SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b))
IN RE MARRIAGE CASES

Case No. S147999

Judicial Council Coordination Proceeding No. 4365

First Appellate District
No. A110449
(Consolidated on appeal with case nos. A110540, A110451, A110463, A110651, A110652)

San Francisco Superior Court Case No. 429539
(Consolidated for trial with San Francisco Superior Court Case No. 429548)

CITY AND COUNTY OF SAN FRANCISCO'S SUPPLEMENTAL BRIEF

The Honorable Richard A. Kramer
Superior Court for the City and County of San Francisco

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Pursuant to the Court's order dated June 20, 2007, the City and County of San Francisco (City) submits this supplemental brief. The brief answers the four questions posed in the order.

DISCUSSION

I. 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.

A. Domestic Partnership Does Not Provide The Title, Status Or Stature Of Marriage.

Marriage is a legal and personal status that is and long has been conferred by the State on persons who satisfy State-imposed requirements. (See Petitioner City and County of San Francisco's Opening Brief on the Merits (City OB) 20-21.) It has some roots in custom, and in some countries at later points in history, in religion. (2 G. Howard, History of Matrimonial Institutions (1904) 125-51; City OB 20-21 & fn. 9.) But in this country it has always been a secular institution sanctioned and regulated by the State. (City OB 20-21; see Respondent's Appendix (Case No. A110449) (RA) 242.) By asserting dominion over marriage, controlling access to it, setting entry and exit requirements, and prescribing rights and obligations that flow from it, the State established and increased its importance in society, added to and changed its meaning,[1] and enhanced its recognition and prestige. (RA 252.) Indeed, this Court has described the

[1] (See RA 246-251 [describing legislative and judicial changes converting marriage from joinder of man and woman into single unit, naturally headed by husband, into relationship between two equal and consenting parties].)

State's involvement in marriage as "pervasive." (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 25.) Thus, when Americans think of marriage, they understand it as a state-sanctioned institution that requires a state-issued license and is governed by state-created rules. It is the State that, through licensing and solemnizing the marriage, legitimizes a relationship and transforms it from something transient and uncommitted into something with broader social meaning: a state-approved relationship that is universally understood and honored as "the highest form of love" – in other words, "the real thing." (See City OB 48-55; RA 318.)

While entering into a marriage gives rise to rights and obligations and entitles married couples to a wide variety of benefits, marriage is more than a bundle of rights, benefits, and duties. It is a legal title and status that are universally understood, honored and cherished. Thus, even though the domestic partnership law grants same-sex couples many of the rights and benefits that are conferred on married couples, it does not "grant[] domestic partners a *status* equivalent to married spouses." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 30, emphasis added.) As the Attorney General acknowledged in *Knight*, " 'marriage' can never be defined solely by the rights and responsibilities conferred on the marital relationship, because those rights are constantly changing." (City and County of San Francisco's Supplemental Request for Judicial Notice (CCSF Supp. RFJN), ex. 1 at 23.) Rather, "the title 'marriage' has legal significance of its own." (*Ibid.*, emphasis added.)

The stature that the State confers on couples and their children when it grants them the title and status of marriage is inestimable. "Spouses receive special consideration from the state" itself, which is "most solicitous of" their rights. (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-75,

emphasis added.) The State accords marriage a high "degree of *dignity*." In doing so, it not only acknowledges but heralds the "solemn and binding … nature" of marriage and its importance as "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (See *ibid.*, internal quotations omitted)

In conferring the title of "marriage" on a relationship, the State proclaims that the relationship is entitled to "dignity," "solicit[ude]" and "special consideration" by all jurisdictions, agencies, institutions and people who come into contact with the married spouses. (*Ibid.*) Marriage signifies to family members and friends that their loved ones have entered into a new familial relationship — one that is of primary importance — and that they should respect, honor and support that relationship. It signifies to employers that their employees are responsible, committed, and stable and have assumed important obligations worthy of the employer's support. And it signifies to government agencies both within and outside of the State that the relationship should be recognized and treated according to the laws that govern marriage.

The term "marriage" is instantly and universally recognized and understood. As the trial court in the *Knight* case observed:

> [T]he least important of the distinctions between the two relationships is *not* the name given to the union. . . . The word "marriage" imports much more than its entitlements . . . .
>
> . . . While it is difficult to describe marriage in a sentence or two, it is true, as pointed out by the Attorney General in oral argument, that even a young child can understand the concept. . . . (CCSF Supp. RFJN, ex. 2.)

Society accords those who marry a dignity and respect that sets them apart from all others. It is not an overstatement to say that marriage is revered by

persons of all ages and cultures within our society. It confers benefits on married couples, treats them and their children as family, and otherwise honors their relationship in countless ways.

The Massachusetts Supreme Court explained this undeniable reality:

> Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. (*Goodridge v. Dept. of Pub. Health* (Mass. 2003) 798 N.E. 2d 941, 954-55.)

Domestic partnership, by contrast, is neither universally recognized nor revered. On the contrary, the terminology "domestic partnership" is new and not well understood. There is significant confusion about what it means both legally and otherwise. Thus, persons registering as domestic partners are constantly called upon to explain and demand the legal rights that this relationship accords them — something no married person has to do.[2] And especially in the context of our society's longstanding animus towards lesbians and gay men, the State's withholding the name "marriage" from *their* committed relationships and designating them instead with

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[2] Despite the broad language of section 297.5(a), even courts have been reluctant to treat domestic partnership the same as marriage. (See, e.g., *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1172-74 [no putative domestic partner protection]; *Garber v. Garber* (Super. Ct. Orange County June 13, 2007, No. G039050) (CCSF Supp. RFJN, ex. 3) [holding ex-wife's entry into domestic partnership did not vitiate right to spousal support as would have been the case if she had remarried]. The courts' confusion is emblematic of the greater problem same-sex couples face almost daily in having to explain and demand their rights. Because they are not married, those rights are often denied to them by confused and sometimes hostile employers, service providers and bureaucrats. (Cf. Kelley, *2 Months After New Jersey's Civil Union Law, Problems Finding True Equality,* New York Times (Apr. 13, 2007) A15.)

different and unfamiliar terminology signifies poignantly that those relationships are not, and are decidedly less than, marriages. (See City OB 50-56; RA 917-20, 964, 994-95.) As the Court of Appeal recognized in *Knight*, the differences between marriage and domestic partnership, including the difference in name, signify "that marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership." (*Knight*, 128 Cal.App.4th at 31.)

Both the denial of the universally understood and honored title and status of marriage and the creation of a separate title and status are demeaning to lesbian and gay couples. (See City OB 48-56.) The Chief Justice of the New Jersey Supreme Court, in an opinion joined by two other justices dissenting from that portion of the plurality's opinion that deferred ruling whether a separately named institution was constitutional, explained this:

> We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage. (*Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 226-27 (dis. opn. of Poritz, C.J., joined by Long, J. and Zazzali, J.)

B. Consistent With Its Denial Of The Title And Status Of Marriage, The State Has Provided Less Recognized And Less Formal Methods For Entering Into And Exiting From Domestic Partnerships.

Entering into marriage is considered a momentous act, and the statutorily mandated process for doing so reflects that.

> According to the statutory scheme, there are five steps in the marriage process. First, the parties must consent. Second, the parties must obtain a license from the county clerk. Since the license and certificate of registry are combined into one form, the parties also obtain the certificate of registry at that time. Third, the marriage must be solemnized. Before solemnizing the marriage, the person conducting the ceremony must ensure that the parties have obtained a marriage license. Fourth, the person solemnizing the marriage must authenticate the marriage by signing the certificate of registry and arranging for at least one witness to sign the certificate. Finally, the person solemnizing the marriage must return the certificate of registry to the county clerk for filing. (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 101.)

(See Fam. Code, §§ 300, 306, 350, 359, 400-402, 420-423.)[3]

The solemnization requirement reflects the seriousness and importance of the marital relationship. The State requires marriages to be solemnized by the local Commissioner of Marriages or someone deputized by the Commissioner, or by a judge, legislator or member of the clergy. (See Fam. Code, §§ 400-402; see also *id.*, § 307 [alternate procedure for persons belonging to denomination that does not have clergy authorized to solemnize marriages].) Purporting to solemnize a marriage without the required authorization or license subjects a person to criminal sanction. (Pen. Code, § 360.)

To register as domestic partners, by contrast, the parties simply file a Declaration of Domestic Partnership with the Secretary of State. (§§ 297(b), 298.5.) No license, solemnization, or authentication are provided or required.

The Secretary of State is the agency that governs election and campaign matters and business filings. The location of the domestic

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[3] All further statutory references are to the Family Code unless otherwise indicated.

partner registry in that agency, as opposed to the agency that generally maintains information and statistics about family relationships, signifies to the public that the relationship has the character of a business rather than a family. By contrast, the registry for marriages is located in the Office of Vital Records within the California Department of Public Health, which is the repository for all significant family-related information, including such momentous events as births, deaths, adoptions, declarations of paternity, marriages, and dissolutions.

(at <http://www.cdph.ca.gov/certlic/birthdeathmar/Pages/default.aspx> [as of August 16, 2007].)

These differences signify the reality that lesbian and gay relationships are not considered as serious or important — or as worthy of social respect and recognition — as heterosexual relationships. Instead of treating their relationships as a "vital statistic" or milestone as significant as birth, death, or adoption, the State treats domestic partnerships in a perfunctory manner, as if the partners were forming a corporation rather than a family.

Likewise signifying the lesser importance and respect accorded to lesbian and gay relationships, under many conditions (i.e., where there are no children of the union and certain other conditions are met), dissolving a domestic partnership involves simply filing a Notice of Termination with the Secretary of State. (§ 299.) Only if those conditions are not met is judicial dissolution required. (*Ibid.*) If those same conditions are met in a marriage, by contrast, summary judicial proceedings are still required to dissolve it. (See §§ 310, 2400-2406.) For summary dissolution of a marriage, moreover, there must be "irreconcilable differences" that have caused "the breakdown of the marriage." No such requirement exists for

terminating a domestic partnership. (Compare § 2400(a)(2) with § 299(a).)[4]

C. Differing Entry Criteria For Domestic Partnerships Reflect The Social Stigma And Skepticism Associated With Same-Sex Relationships.

