that A.B. 205 applies to the parties and that they are entitled to all of the rights and obligations of marriage under California law. A.896. The trial court found that the parties had actual notice of the changes to the rights

and responsibilities attendant to their domestic partnership that would begin on January 1, 2005, and that the Secretary of State had accurate contact information for the couple at the time the letters were sent. A.823, 896. After their registration in 2003, the parties had more than a year to terminate their partnership if they did not wish to have all the rights and responsibilities granted by A.B. 205. A.822, 896. The upcoming changes to registered domestic partnerships were reported extensively in newspapers from San Diego to San Francisco, including front-page articles in the San Francisco Chronicle, the primary source of local news for residents of the Bay Area like Hunter and Rose, as well as the Los Angeles Times. The media reported not just on the changes to the law, but specifically on the changes to parentage responsibilities.

Moreover, regardless of whether the parties had actual notice of the changes to their rights as RDPs under A.B. 205, established law makes clear that A.B. 205 applies to all RDPs who remained registered on its effective date. Cal. Fam. Code § 299.3 (requiring the Secretary of State's letter to state: "Domestic partners who do not wish to be subject to these new rights and responsibilities MUST terminate their domestic partnership before January 1, 2005").

Furthermore, here the relevant conduct -- consent to assisted reproduction and the birth of the children -- occurred well after the new law took effect and while the parties were still registered as domestic partners. [redacted] was conceived in 2006 and born in 2007; [redacted] was conceived in 2008 and born in 2009. A.827, 830, 857. The parties could have terminated their domestic partnership prior to conceiving their children if they did not want the marital parentage provisions to apply to them, but they did not.

E. The California Supreme Court Has Held That Same-Sex Couples Must Be Accorded All of the Rights and Responsibilities Extended to Married Spouses.

In May of 2008, approximately 3 years after A.B. 205 went into effect, the California Supreme Court ruled that the California Constitution required equal treatment of same-sex couples and that same-sex couples must have the right to marry in California. *Marriage Cases*, 183 P.3d at 452. In November of 2008, however, an initiative measure known as Proposition 8 was enacted by a slim majority of voters. Proposition 8 amended the California Constitution to eliminate the right of same-sex couples to marry in California. Cal. Const., Art. I § 7.5 (2011).⁵

⁵ In August 2010, a federal court struck down Proposition 8, holding that it violates the Equal Protection and Due Process Clauses of the Fourteenth

Proposition 8, however, did not affect the rights of registered domestic partners in any way. See generally *Strauss*, 207 P.3d at 62 (noting "limited" effect of Proposition 8: "it is only the designation of marriage -- albeit significant -- that has been removed by this initiative measure"). Moreover, while the California Supreme Court held that Proposition 8 had been properly enacted under the state's initiative procedures, in that same decision the California Supreme Court explicitly reaffirmed the principle that same-sex couples in California have the constitutional right to "'choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage,'" *id.* at 72, except for the "official designation of the term 'marriage.'" *Id.* at 62.

II. THE TRIAL COURT PROPERLY EXTENDED COMITY TO THE PARTIES' CALIFORNIA REGISTERED DOMESTIC PARTNERSHIP.

The trial court correctly found that California registered domestic partners should be accorded all marital rights and responsibilities under principles of comity. A.896-899. Under Massachusetts law, comity is

Amendment to the federal Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010), appeal pending sub nom. *Perry v. Brown*, No. 10-16696 (9th Cir. filed Aug. 5, 2010).

the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Cote-Whitacre, 446 Mass at 368 (citing *Perkins v. Perkins*, 225 Mass. 82, 86 (1916)). Massachusetts extends comity to marriages entered into in another state or country even if those marriages could not have been entered into in Massachusetts in order to protect the rights of Massachusetts citizens who married elsewhere and to promote convenience, justice, and mutual respect between states. *Id.* As this Court has previously recognized, one important justification for extending comity to out-of-state marriages is to protect children who were born into those marriages. *Inhabitants of Medway*, 16 Mass. at 160.

