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DEPARTMENT OF JUSTICE

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April 26, 2004

The Honorable Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

RE: *Lockyer v. City and County of San Francisco, et al.*
California Supreme Court, Case No. S122923

Dear Chief Justice George and Associate Justices:

This letter is in reply to the supplemental letter brief filed by respondents pursuant to this Court's April 14, 2004 order. Respondents confuse what is a simple and fundamental matter within this Court's jurisdiction: that same-sex unions, while worthy of recognition and respect, do not fall within California's statutory definition of marriage. (Fam. Code, § 300.) There are no same-sex marriages to nullify, and no due process rights denied, because the very definition of marriage does not include these partnerships.

Respondents cannot attempt to unilaterally redefine marriage in California, and then argue that this Court is powerless to reaffirm the law. The Attorney General, as the chief law officer for the state, has standing to ask this Court to clarify the law. Similarly, this Court has jurisdiction to reaffirm the law and maintain legal certainty, uniformity and judicial economy.

I. The Attorney General Has Standing To Seek The Requested Relief, And This Court Has Jurisdiction To Reaffirm California Law.

Respondents agree with the Attorney General that the unions at issue in this case are not enumerated as "void" or "voidable" marriages in Part 2, Division 6 (section 2200 *et seq.*) of the Family Code. Nonetheless, prior court decisions regarding the standing of third parties to

collaterally attack void marriages, and regarding the jurisdiction of the courts to declare void marriages invalid in any proceeding, provide guidance in this case. If third parties have standing to collaterally attack void marriages, and if the courts have jurisdiction to declare void marriages invalid in any proceeding in which the fact of the marriage is material, then it follows that the Attorney General has standing, and this Court has jurisdiction, in the instant proceeding involving same-sex unions that do not fall within the threshold definition of marriage.

In the case *In re Estate of Gregorson* (1911) 160 Cal. 21, this Court held that while a voidable marriage may be adjudicated only pursuant to statutory procedures established by the Legislature, a void marriage "is a legal nullity and its validity may be asserted or shown in any proceeding in which the fact of marriage may be material." (*Id.* at 26.) Void marriages need not be adjudicated solely pursuant to statutory procedures, the Court reasoned, because the judicial determination that a marriage is void merely declares an existing fact. (*Ibid.*)

Likewise, in *Estate of Karau* (1938) 26 Cal.App.2d 606, the Court of Appeal noted that for voidable marriages, the Legislature has prescribed "when and by whom such marriages may be attacked and declared void." (*Id.* at 607-608.) The Court of Appeal went on to explain, however, that California law declares certain marriages "void from the beginning," and those void marriages "may be collaterally attacked and declared void in any proceeding wherein the question may arise . . . ." (*Id.* at 607.)

Accordingly, if the courts have jurisdiction to hear collateral attacks on void marriages in any proceeding where the question may arise, then certainly this Court has jurisdiction to declare that the same-sex unions at issue in this action do not fall within the threshold definition of marriage set forth in Part 1 of Division 3 (section 300 *et seq.*) of the Family Code. The definition of marriage is a pure question of law within the purview of this Court, and the Attorney General, as the state's chief law officer, has a duty to insure that the laws of the state are uniformly and adequately enforced. (Cal. Const., Art. V, § 13.) In this case, the Attorney General has standing to ask the Court to reaffirm that same-sex unions do not fall within the definition of marriage set forth in Part 1, Division 3 of the Family Code, and that the same-sex certificates and licenses issued by respondents are invalid.[1]

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[1] Respondents' supplemental letter brief misperceives the Attorney General's prayer for relief. Respondents incorrectly suggest that the Attorney General's original writ petition prayed for an order declaring the invalidity of the same-sex marriage licenses and certificates only "*if* the Court decides 'the validity of Family Code sections 300, 301, 308.5 as a matter of law.'" (Respondents' supp. letter brief dated April 21, 2004, p. 2, *original emphasis, citing* the Attorney General's Original Petition for Writ of Mandate at p. 10.) In fact, paragraph 2 of the Attorney General's prayer does not contain the word "if," and is not phrased as a

II. The Power To Define Marriage Is Within The Sole Province Of The Legislative Branch Of State Government; Family Code Section 306 Does Not Allow Respondents To Redefine Marriage Through Their Acts Or Omissions

Respondents argue that same-sex marriages are not void or voidable, that defects due to the action or inaction of third parties do not invalidate a marriage, and that same-sex marriage is consistent with the State's declared public policy. (Respondents' supp. letter brief, pp. 6-13.) With respect, respondents' arguments miss the point.

The Attorney General agrees that same-sex unions are not void or voidable marriages under Family Code sections 2200, 2201, or 2210. But a marriage may be invalid even if it is not expressly enumerated in those code sections. (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 106.) Independent of the "void" and "voidable" doctrines, the State has defined marriage by statute, and unions falling outside the definition are not valid marriages. Because the regulation of marriage remains the Legislature's sole province (*DePasse, supra*, 97 Cal.App.4th at 99), respondents cannot, absent a judicial determination that California's marriage laws are unconstitutional, expand the definition of a valid marriage under Part 1 of Division 3 of the Family Code.