To register as domestic partners, both persons must be over the age of 18. (§ 297(a), (b)(5).) There is no provision allowing persons younger than 18 to register as domestic partners with parental consent or a court order. By contrast, a person under 18 may marry with the consent of a parent or guardian and a court order (§ 302) or in some circumstances a court order alone (§ 303). This difference implies that entering into a committed same-sex relationship carries such negative connotations that a party should only be able to enter such a relationship when he or she is an adult, irrespective of parental consent or court order.

To register as domestic partners, both persons must also have a common residence. (§ 297(b)(1).) There is no such requirement for parties who wish to marry. As a result, a same-sex couple who needs to live apart for employment or other reasons cannot register as domestic partners, whereas heterosexuals who live apart in different counties, states, or even countries can still marry. For the same reason, "prison inmates have the right and ability to marry despite the fact they are incarcerated, do not

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[4] Further, there is no California residency requirement for termination of a domestic partnership, whereas a marital dissolution can only occur in California if one of the parties resides in this state. (See §§ 299(d), 2320.) To register as domestic partners, both parties must consent to jurisdiction in California to terminate the relationship regardless of the residency of either at the time of such termination. (§ 298(c).) This no doubt reflects the reality that other states may not recognize (and may therefore be unwilling to dissolve) a domestic partnership.

currently reside with their intended spouse, and might never reside with their spouse; however, similarly situated homosexual inmates cannot register as domestic partners." (*Knight,* 128 Cal.App.4th at 30.)

This additional requirement imposed on domestic partnerships suggests that same-sex relationships are less likely to be committed and stable or more likely to be fraudulent than opposite-sex relationships and thus less worthy of the State's recognition. The State requires lesbian and gay couples to live together in order to prove that their relationship is real. The State takes heterosexual couples' word for their commitment and requires no such "proof" on their part.

D. Jurisdictions That Would Recognize And Honor The Marriage Of A Same-Sex Couple If It Were Sanctioned By California May Not Recognize The New Species Of Relationship Known As "Domestic Partnership."

> "[U]nlike a marriage, a domestic partnership will not automatically be recognized by other states [or countries]. Therefore, *if the domestic partners move out of California, the rights bestowed by our state's domestic partnership law may well become illusory.* For example, domestic partners may find it difficult to terminate their relationship in other jurisdictions. (See, e.g., *Rosengarten v. Downes* (2002) 71 Conn.App. 372 [802 A.2d 170].) And many of the rights bestowed upon domestic partners, such as the right to visit their hospitalized partner and to make medical decisions for him or her, may not be acknowledged by other states [or countries]. Consequently, domestic partners do not have the same freedom to travel and retain the benefits associated with their union as do married persons." (*Knight*, 128 Cal.App.4th at 31, emphasis added.)

This is not a theoretical matter. Many states and countries recognize *marriages* of same-sex couples from other jurisdictions, at least for some purposes, including Massachusetts, New York,[5] Rhode Island,[6] Australia,

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[5] at <http://www.cs.state.ny.us/pio/pressrel/nyship_samesexspousalcoverage.cfm> [as of August 16, 2007].

Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland and the United Kingdom. (See generally RA 0331-0829.) But because California does not permit same-sex couples to marry here, they will not be treated as married elsewhere, even in those jurisdictions that would honor their marriages.

The inability to get their relationships recognized by other states may have particularly severe consequences for registered domestic partners with children. Joint parentage arising from domestic partner registration in California may not be recognized by other states. To assure that the parent-child's relationship will be honored in case of death or dissolution if either or both partners leave the state, domestic partners who are non-biological parents may need to obtain formal judgments of parentage that no married parent would need. They will not be able to rely on the domestic partnership law because other states may not recognize their parental rights under that law. This is particularly important since, as a matter of *California* law, custody matters, unlike property disputes between parties, cannot be resolved by California courts if the child or children do not reside here. (See §§ 3402(g), 3421(a).)

E. The Domestic Partnership Law Ensures That Business Entities Cannot Discriminate Between Married Couples And Domestic Partners But Does Not Ensure That Employers Will Treat Same-Sex Employees Equally.

In *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832, this Court interpreted the Unruh Act and domestic partnership law to

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(footnote continued from previous page)

[6] See *R.I. Told to Honor Mass. Same-Sex Rules*, The Recorder (Feb. 23, 2007) 8.

prohibit businesses and other entities that provide goods or services from treating same-sex couples in registered domestic partnerships differently from married couples. Thus, discounts and other benefits offered to married couples must be offered on the same terms to domestic partners. The Unruh Act does not extend to employers, however.

As a result, same-sex couples are routinely denied employment benefits provided to spouses by employers. (See RA 0897-0898; Fahim, *Corzine Enters Dispute With United Parcel Service Over Who Is A Legal Spouse,* New York Times (July 21, 2007) [193 of 1,359 couples who registered for civil unions in New Jersey reported their companies are not recognizing their unions].) The domestic partnership statute does not specifically address this issue, but if it did or if it were interpreted to require employers to provide equal benefits to domestic partners, it would almost certainly be challenged. States cannot adopt laws specifically designed to regulate employer provided health and retirement benefit plans covered by the Employee Retirement Income Security Act (ERISA) because of preemption. Reading the domestic partner law with FEHA to require such California employers to amend their ERISA plans to provide benefits to employees' domestic partners on the same basis as they are provided to employees' spouses would raise preemption issues. (See *In re Council of the City of N.Y. v. Bloomberg* (N.Y. 2006) 846 N.E.2d 433.)

If the State permitted same-sex couples to marry, by contrast, any challenge to the marriage laws under ERISA would be weak, at best, since the marriage laws' effect on benefits would be incidental to its broader purposes and it would not explicitly address benefits. A non-gendered marriage law would simply give same-sex couples the same status as married couples for *all* purposes, including employee benefits.

Significantly, no amendment to an ERISA plan would be necessary to provide such coverage, since the plan's existing references to married employees and spousal benefits would, by their terms, apply to married same-sex couples. To deny benefits to a *married* same-sex couple that are routinely provided to a married opposite-sex couple, therefore, the employer might have to amend its employee benefit plan to explicitly and specifically exclude same-sex couples. Companies might well think twice before engaging in such explicit discrimination, and if they did, that discrimination would be much more vulnerable to legal challenge than a plan that simply discriminates based on marital status thereby leaving out same-sex couples.

F. The Putative Spouse Doctrine, Which Protects Opposite-Sex Couples Who Intend But Fail To Meet The Requirements Of Marriage, Has Been Held Inapplicable To Same-Sex Couples Who Intend But Fail To Meet The Requirements Of Domestic Partnership.

Couples whose marriage is invalid because they failed to obtain a license or to meet some other legal requirement, and the children of such couples, may still receive some of the protections of marriage if either party believed in good faith that the marriage was valid. (§ 2251; *DePasse,* 97 Cal.App.4th at 107.) This doctrine, known as the "putative spouse" doctrine, "operates to protect expectations in property acquired through the parties' joint efforts." (*Id.* at 108.) In addition to allowing courts to treat putative spouses' property rights and debts as if they were legally married, the doctrine allows courts to decide custody issues as if the parties had been married and permits the innocent party to seek spousal support and attorneys' fees and costs upon termination of the union. (See §§ 2251-2255.)

The Court of Appeal has held that same-sex couples cannot invoke the putative spouse doctrine in situations in which they could, if they were heterosexual, invoke it — i.e., where the union is legally invalid for want of procedural requirements or other reasons but one or both parties have acted in the good faith belief that it is valid. (*Velez,* 142 Cal.App.4th at 1172-74 ["given 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 to grant parties dissolution rights despite the invalidity of the relationship due to a legal infirmity"]

G. The Family Code Permits Couples To Enter Into A Confidential Marriage But Not A Confidential Domestic Partnership.

Sections 500 et seq. provide for couples to enter into marriage confidentially in a manner that is not made public and is only subject to disclosure for good cause. (See §§ 500-511.) Opposite-sex couples who, for whatever reason do not want other persons to know of their relationship (for example, because a family member objects to their marriage across racial or religious lines or objects to them remarrying after a death or divorce) are provided confidentiality. Same-sex couples, however, are not permitted by the domestic partner law to keep their relationships confidential. Indeed, the State-maintained domestic partner registry ensures that all who wish to know if a person has entered into such a partnership may readily find out. (§ 298.5(b); see also 84 Ops. Cal. Atty. Gen. 55 (2001) – [common residence listed on certificates of domestic partnership is subject to public disclosure].)

This is potentially important for persons who, by registering as domestic partners, are effectively coming out publicly as lesbian or gay, and may, as a result, be subject to rejection or harassment by family

members, employers, fellow workers or colleagues, or others. There are fields and professions, as well as parts of this State, in which a person who is known to be gay or lesbian faces a serious risk of mistreatment by colleagues and superiors. Similarly, that person's spouse may face threats and a serious risk of harm if his or her identity is publicly disclosed. For example, a police officer known to be gay may be harassed and denied critical assistance by fellow officers in some parts of California. That officer would have to choose between entering into a domestic partnership with his chosen spouse and putting his job and even his life at risk, or foregoing all of the rights and obligations associated with domestic partnership so as to preserve his job security and safety. In view of the historic and continued discrimination against lesbians and gay men, this is no trivial matter.

H. Public Employees And Officials May Purchase Long Term Care Insurance For Their Spouses, Siblings, Parents And Spouses' Parents, But Not For Their Domestic Partners Or Domestic Partners' Parents.

Under the State Public Employees Long Term Care Act, the State must offer long term care insurance to certain active and retired public officials and employees and their "spouses, parents, siblings and spouses' parents." (See Gov. Code, § 21661.) The domestic partner law excuses the State from making these benefits available to domestic partners of employees (See Fam. Code, § 297.5(g)), presumably because to do so would undermine the ability of recipients of the benefits to claim federal tax deductions for the premiums. (See 26 U.S.C. § 7702B.) The law does not require the State to provide such benefits to domestic partners, even under a separate plan.

I. The Rights Provided Or Protected For Spouses Under The California Constitution And Laws Enacted By Initiative Do Not Necessarily Extend To Domestic Partners.

Section 297.5(i) provides: "This section does not amend or modify any provision of the California Constitution or any provision of any statute that was adopted by initiative." Thus, the domestic partnership statute, by its terms, does not automatically extend to persons in a domestic partnership any rights, benefits, protections, or obligations that are provided to spouses under the California Constitution or statutes adopted by initiative.