California RDPs are treated as spouses for all purposes under California law, and are entitled to all of the rights and responsibilities that married spouses receive. Cal. Fam. Code § 297.5. Recognizing that California domestic partners should be given all the rights and protections of marriage under Massachusetts law serves all of the purposes of comity. Extending comity promotes the public policy of Massachusetts and ensures that same-sex couples and their children do not

lose critical protections if they move to Massachusetts.

Rose's argument that recognition of a same-sex couple's California registered domestic partnership under the doctrine of comity would **discriminate** against same-sex couples is absurd. (Br. of Appellant at pp. 29-30). In fact, the opposite is true. This Court held in *Opinions of the Justices* that it would be unconstitutional for Massachusetts to deny same-sex couples the ability to marry and *only* allow them the right to enter civil unions. *In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 1206 (2004). That said, it would, in this Court's language, only compound the "constitutional infirmity" if Massachusetts refused to extend **any** protection to same-sex couples who entered into comprehensive spousal relationships other than marriages in other states, particularly when that state does not allow same-sex couples to marry. This Court recognized in both *Goodridge* and *Opinion of the Justices* that severe harms befall same-sex couples who are denied access to marriage and to the critical rights and responsibilities automatically extended to married couples. *Id.* at 1203-04; *Goodridge*, 440 Mass. at 322-26. A holding that same-sex couples who entered into comprehensive legal relationships in other states

should be denied all of these critical rights and protections in the name of nondiscrimination would fly in the face of the underlying, core concerns that animated this Court's prior opinions.

Although Massachusetts' extension of comity does not depend on whether the California would give comity to Massachusetts' marriages, California does in fact provide comity to marriages between same-sex couples entered in Massachusetts. California law mandates that same-sex spouses in marriages entered into in other states are accorded all of the rights and responsibilities of marriage, including the rights and obligations of parentage with respect to a child born to either partner. Specifically, marriages entered into prior to the effective date of Proposition 8 are recognized as marriages. Cal. Fam. Code § 308(b) ("a marriage between two persons of the same sex contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state if the marriage was contracted prior to November 5, 2008"). Out-of-state same-sex marriages entered into *after* Proposition 8's enactment, on the other hand, "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses

with the sole exception of the designation of 'marriage.'" Cal. Fam. Code § 308(c).⁶

Thus, extending the rights and obligations of marriage to California RDPs clearly promotes convenience, justice, and mutual respect between Massachusetts and California by ensuring reciprocal recognition between the states. Application of comity also serves the vital interest of protecting established family relationships, including established parent-child relationships.

III. HUNTER AND ROSE ARE BOTH [REDACTED] AND [REDACTED]'S LEGAL PARENTS.

The trial court properly recognized that Hunter and Rose are both parents of [REDACTED] and [REDACTED] because the parties have the rights and obligations of marriage under Massachusetts law, including the rights and obligations extended to spouses with respect to children born into their relationships. Under Massachusetts law, which controls here, both Hunter and Rose are legal parents of both [REDACTED] and [REDACTED]. Moreover, even if Massachusetts law did not control

⁶ Although not relevant to Massachusetts, California also extends all of the marital rights and responsibilities to same-sex couples in other types of comprehensive legal relationships. Cal. Fam. Code § 299.2 (requiring recognition of relationships other than marriage that are substantially equivalent to registered domestic partnership).

here, the same result would obtain under California law.

A. Hunter Is [redacted] J's Legal Parent and Rose Is [redacted] M's Legal Parent Because Hunter and Rose Each Consented in Writing to the Other's Insemination.

