Case No. S147999

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

---

**In re MARRIAGE CASES**
Judicial Council Coordination Proceeding No. 4365

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

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# RESPONDENTS' CONSOLIDATED SUPPLEMENTAL REPLY BRIEF

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## SUPPLEMENTAL QUESTION 1

**What differences in legal rights or benefits and legal obligations or duties exist under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses? Please list all of the current differences of which you are aware.**

The State and the Governor assert that there are *no* differences in the legal rights and obligations of domestic partners and married couples under current California law. The Campaign for California Families (hereafter CCF) and the Proposition 22 Legal Defense and Education Fund (hereafter the Fund) acknowledge that such differences exist, but dismiss them as insignificant. Both are mistaken. California law provides substantial legal rights and obligations to married couples that continue to be withheld from domestic partners. More important, Appellants miss the crucial fact that it is not the tangible distinctions between marriage and domestic partnership that lie at the heart of this case. It is, instead, the intangible benefits conferred by marriage that create the vast chasm between marriage and "something else." No effort to equalize the tangible rights and benefits of domestic partnership and marriage can ever hope to fill that unbridgeable gap.

The position of the State and the Governor – both of whom deny that there are any tangible differences between domestic partnership and marriage – is not credible. As described in Respondents' Supplemental Brief,[1] most of the differences between domestic partnership and marriage

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[1] Unfortunately, confusion may have been generated by the conflicting ways in which different briefs submitted to this Court have referred to the parties in these appeals. The Rymer parties (previously known as the Woo parties) and the Martin parties jointly have referred to themselves in their briefs to this Court as "Respondents" because the trial court's judgment was in their favor. The State, CCF, and the Fund

are *explicit* in the text of the domestic partnership and marriage statutes themselves. (Respondents' Supp. Br. at pp. 1-11.)

CCF and the Fund at least acknowledge some of the statutory differences between domestic partnership and marriage, but seek to dismiss them as "minor procedural differences" (CCF's Supp. Br. at p. 4), and as "minimal" (Fund's Supp. Br. at p. 2.) In fact, the impact of the differences between domestic partnership and marriage can be quite grave. For example, a public employee who is denied long-term care insurance for his or her domestic partner may suffer significant financial hardship if forced to pay for such care out-of-pocket.[2] Moreover, depending upon the financial circumstances of the couple, the deprivation of this benefit may cause a same-sex partner to receive substandard care or even to forego necessary

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appealed and therefore were Appellants before the Court of Appeal. The Court of Appeal's opinion referred to the State, as well as CCF and the Fund, as "Appellants" and referred to the parties in whose favor judgment had been entered in the Superior Court as "Respondents." (See Opn. p. 21.) The Court of Appeal's opinion is cited throughout this brief as "Opn." In accordance with California Rules of Court, rule 8.504 and, as reflected on this Court's docket and the prior orders of this Court (see docket entry in *In re Marriage Cases* (April 3, 2007) 2007 Cal. LEXIS 5098; order granting Respondents leave to file overlength brief in *In re Marriage Cases* (April 3, 2007) 2007 Cal. LEXIS 5097), this brief follows the designations used in the Court of Appeal's opinion.

[2] As noted in Respondents' Supplemental Brief, this benefit is expressly denied to domestic partners in the text of the domestic partnership statute. (Respondents' Supp. Br. at pp. 7-8.) While the Legislature appears to have adopted this provision because the current federal tax code does not permit qualified (i.e., federally tax-exempt) long-term care plans to offer benefits to same-sex spouses, this does not preclude other means of providing this benefit equally to public employees with domestic partners or, if same-sex couples were permitted to marry, to those with same-sex spouses. (See, e.g., Gov. Code, § 21661, subd. (b) [expressly authorizing State to offer multiple long-term care insurance plans].)

care altogether, to potentially disastrous effect. (See Darc, *Nursing Home Costs Exceed Average Salary*, San Diego Union Tribune (Apr. 4, 2007) p. C-1 [noting that private long-term care insurance "can be expensive" and referring to one company that "offers coverage to people older than 50 for $2,000 per year" and requires that such annual premiums be paid "at least until the beneficiary enters a long-term care facility"].) Similarly, a surviving same-sex partner who has incurred a debt to the Medi-Cal program for nursing home care of his or her deceased partner may face the loss of his or her family home, whereas a similarly situated surviving spouse would be protected. (Respondents' Supp. Br. at pp. 9-10.)[3]

By any measure, these differences are neither "minimal" nor merely "procedural." In fact, these concerns are vitally important to many of the Respondent couples in this case. For example, as a long-time public employee, Ida Matson was unable to purchase long-term care insurance for her partner, Myra Beals. Throughout their thirty years together, Ida, who is now 71, and Myra, who is 64, have had to purchase extra life and health insurance out of their own pockets in order to obtain even a fraction of the security they would have as a married couple. (Respondent-Intervener's Appendix, Case No. A110652, p. 156 (hereafter RIA).) Likewise, Del

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[3] The impact of California's unequal treatment of domestic partners and spouses with regard to these issues is exacerbated by the fact that most private employers do not permit surviving domestic partners to receive their partner's pension or retirement benefits. (See, e.g., Fricker, *Benefits, Liabilities of Same-Sex Marriage*, Santa Rosa Press Democrat (May 31, 2004) p. D1 ["Pension plans for many employers do not have benefits for anyone other than a surviving spouse or children"]; Geisel, *Responding to changing ideas of family: before allowing domestic partners under your benefits umbrella, consider cost, eligibility and tax rules* (Aug. 1, 2004) HR Magazine, at p. 89, Westlaw, ALLNEWS, 2004 WLNR 14768880 ["[M]any employers . . . don't make domestic partners eligible for the pension plan survivor benefits that opposite-sex spouses receive"].)

Martin, who is now 86, and Phyllis Lyon, who is now 82, are concerned that they may lose their home if either of them has to go into long-term care. (RIA, p. 127.)

Moreover, even ostensibly "procedural" differences may result in the denial of important substantive protections. Thus, for example, the ability to dissolve a domestic partnership without any court action adversely affects same-sex couples in at least two substantive respects. First, California courts have stressed that, even in the era of no-fault divorce, the requirement that a court must find "irreconcilable differences" evinces the State's strong interest in "preserving the institution of marriage." (*In re Marriage of McKim* (1972) 6 Cal.3d 673, 680.) Thus, "even when spouses have formally commenced the process of legal separation or marriage dissolution, the governing law contemplates the possibility of reconciliation as 'the important issue.'" (*Corder v. Corder* (2007) 41 Cal.4th 644, 664 [quoting *In re Marriage of McKim*, *supra*, at p. 679].) By omitting this requirement for the summary dissolution of a domestic partnership, the law deprives same-sex couples of a significant deterrent to dissolution and signals that it views same-sex relationships as less valuable. Second, by requiring the entry of a court judgment even when a marriage is summarily dissolved, the law ensures that the parties have a valid, legally enforceable judgment that will be res judicata as between the parties. (See, e.g., *Estate of Williams* (1950) 36 Cal.2d 289 [divorce decrees are res judicata with regard to all the issues resolved therein].) Domestic partners who obtain a summary dissolution are deprived of this protection; in the event of a dispute as to whether or how a domestic partnership was dissolved, there is no judgment upon which to rely.

Similarly, for same-sex couples who are unable to establish a common residence because one of the partners is incarcerated or for other

reasons,[4] this purportedly "procedural" requirement precludes domestic partnership registration altogether, thereby depriving the couple of innumerable substantive rights and protections afforded married couples, many of which cannot be obtained in any other way.

In addition, despite the express requirement in Family Code Section 297.5 that domestic partners are to be given all of the legal rights and duties of spouses, California courts have not followed this statutory mandate. (See, e.g., *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1174 (hereafter *Velez*) [holding that domestic partners are not entitled to the protections afforded by the putative spouse doctrine].)[5]

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[4] In addition to creating a complete bar to domestic partnership registration for prisoners, the common residence requirement also bars same-sex couples who are homeless from legally formalizing their relationships. In other contexts, this Court "has been particularly critical of statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society." (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281 (hereafter *Myers*).)