One example was California Constitution article XIIIA, section 2, subdivision (g), which exempts from reassessment for property tax purposes properties and interests in property that were transferred between spouses and, in some instances, former spouses. This provision does not apply to property transfers between domestic partners or former domestic partners. The Legislature fixed this in 2005. (See Stats. 2005, ch. 416, § 2 [amending Rev. & Tax. Code, § 62 to add subd. (p)].) But even this legislative solution does not provide domestic partners the same constitutional protection ensuring that their homes will not be reassessed upon death or divorce that married couples have, since protection for the latter is embedded in the Constitution.

Domestic partners are denied altogether some rights and benefits that are provided in the Constitution or laws passed by initiative. For example, article XIII, section 3, subdivision (o) of the California Constitution provides for a service member's homeowner's exemption, if unused, to be used by his spouse, and subdivision (p) provides a homestead exemption from property taxes for the spouse of a deceased service member.

Domestic partners do not enjoy similar constitutional (or even statutory) exemptions.

J. Since California Does Not Recognize The Relationships Of Lesbians And Gay Men As Marriages, The Federal Government Has No Reason Even To Consider Doing So.

California does not treat its committed lesbian and gay couples as married. As a result, those couples cannot even seek the thousand-plus rights and benefits accorded to married couples under federal law – including social security and pension benefits, tax benefits (such as joint income tax filing and tax free transfers between spouses), veteran's benefits, family medical leave, COBRA benefits and so forth. To be sure, the federal government remains generally hostile toward lesbians and gay men and their families and has failed to accord them any measure of equality. (See, e.g., 1 U.S.C. § 7.) Nonetheless, by failing to allow its own lesbian and gay citizens to marry, the State itself imposes a barrier that forecloses them from seeking recognition and full equality under the federal Constitution. (See *Smelt v. County of Orange* (9th Cir. 2006) 447 F.3d 673, 683-86 [holding same-sex couple in domestic partnerships had no standing to challenge federal government's denial of equal federal benefits because a couple could not legally marry in their own state, California], cert. den. (2006) 127 S.Ct. 396.) Instead, the State sends a powerful signal of approving the inequality visited upon lesbians and gay men by our national government; it does not consider them to be married and neither expects nor even asks that the federal government do so either.

Historically, of course, the federal government has deferred to the States with respect to what constitutes a marriage. The Federal Defense of Marriage Act was a dramatic departure from this tradition and was motivated by anti-gay animus. Thus, it may eventually be struck down.

But by denying its lesbians and gay citizens the right to marry under state law, California thus condones the federal government's denial to those citizens of federally provided or regulated pension benefits, social security benefits, Medicare benefits, immigration rights, federal housing, food stamps, veteran's benefits, and the thousand-plus other rights and benefits the federal government routinely accords married spouses and insulates this discrimination from direct legal challenge.

K. Domestic Partners Take On Most Or All Of The Obligations Of Marriage Without Receiving All Of The Benefits.

By entering into a domestic partnership, same-sex couples undertake obligations to each other, to each other's creditors, and to the children of their union, just as married couples do. These obligations are substantial and include the obligation to support one another during and often after the relationship, to support their children, and to take responsibility for each other's debts and obligations incurred during and sometimes after the relationship. These obligations and responsibilities are substantial and serious and can have implications that last a lifetime. Yet, as discussed above, many of the rights and benefits that governments and third parties routinely provide to married couples and their families to aid them in fulfilling these responsibilities are routinely denied to lesbian and gay couples and their families, including those in domestic partnerships.

This is true with respect to all of the differences described above. Moreover, domestic partners are denied substantial federal benefits such as federal pensions, social security, and federal tax law. These issues would not necessarily be resolved if the State permitted same-sex couples to marry, but allowing them to marry would at least enable same-sex couples more easily to challenge the discrimination between married heterosexual

and homosexual couples in all of these arenas. Historically the federal government has deferred to the states in determining who is and who is not married. Thus, its refusal to recognize a marriage that the State recognizes is much more obviously discriminatory than its differential treatment of a relationship (domestic partnership) that the State itself treats as inferior. Moreover, as discussed above, if same-sex couples could marry under State law, they would have standing to challenge discriminatory federal laws that refuse to recognize their marriages.

In sum, denying lesbian and gay couples the right to marry and relegating them to the new and lesser status of domestic partners, results in and reinforces unequal and discriminatory treatment. Further, it puts same-sex couples in the unenviable position of having to pay the same price (i.e., obligations to each other and third parties) for a half a loaf (i.e., rights, benefits, and recognition) that opposite-sex couples pay for a full loaf. This is unfair and discriminatory.

II. 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 MARITAL 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?

The "right to marry" is protected by the liberty and privacy clauses of our State Constitution because of the enormous benefits marriage confers on the individuals who choose to partake in it and because decisions about

marriage are so personal and self-defining that they go to the heart of what it means to be a full participant in our society. As courts have explained, it is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Loving v. Virginia* (1967) 388 U.S. 1, 12; accord, *Perez,* 32 Cal. 2d at 714 ["Marriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right of free men."]; *id.* at 715 [marriage is " 'one of the basic civil rights of man' "]; *id.* at 734 (conc. opn. of Carter, J.) [right to marry "involves the pursuit of happiness in its clearest and most universally approved form."].)

The State governs marriage to advance governmental interests in stable relationships, orderly distribution of property, and support and care for adults and children. (RA 242-43.) The State confers certain rights and benefits on married persons to promote these *governmental* interests. But marriage is protected as a fundamental right under the liberty and privacy clauses of the California Constitution for quite different reasons – reasons that pertain to an individual's interests in association, expression, personal beliefs and self-definition, dignity, autonomy, happiness, and privacy. "Homage to personhood is the foundation for individual rights protected by our state and national Constitutions." (*In re William G.* (1985) 40 Cal.3d 550, 563.) Certain attributes of marriage core to these interests are therefore protected by the California Constitution. And any rights or benefits of marriage that embody those core attributes of marriage are part and parcel of what the Constitution protects. In particular, the legal title and status of marriage implicate many of the core attributes of marriage protected by the California Constitution, including expression, personal beliefs and self-definition, dignity, autonomy, and happiness. Thus, the

title and status of marriage could not be eliminated or denied to same-sex couples absent a compelling State interest.

But some rights and obligations provided by the State for the purposes of advancing its governmental interests could be changed or eliminated without violating the California Constitution, so long as the change was even-handed. For example, the right to file tax returns jointly or to take paid or unpaid leave to tend an ill spouse do not have significant constitutional implications and could be altered or withdrawn by the State.

In the following sections, the City explains why marriage is constitutionally protected and identifies the core attributes of marriage courts have recognized as within that zone of constitutional protection. It then identifies specific marital rights, benefits, and obligations that the State could and could not, without compelling reasons, constitutionally deny.

A. Marriage Is Constitutionally Protected Because It Implicates Important Associational Interests, The Right To Pursuit Of Happiness, Freedoms Of Belief And Expression, Personal Dignity, Privacy, And Autonomy.

The core attributes of marriage protected by the California Constitution derive from the recognition by courts that marriage enhances the lives of those who enter into it in crucial ways. Not the least of these are the deep personal connection, companionship, intimacy, and sense of family that marriage can provide. (See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479, 486 ["Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects"]; *Zablocki v. Redhail* (1978) 434 U.S. 374, 384 [marriage is "the most important relation in life"]; *Roberts v. United States Jaycees* (1984) 468

U.S. 609, 618-19 ["Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life"].)

These life-enhancing aspects of marriage foster important associational interests that the Constitution recognizes and protects. *Roberts,* at 619 ["[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty"]; cf. *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130, fn. 3 "[t]he choice of household companions -- of whether a person's 'intellectual and emotional needs' are best met by living with family, friends, professional associates, or others -- involves deeply personal considerations as to the kind and quality of intimate relationships within the home," some internal quotations and citations omitted.) Decisions about whether and who to marry implicate these same associational interests and are also constitutionally protected. (*Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275, citing Karst, *The Freedom of Intimate Association* (1980) 89 Yale L.J. 624, 641 fn. 90; see also *Zablocki*, at 385, fn. 10 [discussing case holding filing fees for divorce violated due process and noting that those fees "touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship"].)

Because the association can be so personally fulfilling, marriage also strongly implicates the constitutional right to pursuit of happiness. (See

Loving, 388 U.S. at 12; *Perez*, 32 Cal.2d at 714, 715; *Bowers v. Hardwick* (1986) 478 U.S. 186, 204-05 (dis. opn. of Blackmun, J.) [basis for "accord[ing] shelter" to "certain rights associated with the family" under the due process clause is "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life"; "we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households"]. As the Supreme Judicial Court of Massachusetts stated in *Goodridge,* 798 N.E.2d at 955, marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity." (See also *Elden,* 46 Cal.3d at 274-75 [marriage is accorded "special consideration" and "dignity" by the state in recognition that "marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime," internal quotations and citation omitted.)

Another core attribute of marriage is its expressive function. (*Turner v. Safley* (1987) 482 U.S. 78, 95-96 [Marriages "are expressions of emotional support and public commitment" and "[t]hese elements are an important and significant aspect of the marital relationship"].) When two individuals marry, they publicly express their dedication and commitment to support each other through the licensing and solemnization procedures required by law. In doing so, the two individuals legitimate their relationship in the eyes of the law and society and ensure that the State will protect and support their mutual commitment. After the ceremony, married persons continue to express the primacy of their relationship, typically by referring to themselves as "married" and to each other as "spouse," "husband" or "wife," wearing wedding rings, changing or combining their

names, or using the title "Mrs." These commonly understood symbols of marriage declare to all that the married person is committed to his or her spouse and that the relationship is important (likely central) to his or her life. (See, e.g., RA 294, 301, 305-06, 309, 316, 317-18, 323-24) In conveying this message, the married person expresses an important part of his or her identity. (RA 293-94.)

Another expressive aspect of marriage for many is its "spiritual significance"; entering the civil institution of marriage may express religious faith as well as personal dedication. (*Turner*, 482 U.S. at 96; see also *Perez*, 32 Cal.2d at 740 (conc. opn. of Edmonds, J.).) Thus, the State allows marriages to be solemnized by ordained clergy (§ 400; see also §§ 307, 402), and many persons have their marriages performed in places of worship. The expressive functions of marriage are among the core attributes marriage that are constitutionally protected. (See *Turner*, at 96.)