Massachusetts recognizes that when a married woman conceives a child through alternative insemination, her spouse is a legal parent of the child if he or she consents to the insemination. G.L. c. 46, § 4B ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."). This provision applies equally to a woman who consents to her female spouse's insemination because Massachusetts allows same-sex couples to marry and grants them all the same rights and obligations of different-sex married couples under Massachusetts law. *Goodridge*, 440 Mass. at 324 (identifying "presumptions of legitimacy and parentage" under G.L. c. 46, § 4B as a "marital benefit"); *id.* at 344 (holding that same-sex couples are entitled to the "protections, benefits, and obligations of civil marriage"); *Opinions of the Justices*, 440 Mass. at 1206 (concluding that a bill barring same-sex couples from marriage but providing them with civil unions would be unconstitutional; holding that same-sex couples entitled to the same

rights of marriage as opposite-sex couples). See also *T.F. v. B.L.*, 442 Mass. 522, 532 (2004) ("if the spouse of a woman who undergoes artificial insemination consents to the procedure, that spouse is considered the legitimate parent of a resulting child, and is thus obligated to pay child support."). The trial court correctly found that both parties are parents based on their registered domestic partnership because they each consented to the other's insemination. A.901-903, 826 (finding that Hunter consented to Rose's insemination), 856-857 (finding that Rose consented to Hunter's insemination), A.868 (finding that both parties consented to the conception of both children). See G.L. c. 46, § 4B.

Although Massachusetts law controls, the result would be the same under California law. Under California Family Code section 7613(a), when a husband consents to his wife's insemination in a writing signed by him and his wife, he is "treated in law as if he were the natural father of the child thereby conceived." *Id.* Under California Family Code section 297.5, this provision applies equally to a registered domestic partner who consents in writing to her partner's insemination. The purpose of this provision is to ensure that spouses who intentionally create children together, regardless of the method of

conception, will both be equally responsible for the resulting children. See *People v. Sorensen*, 68 Cal.2d 280, 285, 437 P.2d 495, 499 (Cal. 1968) ("[A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood"). Because California Family Code section 297.5(j) unambiguously requires that all provisions using the terms "husband" or "spouse" apply equally to registered domestic partners, the presumptions of parentage based on marriage apply equally to the registered domestic partner of a birth mother. See also *In re Rabin*, 359 B.R. 242, 247 (B.A.P. 9th Cir. 2007) (explaining that the statutory terms "'husband' and 'wife,' 'spouses,' or 'married persons'" all apply equally to registered domestic partners).

Rose argues that Hunter is not a parent under California law because she did not sign a particular form establishing her parentage. (Br. of Appellant at p. 39, n.19). While it is clear that Massachusetts parentage law applies in this case, amici seek to clarify that Rose's interpretation of those provisions is erroneous. California Family Code Section 7613(a)

does not require any particular form to be signed; it only requires that the spouse or domestic partner consent in writing to the insemination. Again, although not relevant to the resolution of this case, Hunter fully complied with this requirement when she signed an "Agreement for Administration of Donor Sperm" consenting to Rose's insemination. A.909, 825-827.

Because Hunter and Rose were registered as domestic partners and Hunter signed a written consent to Rose's insemination, Hunter is [REDACTED] J's legal parent. Rose is also a legal parent to [REDACTED] M because the parties were registered as domestic partners and Rose consented in writing to Hunter's use of assisted reproductive technology to conceive the couple's second child.

B. Hunter and Rose Are Both Legal Parents of [REDACTED] J and [REDACTED] M Because the Parties Were Registered as Domestic Partners at the Time the Children Were Born.

While it is clear that both parties are considered legal parents of both children by virtue of the assisted reproduction provisions, the same result would also be reached under other marital parentage provisions. For example, another provision of Massachusetts law provides that a spouse is presumed to be a parent of any child born during a marriage. G.L. c. 209C, § 6 (a man is presumed to be a father if "he

is or has been married to the mother and the child was born during the marriage or within three hundred days after the marriage was terminated by death, annulment or divorce."). Massachusetts law also makes clear that the lack of a genetic relationship does not necessarily rebut this marital parenting presumption. See *Paternity of Cheryl*, 434 Mass. 23, 24, 31 (2001). Because the trial court properly held that comity applies and that Hunter and Rose therefore should be accorded all marital rights and responsibilities, the court correctly recognized that they are both parents because they were in a spousal relationships at the time their children were born. A.901-902.

