IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding, Special Title [Rule 1550(b)] **In re MARRIAGE CASES.**	Case No. S147999 (JCCP No. 4365)

First Appellate District, Case Nos. A110449, A110450, A110451
A110463, A110651, A110652
San Francisco County Superior Court Nos. CGC-04-429539, CGC-04-504038,
CGC-04-429548, CPF-04-503943, CGC-04-428794
Los Angeles County Superior Court Case No. BS-088506
Hon. Richard A. Kramer, Judge

REPLY OF THE STATE OF CALIFORNIA AND ATTORNEY GENERAL TO SUPPLEMENTAL BRIEFS

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INTRODUCTION

There is a fundamental right to marry, as that social institution has been understood from time immemorial. And though the Constitution does not compel the Legislature to license and authorize marriages, the Legislature generally may not forbid or prevent a marriage from taking place without a constitutionally-sufficient justification for doing so. But if the Legislature chooses to license, regulate, and empower governmental officials to validate commitments of life-partnership at all, the Constitution does not require the Legislature to use the word "marriage."

The Legislature's choice to preserve the word "marriage" for use in connection with the union of a man and a woman is a policy recognition that this word describes an institution whose roots extend to the dawn of civilization. It is not a stigmatization of same-sex unions.

The State does not deny the significance of marriage as a social and spiritual ideal; after all, marriage existed long before the State of California ever recognized it in a statute. The state does not create a marriage: From antiquity, Western society has recognized that a marriage is created by the witnessed interpersonal commitment of the two persons themselves. The

state can only give a marriage standing *in the law*.

The *only* institution at issue in these proceedings is the *state-sanctioned regime* to which the label "marriage" has been attached in statute. The Legislature cannot change the historic and social forces that have given the term "marriage" its meaning and significance, but neither must the Legislature ignore the historical, cultural, and social sense of that word in order to ensure that *the law* treats life-partnerships equally, whether they be between a man and woman or between persons of the same sex.[1/] The Legislature has unequivocally declared that *under the law* married couples and domestic partners are to be treated equally in all respects. (Fam. Code, § 297.5.)

It is thus for the Legislature to decide whether (i) to employ the term "marriage" to describe only the state-sanctioned partnership of a man and a woman, (ii) to employ the term "marriage" to describe state-sanctioned life partnerships regardless of the couple's sex, or (iii) to employ a "neutral" term to describe state-sanctioned life partnerships regardless of the couple's sex. But, so long as the fundamental right of a man and woman to marry is not unreasonably restricted by government, the *Constitution* has no concern over the Legislature's choice of term to describe the state-sanctioned regime. And so long as the Legislature ensures that all rights and benefits

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1. In a similar vein, the Legislature can use the term "place of worship' to describe all such institutions that might fall under that description, or the Legislature might use the terms "church," "synagogue,"and "mosque" in recognition of the distinct and significant historic and cultural meanings that those terms have to their associated communities—or the Legislature might do both. (See e.g., Pen. Code, § 594.3.) But few would be surprised at the offense that would be taken were the Legislature to collect all such institutions under the single rubric "church" or "synagogue" or "mosque." Similarly, the Legislature could properly consider the cultural and social sensibilities at risk were the term "marriage" used to encompass same-sex unions.

enjoyed by married couples *under the law* are also available to domestic partners—including, most importantly, the right to self-declaration and public legitimization of one's life-partnership—then the Constitution is not violated.

ARGUMENT

MARRIAGE IS A FUNDAMENTAL RIGHT, BUT THE TITLE OF THE STATE-SANCTIONED INSTITUTION AND THE RIGHTS AND BENEFITS TYPICALLY GIVEN TO MARRIED COUPLES UNDER STATE LAW ARE NOT PART OF THAT FUNDAMENTAL RIGHT.

As their answers to the Court's questions illustrate, the parties are discussing at least three distinct issues when they discuss marriage. First, there is the word "marriage," which, for purposes of these proceedings, describes a legal relationship entered into upon satisfaction of certain statutory requirements. Second, there is the fundamental right to marriage, which finds its basis in our constitutional protections for liberty, autonomy, and privacy. Third, there are the rights and benefits that flow from the legal relationship, rights and benefits that the government affords to married couples and the accompanying duties and obligations that government imposes. Although each of these strands is interwoven in the conception of marriage as a legal regime, they do not form an indissoluble Gordian Knot that mandates unitary treatment of any legitimized life-partnership, whether it comprises a union of a man and woman or a union of persons of the same sex. These different strands of the marriage discussion can and should be separately analyzed because each proceeds from a different legal basis.