An equally important attribute of marriage that contributes to the well-being of married couples and their children is the universal recognition of and reverence for marriage in our society, which results in significant part from the State's imprimatur. Marriage is instantly and universally recognized and honored by governments, employers, businesses, schools, hospitals, and other institutions of all kinds, as well as by friends, family, and other individuals with whom one comes into contact. Married couples do not have to explain their relationship to anyone; just using the words "marriage" or "married" says it all. (RA 305 ["When you tell somebody that your daughter or son is 'married,' they know what you mean. They know your son or daughter has someone they love and someone they are committed to. [¶] When your son or daughter is married, you know how to introduce their spouse to your friends: you call them your son or son-in-

law or daughter or daughter-in-law. Everyone knows what that means. It means they are related to you and are part of your family"]) Children benefit from this legal and social recognition as well. Children born to married persons are both legally and socially presumed to be legitimate and to be the children of the married couple. (See *In re Elijah V.* (2005) 127 Cal.App.4th 576, 585; §§ 7540, 7611.) Even though California, like other states, has endeavored to eliminate "legal distinctions between marital and nonmarital children, . . . the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children." (*Goodridge*, 798 N.E.2d at 956; see *Turner*, 482 U.S. at 96 [marriage "legitimat[es] children born out of wedlock"]; see RA 301, 316-18, 326-28, 921.) The state-sanctioned title of "marriage" thus bestows on a couple's relationship and on their children a special status in the eyes of the law and society -- one that affects how they are perceived and treated by others. (*Elden*, 46 Cal.3d at 274-75; see RA 915-18; RA 293-94, 300-03, 305-07, 316-18, 323-24, 326-28, 309-13.)[7]

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[7]"[M]arriage has profound effects on how married partners see themselves and *how others regard them*, . . . Indeed, the level of public debate and controversy surrounding the question of whether marriage rights should be granted to same-sex couples is an indication of the special status that marriage has as a social institution." (RA 917-18.) "Through [marriage], society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self worth and dignity." (*Halpern v. Toronto*, (Ont.Ct.App. 2003) 36 R.F.L.(5th) 127 [RA 333, 510, 523].)

The universal recognition of civil marriage and the intangible benefits that flow from the legal title of "marriage" implicate both expressive and dignitary interests that are constitutionally significant. The title and status of marriage as sanctioned by the State is something that everyone understands. As a result, many, if not most, people bestow on marriage and a couple who enters into it, a special esteem reserved for the most sacred kind of family commitment. Indeed, the United States Supreme Court has observed that marriage is "older than the Bill of Rights — older than our political parties, older than our school system." (*Griswold*, 381 U.S. at 486.) Marriage is understood as a deep and enduring commitment between two individuals that is sanctioned by the State. And the civil institution of marriage is esteemed in the eyes of the law and society as representing "the most important relation in life" and "the foundation of the family in our society" (*Zablocki*, 434 U.S. at 384, 386; see also *Griswold*, 381 U.S. at 486 [describing marriage as "intimate to the degree of being sacred" and "an association for as noble a purpose as any involved in our prior decisions"].) As the United States Supreme Court observed in *Zablocki*, "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." (*Zablocki,* 434 U.S. at 386, emphasis added.) And in *Turner*, the court identified the intangible governmental and social benefits as among the core attributes of marriage that are constitutionally protected. (*Turner,* 482 U.S. at 96.) Thus, the recognition and esteem accorded to the civil institution of marriage are constitutionally significant attributes that the State may not withhold.

Finally, one of the core attributes of marriage that the California Constitution protects is personal autonomy: a person's right to make decisions for oneself, based on one's personal beliefs, about this momentous and self-defining act.[8] This autonomy interest extends not only to the decision whether to marry, but the decision whether to marry a particular person. (See *Perez*, 32 Cal.2d at 715 [describing the right to marry as "the right to join in marriage with the person of one's choice" and striking down miscegenation law because it "restricts the scope of [a person's] choice and thereby restricts his right to marry"]), 716 ["The right to marry is the right of individuals, not of racial groups"], 717 ["the essence of the right to marry

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[8] (See *Zablocki*, 434 U.S. at 384 [Court has "routinely categorized the decision to marry as among the personal decisions protected by the right of privacy"]; *Roberts*, 468 U.S. at 619 [protection of marriage and similar relationships "safeguards the ability independently to define one's identity"]; *Lawrence v. Texas* (2003) 539 U.S. 558, 574 [describing "the respect the Constitution demands for the autonomy of the person in making" choices about family matters, including marriage]; *Planned Parenthood v. Casey* (1992) 505 U.S. 833, 851 ["personal choices" regarding marriage and family are "central to personal dignity and autonomy"; personal decisions relating to marriage and other family matters "involve[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"; "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."]; cf. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 333 [protecting woman's right to make decisions about procreation because such decisions are "central to a woman's control . . . of her own body, . . . her social role and personal destiny," have "enormous" implications "for a woman's education, employment opportunities and associational opportunities" and "may also implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs"]; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34 [referring to "freedom . . . to pursue consensual familial relationships" as "an interest fundamental to personal autonomy"].)

is freedom to join in marriage with the person of one's choice" and segregation in this context "necessarily" impinges on that freedom], 725 ["A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains"].)

B. The State Could Not Deny, Without A Compelling Governmental Interest, The Title And Status Of Marriage Or The Right To Decide Whether And Who To Marry And How To Conduct One's Marital Relationship.

In light of the core attributes of marriage protected by the California Constitution, the State could not, without a compelling governmental interest, eliminate the state-sanctioned title and status of marriage. It could not cease issuing marriage licenses. It could not refuse to confer the title and status of "marriage" and substitute some newer less meaningful concept in its place. This would deny the recognition and prestige that only the civil institution of marriage can provide and deprive Californians of the dignitary interests of marriage protected by the Constitution. It would also tread on the expressive attributes of marriage, which are also constitutionally protected. And by denying them the recognition of and esteem for civil marriage, it would deny Californians the right to pursue "happiness in its clearest and most universal form." (*Perez*, 32 Cal.2d at 734 (conc. opn. of Carter, J.).)

Nor could the State, without a compelling interest, deny persons – including lesbians and gay men – the right to decide whether (or not) to marry, who to marry, or how to conduct one's marital relationship (i.e., when and how to engage in sexual intimacy, whether and when to have children and how many, how to share the responsibilities of supporting

their family, maintaining a household, and raising and educating any children).[9] Again, these decisions reflect highly personal beliefs, involve the most important associational interests, and go to the heart of controlling one's personal destiny and pursuing happiness. They are thus central to the fundamental "right to marry" protected by our State constitutional guarantees of liberty, privacy, and the pursuit of happiness. Entering into marriage also involves important expressive interests. For these reasons, decisions whether and who to marry are constitutionally protected.

Sections 300 and 308.5 deny lesbians and gay men these core attributes of marriage. By limiting their right to marry to persons of the opposite sex, these statutes deny lesbians and gay men the autonomy to marry the one person who is "irreplaceable" to them. They are thus forced to choose between the associational and happiness interests that come from creating a family with someone whose companionship and love will be deeply fulfilling, on the one hand, and the expressive and dignitary interests that come from entering into the one state-sanctioned relationship that is universally recognized and revered, on the other. The liberty and privacy clauses of the California Constitution prohibit the State from denying lesbians and gay men any of the core attributes of marriage or forcing them

[9] It is also doubtful that the State today could, without a compelling interest, constitutionally deny to married persons the right to dissolve their marital relationship through divorce or deny divorced persons the right to remarry. Historically, the states did limit the right to divorce (see City OB 22-25), but decisions about divorce and remarriage, like those about marriage, implicate deeply personal and intimate concerns and beliefs and are central to the social role and personal destiny of each person. This, the United States Supreme Court's privacy jurisprudence, and our State's constitutional amendment providing an express right to privacy raise serious questions about whether laws severely limiting divorce are constitutional.

to choose among those attributes. Indeed, the forced choice between those two sets of core attributes deprives lesbians and gay men of their personal autonomy – which too is protected by the Constitution. Thus, absent a compelling governmental interest, the State cannot deny the title and status of marriage to a same-sex couple who wishes to make the deeply personal commitment and self-defining act of entering into the civil marriage. Such a denial deprives that couple of their rights under the liberty and privacy clauses as well as the equal protection clause of the California Constitution.

Of course, this does not mean that the State could not change or limit many of the rights, benefits, or obligations associated with the civil institution of marriage even if it lacked a compelling reason to do so. There are closer questions, such as whether the State could, without a compelling governmental interest, deny married persons the right to visit each other in the hospital or prevent one spouse from making medical decisions for the other when the latter is incapacitated. The zone of privacy that protects the marital relationship and the autonomy of individuals to make the commitment that marriage represents arguably extend beyond sexual intimacy and procreation decisions to matters such as these. Also questionable is whether the State could eliminate the statutory privilege that prevents a person from being forced to testify against his or her spouse. Requiring such testimony, absent a compelling government interest, could intrude on the privacy of the marital relationship to a degree that raises constitutional concerns.

Nonetheless, there are rights and obligations that the State and federal governments have attached to marriage that plainly are *not* constitutionally significant and that could, even without a compelling

interest, be eliminated for all couples, at least on a prospective basis[10]. Examples include joint filing of tax returns, property tax exemptions, health, pension and other benefits provided to spouses of government employees, state and federally subsidized health, welfare, and other benefits provided to spouses of government employees and veterans, and paid or unpaid family leave provided for the care of a spouse. The Legislature also presumably could repeal the provision of the wrongful death statute allowing individuals to sue tortfeasors who cause the death of their spouse. While these rights, benefits and protections are designed to support the marital relationship, they do not go to the core of the marital relationship protected by the California Constitution. Nor are they critical to the autonomy interests of individuals to define themselves and decide how to live, the privacy interests that protect the marital relationship from state interference, or the associational, expressive, and dignitary interests that marriage embodies.

However, it should go without saying that if the Legislature were to reduce or eliminate some of the rights, benefits or obligations attached to marriage that are not themselves of constitutional dimension, it would still have to do so in an even handed manner consistent with the equal protection clause. For the reasons discussed at pages 48-82 of the City's Opening Brief, a compelling government interest would still be required for the State to deny such benefits to same-sex couples while granting them to opposite-sex couples.

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[10] Plainly the State could not make changes that would destroy vested rights, such as existing rights in community property held by persons already married.