[5] Decisions such as *Velez* reflect a belief that domestic partnership is a lesser status than marriage. (See *Velez*, *supra*, at p. 1174 ["[G]iven the different and less stringent requirements for formation of a domestic partnership, the Legislature may not have wanted to create a putative domestic partnership status"].) They also reflect confusion generated by the fact that, while all of the specific rights and duties of spouses are enumerated throughout the California codes, the rights and duties of domestic partners are provided through a composite system in which some rights and duties – primarily those established prior to the enactment of Assembly Bill No. 205 (2003-2004 Reg. Sess.) (hereafter AB 205) – are expressly enumerated in the codes, while many others are not and instead depend upon the operation of Family Code § 297.5. Thus, in situations involving married persons, government and private actors may determine which rule governs a particular situation simply by consulting the statutes or other authorities relating to a particular substantive area of law. In situations involving domestic partners, however, government and private actors must be aware that there is a different, hybrid system for registered

Further, CCF argues that the Legislature lacked authority to provide domestic partners with other important rights that purportedly are reserved by the Constitution only for spouses, including community property rights and the right to intestate inheritance. (CCF's Supp. Br. at pp. 19-21.) Respondents do not believe these arguments have merit; nonetheless, by consigning same-sex couples to domestic partnership rather than marriage, current law renders many of the rights and protections of same-sex couples uncertain and vulnerable to repeated challenges and attacks, a burden not borne by married couples.

Appellants likewise fail to acknowledge that, by placing lesbian and gay couples in a separate status based on their sexual orientation, the law both facilitates and, inevitably, encourages private and public discrimination. As the Supreme Court recognized in *Lawrence v. Texas*, laws that deny lesbians and gay men equal protection constitute "an

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domestic partners in which domestic partners may or may not be listed in the same statute as spouses, and must further be aware (as established in section 297.5) that the absence of an express reference to domestic partners in a statute or other authority does not mean the right or duty in question applies only to spouses. Predictably, the different treatment of spouses and domestic partners in this regard has generated confusion and will no doubt continue to do so. (See, e.g., *Velez*, *supra*, at p.1173 [holding that domestic partners are not entitled to the protections of the putative spouse doctrine because "nothing in the statutory scheme includes within the enumerated rights granted to domestic partners any form of putative spouse recognition"]; see also *id.* at p. 1174 ["[W]e must assume the Legislature was aware of the existing putative spouse doctrine, and if inclined to do so could have either expressly added to the Domestic Partner Act the rights granted to putative spouses or amended section 2251 to include . . . putative domestic partners"].) The reasoning of *Velez* is being challenged in a case now before the Fourth Appellate District, *Ellis v. Arriaga* (G038437, app. pending). Even if corrected, however, *Velez* shows that establishing a separate system for providing "the same" rights is inherently confusing and provides same-sex couples with less protection.

invitation to subject homosexual persons to discrimination both in the public and in the private spheres." (*Lawrence v. Texas* (2003) 539 U.S. 558, 575.) In this case, by requiring same-sex couples to be domestic partners rather than spouses, the law communicates that sexual orientation is a relevant basis for differential treatment and, at the same time, provides a ready means of identifying those who are lesbian or gay. The entirely predictable result is that many employers and state agencies do not treat domestic partners equally. (See Respondents' Supp. Br. at pp. 11-14; see also McKee, *Domestic Miss*, S.F. Recorder (Aug. 20, 2007) p. 1 [describing failure of businesses and public entities to treat domestic partners equally].) While Respondents expect the State to argue that it cannot be held responsible for the conduct of private parties, this disavowal rings hollow so long as the State itself is affirmatively separating and labeling couples based on their sexual orientation.[6]

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[6] The State also argues that excluding same-sex couples from marriage does not disadvantage them vis-à-vis federal law because the federal government would not recognize their marriages. (State's Supp. Br. at p. 2.) Current federal law provides more than a thousand protections that apply exclusively to married persons, ranging from the right to collect social security benefits as a surviving spouse to the ability to sponsor a foreign-born spouse for immigration to the United States. While California cannot directly modify these federal provisions, by excluding same-sex couples from marriage, it has placed those federal benefits off limits to lesbian and gay Californians should federal law change, and it has deprived them of standing to challenge the denial of those federal benefits and protections in federal court. (See *Smelt v. County of Orange* (2005) 447 F.3d 673, 683-684.) The loss of this ability is a serious and tangible harm.

The State also contends that excluding same-sex couples from marriage does not disadvantage lesbian and gay Californians who travel or move to other jurisdictions because, even if California permitted them to marry, it can not "compel other states to recognize California law." (State's Supp. Br. at p. 2.) In fact, however, there already are many jurisdictions in which marriages of same-sex couples from California would be entitled to

Respondents acknowledge that, notwithstanding the significant differences described above, the current law provides domestic partners with most of the *tangible* rights and obligations of spouses under California law. While this is an important achievement, it does not alter the essential constitutional issues presented by this case. Indeed, as Judge Kramer held below, the more closely domestic partnership replicates the tangible protections of marriage, the more irrational it becomes to withhold "the last step in the equation: marriage itself." (Trial Court Opinion, Appellants' Appendix, Case No. A110451, p. 114 (hereafter AA).) As Judge Kramer further explained, "the existence of marriage-like rights without marriage actually cuts against the existence of a rational government interest for denying marriage to same-sex couples" and "smacks of a concept long rejected by the courts: separate but equal." (Trial Court Opinion, AA, p. 115.) The State's very willingness to attempt to provide comparable *tangible* rights to both groups makes it evident that the maintenance of a separate status for lesbian and gay couples is based not on any objective

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full recognition and respect. These include (at least) the state of Massachusetts, as well as our nation's nearest neighbor to the north – Canada – and the Netherlands, Belgium, Spain, and South Africa. More fundamentally, the State's argument disregards the overwhelming weight of history and precedent supporting recognition even of out-of-state marriages that violate the public policy of a given state. Thus, while some states undoubtedly will refuse to honor marriages of same-sex couples under any circumstances, it is also likely – especially over time – that others will follow past patterns of interstate marriage recognition and will treat such marriages as valid or recognize them for specific purposes. (See, e.g., *Godfrey v. Spano* (2007) 836 N.Y.S.2d 813, 813-817 [New York comity law requires that marriages of same-sex couples lawfully entered in other jurisdictions be honored in New York, even though New York does not allow same-sex couples to marry in the state].)

differences between the two groups, but rather simply on a desire to preserve the enormous intangible values and benefits of marriage exclusively for heterosexual persons.

In *Brown v. Board of Education*, the Supreme Court expressly noted "that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." (*Brown v. Bd. of Education of Topeka, Shawnee County, Kan.* (1952) 347 U.S. 483, 492 (hereafter *Brown*).) But the Court concluded that such "tangible" equality could not save the defendant's "separate but equal" school system from unconstitutionality because the essence of the constitutional failing did not reside in bricks or books, but in the inherent inferiority of continued separation itself. (*Id.* at p. 493.)