A. Marriage Is a Highly Significant Institution, But There Is No Constitutional Reason Why the Legal Institution Now Defined as Marriage Could Not Be Renamed.

With regard to the word "marriage," several of the parties confuse policy arguments with constitutional compulsion. Petitioners[2/] argue that, if the title of "marriage" in our statutory scheme were changed to some other title, "the right to marry would be stripped of much of its resonance and power" and "reduced to a functional status." (Rymer Supp. Br. at p. 32.) They assert that "[a] union with another name, no matter how strongly the parties entering it may wish it to be so, will not be recognized or honored widely (much less universally) by society." (City Supp. Br. at p. 33.) The Fund and CCF agree with petitioners. (Fund Supp. Br. at p. 13 [stating that "[t]o change the name of the relationship would eliminate its universal identity and generate confusion as to the nature of the relationship."]; CCF Supp. Br. at p. 26 [marriage is a "universally recognized social institution" whose traditional title cannot be changed].)

While these might be appropriate (or even persuasive) points to urge upon a legislature, they are not arguments of a constitutional stature. Petitioners assert, correctly, that the meaning of marriage comes from the understanding that it has been given in our society. Marriage has a long history and an undeniable social and/or religious significance for most people, and for these reasons it is highly unlikely that any legislature would rename marriage as the institution comprising the union of a man and a woman. Certainly, no one would ever claim that marriage as an institution

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2. The City and County of San Francisco, the Rymer petitioners and the Clinton petitioners will be collectively referred to herein as "petitioners." (The Tyler petitioners did not file a supplemental brief.) The Proposition 22 Legal Defense and Education Fund and the Campaign for California Families, which challenge the court of appeal's decision on different grounds, will be referred to individually as the "Fund" and "CCF."

is insignificant. Nor is marriage a mere label.

Nonetheless, the cases establishing the fundamental right to marry do not base their holdings on the terminology that the government uses to describe a relationship. When the high court cited the "right to marry, establish a home, and bring up children" as a relation protected by due process (*Meyer v. State of Nebraska* (1923) 262 U.S. 390, 399), it was describing a venerable social institution, the right to have a familial relationship; the Court was not describing a right to have the state use a certain word in its statutory recognition of that relationship. When the Court described marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486), the focus was on the relationship of the couple, not the verbiage used on state legal forms. In *Perez v. Sharp* (1948) 32 Cal.2d 711, this Court cited United States Supreme Court precedents in stating that "[t]he right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring." (*Id.* at p. 715 (plur. opn. of Traynor, J.).) But this Court was plainly speaking of a fundamental right in the couple there to have an intimate family relationship—whether the statute involved happened to call it "marriage" or "wedlock" or "matrimony" or "*matrimonio*."

These cases indeed recognize a fundamental right to marriage, but they do not purport to declare a constitutionally protected interest in having the government use a specific word to describe the statutory regime that overlays the social relationship commonly known as "marriage." (See Answer Brief of the State of California and the Attorney General to the Opening Briefs on the Merits ("State Answer Br."), p. 63.)

B. Unlike the Title "Marriage," the Relationship that We Know as Marriage Is a Fundamental Right, But the Rights or Benefits That Petitioners Claim to Have Been Denied to Domestic Partners Do Not Form a Part of That Fundamental Right.

All parties appear to agree that there is a fundamental right to marry, whatever name the institution may be given in statute. The State has twice presented its views on the nature of that fundamental right to this Court, and nothing in the supplemental briefs from the other parties would lead it to change its position. (State Answer Br. at pp. 55-63; State Supp. Br. at pp. 3-5.)