III. 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?

Marriage is more than a "name." It is a legal title and status that is unique because of its place in our culture as a state-sanctioned relationship. Thus, the terms "marriage" and "marry" are constitutionally significant. Accordingly, the Legislature could not, consistent with the California Constitution, replace civil marriage with a differently named institution. Furthermore, even if the State could decide to eliminate civil marriage for *all* its citizens, it could not deny civil marriage to some while extending it to others, absent a compelling reason for doing so. Otherwise, the State would be free to exclude other disfavored groups – such as deadbeat parents or prisoners – from the civil institution of marriage and relegate them to a differently-named institution like domestic partnership.

To understand this point, one need only consider the following hypothetical: The State ceases to issue marriage licenses and revokes the marriage licenses of all those who currently have licenses issued by subdivisions of this State. It provides as a substitute, both for already married people and people who wish to marry, a "certificate of domestic partnership." The State declares that civil marriage no longer exists in California, that persons previously married are no longer married under State law, and that all the rights, benefits, and obligations of marriage will now be conferred on domestic partners. In this situation, would a couple already married or a couple who wishes to marry in California have a claim

for violation of their constitutional rights to liberty and privacy? The City believes they would.

Depriving persons who wish to marry the right to enter into that state-sanctioned relationship would deny them the important expressive and dignitary interests that flow from our society's recognition of and reverence for marriage. The esteem in which our society holds marriage flows in large part from the approbation our State and others have long given to the institution through the entry and exit requirements the State imposes, the process of licensing and solemnization the State prescribes, and the myriad rights and benefits the State accords to those who choose to enter into marriage.

> Marriage has a legitimacy that has been earned through many years of validation and institutionalization in law and society. Enhanced by government recognition for so long, legal marriage is a symbol of privilege. The idea that marriage is the happy ending, the ultimate reward, the sign of adult belonging, and the definitive expression of love and commitment is deeply ingrained in our society. This is reflected in and perpetuated in custom and the high and popular arts as well as in law. (RA 241)

It is marriage that people hold up as the ideal for permanent and long-term relationships and for expressing commitment, dedication, loyalty, fidelity, and emotional support. It is marriage that the Court has described as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." (*Griswold,* 381 U.S. at 486.) It is marriage that society reveres as "the foundation of the family in our society." (*Zablocki,* 434 U.S. at 386.) And it is marriage that joins two families together as in-laws. (RA 0306-07; see also RA 0301.) As sixteen-year-old Michael Allen Queneville explained it:

> [M]arriage is the highest form of love that you can show someone, ... [I]n this society people respect

> the institution of marriage. People respect people who make that commitment and get married. It's an acknowledgement of a relationship and it isn't the real thing until you get married. (RA 0317-18.)

Without the State-conferred legal title and status of marriage, there is no reason to assume that a relationship, even if formalized under some another name, would be respected and honored by society to the same degree, viewed with the same reverence, or accorded the same honor and dignity. Certainly a domestic partnership would not be so honored today. For, in the words of a sixteen-year-old, "[d]omestic partnership is not the same as marriage. It's less than marriage and everybody knows it." (RA 317-18.)[11]

A union with another name, no matter how strongly the parties entering may wish it to be so, will not be recognized or honored widely (much less universally) by society. Nor therefore will it have the same expressive function or be able to convey the same depth of commitment or dedication or legitimacy as marriage. Indeed, the fact alone that it is called something else will signal to all who come across it that it is different in some meaningful way from marriage. Domestic partnerships and civil unions — both because of their novelty and because they were created specifically for a group long reviled and rejected — necessarily lack the stature and expressive capacity of marriage. Entering into such a relationship, even with its government sanction, is not the same as entering into a marriage. It is not even close.

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[11] A couple could, of course, call themselves married and even marry under the auspices of their religion, but they would not be married in the eyes of the law. Without the State–sanctioned legal title and status, many people — in and outside California — still would not view them as married.

Indeed, that is the crux of the dispute between the parties. It is why these cases are before the Court. Opponents are concerned that associating marriage with homosexuals, who have long been reviled by our culture, will deface and tarnish the name and image of the civil institution, and undermine the message it conveys. Their view that lesbians and gay men are less worthy — that they are immoral, that their relationships are less stable and less valuable to society than those of heterosexuals, indeed of no value at all — fuels their desire to exclude lesbians and gay men from marriage.[12] But their very fears about admission of lesbian and gay couples into the civil institution of marriage proves that marriage alone has a meaning that no other name can express — a meaning that is extremely important to all who partake of it.

Entering into marriage is a "momentous act of self-definition." (*Goodridge,* 798 N.E.2d at 955) It is momentous in significant part because of all that it says and signals to society about the individuals entering into it and the meaning of their relationship. It is self-defining because the decision whether and with whom to enter into marriage affects

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[12] The State pretends not to hold this distaste for lesbians and gay men. Yet, its principal rationales for upholding the distinction — protecting the "traditional definition" of marriage and deferring to the "will of the people" — are a thin smokescreen. In reality, the State is saying that the Court should not require it to allow lesbians and gay men to marry because doing so will upset a group within our society that views them with distaste and believes their participation in marriage will taint or tarnish it. Similarly, the State's argument that the Court should not hold that same-sex couples have a right to marry because that might result in political "backlash" is both an admission that society remains prejudiced against lesbians and gay men and a legally bankrupt argument that the Court should defer to this prejudice rather than fulfill its constitutional duty.

not only how others see the person but how he or she sees himself. (RA 917.)

These aspects of marriage — which are inseparable from its title — are, without doubt, constitutionally significant. The Legislature could not, therefore, consistent with the California Constitution, change the name of the legal relationship of "marriage" to some other name, even if it purported to preserve all of the rights and obligations that are now associated with marriage. Doing so would deny couples constitutionally significant rights that inhere in the title and status of marriage.

There are further reasons this is so. As already discussed, marriage is well understood by everyone in our culture; even young children know what it means. Domestic partnership, by contrast, is not. (See RA 298-99, 300, 301, 302, 312-13, 317-18, 323-24.) In the hypothetical described above, couples who were formerly married would now be called upon, in a way they never previously were, to explain the nature of their relationship and the significance of it to friends and family members, employers, and third parties with whom they do business. (See RA 298-301, 306-07, 312-13, 318, 322-24; Kelley, *2 months after New Jersey's Civil Union Law,* at A15.) That would be true even in this State, because there would be a long period of adjustment during which people would either be ignorant about or raise legitimate questions whether laws, contracts, and social matters that always have depended upon marriage are affected by the change in status to domestic partnership. For example, an insurer might question whether a policy issued to an individual that covered him and his spouse continued to apply to his domestic partner. Absent an amendment to that policy, the insurer might argue it did not. A California employer who provided benefits to employees and spouses might withdraw benefits from the former

spouses, now domestic partners, who would no longer be covered by the employer's ERISA plan. (See RA 898.)

If a couple who formerly were married traveled outside the State, other states might refuse to recognize their relationship now that California does not recognize it as marriage. If that couple had an accident in another state and one domestic partner was injured, the hospital in that state might not allow the other partner to visit or make medical decisions about the injured partner. (RA 917; see also RA 311, RA 915.) If the couple sent their teenage child to attend a school in another state, that state might refuse to recognize one of the domestic partners as the parent of that child. Worse, if one or both moved to another State, that State might refuse to recognize the parent-child relationship between one of them and the child. (See RA 258, 291.)

The lack of recognition that would result from withdrawal of the title "marriage" would have other serious consequences. It would create uncertainty, anxiety, and stress for the couple when either they or their children traveled outside of California. (RA 917.) It would intrude on their privacy by forcing them to explain and justify the nature of their relationship. This intrusion would demean the couples and their children and undermine their familial relationship. Relegating California citizens to a new and unrecognized form of legal recognition in lieu of the time-honored institution of marriage would therefore deprive them of important expressive and dignitary interests, which could not be denied absent a compelling state interest.

Finally, it bears emphasis that even if the State could deny *all* couples marriage licenses without running afoul of the liberty and privacy clauses of our State Constitution, that would not mean the State could deny

marriage licenses to some persons but not others. In the voting rights cases, the United States Supreme Court has held that, whether or not the states are required by the federal Constitution to permit citizens to vote, once they grant the right to the electorate they may not withhold it selectively, absent a compelling state interest, without violating equal protection. (*Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 666-67.) It has thus struck down poll taxes and fees because there is no connection between affluence and voter qualifications. (*Id.* at 666) It has also stated that membership in the armed services, home site, and occupation are impermissible grounds for restricting the right to vote. (*Id.* at 667.) In *Harper*, the Court held that the right to vote is fundamental for equal protection purposes even if a state could decline to hold elections altogether. (See *id.* at 666, 668-69, 670.) For that reason, restrictions on the right to vote are subject to strict scrutiny whether or not they are based on a suspect classification. (See *Dunn v. Blumstein* (1972) 405 U.S. 330, 337 [striking down durational residency requirements for voting in state elections].)

Here, even if the State could constitutionally withdraw from the marriage business altogether — a proposition with which, for the reasons stated above, the City does not agree — that would not mean that the State could issue marriage licenses to a select group of California citizens while denying them to others. Quite apart from being protected by the liberty and privacy clauses, the right to marry (like the right to vote) is fundamental for *equal protection* purposes. (See *Perez,* 32 Cal.2d at 714-15; *Zablocki,* 434 U.S. at 374.) For that reason alone, under equal protection, limitations on marriage must be justified under a standard more stringent than rational basis. (See *Zablocki,* at 388 ["When a statutory classification significantly

interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"].)

If the legal title and status of marriage were not protected as fundamental under the equal protection clause of the California Constitution, then the State could selectively deny that title and status to any disfavored group. The State could exclude the elderly, the mentally ill, the deadbeat parents, the divorced, and the imprisoned from the civil institution of marriage and relegate them to a differently-named institution. But such a result would demean and stigmatize those groups in the same way that being limited to domestic partnerships demeans and stigmatizes lesbians and gay men. Such a result would deprive the members of those groups of the constitutionally-protected attributes of marriage. Thus, the State cannot, as it has done here, issue marriage licenses to some but withhold them from others without a compelling justification. This is true whether or not the group denied the right is deemed a suspect class.