The very fact of separation – whether achieved physically or semantically – conveys both to the "separated" parties and to society at large, that there is something not only "different," but "lesser" about those who are singled out for "separate" treatment. That message cannot help but "generate[] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (Trial Court Opinion, AA, p. 115 [citing *Brown, supra,* 347 U.S. at p. 494].) Entirely apart from any denial of tangible rights, the marriage restriction stigmatizes lesbian and gay people and violates the State's constitutional obligation to "recogniz[e] the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." (*People v. Ramirez* (1979) 25 Cal.3d 260, 267.)[7]

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[7] The U.S. Supreme Court likewise has recognized that, entirely apart from the deprivation of any tangible right, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members

## SUPPLEMENTAL QUESTION 2

**What, if any, are the minimum, constitutionally-guaranteed substantive attributes or rights that are embodied within the fundamental constitutional "right to marry" that is referred to in cases such as *Perez v. Sharp* (1948) 32 Cal.2d 711, 713-714? In other words, what set of substantive rights and/or obligations, if any, does a married couple possess that, because of their constitutionally protected status under the state Constitution, may not (in the absence of a compelling interest) be eliminated or abrogated by the Legislature, or by the people through the initiative process, without amending the California Constitution?**

In responding to the Court's Questions 2 and 3, the State and the Governor both assert that California could alter or eliminate any of the statutory rights or duties of marriage, subject only to rational basis review. (See State's Supp. Br. at pp. 4-5; Governor's Supp. Br. at p. 3.) They also contend that the terms "marry" and "marriage" have *no* constitutional significance and could be abolished by the State altogether, apparently without having to satisfy any standard of review. (See State's Supp. Br. at p. 6; Governor's Supp. Br. at p. 3.) These arguments denigrate the institution of marriage and undermine its constitutionally protected status. By contrast, while CCF and the Fund acknowledge the importance of marriage, they err by reducing marriage exclusively to the single dimension of procreation and by failing to recognize that same-sex couples have the same interest in marriage as others.

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of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community [citation] can cause serious non-economic injuries . . . ." (*Heckler v. Mathews* (1984) 465 U.S. 728, 739.)

### A. The State And The Governor Do Not Recognize That The *Status* Of Marriage Itself Is Constitutionally Protected.

The arguments of the State and the Governor in this case suffer from a fatal contradiction. On the one hand, the State and the Governor rely on tradition in an effort to justify excluding same-sex couples from marriage; on the other, they appear to discount tradition almost entirely in arguing that the State can alter or eliminate existing marital protections and even change the name of marriage itself, with virtually no constitutional restraints. Both of these arguments are erroneous, and both are based on a shared misunderstanding of the role of tradition in fundamental rights discourse.

It is well settled that tradition is an important guide to the core *values* and *principles* underlying constitutional protections and thus may play an important role in determining whether a fundamental right exists. (See, e.g., *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105 [a fundamental right must embody a "*principle* of justice . . . rooted in the traditions and conscience of our people" (italics added)]; *Griswold v. Connecticut* (1965) 381 U.S. 479, 500 (conc. opn. of Harlan, J.) (hereafter *Griswold*) [a fundamental right must reflect "basic *values* 'implicit in the concept of ordered liberty [citation]'" (italics added) (quoting *Palko v. Connecticut* (1937) 302 U.S. 319, 325.) But "tradition" may not be used to justify exclusions from existing rights or to determine who is entitled to exercise a fundamental right. (See, e.g., *Perez v. Sharp* (1948) 32 Cal.2d 711, 727 (hereafter *Perez*); *Hernandez v. Robles* (2006) 7 N.Y.3d 338, 382 (dis. opn. of Kaye, C.J.) ["Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them"].)

The State and the Governor have turned these principles on their head. The State and the Governor improperly *invoke* tradition to justify the

exclusion of lesbian and gay people from marriage. As Respondents have previously shown, however, neither California's longstanding practice of excluding same-sex couples from marriage nor the strength of the majority's desire to preserve marriage only for itself constitutes a legitimate public interest. (See Respondents' Opening Br. at pp. 73-75; Respondents' Reply Br. at pp. 47-49.)

At the same time, the State and the Governor improperly *disregard* tradition by asserting that the State may alter or abolish at will both the status of marriage and essentially all of the protections that have been afforded through marriage, subject only to the lowest level of constitutional review. (State's Supp. Br. at p. 5; Governor's Supp. Br. at p. 3.) That argument fails to acknowledge the historical and traditional importance of marriage in our society, including the long-settled determination that the right to marry is fundamental and may be infringed only where necessary to further a compelling state interest. By disregarding this settled law, the State and the Governor have misconstrued – and improperly diminished – the fundamental right to marry in multiple respects.

First, contrary to the contentions of the State and the Governor, the fundamental right to marry has not been cast into doubt – nor has its importance been lessened – merely because courts have recognized that unmarried couples *also* have constitutionally protected rights to procreative freedom and sexual privacy. (See State's Supp. Br. at p. 4; Governor's Supp. Br. at p. 3.) Rather, just as marriage confers intangible benefits that transcend the sum of its legal parts, so the fundamental right to marry is more than the sum of the underlying rights (all of which belong to unmarried couples as well) to engage in "cohabitation and lawful sexual intimacy, mutual lifelong care and support, legitimate procreation, [and] rearing of children." (State's Supp. Br. at p. 4; see also Governor's Supp.

Br. at p. 3 [asserting that marriage is no longer required for "cohabitation, sexual intimacy, mutual lifelong care and support, procreation or child-rearing"].) Entirely missing from these lists is the right to *marriage* itself – i.e., to the unique public validation, recognition, and support provided by participation in the state-sanctioned institution of civil marriage. Indeed, even when the State acknowledges a right to "public declaration and recognition," it erroneously separates this right from marriage, asserting that it is merely a right to "recognition of *life partnership*." (State's Supp. Br. at p. 5.) (emphasis added) [arguing that, at least for lesbian and gay people, domestic partnership satisfies this right].)

Second, the State and the Governor do not acknowledge the State's constitutional obligation to recognize marriage as a distinct status. The fundamental right to marry is not merely the "ability to choose and declare one's life partner in a reciprocal and binding *contractual* commitment of mutual support." (State's Supp. Br. at p. 5, italics added.) If this were all the right to marry required, then the State could fulfill its duties merely by providing a legal mechanism for the enforcement of such contracts, as it currently does for unmarried couples. (See *Marvin v. Marvin* (1976) 18 Cal.3d 660.) But the California Constitution requires more. As this Court and the United States Supreme Court have made clear, the right to marry also includes a right to the legal status known as "marriage" and to participate in the state-sanctioned institution of civil marriage, with its accumulated personal, social, and historical meaning. (See Respondents' Supp. Br. at pp. 19-29; Respondents' Reply Br. at p. 13; *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863 ["marriage is a great deal more than a contract"].)

Accordingly, while the State rightly acknowledges that marriage confers important "intangible emotional benefits," the State's assertion that

it can provide same-sex couples with these benefits "under the rubric of domestic partnership" (State's Supp. Br. at p. 5, fn. 2) misses the most fundamental constitutional point. The essence of marriage lies in its intangible and symbolic aspects, which derive in large part from its historical and traditional significance, as well as from its continued centrality as "the basic unit of our society." (*De Burgh v. De Burgh*, *supra*, 39 Cal.2d at p. 863.) By definition, neither domestic partnership nor any other newly minted status can provide the "intangible benefits that come from the ancient tradition of public declaration and recognition" that marriage – and only marriage – provides. (State's Supp. Br. at 5.)

Finally, the State's assertion that it could abrogate or eliminate any of the statutory rights and obligations of married couples "for any rational legislative purpose" is precipitous and overbroad. (See State's Supp. Br. at p. 5; Governor's Supp. Br. at p. 3.) Both this Court and the United States Supreme Court have cautioned that the precise contours of a fundamental right generally cannot be determined apart from the facts and circumstances of specific cases. (*Troxel v. Granville* (2000) 530 U.S. 57, 73; *In re Marriage of Harris* (2004) 34 Cal.4th 210, 226.) Nonetheless, there undoubtedly are circumstances under which the State's failure to provide or enforce at least some existing statutory marital rights and duties would implicate a married couple's constitutionally protected right to dignity, privacy, and autonomy. To consider merely one example, at least under some circumstances, there may be a constitutionally protected marital right to be deemed the presumed parent of a child born into the marriage. Unmarried individuals can of course also become legal and presumed parents, but historically and through the present, marriage generally has been held to trump biology in determining legal parentage. (See, e.g., *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932; *Michael H. v. Gerald D.*

(1989) 491 U.S. 110.) In light of the long-standing reliance of married couples on this presumption and its importance in our society, it may be that the State could not simply abolish this rule without a compelling reason.[8]

In sum, while the State has considerable flexibility in regulating marriage, there undoubtedly are constitutional limits beyond which it may not go. By failing to give sufficient recognition to marriage as a *status* that requires affirmative protection and recognition in its own right, the positions taken by the State and the Governor do not give sufficient consideration to these limits, nor do they acknowledge the impact on same-sex couples of being deprived of that protected status.