Respondents' "defect" argument under Family Code section 306 is equally flawed. Although section 306 provides that a third party's noncompliance with the Family Code "does not invalidate the marriage" (Fam. Code, § 306), section 306 does not alter or expand the definition of marriage set forth in Family Code section 300, and hence section 306 is not relevant to the instant proceeding. None of the cases cited by respondents hold that a same-sex union somehow expands the definition of marriage and becomes valid when a clerk, inadvertently or otherwise, issues a marriage certificate and license to a same-sex couple. To the contrary, the out-of-state and federal cases cited in the Attorney General's opening letter brief demonstrate that an attempted same-sex marriage remains invalid regardless of whether the alleged marriage was subsequently licensed or recorded. (*See Anonymous v. Anonymous* (N.Y.Sup. 1971) 325 N.Y.S. 2d 499, 501 [the same-sex marriage ceremony itself was a nullity under state law and no legal relationship could be created by it]; *Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588, 589

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conditional request, but instead is phrased in the conjunctive form. Paragraph 2 of the Attorney General's prayer asked this Court to exercise original jurisdiction, to determine the validity of Family Code sections 300, 301 and 308.5, *and* grant the writ petition in its entirety, issuing an order (a) declaring the invalidity of the same-sex marriage licenses and certificates, *and* (b) directing respondents to perform their ministerial duties in full compliance with California law.

[any issued same-sex marriage license would be a nullity because the resulting relationship could not be a marriage under state law]; *Adams v. Howerton* (C.D.Cal. 1980) 486 F.Supp. 1119, 1120-1122 [even though the same-sex couple had obtained a license from a county clerk and had the ceremony performed, the purported marriage had no legal effect under state law]; *Littleton v. Prange* (Tex.App. 1999) 9 S.W.3d 223, 231 [because a same-sex marriage was invalid under state law, the plaintiff could not bring a wrongful death claim as a surviving spouse].)

Regarding respondents' public policy argument, the Attorney General agrees that under California law, same-sex unions can promote the public policy objectives that have resulted in California's statutory scheme on domestic partnerships. (Fam. Code, §§ 297 - 299.6.) The Attorney General is currently defending a legal challenge to these statutes, and he will continue to aggressively defend them in the future. Respondents correctly observe in their opening letter brief that the Legislature has continued to expand the rights of same-sex couples who register as domestic partners. The Attorney General has supported this expansion. Nevertheless, the Attorney General respectfully submits that policy questions regarding the scope of marriages and domestic partnerships properly remain with the Legislature. Because no California court and no federal court has held that the current distinctions between these different unions are unconstitutional, respondents cannot assert for themselves the legislative power to unilaterally redefine marriage in California.

III. Respondents Cannot Create Constitutional Rights By Anticipating Future Rulings From The Courts

Respondents argue that if this Court determines the validity of the same-sex certificates and licenses prior to a resolution of respondents' constitutional arguments, it would prematurely deprive the couples of their constitutional rights. (Respondents' supp. letter brief, pp. 13-15.) But as the Attorney General argued in his reply brief in support of his original petition to this Court, respondents cannot unilaterally anticipate constitutional rights that have not been declared by the courts. Because the power to declare state laws unconstitutional is expressly reserved to the judicial branch of government, respondents cannot create or declare new constitutional rights on behalf of these couples in anticipation of a judicial ruling that has not occurred. The California courts, and not respondents, must adjudicate the constitutional issues that have been raised regarding same-sex marriages. Until these claims are resolved, Part 1 of Division 3 of the Family Code expressly mandates that same-sex unions do not fall within the definition of marriage, and that same-sex marriages are invalid. Such a ruling would not "send a signal" (respondents' supp. letter brief, p. 14) regarding this Court's views on same-sex couples. Rather, such a decision would merely reaffirm that local ministerial officials must comply with state law in the absence of a judicial determination to the contrary and while the constitutional issues are

pending in California's courts. As Chief Justice John Marshall observed over two hundred years ago, [i]t is emphatically the province and duty of the judicial department to say what the law is . . . ." (*Marbury v. Madison* (1803) 5 U.S. 137, 177.) Resolution of this case requires respondents' adherence to this enduring principle of American jurisprudence.

Respectfully submitted,

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cc: Service list

DECLARATION OF SERVICE
(C.C.P. §§ 1011, 1012, 1012.5, 1013)

Case Name: ***Bill Lockyer, Attorney General of the State of California v. City and County of San Francisco, Gavin Newsom, in his capacity as Mayor of the City and County of San Francisco; Mabel S. Teng, in her capacity as Assessor-Recorder of the City and County of San Francisco, and Nancy Alfaro, in her official capacity as the San Francisco County Clerk***

I declare: I am employed in the County of San Francisco, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, California.

On April 26, 2004, I served the attached

LETTER TO SUPREME COURT DATED APRIL 26, 2004

in said cause, by placing a true copy thereof enclosed in a sealed envelope and served as follows:

XX United States mail by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a United States mailbox in the City of San Francisco, California, after the close of the day's business - ***(SEE ATTACHED LIST)***

____ California Overnight (Overnight Courier)

____ Facsimile at the following Number:

XX Personal Service, via America Net-Working, at the below address(es):

to the parties addressed as follows:

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on April 26, 2004.

Marlene Dong

MARLENE DONG