IV. 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 MARRIAGES OF SAME-SEX COUPLES THAT ARE ENTERED INTO IN ANOTHER STATE OR COUNTRY OR DOES THE PROVISION ALSO APPLY TO AND PROHIBIT MARRIAGES OF SAME-SEX COUPLES 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 MARRIAGES OF SAME-SEX COUPLES THAT ARE ENTERED INTO WITHIN CALIFORNIA BUT DENY SUCH RECOGNITION TO MARRIAGES OF SAME-SEX COUPLES THAT ARE ENTERED INTO IN ANOTHER STATE? DO THESE FEDERAL CONSTITUTIONAL PROVISIONS AFFECT HOW FAMILY CODE SECTION 308.5 SHOULD BE INTERPRETED?[13]

If the Court holds that section 300 – which prohibits California from recognizing marriages of same-sex couples entered into within California – violates the California Constitution on any of the grounds urged by the City, then section 308.5 is unconstitutional regardless of whether it applies to in-state marriages. In that case, section 308.5 would, by definition, be unconstitutional to the extent it applies to in-state marriages. Similarly, section 308.5 would be unconstitutional to the extent it prohibits the recognition of marriages of same-sex couples entered into outside

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[13] Throughout this question, the Court uses the term "same-sex marriage." On occasion, the City may have done the same. But upon further reflection, the City believes that the term is a misnomer. "Same-sex" marriage does not exist; only marriage does. And the City has filed this action to secure access for lesbians and gay men to the civil institution of marriage – and not to give them a nonexistent right to "same-sex" marriage. Indeed, the term "same-sex marriage" implies that marriages between same-sex couples are somehow different than and inferior to the marriages of their heterosexual counterparts. Rather than implicitly foster the very inequality that it seeks to eliminate, the City therefore eschews that term and respectfully rephrases the Court's question.

California because there is no more rational or compelling justification for denying the validity of out-of-state marriages of same-sex couples than there is for prohibiting in-state marriages of same-sex couples. None of the parties identify any difference between the ban on in-state marriages of same-sex couples and the refusal to recognize out-of-state marriages of same-sex couples. Thus, the Court need not decide the proper interpretation of section 308.5 or any of the other issues presented in this question if it agrees with the City on any of the substantive constitutional issues.

If, however, this Court finds it necessary to resolve this question[14], the City explains below that: (1) section 308.5 does not apply to in-state marriages and only prohibits the recognition of marriages of same-sex couples entered into outside California; (2) denying recognition of marriages of same-sex couples entered into in another state would violate both the Full Faith and Credit Clause and the Privileges and Immunities Clause if California recognizes marriages of same-sex couples entered into within California; and (3) neither the Full Faith and Credit Clause nor the Privileges and Immunities Clause affects how section 308.5 should be interpreted.

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[14] Neither the Court of Appeal nor the trial court addressed whether section 308.5 applies to in-state marriages or any other issues raised by this question. If the Court believes that the issues raised in this question still need to be decided after resolving the state constitutional issues, then it may remand the matter with instructions to do so.

A. Section 308.5 Prohibits Only The Recognition Of Marriages Of Same-Sex Couples Entered Into In Another State Or Country – And Not Marriages Of Same-Sex Couples Entered Into Within California.

The application of well-established rules of statutory construction establishes that section 308.5 only prohibits the recognition of marriages of same-sex couples entered into outside California.

"In interpreting a voter initiative," California courts "apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) Thus, the words of an initiative must be given "their ordinary meaning" (*ibid.*, internal quotations omitted), and be "interpreted in the sense in which they would have been understood at the time of enactment" (*People v. Cruz* (1996) 13 Cal.4th 764, 775). "If the language is clear and unambiguous, [courts] follow the plain meaning of the measure." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.)

That language, however, must still be construed "in the context of the statute as a whole and the overall statutory scheme." (*Rizo*, 22 Cal.4th at 685, internal quotation omitted.) "[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Thus, courts should " 'read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." ' " (*Calatayud v. State* (1998) 18 Cal.4th 1057, 1065, quoting *Peter v. Pieters* (1991) 52 Cal.3d 894, 899.) Moreover, "[i]t is a fundamental rule that a statute should be construed in the light of the history of the time and the conditions which prompted its enactment." (*People v. Fair* (1967) 254 Cal.App.2d 890, 893, internal quotation marks omitted.) And "[w]hen the language is ambiguous" –

whether on its face or in context – courts may "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, internal quotations omitted.)

Application of these rules reveals that section 308.5 does not prohibit in-state marriages of same-sex couples and only bars the State from recognizing out of-state marriages of same-sex couples. As an initial matter, the literal language of section 308.5 – which states that "[o]nly marriage between a man and a woman is valid or recognized in California" – is ambiguous. On the one hand, this language, by stating that only such marriages are "valid," arguably reaffirms that marriage in California must be between a man and a woman. On the other hand, this language could also be reasonably construed to mean that California will only consider out-of-state marriages of opposite-sex couples to be "valid" marriages and will not recognize out-of-state marriages of same-sex couples for any purpose.[15] Indeed, only the latter construction is consistent with the way the immediately preceding section uses the term "valid." (See § 308 ["marriage 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"].

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[15] Under this construction, the terms, "valid" and "recognized," would have separate meanings. "Valid" would refer to valid marriages, and "recognized" would refer to the recognition of such marriages for some other purpose – i.e., providing spousal or child support upon divorce or allowing wrongful death damages to one spouse if the other is injured. In any event, a minor redundancy between two terms used in a single statute may be permissible in order to effectuate the voter's intent. (See *Rizo*, 22 Cal.4th at 687 [permitting an interpretation that renders the statutory term "true" a minor redundancy in order to effectuate the voter's intent].)

But this ambiguity disappears when section 308.5 is construed in context. (See *Calatayud*, 18 Cal.4th at 1065.) Section 300[16] already establishes that the State will only permit marriages between opposite-sex couples within California. Construing section 308.5 to apply to in-state marriages would therefore render language in section 300 superfluous. Because this would violate the rules of statutory construction, section 308.5 should be construed to apply only to out-of-state marriages. (See *Hassan v. Mercy Am. River Hosp.* (2003) 31 Cal.4th 709, 715-716 [precluding "judicial construction that renders part of the statute 'meaningless or inoperative' "].)

The pertinent ballot analyses and arguments bolster this conclusion. As the Legislative Analyst explained in its analysis of Proposition 22,

> Under current California law, "marriage is based on a contract between a man and a woman. Current law provides that a legal marriage that took place inside of California is generally considered valid in California. No state in the nation currently recognizes a civil contract or any other relationship between two people of the same sex as a marriage. (RA 90.)

Thus, the analysis acknowledged that only opposite-sex marriages in California are valid under existing law and impliedly recognized that other states may permit marriages of same-sex couples. In doing so, this analysis strongly suggests that section 308.5 addresses only the risk that the State would have to recognize out-of-state marriages of same-sex couples

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[16] Section 300 states in relevant part:

> Marriage is a personal relation arising out of a civil contract between a man and a woman .... Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Sections 500).

because of section 308 – which again provides that "[a] marriage 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."

The ballot arguments confirm that the purpose of Proposition 22 was to prevent California from honoring other states' decisions on this issue. The argument in favor of Proposition 22 acknowledged that "California law already says only a man and a woman may marry" (RA 92), but claimed that Proposition 22 was "necessary" to prevent the State from recognizing out-of-state marriages between same-sex couples (RA 92).[17] Similarly, in explaining the need for section 308.5, the rebuttal to the argument in opposition to Proposition 22 stated:

> THE TRUTH IS, UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE "SAME-SEX MARRIAGES" PERFORMED IN OTHER STATES. [¶] That's why 30 other states and the federal government have passed laws to close these loopholes. California deserves the same choice. (RA 91.)

Thus, section 308.5 was enacted solely to plug a legal loophole – section 308 – which required California to recognize out-of-state marriages of same-sex couples notwithstanding section 300. In other words, section 308.5 simply limited the application of section 308 to marriages between a man and a woman. (See *United Bus. Com. v. City of San Diego* (1979) 91

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[17] This argument states:

> When people ask, "Why is this necessary?" I say that even though California law 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, even though most people believe marriage should be between a man and a woman.

Cal.App.3d 156, 170 [holding that statute "must be construed in light of its historical background and evidence objective"].)

The historical backdrop behind the passage of Proposition 22 provides additional support for this interpretation of section 308.5. Responding to the possibility that sister states would have to recognize marriages of same-sex couples performed in Hawaii, Congress passed the federal Defense of Marriage Act (DOMA) in 1996 – approximately four years before the passage of Proposition 22.[18] (Kay, *Same-Sex Divorce in the Conflict of Laws* (2004) 15 King's College L.J. 63, 72.) To reduce that possibility, the federal DOMA provided in relevant part that:

> [n]o State, territory, or possession, of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. (28 U.S.C. § 1738C)

Following the passage of the federal DOMA, many states enacted similar provisions – dubbed "mini-DOMAs" by commentators. Consistent with the federal DOMA – which expressly allowed a state to refuse to recognize marriages of same-sex couples performed outside that state – these mini-DOMAs typically barred the enacting state from recognizing

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[18] In 1993, the Hawaii Supreme Court held that the exclusion of lesbians and gay men from the state-sanctioned institution of marriage was subject to strict scrutiny under the Hawaii Constitution. (*Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, 67.) On remand, the Circuit Court of Hawaii held that the exclusion violated the equal protection clause of the Hawaii Constitution. (*Baehr v. Miike* (Haw. Cir. Ct. Dec. 3, 1996) 1996 WL 694235, *22.) However, Hawaii amended its Constitution in 1998 to limit marriage to opposite-sex couples. (*Baehr v. Miike* (Haw. 1999) 1999 Haw. LEXIS 391, *6.)

marriages of same-sex couples performed in any other state. As explained in the ballot arguments, section 308.5 is one example of the mini-DOMAs enacted pursuant to the federal DOMA and represents California's codification of what the federal DOMA expressly allowed. (See, e.g., RA 91.) Indeed, section 1 of Proposition 22 states: "This act may be cited as the California *Defense of Marriage Act*." (Italics added.)

Finally, the location of section 308.5 within the Family Code and its section number strongly suggest that section 308.5 only prohibits the recognition of marriages of same-sex couples entered into outside California. (See *Sanchez v. Workers' Comp. Appeals Bd.* (1990) 217 Cal.App.3d 346, 354-355 [considering location of statute within the statutory scheme in determining proper interpretation].) Section 308.5 immediately follows section 308 – which only addresses the validity of out-of-state marriages. And its section number – 308.5 – implies that it modifies section 308. Locating section 308.5 in this manner within the Family Code evidences a legislative intent to limit the application of that section to out-of-state marriages.

Thus, it is clear that section 308.5 "was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming . . . that their marriages must be recognized as valid marriages." (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424.) Indeed, nothing in the ballot analyses or arguments suggests that section 308.5 was intended to supersede sections 300 and 301 in any way. Instead, those materials indicate that section 308.5 was intended to complement those statutes by

barring California from recognizing out-of-state marriages between same-sex couples.[19] (See RA 90-92.)