### B. CCF And The Fund Define The Right To Marry Too Narrowly.

In contrast to the State and the Governor, CCF and the Fund acknowledge the constitutional importance of marriage; however, they define the fundamental right to marry too narrowly, as tied exclusively to procreation. This definition is grossly under-inclusive. In *Perez*, for

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[8] In addition, of course, as Respondents previously have noted, absent a compelling justification, California may not infringe upon married couples' constitutionally protected rights to make decisions regarding sexual intimacy, whether and when to have children, how to raise children, or how to allocate roles and responsibilities within the marital relationship. (Respondents' Supp. Br. at p. 20, fn. 10.) The State and the Governor appear to assume that California could alter or eliminate any or all of the *statutory* protections that California currently provides to married couples without infringing any of these *constitutionally* protected interests. As Respondents argue above, however, this assumption is overbroad and might well prove false in the context of a particular case.

example, this Court did not hold that Andrea Davis and Sylvester Perez were entitled to marry simply in order to procreate, but rather because each viewed the other as "irreplaceable." (*Perez*, *supra*, 32 Cal.2d at p. 725.)[9] In *Griswold*, the Supreme Court defined marriage not merely as a setting for procreation but as a "way of life," "a harmony in living," "a bilateral loyalty," and an association "intimate to the degree of being sacred." (*Griswold*, *supra*, 381 U.S. at p. 486.) In *Turner*, the Court likewise stressed the importance of marriage as an expression of personal and spiritual commitment to another person and held that the right to marry was protected even in a setting where procreation was impossible. (*Turner v. Safley* (1987) 482 U.S. 78, 96.) In short, the core characteristic protected by the right to marry is not the ability of two individuals to procreate biologically, but the state's provision of a unique status that both protects and provides public recognition and validation of the quintessentially human capacity to love and to be loved. This capacity does not depend upon the sex of the partners.

That marriage serves purposes other than channeling biological procreation is also abundantly apparent from California's marriage and parenting laws. California does not require that applicants for a marriage

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[9] Contrary to the arguments of CCF and the Fund, the right to marry is protected under the California Constitution as well as the federal Constitution. (See *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 [the right to marry is protected under the California privacy clause]; *Ortiz v. L.A. Police Relief Ass'n* (2002) 98 Cal.App.4th 1288, 1306 [same]; *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1388 [same]; *In re Marriage of Wellman* (1980) 104 Cal.App.3d 992, 999 [same].) In fact, even in the decision cited by the Fund to support its argument (Fund's Supp. Br. at p. 4), this Court expressly acknowledged that the right to marry is protected by the both the United States and the California Constitutions. (*People v. Belous* (1969) 71 Cal.2d 954, 963.)

license have either the ability or intent to procreate. (Fam. Code, §§ 300-301.) There is no requirement that a couple must engage in sexual intercourse in order to be, or stay, legally married. (*Sharon v. Sharon* (1889) 79 Cal. 633, 670 (hereafter *Sharon*) [holding that "sexual intercourse is not necessary to the validity of a marriage"].) Infertility is not a ground for invalidating a marriage. (See Fam. Code, § 2210.)[10] Nor is it a ground for dissolution or legal separation. (See Fam. Code, § 2310.) In addition, California parentage law mandates equal treatment of marital and non-marital children (see Fam. Code, § 7602), and expressly facilitates adoption and assisted reproduction for both married and unmarried parents. (See, e.g., *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433 ["California's adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents"]; Fam. Code, § 7613 [establishing legal parentage for children born through artificial insemination to both married and single women].) California law also expressly requires that adopted children and children born through assisted reproduction have the same rights and protections as other children. (See,

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[10] While "physical incapacity" is a ground for nullifying a marriage (Fam. Code, § 2210, subd. (f)), this refers to the ability to engage in sexual relations, not to the ability to procreate. (*Millar v. Millar* (1917) 175 Cal. 797, 802; *Stepanek v. Stepanek* (1961) 193 Cal.App.2d 760, 762.) Moreover, as noted above, there is no requirement that a married couple must sexually consummate their marriage. (See *Sharon*, *supra*, 79 Cal. at p. 670.) In addition, some California cases have held that deliberate concealment of an inability to procreate, or deliberate concealment of an intention not to procreate, may be grounds to invalidate a marriage based on fraud. (See, e.g., *Vileta v. Vileta* (1942) 53 Cal.App.2d 794, 796.) However, as Judge Kramer held below, these cases establish "that annulment is a remedy for the fraudulent inducement to marry"; they "do not establish that . . . the purpose of marriage in this state is procreation." (Trial Court Opinion, AA, p. 122.)

e.g., Fam. Code, § 8616 ["After adoption, the adopted child and the adoptive parents shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship"]; *People v. Sorensen* (1968) 68 Cal.2d 280, 284-285 [holding that child born through artificial insemination is entitled to the same legal protections as a child born through sexual intercourse].)

In sum, as the Massachusetts high court held in *Goodridge*, "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage." (*Goodridge v. Dept of Public Health* (2003) 798 N.E.2d 941, 961 (hereafter *Goodridge*).) The same is true of civil marriage in California.[11]

Nonetheless, while CCF and the Fund overstate the significance of procreation, Respondents do not dispute that marriage is protected in part because it provides a stable setting for raising children. But this is a further reason to *include* same-sex couples in marriage, not a reason to bar them. Many same-sex couples (including many of the Respondent couples in this case) have conceived or adopted children and are raising them together.[12]

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[11] Similarly, many of the federal constitutional cases about marriage cited by CCF and the Fund, that refer to marriage as essential to the survival of the race, cannot be understood as referring *solely* to procreation, since obviously couples can procreate and raise children outside of marriage. Rather, those cases are best understood as referring to the important ways in which marriage has supported families and society at large, which marriage would provide to even a *greater* extent were same-sex couples also allowed to wed.

[12] For example, Jeanne Rizzo and Pali Cooper have raised Jeanne's son together since he was nine years old. (RA at pp. 112-113.) Karen Shain and Jody Sokolower foster parented a child together for seven years (RA at pp. 120-121), and also have a daughter, Ericka, who is now a teenager. (RA at p. 121.) Rachel Lederman and Alexsis Beach have two

Not only do lesbian and gay couples "have children for the reasons others do – to love them, to care for them, to nurture them," the State does not advance its interest in the welfare of children by making "the task of child rearing for same-sex couples . . . infinitely harder by their status as outliers to the marriage laws." (*Goodridge*, *supra*, 798 N.E.2d at p. 963.)[13]

The Fund and CCF also erroneously contend that the common-law "definition" of marriage as the union of a man and a woman is embodied in California's Constitution. (See CCF's Supp. Br. at pp. 18-20, 24; Fund's Supp. Br. at pp. 11-12.) Both rely on now-repealed language of the 1849 and 1879 constitutions that used the terms "marriage," "wife," and "husband" in providing for separate property rights. (See Cal. Const. of 1849, art. XI, § 14; former Cal. Const., art. XX, § 8, now art. I, § 21; CCF's Supp. Br. at pp. 18-19; Fund's Supp. Br. at p. 11; Fund's Reply Br. at pp. 17-18.) However, neither cites to any authority showing that the purpose of the separate-property provision was to constitutionalize the common-law definition of marriage. The principal case on which the Fund relies, *Dow v. Gould & Curry Silver Mining Co.*, merely notes that "the laws in force at

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sons – Izak, who will turn 11 in October, and Raziel, who is now seven years old – who are the center of their parents' lives. (RA at pp. 141-142.)