However, petitioners' answers to this Court's questions highlight the fact that California has already afforded domestic partners all of the minimum, constitutionally-guaranteed attributes or rights associated with the fundamental right to marry. A comparison of the answers to questions 1 and 2 reveals that, while petitioners may have listed "differences" between the marriage and domestic-partnership statutory schemes,[3/] those differences are

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3. The answers filed by the petitioners were not truly responsive to the Court's question. The Court asked for "differences in legal rights or benefits and legal obligations or duties" under California law affecting presently married couples and those affecting domestic partners who are now registered, but petitioners did not answer this question. Instead, they enumerated differences between the two statutory schemes. Petitioners also listed differences in treatment resulting from federal law or the laws of other states (which are beyond the control of the State of California) and differences in how private persons and entities treat domestic partnerships.

The list of differences offered by the petitioners did include a possible difference in rights or benefits caused by California law, namely a $1,000 veterans tax exemption that appears article XIII, section 3, subdivisions (o) and (p) of the California Constitution. The property tax exemption states that it is inapplicable if the unmarried spouse of the deceased veteran owns property in excess of $10,000. (Cal. Const., art. XIII, § 3, subd. (p).) As petitioners admit, it is unclear whether this exemption would apply to domestic partners. (Rymer Supp. Br. at p. 9.) Moreover, it would appear to have a fairly limited application. The Legislative Analyst noted in 1988, when this exemption was last amended to

not of constitutional magnitude such as would invalidate the Legislature's choice to treat traditional marriage and same-sex unions as different institutions. All are capable of legislative correction if the differences prove to be problematic.[4/]

The City asserts that same-sex couples cannot be denied the title of marriage for their publicly legitimized relationships, a point that the State contests, but the City does concede that "this does not mean that the State could not change or limit many of the rights, benefits, or obligations associated with the institution of civil institution of marriage even if it lacked a compelling reason to do so." (City Supp. Br. at p. 29.) The other petitioners concede through their silence that the differences that they have listed in response to question 1 are simply not part of the fundamental right

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eliminate a residency requirement, that "[r]elatively few persons claim this exemption because a homeowner is not allowed to claim both this exemption and the homeowners' exemption on the same property." (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) analysis by Legislative Analyst of Prop. 93, p. 60.) Presumably, even fewer persons claim this exemption today, since the monetary limits on the exemption have remained unchanged despite inflation.

Petitioners also adverted to the requirement that domestic partners have a "common residence" at the time of their filing of a declaration. (Fam. Code, § 297, subd. (b)(1).) The requirement has not been judicially construed and it may be, for example, that nothing more is required than that one residence of the couple be declared as the couple's intended domicile at the time of filing of the declaration. In any event, to the extent that the residency requirement could be said to deprive domestic partners of rights or benefits enjoyed by spouses, the requirement would have to be judicially construed in light of the expressly equalizing language of Family Code section 297.5. And, again, the residency requirement is subject to legislative change.

4. The Court's first question also asked for a list of the duties or obligations that domestic partners assume as compared to married couples. Petitioners left this part of the question mostly unaddressed, although the City conceded that domestic partners assume "most or all" of such duties or obligations. (City Supp. Br. at p. 17.)

to marriage. This recognition—that "there are rights and obligations that the state and federal governments have attached to marriage that plainly are not constitutionally significant" because "they do not go to the core of the marital relationship protected by the California Constitution" (City Supp. Br. at pp. 29-30)---is consistent with the State's view.

CONCLUSION

Marriage is an important institution in our society. The cases recognizing a fundamental right to marriage are based on the idea that liberty, due process, and privacy protect the most intimate relationships—including the right to have an intimate relationship with the person of one's choice and the right to create a family—from governmental intrusion. Although the fundamental right was judicially recognized in the context of the male-female life partnership, marriage, the zone of privacy and the dignitary interest that the right reflects are exactly what the Legislature has extended to same-sex life partnerships in the domestic partnership law.

Dated: August 31, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
[Pursuant to California Rules of Court, rule 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I hereby certify that the attached **REPLY OF THE STATE OF CALIFORNIA AND ATTORNEY GENERAL TO SUPPLEMENTAL BRIEFS** is proportionately spaced utilizing 13-point Times New Roman font. In reliance on the word count feature of the WordPerfect 8 software used to prepare this brief, I further certify that the total number of words of this brief is 2,503, exclusive of those materials not required to be counted.

Dated: August 31, 2007

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