Knight, 128 Cal.App.4th 14 is not persuasive authority to the contrary. In *Knight*, the Court of Appeal considered the language of section 308.5 in isolation – and not in context. Moreover, the court did not even mention – much less consider – the ballot materials or the relevant historical background. Its reasoning is therefore flawed and should not be followed. Accordingly, this Court, if it reaches the issue, should hold that section 308.5 applies only to out-of-state marriages.

B. If California Recognizes Marriages Of Same-Sex Couples Entered Into Within California, Then It May Not Deny Recognition To Marriages Of Same-Sex Couples Entered Into In Another State Under The Full Faith And Credit Clause.

Currently, section 300 prohibits California from recognizing marriages of same-sex couples entered into within California. Thus, the issue posed by the Court's hypothetical – whether California could recognize marriages of same-sex couples entered into within California but deny recognition to such marriages entered into outside California under the Full Faith and Credit Clause – is not presented by this appeal. And if this Court holds that section 300 is unconstitutional on any of the grounds urged by the City, then section 308.5 would be unconstitutional as well. Thus, the issue need not be decided here.

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[19] Contrary to the assertions of the Proposition 22 Legal Defense and Education Fund (see Proposition 22 Legal Defense and Education Fund Answer to Petitioners' Opening Brief on the Substantive Issues 82-83), unpassed legislation proposed by Senator Knight, the proponent of Proposition 22, has little or no probative value (see *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 573, fn. 5 [" 'Unpassed bills, as evidence of legislative intent, have little value' "]).

Moreover, even if this appeal did present the issue, the issue should first be resolved under state law. In other words, the Court should apply state law principles of comity or state constitutional principles and avoid the federal Full Faith and Credit issue if possible. In the past, this Court has regularly recognized out-of-state marriages to avoid inequities even though California law prohibited such marriages.[20] Thus, any refusal to recognize out-of-state marriages of same-sex couples under the Court's hypothetical would likely violate the equal protection of the California Constitution. Nonetheless, if the Court finds it necessary to resolve the issue, then it should hold that the Full Faith and Credit Clause requires California to recognize out-of-state marriages of same-sex couples if it recognizes in-state marriages of same-sex couples.

The Full Faith and Credit Clause of the federal Constitution states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be provided, and the Effect thereof. (U.S. Const. art. IV, § 1.)

Pursuant to this Clause, Congress has enacted 28 U.S.C. section 1738 which states:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and

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[20] (See, e.g., *McDonald v. McDonald* (1936) 6 Cal.2d 457, 459-60 [upholding Nevada marriage of underage persons who evaded California law requiring parental consent in action for maintenance following breakup]; *Estate of Wood* (1902) 137 Cal. 129, 136 [upholding Nevada marriage that would have been void under California law in action for family allowance]; *Pearson v. Pearson* (1873) 51 Cal. 120, 125 [upholding Utah marriage between white woman and black man that would have been void under California law in inheritance dispute].)

> its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

In applying the Full Faith and Credit Clause, courts differentiate between "judgments" and "laws (legislative measures and common law)." (*Baker v. Gen. Motors Corp.* (1998) 522 U.S. 222, 232.) "Regarding judgments . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." (*Id.* at 233.) This is true even if the judgment contravenes the public policy of the forum state. (*Ibid.*)

By contrast, "the full faith and credit command . . . is less demanding with respect to choice of laws." (*Franchise Tax Bd. v. Hyatt* (2003) 538 U.S. 488, 494.) "[T]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." (*Ibid.*) Thus, the Clause only requires California to apply the laws of another state if those laws do not violate California's "own legitimate public policy." (*Id.* at 497; see also *Pac. Employers Ins. Co. v. Indust. Accident Com.* (1939) 306 U.S. 493, 504 [holding that the Full Faith and Credit Clause does not require California to apply a Massachusetts law "obnoxious to" its own public policies].)

In the hypothetical posed by this Court, there would be no difference between the laws of California governing marriages within California and the laws of another state like Massachusetts that permit same-sex couples to marry. Thus, if California recognizes marriages of same-sex couples entered into within California, then its recognition of marriages of same-sex couples entered into in, for example, Massachusetts would not require

California to substitute Massachusetts law "for its own statutes dealing with a subject matter concerning which it is competent to legislate." (*Hyatt*, 538 U.S. at 494.) Under both California and Massachusetts law, same-sex couples could marry. Because there would be no conflict between Massachusetts marriage laws and the public policies of California, the Full Faith and Credit Clause would require California to recognize marriages of same-sex couples entered into in Massachusetts. (See *id.* at 497.)

Section 308.5 does not compel a contrary conclusion.[21] The Full Faith and Credit Clause requires California to recognize marriages of same-sex couples entered into in another state unless it "would violate California's own legitimate public policy." (*Hyatt*, 538 U.S. at 497.) Once California recognizes marriages of same-sex couples entered into within California, any refusal to recognize marriages of same-sex couples entered into outside California would serve no legitimate public policy.[22] Indeed, there would be no rational reason for California to distinguish between in-state marriages of same sex couples – which are clearly permissible under the Court's hypothetical – and out-of-state marriages of same-sex couples. Such an arbitrary distinction cannot be a "legitimate public policy" that precludes the application of the Full Faith and Credit Clause.

Indeed, the distinction makes no sense in light of California's strong public policy in favor of equality. As explained in the City's opening and

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[21] Given the Court's hypothetical, the City assumes that section 308.5 applies only to out-of-state marriages and does not prohibit in-state marriages of same-sex couples.

[22] This does not, however, mean that existing California law – which prohibits the recognition of in-state (§300) and out-of-state marriages (§308.5) of same-sex couples – does not violate the Full Faith and Credit Clause.

reply briefs, California public policy treats lesbians and gay men as equal to heterosexuals in almost all respects except the one at issue in this case. (City OB 37-40, City and County of San Francisco's Consolidated Reply Brief (City Reply) 34-35.) But once that exception has been eliminated (as in the Court's hypothetical), there is *no* California public policy that supports treating out-of-state marriages of same-sex couples any differently than in-state marriages of same-sex couples.

And the distinction makes even less sense because California would have to recognize judgments predicated on the recognition of marriages of same-sex couples entered into in another state. For example, a divorce decree dissolving an out-of-state marriage of a same-sex couple is entitled to full faith and credit because there is no public policy except for judgments. (*Worthley v. Worthley* (1955) 44 Cal.2d 465, 467-68, see also *Baker*, 522 U.S. at 233.) By giving full faith and credit to such a decree, California implicitly recognizes that the marriage is valid and necessitates dissolution. In light of this implicit recognition required by law, California's strong public policy in favor of equal treatment of lesbians and gay men, and California's recognition of marriages of same-sex couples entered into within California, there is no legitimate public policy that could justify the refusal to recognize marriages of same-sex couples entered into outside California. Accordingly, the Full Faith and Credit Clause requires California to recognize out-of-state marriages of same-sex couples if it recognizes in-state marriages of same-sex couples.

C. If California Recognizes Marriages Of Same-Sex Couples Entered Into Within California, Any Refusal To Recognize Such Marriages Entered Into In Another State Would Likely Violate The Privileges And Immunities Clause.

California's marriage laws currently treat in-state and out-of-state residents who are same-sex couples the same. Neither may enter into marriages recognized by California. Thus, those laws do not violate the Privileges and Immunities Clause at this time, and the Court need not address the issue. Moreover, the same will be true if the Court holds that section 300 violates the equal protection, liberty, or privacy clauses of the California Constitution because such a holding would establish that section 308.5 is likewise unconstitutional. In that event, the law will still treat residents and non-residents equally, and the Court will not need to address the Privileges and Immunities Clause. Nonetheless, if the Court finds it necessary to address its hypothetical, denying recognition to marriages of same-sex couples entered into in another state would likely violate the Privileges and Immunities Clause if California recognizes marriages of same-sex couples entered into within California.

The Privileges and Immunities Clause provides that the "citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." (U.S. Const. art. IV, § 2.) "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." (*Toomer v. Witsell* (1948) 334 U.S. 385, 395.)

> The purpose of the Clause . . . is 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those states in the acquisition and

> enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. (*Hicklin v. Orbeck* (1978) 437 U.S. 518, 524, quoting *Paul v. Virginia* (1869) 75 U.S. (8 Wall.) 168, 180.)

In so doing, the "Clause was intended to 'fuse into one Nation a collection of independent, sovereign States.' " (*Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 279, quoting *Toomer*, 334 U.S. at 395.)

Thus, "[t]he privileges and immunities clause acts primarily as a restraint upon state action which interferes with 'interstate harmony,' or the development of a 'national economic union.' " (*Silver v. Garcia* (1st Cir. 1985) 760 F.2d 33, 37, citations omitted.) It only protects those rights "that arise from the Constitution and the laws of the United States as contrasted with those that spring from other sources." (*Addison v. Addison* (1965) 62 Cal.2d 558, 568; see also *In re Demergian* (1989) 48 Cal.3d 284, 291 ["clause protects only those rights incident to national citizenship; it does not protect rights that depend solely on state law"].) Nonetheless, it "protects more than those rights which are considered fundamental individual rights protected by the Fourteenth Amendment" (*Friedman v. Supreme Court of Virginia* (4th Cir. 1987) 822 F.2d 423, 426); it also protects "those rights which are fundamental to the promotion of interstate harmony" (*ibid*, internal quotation marks omitted) – and not just "economic interests" (*Piper*, 470 U.S. at 281, fn. 11). Consistent with this understanding, the Privileges and Immunities Clause has been held to protect the fundamental right "to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." (*Saenz v. Roe* (1999) 526 U.S. 489, 502, citations omitted.)

Of course, " 'the privileges and immunities clause is not an

absolute.' " (*Piper*, 470 U.S. at 284, quoting *Toomer*, 334 U.S. at 396.) "The Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." (*Piper*, at 284.)

Under these standards, denying recognition to out-of-state marriages of same-sex couples while recognizing in-state marriages of same-sex couples would likely violate the Privileges and Immunities Clause.