[13] Contrary to the arguments of CCF, the notion that protecting same-sex parents through marriage would violate the fundamental constitutional rights of biological parents has no basis in either federal or state law. (See CCF's Supp. Br. at pp. 12-17.) Like other states, California recognizes many situations in which a person who is not a biological or adoptive parent is nonetheless a legal parent, with all of the statutory and constitutional rights of a parent. (See, e.g., *Dawn D. v. Superior Court*, *supra*, 17 Cal.4th 932; *In re Nicholas H.* (2003) 112 Cal.App.4th 251; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108; see also *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357-1358 ["The paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family"].)

the time of the adoption of the Constitution were continued in force *until altered or repealed by the Legislature*." (*Dow v. Gould & Curry Silver Mining Co.* (1867) 31 Cal. 629, 640 (hereafter *Dow*), italics added.)[14]

In any event, the gender-specific language of the California Constitution's separate property provision was repealed and replaced with gender-neutral language in 1970. (See Prop. 15, as approved by voters, Gen. Elec. (Nov. 3, 1970) [amending former Cal. Const., art. XX, § 8, now art. I, § 21 ["Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."].) Although Respondents do not contend that the 1970 change in that constitutional language was enacted with same-sex couples in mind, the replacement of the terms "wife" and "husband" with gender-neutral language was consistent with California's continuing eradication of gender-based differences in marriage law and precludes the argument that CCF and the Fund present.

Indeed, if the contention that the Constitution has codified the common-law definition of marriage were accepted, it would lead to conclusions plainly at odds with California law. Marriage, as it existed at

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[14] Similarly, the other cases on which the Fund relies (Fund's Answer Br. at pp. 18-19) are not on point. *Saala v. McFarland* (1965) 63 Cal.2d 124 concerned the meaning of sections of the Labor Code, not any constitutional provision. In *Sesler v. Montgomery*, this Court merely looked to the common law to decide whether a communication with a spouse constituted publication for purposes of slander where the relevant statutes were silent on the question. (See *Sesler v. Montgomery* (1889) 78 Cal. 486, 487 ["For the determination of these questions, therefore – as there are no provisions about them in the codes – we must look to the common law, which is the basis of our jurisprudence. (Citation)"].) Similarly, *Estate of Elizalde* simply states the unremarkable proposition that "a section of the code purporting to embody [a] doctrine or rule will be construed in the light of common-law decisions on the same subject. [Citation]." (*Estate of Elizalde* (1920) 182 Cal. 427, 433.)

common law at the time of the 1849 Constitution, reflected numerous assumptions about the roles of men and women within marriage, and within society in general, that are now understood to be contrary to the requirements of equal protection. In addition, the common law then assumed that spouses would be both of the same race. (See *Perez*, *supra*, 32 Cal.2d at pp. 742-752 (dis. opn. of Shenk, J.) [explaining that anti-miscegenation laws "ha[d] been in effect . . . in this state since our first legislative session"].) The protections afforded by the California Constitution's equal protection, privileges or immunities, due process, privacy, and free expression guarantees, however, are not fenced in by the common law as it existed in 1849 or 1879. (Cf. *Katz v. United States* (1967) 389 U.S. 347 [rejecting the notion that the common law defines the limits of the term "seizure" in the Fourth Amendment].)[15]

Finally, there is no merit to the claims by CCF and the Fund that there is a single, fixed definition of marriage as the union of a man and a woman that exists universally across all cultures and times and that is

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[15] The Fund unconvincingly attempts to support its contrary argument – that constitutional terms are fixed by their common-law meaning – based on this Court's decision in *Ex parte Mana* (1918) 178 Cal. 213, which upheld the Legislature's authorization of women to sit on juries *even though* they were not permitted to do so at common law. Contrary to the Fund's argument, this Court's holding in that case does *not* stand for the proposition that courts may only construe constitutional protections more broadly than their common-law precedents where expressly authorized to do so by subsequent constitutional amendments. Rather, in holding that juries could include women notwithstanding the contrary provision of the common law, this Court merely drew upon the policies established by constitutional amendments giving women the right to vote and to hold office: "The [California] constitution having recognized her as in all respects the equal of man, the legislature was justified in doing away with the discrimination which had theretofore existed against her in the matter of jury service." (*Id.* at p. 216.)

purportedly rooted in the dictates of nature. (See CCF's Supp. Br. at p. 24; Fund's Supp. Br. at p. 13.) Today, of course, same-sex couples are permitted to marry not only in Massachusetts, but also in Canada, the Netherlands, Belgium, Spain, and South Africa. In addition, both today and throughout history, different jurisdictions vary and have varied with regard to restrictions based on consanguinity. "First cousin marriages, which also are prohibited in many states, are permitted across Europe, and certain types of cousin marriages are preferred unions in a range of cultures including many in the Islamic world." (Estin, *Embracing Tradition: Pluralism in American Family Law* (2004) 63 Md. L.Rev. 540, 563-564; see also *People v. Baker* (1968) 69 Cal.2d 44, 46-50 [discussing history of prohibitions on marriages between first cousins].)[16]

It also scarcely needs repeating that in much of the United States, for much of its early history, marriage was "defined" as a union between people of the same race. Indeed, as pointed out by Justice Stevens in his dissenting opinion in Bowers, "miscegenation was once treated as a crime similar to sodomy." (*Bowers v. Hardwick* (1986) 478 U.S. 186, 216, fn. 9 (dis. opn. of Stevens, J.).) Even today, laws barring marriage between persons of different races, castes, or religions continue to exist in some countries. (See, e.g., *Norani v. Gonzales* (2d Cir. 2006) 451 F.3d 292, 293.)

In sum, marriage is a widely recognized and in some respects universal institution, but its specific features vary significantly between cultures and have changed significantly over time. In our culture, the core

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[16] Arranged marriages are also common in many religions and cultures. (See, e.g., *Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 635 [discussing arranged marriage]; *Tayian v. Tayian* (1923) 64 Cal.App.632 [same].)

feature of this institution, to which Respondents seek access, is not its historical limitation to male-female couples, but its unique ability to bind two people in a distinct relationship of love and mutual commitment that is central to personal identity and fulfillment and that the state recognizes and sanctions as "marriage." The state can neither deny to same-sex couples, nor abolish for everyone, those essential features of marriage. The name "marriage," and all it conveys, are part of the fundamental right to marry under the California Constitution.

## SUPPLEMENTAL QUESTION 3

**Do the terms "marriage" or "marry" themselves have constitutional significance under the California Constitution? Could the Legislature, consistent with the California Constitution, change the name of the legal relationship of "marriage" to some other name, assuming the legislation preserved all of the rights and obligations that are now associated with marriage?**

In response to Question 3, neither the State nor the Governor provides even a sentence of argument in support of their remarkable assertions that the words "marriage" and "marry" carry no significance under the California Constitution and that the name of the legal relationship known as marriage could be changed without raising any constitutional problem. (See State's Supp. Br. at p. 6; Governor's Supp. Brief at p. 3.) Respondents therefore refer the Court to Respondents' arguments in response to Question 2 above and in Respondents' Supplemental Brief at pages 32 to 40. Moreover, as Respondents also previously have shown, contrary to the arguments of the State and the Governor, consigning same-sex couples to a separate status, known by a different name, by definition relegates them to a position of difference and inferiority. There is no such thing as "separately named, but equal." (See Respondents' Supp. Br. at pp.

36-38.) The Fund and CCF agree with Respondents that the words "marry" and "marriage" have constitutional significance and that the Legislature may not change the name of the status of marriage to some other name. (See Fund's Supp. Br. at p. 12; CCF's Supp. Br. at p. 24.) The Fund and CCF erroneously argue, however, that the legal status called "marriage" must be limited to unions of a man and a woman. (See Fund's Br. at p. 13; CCF's Br. at pp. 25-26.) Respondents have replied to those arguments, including arguments related to procreation, in the preceding section of this brief.