Again, although not relevant to the resolution of this case, the result would be the same under application of California law. Like Massachusetts, California also has a number of marital parenting presumptions. For example, California Family Code Section 7611(a) provides a presumption of parentage to a man when "[h]e and the child's natural mother are or have been married to each other and the child is born during the marriage . . ." Cal. Fam. Code § 7611(a) (2006); see also Cal. Fam. Code § 7540 (husband is conclusively presumed to be a parent of a child born to his wife during the marriage if the spouses lived together at the time of conception). Although these

presumptions are phrased in terms of fathers, they apply equally to women. Cal. Fam. Code § 7650; *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005) (under the UPA, "legal principles applying to the presumed father apply equally to women seeking presumed mother status" (quoting *In re Salvador M.*, 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003))).

And, as is true in Massachusetts, the fact that a presumed parent is not biologically related to the child does not necessarily rebut the presumption. See, e.g., *Dawn D. v. Superior Court of Riverside County*, 952 P.2d 1139, 1140 (Cal. 1998) (holding that the mother's husband was the legal father under § 7611(a) even though blood testing revealed he was not the biological father); *In re Marriage of Freeman*, 53 Cal. Rptr. 2d 439 (Cal. Ct. App. 1996) (holding that mother's husband was legal father under § 7540 even though parties agreed he was not the biological father). Particularly where a child has two intended parents who both planned for the conception of the children, California courts are reluctant to find that a presumption of parentage has been rebutted. See, e.g., *Elisa B.*, 117 P.3d at 669-670 (asserting state's interest in having children raised by both of their parents whenever possible); *id.* at 670 ("having helped cause the children to be born, and having raised them

as her own, [non-biological mother] should not be permitted to abandon the twins simply because her relationship with [biological mother] dissolved.").⁷

Hunter and Rose registered as domestic partners. A.822-823. They lived together at the time of conception of both children, and continued to be registered as domestic partners at the time both children were born. A.821-823, 827, 830, 840, 857, 868. Therefore, Hunter and Rose are both the legal parents of both of the children conceived and born during their domestic partnership.

CONCLUSION

The trial court correctly recognized that registered domestic partners have all the rights and responsibilities of marriage under California law and should be treated as spouses in Massachusetts under comity principles. To hold otherwise would leave two children who were intentionally conceived together by the parties in the context of their registered domestic partnership with only one legal parent each and prevent them from having a relationship with their sibling.

⁷ Even if Hunter and Rose were not registered as domestic partners, Hunter would be a legal parent to [redacted] under application of California's parentage statutes. Cal. Fam. Code § 7611(d) (providing a presumption of parentage to a man who takes a child into his home and holds her out as his own); *Elisa B.*, 117 P.3d at 667 (holding that this provision "appl[ies] equally to women").

This Court should uphold the trial court's extension of comity to the parties' California registered domestic partnership so that they will have all the rights and responsibilities of marriage under Massachusetts law, including the rights and obligations of parentage for the children conceived or born into the relationship, just as they would have under California law.

Respectfully submitted,

Professors of Law Scott
Altman, Grace Ganz Blumberg,
Janet Bowermaster, Jan C.
Costello, Barbara J. Cox,
Deborah L. Forman, Joan
Heifetz Hollinger, Lisa
Ikemoto, Courtney Joslin,
Herma Hill Kay, Lawrence
Levine, Maya Manian, John E.B.
Myers, Douglas NeJaime,
Shelley Saxer, Michael S.
Wald, D. Kelly Weisberg, and
Lois Weithorn.

By their Counsel,

A handwritten signature in dark ink, appearing to read "NeJaime", is written over a horizontal line. The signature is stylized and cursive.

Neil Jacobs (BBO # 249300)
Mary J. Edwards (BBO # 654872)
Darren Griffis (BBO # 675627)
Wilmer Cutler Pickering
Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Ilona M. Turner
Catherine P. Sakimura
National Center for Lesbian
Rights
870 Market St.
Suite 370
San Francisco, CA 94102

Date: October 5,
2011