First, denying recognition under the circumstances described in the Court's hypothetical discriminates against nonresident same-sex couples. Although California marriage laws do not have an express residency requirement,[23] the refusal of California to recognize out-of-state marriages of same-sex couples would have a "disproportionate impact" on nonresident same-sex couples. (*Friedman*, 822 F.2d at 426.) All same-sex couples would have to marry within California if they want California to recognize their marriages. As a result, nonresident same-sex couples married in another state would have to go through the additional burden of obtaining a California marriage license in order to enjoy the status, rights, and benefits accorded to same-sex couples married within California – even if they are just temporarily traveling through California. Moreover, those couples would be unable to get a divorce in California if one member of the couple chose to move there. By contrast, same-sex couples residing in California would only have to obtain a *single* marriage license to obtain the status,

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[23] Nonresidents may obtain a California marriage license if they get married within California.

rights, and benefits accorded to marriage by the State.[24] The extra burden placed on non-resident same-sex couples[25] as well as the lack of respect accorded to their most cherished commitment impermissibly burdens their right to travel (see *Saenz*, 526 U.S. at 502) and might deter them from traveling or moving to California (*Friedman*, 822 F.2d at 427).

Second, denying recognition would deprive nonresident same-sex couples of a fundamental right protected by the Privileges and Immunities Clause. As explained in the City's opening and reply briefs, the right to marry the person of one's choice is a fundamental liberty interest under the California Constitution. (City OB 89-97, City Reply 59-60.) And for those same reasons, it is a fundamental right under the Fourteenth Amendment of the federal Constitution. Denying recognition to out-of-state marriages of same-sex couples while recognizing in-state marriages of same-sex couples would therefore violate the Privileges and Immunities Clause.

This is true even if the Court holds that lesbians and gay men have no fundamental right to marry under the Fourteenth Amendment. Once another state chooses to recognize marriages of same-sex couples and determines that such marriages should be accorded the same status, rights, benefits, and obligations as any other marriage, the right to enter those marriages becomes "fundamental to the promotion of interstate harmony."

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[24] Theoretically, same-sex couples residing in California who were married in another state like Massachusetts would also have to get a marriage license in California.

[25] For example, a member of a nonresident same-sex couple married outside California may not have the right to visit his or her spouse in a California hospital. That member may also lose the right to inherit or receive death benefits if his or her spouse dies in California. And that member may not be able to obtain a divorce if he or she moves to California.

(*Friedman*, 822 F.2d at 426, internal quotations omitted.) As such, that right is protected by the Privileges and Immunities Clause.

Finally, as explained above, there would be no "substantial reason" for this discrimination once California recognizes marriages of same-sex couples entered into within California. (See *ante*, at 50-51.) Accordingly, denying recognition to out-of-state same-sex marriages while recognizing in-state marriages of same-sex couples would violate the Privileges and Immunities Clause of the United States Constitution.

D. Neither The Full Faith And Credit Clause Nor The Privileges And Immunities Clause Affect How Section 308.5 Should Be Interpreted.

At the time section 308.5 was enacted, section 300 already prohibited California from recognizing marriages of same-sex couples entered into within California. Thus, existing law barred California from recognizing both in-state and, once section 308.5 had been adopted, out-of-state marriages of same-sex couples. As a result, the adoption of section 308.5 harmonized the treatment of in-state and out-of-state marriages. And whether section 308.5 applies only to out-of-state marriages or to both in-state and out-of-state marriages raised *no* Full Faith And Credit or Privileges and Immunities Clause issues at the time section 308.5 was adopted.[26] Whether the marriages statutes violate the Full Faith and Credit or the Privileges and Immunities Clauses should therefore have no effect on how section 308.5 should be interpreted. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 [holding that a constitutional issue

[26] Of course, the issues of whether the marriage statutes violated the equal protection, liberty, and privacy clauses of the California Constitution existed at the time section 308.5 was enacted. But the proper interpretation of section 308.5 has no bearing on the resolution of those issues.

affects the interpretation of a statute only if one of the constructions raises that issue].)

But even if California permits same-sex couples to marry within California at some later date, the Full Faith and Credit Clause and the Privileges and Immunities Clause still would not affect how section 308.5 should be interpreted. If this Court holds that California must recognize such marriages on any of the state constitutional grounds urged by the City, then it will necessarily hold that California must also recognize marriages of same-sex couples entered into in another state. Thus, section 308.5 would be unconstitutional regardless of whether it applied to in-state or out-of-state marriages, and no interpretation could preserve its constitutionality. In that circumstance, the Full Faith and Credit Clause and the Privileges and Immunities Clause would have no bearing on how section 308.5 should be interpreted. (See *Romero*, 13 Cal.4th at 509 [holding that court may only adopt construction of statute that "render[s] it valid in its entirety, or free from doubt as to its constitutionality"].)

The same is true if the Legislature later amends section 300 and requires California to recognize marriages of same-sex couples entered into within California. Although this hypothetical legislative action would call the constitutionality of section 308.5 into question under the Full Faith and Credit and Privileges and Immunities Clauses if section 308.5 applied only to out-of-state marriages, this constitutional question would not affect how section 308.5 should be interpreted.

This is because"[t]he words of a statute are to be interpreted in the sense in which they would have been understood *at the time of the*

enactment."[27] (*Cruz,* 13 Cal.4th at 775, italics added.) Thus, statutes "are normally construed in light of *existing* statutory definitions or judicial interpretations in effect *at the time of the [statute's] adoption.*" (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487, italics added.) Indeed, "[a]n important consideration in determining the intention of the Legislature in enacting the new section is the state of the law as it existed prior to the enactment – a consideration of the criticisms, if any, of alleged deficiency or inequity of existing law." (*Estate of Simoni* (1963) 220 Cal.App.2d 339, 341; see also *Fair*, 254 Cal.App.2d at 893 ["It is a fundamental rule that a statute should be construed in the light of the history of the times and the conditions which prompted its enactment, and in the light of relevant court decisions existing at the time of its enactment," internal quotations and citations omitted].)

At the time of its enactment, the issue of whether section 308.5 applied to in-state marriages raised no Full Faith and Credit or Privileges and Immunities questions because section 300 already prohibited California from recognizing marriages of same-sex couples entered into within California. Because *only* the state of the law at the time of the statute's enactment is relevant in construing that statute (see *Cruz*, 13 Cal.4th at 775; *Heckendorn*, 42 Cal.3d at 487), a hypothetical constitutional question created by a hypothetical legislative amendment should have no bearing on the proper interpretation of section 308.5 (cf. *Peralta Cmty. Coll. Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52 [holding that

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[27] By contrast, "[c]onstitutional concepts are not static." (*People v. Belous* (1969) 71 Cal.2d 954, 967.) And "[a] change in conditions may invalidate a statute which was reasonable and valid when enacted." (*Perez,* 32 Cal.2d at 737 (conc. opn. of Carter, J.).)

declaration of later Legislature has little weight in determining intent of the enacting Legislature].)

Moreover, there is nothing to suggest that the possibility the Legislature would amend California law to require the recognition of marriages of same-sex couples entered into within California was a concern at the time section 308.5 was enacted. In fact, the legislative history suggests otherwise. As explained above, the ballot materials unequivocally stated that California law already prohibited marriages of same-sex couples entered into within California. Those materials expressed no fear that this law would ever change. Indeed, the ballot materials indicate that the voters were only concerned that section 308 may require California to recognize out-of-state marriages of same-sex couples. Under these circumstances, no intent to have section 308.5 supersede section 300 may be inferred.[28] (See *People v. Horn* (1984) 158 Cal.App.3d 1014, 1032 [refusing to infer an intent to impose a harsher test for insanity than the *M'Naugten* rule because

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[28] Likewise, the Court would have no authority to rewrite section 308.5 in order to preserve its constitutionality. First, courts should not reform a statute to avoid constitutional questions that do not yet exist. Indeed, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (*Lyng v. Northwest Indian Cemetery Protective Ass'n* (1988) 485 U.S. 439, 445.) Second, courts may not reform a statute to resolve a constitutional infirmity that did not exist at the time the statute was enacted. The reformation of a statute must effectuate the legislative or electorate intent at the time of enactment. (See *Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607, 670.) It may not conform a statute "to constitutional doctrine unanticipated by its drafters." (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187.) Reforming section 308.5 in order to avoid a constitutional question created by a hypothetical legislative amendment of section 300 would do just that.

there was no evidence that the community was concerned about the leniency of that rule at the time of its enactment].)

Indeed, a contrary conclusion would wreak havoc in every case requiring the interpretation of a statute or ordinance. If hypothetical legislative actions may be considered in ascertaining legislative intent, then statutory construction would become an exercise in guesswork with no connection to the actual concerns that motivated the Legislature or the voters. Not only would such a result contravene well-established principles of statutory construction, it would transform the courts into legislative bodies free to rewrite statutes in light of hypothetical concerns that did not exist at the time of enactment. Accordingly, the Full Faith and Credit Clause and the Privileges and Immunities Clause do not affect how section 308.5 should be interpreted.

Dated: August 17, 2007

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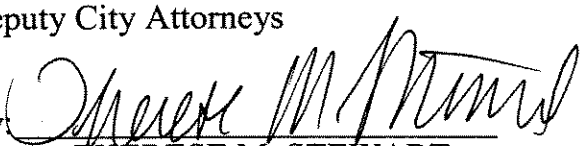
By 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 17,607 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 17, 2007.

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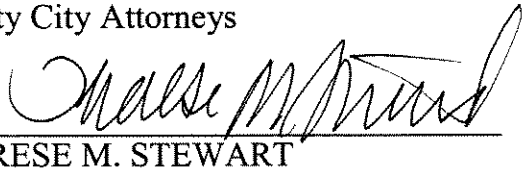
By: 
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PROOF OF SERVICE

I, HOLLY TAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, California, 94102.

On August 17, 2007, I served:

CITY AND COUNTY OF SAN FRANCISCO'S SUPPLEMENTAL BRIEF

on the interested parties in said action, by placing a true copy thereof in sealed envelopes addressed as follows:

ATTACHED SERVICE LIST

and served the named document on the parties as set forth on the attached list in the manners indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the offices of the addressees.

☒ **BY ELECTRONIC MAIL**: I caused a copy of such document to be transmitted via electronic mail in Portable Document Format ("PDF") Adobe Acrobat from the electronic address: *holly.tan@sfgov.org*

☒ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelopes and caused such envelopes to be delivered by hand at the above locations by a professional messenger service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed August 17, 2007, at San Francisco, California.

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San Francisco Superior Court Case No. CGC-04-429539
consolidated with
Woo v. Lockyer
San Francisco Superior Court Case No. CPF-04-504038

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