## SUPPLEMENTAL QUESTION 4

**Should Family Code section 308.5 – which provides that "[o]nly marriage between a man and a woman is valid or recognized in California" – be interpreted to prohibit only the recognition in California of same-sex marriages that are entered into in another state or country or does the provision also apply to and prohibit same-sex marriages entered into within California? Under the Full Faith and Credit Clause and the Privileges and Immunities Clause of the federal Constitution (U.S. Const., art. IV, §§ 1, 2, cl. 1), could California recognize same-sex marriages that are entered into within California but deny such recognition to same-sex marriages that are entered into in another state? Do these federal constitutional provisions affect how Family Code section 308.5 should be interpreted?**

### A. Family Code Section 308.5 Should Be Interpreted To Prohibit Only The Recognition In California Of Marriages Of Same-Sex Couples That Were Entered Into In Another State.

#### 1. The Text Of Section 308.5 Is Most Reasonably Construed To Apply Only To Marriages Entered Outside Of California.

Appellants have failed to refute Respondents' explanation that the text of Family Code section 308.5[17] reasonably lends itself to two constructions: (1) as a restriction applicable both to marriages of same-sex couples entered within the state and to such marriages entered outside the state; and (2) as a restriction applicable only to marriages of same-sex couples entered outside the state, with the intention of preventing California either from treating such marriages as valid within California or from recognizing such marriages for more limited purposes (such as intestate succession). (See Respondents' Opening Br. at pp. 80-81; Respondents' Supp. Br. at pp. 42-44.)[18]

Appellants' arguments that there is no ambiguity in the language of section 308.5 fail. For example, CCF contends that the word "valid" in section 308.5 refers to marriages entered within California, while the word "recognized" in section 308.5 refers to marriages entered outside California. (CCF's Supp. Br. at p. 30.) CCF's argument is laid to rest, however, by the text of section 308, California's general statute governing treatment of out-of-state marriages. Section 308 does not employ the word "recognize," but instead uses the word "valid" to describe how California may choose to treat a marriage entered *outside California*: "A marriage

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[17] All further statutory references are to the Family code unless otherwise indicated.

[18] The State has taken no position on whether section 308.5 applies to marriages entered within California in addition to marriages entered outside California. (State's Supp. Br. at p. 7 & fn. 3.) The Governor's Supplemental Brief, however, states, without analysis, that section 308.5's meaning is purportedly "clear and unambiguous" in applying to marriages entered within and outside California. (Governor's Supp. Br. at pp. 4-5.) The Fund's and CCF's arguments about section 308.5's text and the ballot materials are addressed in this brief.

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.*" (Fam. Code, § 308, italics added.) Accordingly, the more reasonable construction of the terms "valid" and "recognized" in section 308.5 – indeed, the construction that avoids surplusage in the meaning of those two words within section 308.5 – is that the two words were used in section 308.5 to ensure that marriages of same-sex couples entered outside California would *neither* be treated as "valid" pursuant to section 308 nor "recognized" for any other purpose.[19] (See *Lungren v. Superior Court* (1996) 14 Cal.4th 294, 302 ["Statutes, whether enacted by the people or the Legislature, will be construed to as to eliminate surplusage"].)

Moreover, only Respondents' construction, under which section 308.5 limits section 308's policy of treating marriages validly entered outside California as valid within the state, makes sense of the statute *within its statutory context.*[20] Prior to the enactment of section 308.5,

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[19] Contrary to the arguments of CCF and the Fund, Respondents' argument in no way hinges on a strict dichotomy between the meaning of the terms "valid" and "recognized." Instead, the fact that cases use these terms to describe *both* in-state and out-of-state marriages makes plain that the use of both terms in section 308.5 is ambiguous. Only if both terms were used *exclusively* to refer either to in-state or to out-of-state marriages would there be no ambiguity. This facial ambiguity – as well as section 308.5's placement immediately following section 308, and the conflicting views of the Courts of Appeal in *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424 and *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23-24 on the meaning of section 308.5 – precludes any resolution of this issue based on the text of the statute alone.

[20] See *Catholic Mutual Relief Society v. Superior Court* (Aug. 27, 2007, S134545) __ Cal.4th __ [2007 WL 2412234, *5] (finding ambiguity in statutory language and explaining that "[w]hen used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear" [quoting *DuBois v. Workers'*

California law consistently addressed in *different* statutes (1) the validity of marriages entered within California (Family Code section 300 and its predecessors) and (2) California's treatment of marriages entered outside California (section 308 and its predecessors). The codification of Proposition 22 as section 308.5 of the Family Code indicates that, like section 308, it too was concerned only with California's treatment of out-of-state marriages. (Prop. 22, as approved by voters, Primary Elec. (Mar. 7, 2000).) Because the scope of section 308.5, at a minimum, is ambiguous, this Court should consider the measure's ballot materials in interpreting it.

### 2. The Ballot Materials Confirm That Section 308.5 Was Intended To Prevent Another Jurisdiction's Decision To Permit Same-Sex Couples To Marry From Requiring California To Recognize Such Marriages.

In their Supplemental Briefs, the State, the Governor, and CCF offer no analysis whatsoever of Proposition 22's ballot materials. The Fund refers to arguments submitted in previous briefs, but those arguments do nothing to refute that section 308.5's ballot materials focused the voters' attention on a singular purported problem – that the decision of another state to permit same-sex couples to marry might require California to treat marriages of same-sex couples entered elsewhere as valid or otherwise recognize them without California having decided for itself whether same-sex couples should be included in marriage.

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*Compensation Appeals Bd.* (1993) 5 Cal.4th 382, 388] [internal quotation marks omitted, second alteration in original]); *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, at p. 388 (construction of statutory language requires consideration of such language "in the context of the entire statute . . . and the statutory scheme of which it is a part").

Nothing of significance follows from the Fund's observation that the ballot materials did not expressly state that section 308.5 would *not* apply to in-state marriages. (Fund's Answer Br. at p. 75.) The relevant question is what an ordinary voter would have understood the ballot materials to mean. (See *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 116 [construing initiative as limited to the purpose described in the ballot arguments, even though ballot arguments did not expressly state that initiative's preclusion of certain non-economic damages would *not* apply "in the case of a vehicle design defect"].) The ballot arguments in favor of section 308.5 affirmatively told voters that the measure was "necessary" because:

> [E]ven though California already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages . . . .

(Respondents' Appendix, Case No. A110652, vol. I, p. 99 (hereafter RA) [Voter Information Guide (Mar. 7, 2000) p. 52].) The rebuttal argument in support of the initiative even more strongly emphasized – in italicized, capitalized letters – that "*UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES.*" (RA, vol. I, p. 98.)

Those clear statements of purpose are far more persuasive than the brief excerpts from the ballot arguments on which the Fund relies in its attempt to support a broader reading of section 308.5. (See Fund's Answer Br. at pp. 75-76; *Hodges v. Superior Court*, *supra*, 21 Cal.4th at p. 116 [holding that the ballot materials for an initiative should be "considered as a

whole"].) The clear import of section 308.5's ballot materials is that the measure was designed to protect California's sovereignty by providing that another state's decision to permit same-sex couples to marry should not require California to treat that marriage as valid or otherwise recognize it.[21]

### 3. Broadly Construing Section 308.5 To Apply To Marriages Entered Within California Would Not Save It From Invalidity Or "Absurdity."

There is no merit to the Fund's suggestion that this Court should construe section 308.5 as applying to all marriages by same-sex couples in order to avoid an "absurd" result. (Fund's Supp. Br. at p. 15; Fund's Reply Br. at p. 28.) As an initial matter, contrary to the Fund's contention (Fund's

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[21] Contrary to the Fund's contention (Fund's Answer Br. at p. 78), this Court should give no weight to the Legislative Counsel's opinion, offered in March 2003 (Ops. Cal. Legis. Counsel, No. 1144 (Mar. 24, 2003) Domestic Partner: Initiative Amendment.), regarding the scope of section 308.5, which was enacted by the voters three years earlier, in March 2000. Only material "directly presented to the voters" is "relevant" to this Court's inquiry regarding the electorate's intent in enacting an initiative. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 277.) Neither of the cases cited by the Fund provides support for the Fund's remarkable suggestion that this Court should consider the Legislative Counsel's 2003 opinion as "cognizable evidence of [the] legislative history" of section 308.5. (Fund's Answer Br. at p. 78.) In *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, the Third Appellate District addressed only the question of whether a Legislative Counsel opinion is cognizable legislative history *for the bill it accompanied*, not for any older law that happens to be discussed within the opinion. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 35.) Similarly, in *California Assn. of Psychology Providers v. Rank*, this Court held that, although Legislative Counsel opinions are not binding on the Court, they may be persuasive under certain circumstances "since they are prepared to assist the Legislature in its consideration of *pending* legislation." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17, italics added.)

Reply Br. at p. 28), it is by no means absurd to think that many of those who voted in favor of section 308.5 were seeking to address only marriages entered into outside the state. As noted above, separate statutes already applied to in-state and out-of-state marriages, and the marriages that could be entered within the state did not match the marriages that California would treat as valid if entered outside the State. Given the ballot materials' repeated emphasis on state sovereignty and repeated assurances that the measure's purpose was not to deny legal protections to same-sex couples, many voters likely supported section 308.5's enactment for state-sovereignty reasons, without any intent to close the door on the power of California's own Legislature to consider whether same-sex couples should be permitted to marry. Indeed, it is likely that many voters did not consider this issue at all.[22]

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[22] In passing Assembly Bill No. 849, vetoed by Governor, Sept. 29, 2005 (2005-2006 Reg. Sess.) (hereafter AB 849), the Legislature's purpose was not to circumvent the will of the people as expressed in section 308.5, but to remedy, to the full extent of its power, the constitutional violations inherent in Family Code section 300. Unlike administrative agencies (see Cal. Const., art. III, § 3.5), the Legislature is under no obligation to await an appellate court ruling – or any court ruling – to remedy constitutional violations in previously enacted statutes. Rather, the people should expect the Legislature to be vigilant about correcting constitutional violations in its prior enactments.

AB 849 expressly acknowledged that it is *this Court*, and not the Legislature, that has the power to remedy the constitutional violations inherent in section 308.5. AB 849 included the following statements among its findings and enactments:

> [Sec. 3] (f) California's discriminatory exclusion of same-sex couples from marriage violates the California Constitution's guarantee of due process, privacy, equal protection of the law, and free expression by arbitrarily denying equal marriage rights to lesbian, gay, and bisexual Californians.

In any event, the entire enterprise of construing section 308.5 so as to "render it . . . free from doubt as to its constitutionality" (*People v. Superior Court* (1996) 13 Cal.4th 497, 509) is futile because *any* construction of section 308.5 leads to arbitrary, absurd, and unconstitutional results. (See Respondents' Supp. Br. at pp. 51-53.) This is especially true now that same-sex couples may marry in numerous jurisdictions. While

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> [¶] . . . [¶]
>
> (k) It is the intent of the Legislature in enacting this act to end the pernicious practice of marriage discrimination in California. This act is in no way intended to alter Section 308.5 of the Family Code, which prohibits California from treating as valid or otherwise recognizing marriages of same-sex couples solemnized outside of California.
>
> [¶] . . . [¶]
>
> SEC. 8. The Legislature finds and declares that this act does not amend or modify Section 308.5 of the Family Code, as enacted by an initiative measure, to the extent that Section 308.5 addresses only marriages from other jurisdictions. The Legislature further finds that Sections 300 and 308.5 of the Family Code have been declared unconstitutional by a state coordination trial judge appointed by the Judicial Council, and the Legislature declares that the purpose of this act is to correct the constitutional infirmities of Section 300, which was enacted by the Legislature. The Legislature further finds that the constitutional infirmities of Section 308.5 of the Family Code, which was enacted through the initiative process, cannot be corrected by the Legislature and that the California Supreme Court is the governmental body that has authority to make a final determination regarding the meaning, validity, or invalidity of Section 308.5.

(AB 849 (2005-2006 Reg. Sess.).)

same-sex couples could not marry in any jurisdiction anywhere in the world when section 308.5 was enacted in March 2000, today same-sex couples may marry in Massachusetts, Canada, the Netherlands, Belgium, Spain, and South Africa. Although California today would honor the marriage of a heterosexual couple validly entered in any of those jurisdictions, California would refuse to honor the marriage of a same-sex couple from any of those jurisdictions, even though California makes available to same-sex couples, through domestic partnership, nearly all of the state-law protections offered through marriage to heterosexual couples. As a practical matter, section 308.5 has the effect of requiring that any validly married same-sex couple moving to California must register their relationship as a domestic partnership with California's Secretary of State in order to obtain basic legal protections for their family (including those that might be necessary in the event of an emergency). In contrast, those legal protections are available *immediately* and without any registration requirement to heterosexual married couples moving to California from the same jurisdictions. In sum, section 308.5 discriminates between validly *married* couples depending on the sex of the spouses. That discrimination is patently arbitrary and violates not only California's constitutional equal protection, privacy, due process, and free expression protections, but also California's privileges or immunities clause, which provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted *on the same terms* to all citizens." (Cal. Const., art I, § 7, subd. (b), italics added.)

The constant refrain of section 308.5's ballot materials was that the initiative's purpose was to prevent California from being required to recognize marriages entered by same-sex couples outside California. A court construing section 308.5 cannot save it from absurdity or invalidity by

construing it more broadly, because, regardless of its scope, it violates multiple provisions of the California Constitution.

### B. Under The Full Faith And Credit Clause And The Privileges And Immunities Clause Of The Federal Constitution, California Could Not Deny Recognition To Same-Sex Couples Who Were Married In Another State While Permitting Same-Sex Couples To Marry In California.

#### 1. Neither The Full Faith And Credit Clause Nor The Privileges And Immunities Clause Of The Federal Constitution Affects How This Court Should Interpret Family Code Section 308.5.

The federal constitutional questions this Court has posed for supplemental briefing could theoretically arise in the future if the Court rules that section 300's prohibition of marriage by same-sex couples violates the California Constitution without addressing the validity of section 308.5. Nevertheless, those federal questions are not directly presented by *this case* given that no party has asserted that the State has infringed upon his or her rights under the federal Privileges and Immunities Clause or the Full Faith and Credit Clause by refusing to recognize a marriage from Massachusetts, the only state that currently permits same-sex couples to marry.[23] Moreover, as Respondents have explained, section 308.5 violates all of the California constitutional provisions that section 300

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[23] Although Respondents Troy Perry and Philip DeBliek have entered into a Canadian marriage (see Petition for Review and Joinder in Petitions for Review By the City and County of San Francisco (A110449), and by the Woo Petitioners (A110451) (filed by *Tyler* parties, Nov. 14, 2006) at p. 4, fn. 2), the federal Privileges and Immunities Clause and the Full Faith and Credit Clause are concerned with inter*state* matters, not international matters. (See U.S. Const., art. IV, §§ 1, 2.)

violates – and offends the state privileges or immunities clause in more ways than even section 300 does. Given that there is no construction of section 308.5 that could save that provision from invalidity under the *California* Constitution (see Respondents' Supp. Br. at pp. 51-52), there is no need for this Court to decide *federal* constitutional issues in this case.

"Logically, state constitutions are prior in the sense that there is no more reason for a state court to reach a federal constitutional issue when the case can be decided by application of the state constitution than there is for any court to reach any constitutional issue when the case can be decided on statutory or other non-constitutional grounds." (Grodin, *Some Reflections on State Constitutions* (1988) 15 Hastings Const. L.Q. 391, 396.) This is particularly so in California given the state Constitution's express provision, enacted by initiative in 1974, that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution" (Cal. Const., art I, § 24; see *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354 ["This declaration of independence made explicit a preexisting fundamental principle of constitutional jurisprudence [citation], and in the years that followed served as the basis for numerous decisions interpreting the state Constitution as extending protections to our citizens beyond the limits imposed by the high court under the Federal Constitution."]; *id.* at p. 353 [invalidating state constitutional amendment enacted through initiative because it amounted to a qualitative constitutional revision by "severely limit[ing] the independent force and effect of the California Constitution"].) It is in keeping with the import and spirit of article I, section 24 for this Court first to address whether section 308.5 violates "[r]ights guaranteed by [the California] Constitution," especially where so deciding would obviate the need to

address novel federal constitutional issues never decided by the United States Supreme Court.

Such avoidance of federal constitutional questions is particularly appropriate where, as here, disposition of the case does not require decision of those questions. (*Miller v. Municipal Court of City of L.A.* (1943) 22 Cal.2d 818, 828-829 [repeating "the well-settled rule that a court will ordinarily inquire into the constitutionality of a statute only to the extent required by the case under consideration and will formulate a rule no broader than that necessitated by the precise facts in controversy"].) The State concedes that the federal constitutional questions on which the Court requested supplemental briefing are issues that would be raised "at some later date" rather than in the present case (State's Supp. Br. at p. 8), and none of the other Appellants offers any argument as to why this Court should decide those federal questions in this case except in an effort to save Section 308.5 from invalidity. (See CCF's Supp. Br. at p. 41; Fund's Supp. Br. at pp. 21-22.) Because multiple California constitutional provisions render any such saving construction impossible, this Court need not address either the federal Privileges and Immunities Clause or the Full Faith and Credit Clause in construing or ruling upon the invalidity of section 308.5.

### 2. Were California To Permit Same-Sex Couples To Marry Within The State, Both The Federal Privileges And Immunities Clause And The Full Faith And Credit Clause Would Require California To Recognize Out-Of-State Marriages Of Same-Sex Couples.

All Appellants agree with Respondents that, were California to permit same-sex couples to marry within the state, California could not, consistent with the federal Constitution, deny recognition to same-sex

couples' marriages entered outside the State. (See State's Supp. Br. at p. 8; Governor's Supp. Br. at p.5; CCF's Supp. Br. at pp. 35, 40; Fund's Supp. Br. at p. 19.) The State remains vague as to which provision or provisions of the federal Constitution would be violated by such denial (see State's Supp. Br. at p. 9, fn. 4), while the Governor's Supplemental Brief, without addressing the Full Faith and Credit Clause, indicates that such denial would violate the Privileges and Immunities Clause. (See Governor's Supp. Br. at p. 5.) CCF agrees with Respondents that such denial would offend both the Privileges and Immunities Clause and the Full Faith and Credit Clause (see CCF's Supp. Br. at pp. 35, 40), but the Fund contends that only the former constitutional provision would be implicated. (See Fund's Supp. Br. at pp. 21-22.)

Only the Fund presents argument as to why the Full Faith and Credit Clause purportedly would not be offended were California to deny recognition to same-sex couples' marriages entered in other states while permitting same-sex couples to marry within California. (Fund's Supp. Br. at pp. 19-21.) The Fund's arguments are not persuasive. The Fund asserts that the issuance of a marriage license is merely a ministerial administrative act that is not entitled to the same degree of "unyielding" full faith and credit that final judgments warrant, in part because administrative actions are not mentioned in title 28 United States Code section 1738, the statute implementing the Full Faith and Credit Clause. (Fund's Supp. Br. at pp. 19-20.) Respondents do not quarrel with the basic point that judgments are entitled to the highest degree of full faith and credit. (See Respondents' Supp. Br. at p. 57.) Nevertheless, the implementing statute's failure to mention administrative actions does not mean that administrative actions fall outside the scope of the Full Faith and Credit Clause. (See *Thomas v. Washington Gas Light Co.* (1980) 448 U.S. 261, 272, fn. 18 (plur. opn. of

Stevens, J.) ["[I]t is quite clear that Congress' power in this area [of full faith and credit] is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation"].) Indeed, even the Fund does not contend that administrative actions are not entitled to full faith and credit, but simply that they are not entitled to the "same level of full faith and credit" as judgments. (Fund's Supp. Br. at p. 19.)[24]

Moreover, the Full Faith and Credit Clause issue presented by this Court's Question 4 does not concern simply California's treatment of a marriage *license* issued in another state, but the refusal of California to respect the marriage *statute* of another state that permits same-sex couples to marry. The Fund cites to a string of cases for the proposition that the Full Faith and Credit Clause does not require a state to subordinate its own policies to the policies of other states. (See Fund's Supp. Br. at p. 20-21 [citing cases].) These arguments are not relevant, however, to the basic premise of this Court's question: whether, if California permits same-sex couples to marry within the state, California simultaneously may deny recognition to same-sex couples' marriages entered outside California. As Respondents explained in their Supplemental Brief at pages 58-60, California would have no legitimate public policy reason for denying such recognition if California were to permit same-sex couples to marry within the State.

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[24] The sole case on which the Fund relies for its argument regarding administrative agencies concerned the unique circumstances presented by decisions of a workers' compensation tribunal that lacked authority under state law to consider potential claims under another jurisdiction's laws. (See *Thomas v. Washington Gas Light Co., supra*, at pp. 282-283 (plur. opn. of Stevens, J.); see also *World Wide Imports, Inc. v. Bartel* (1983) 145 Cal.App.3d 1006, 1011-1012 [describing *Thomas v. Washington Gas Light Co.* as "confined to the unique subject of workers' compensation"].)

In the absence of any legitimate policy justification, California's refusal to recognize marriages of same-sex couples from other states while permitting such couples to marry California would exhibit "a 'policy of hostility to the public Acts' of a sister State." (*Franchise Tax Bd. of Cal. v. Hyatt* (2003) 538 U.S. 488, 499 [quoting *Carroll v. Lanza* (1955) 349 U.S. 408, 413]; see also *Hughes v. Fetter* (1951) 341 U.S. 609 [finding violation of Full Faith and Credit Clause where there was no sufficient policy justification for Wisconsin's refusal to entertain wrongful death action under an Illinois statute for a death occurring in Illinois]; *Carroll v. Lanza, supra*, 349 U.S. at p. 413 [distinguishing between a state's permissible "ch[oice] to apply its own rule of law" and an impermissible "policy of hostility" to other state's public acts].) Contrary to the Fund's suggestion, a state's refusal to give credit to another state's marriage statutes is subject to scrutiny under the Full Faith and Credit Clause where such refusal manifests not a legitimate policy choice by the first state, but instead mere antipathy toward the laws of the second state. Such would be the case under the hypothetical posed by this Court's Question 4.

Nevertheless, as explained above, there is no need for the Court to address these federal questions in this litigation, given that both section 300 and section 308.5 are invalid under numerous provisions of the California Constitution. Rather, this Court can and should invalidate California's exclusion of same-sex couples from marriage on adequate and independent state constitutional grounds.

## CONCLUSION

For the reasons set forth in this brief and in Respondents' Opening Brief, Reply Brief, and Supplemental Brief, Respondents respectfully request that this Court affirm the judgment and writ relief granted by the

Superior Court requiring the State of California to issue marriage licenses to same-sex couples on the same terms as such licenses are issued to heterosexual couples.

Dated: August 31, 2007 Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**
**PURSUANT TO RULE 8.520(c)(1)**

Pursuant to California Rule of Court 8.520(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Supplemental Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 12,236 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: August 31, 2007

Respectfully submitted,

By: _____
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## PROOF OF SERVICE

I, Norman S. Lee, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 Bush Street, San Francisco, California 94104.

On August 31, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

**RESPONDENTS' CONSOLIDATED SUPPLEMENTAL REPLY BRIEF**

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**INTERESTED PARTIES:**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on August 31, 2007, at San Francisco, California.

Norman S. Lee

**SERVICE LIST**

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

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***Woo, et al. v. California, et al.***
**San Francisco Superior Court Case No. CPF-04-504038**
**Court of Appeal Case No. A110451**

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***Tyler, et al. v. California, et al.***
**Los Angeles Superior Court Case No. BS088506**
**Court of Appeal Case No. A110450**

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***Clinton, et al. v. California, et al.***
**San Francisco Superior Court Case No. 429548**
**Court of Appeal Case No. A110463**

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***Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco***
**San Francisco Superior Court Case No., CPF-04-503943**
**Court of Appeal Case No. A110651**

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***Campaign for California Families v. Newsom, et al.***
**San Francisco Superior Court Case No. CGC 04-428794**
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