CITY AND COUNTY OF SAN FRANCISCO

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April 21, 2004

The Honorable Chief Justice Ronald George
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Lewis et al. v. Alfaro,* Case No. S122865
Lockyer v. City and County of San Francisco, et al., Case No. S122923

City Respondents' Letter Brief Regarding Determination Of Validity of Marriages, filed pursuant to April 14, 2004 Orders

Dear Chief Justice George and Associate Justices Kennard, Baxter, Werdegar, Chin, Brown & Moreno:

I. NEITHER STATUTORY NOR JUDICIAL AUTHORITY PERMIT THE ATTORNEY GENERAL TO SEEK INVALIDATION OF THE MARRIAGE LICENSES ALREADY ISSUED TO SAME-GENDER COUPLES IN THIS PROCEEDING.

A. This Court Lacks Jurisdiction To Rule On The Validity Of Same-Sex Couples' Marriages In This Original Proceeding.

To the extent the Attorney General prays for a declaration of the invalidity of the already issued marriage licenses, he is not seeking a writ of mandamus or prohibition but a declaratory judgment. This Court has original jurisdiction only over habeas corpus proceedings and proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. Cal. Const. art. VI, §10. "Superior courts have original jurisdiction in all other causes." *Id*. *See also* Cal. Fam. Code §200 ("The superior court has jurisdiction in proceedings under this code").

The Court also has no jurisdiction because there are no interested parties before the Court (*i.e*., married couples themselves), which means that the Court's ruling would be wholly advisory *whether or not public officials or third parties desire clarity on the question*. *See Lynch v. Superior Court*, 1 Cal. 3d 910, 911-12 (1970) (discharging order to show cause as improvidently granted in response to attorney general's petition seeking determination that California's prejudgment attachment statutes were void).

B. The Attorney General Has Not Sought A Determination Of The Validity Of The Marriages Except In The Context Of A Decision On The Underlying Issues Of The Constitutionality Of The Marriage Statutes.

The Attorney General's Petition for Writ of Mandate asks for a determination of the validity of the approximately 4000 marriages of same-gender couples *only* in the context of a decision by this Court on the underlying constitutional issues; the Attorney General requests such an order as a form of relief *if* the Court decides "the validity of Family Code Sections 300, 301, 308.5 as a matter of law . . ." (Lockyer Pet. at 10.) The Attorney General does *not* request a decision on the validity of the marriages until and unless the Court decides that these Family Code Sections are valid. (*See id*. at 10-11.)

The Attorney General has thus conceded that the Court should not determine that the marriages are invalid in the context of a ruling on the municipal power issue alone or any other issue that does not fully and finally resolve the constitutionality of the marriage statutes. At the very least, the Attorney General has not prayed for such relief in his Petition, and such relief would be beyond the scope of the pending writ. This Court should not reach out and decide an issue it has not been asked to decide at this juncture.

C. The Attorney General Cannot Challenge The Validity Of A Marriage On The Ground That It Involves A Same-Gender Couple Or At All.

The Attorney General lacks standing to challenge the validity of the marriages. The Family Code limits the persons who have standing to assert that a marriage is invalid. Under Family Code Section 310, a marriage can be dissolved *only* by death, a judgment of dissolution or a judgment of nullity of the marriage. Family Code Section 2211 provides that a proceeding to obtain a judgment of nullity may only be commenced by the following parties: in the case of a marriage between one or more underage parties: a party who was married under the age of consent or the parent, guardian, conservator or other person having charge of an underage person who was married (Fam. Code § 2211(a)(1),(2)); in the case of marriages where a former spouse is thought to be, but turns out not to be, deceased: a party to the marriage or the former (not deceased) spouse (*id*. § 2211(b)(1),(2)); in the case of a marriage between one or more persons of unsound mind: the injured party to the marriage or a relative or conservator of the party who was of unsound mind (*id*. § 2211(c)); in the case of a marriage where consent was obtained by fraud or force: the party to the marriage who was defrauded or forced into marriage (*id*. § 2211(d), (e)); in the case of a marriage between a party who was physically incapable of entering into the marriage state: the injured party to the marriage (*id*. § 2211(f)).

Besides this limited universe of potential parties who, under Section 2011, may *commence* a nullification proceeding, the Code provides for joinder by the court to a proceeding commenced by the parties specified in Section 2011 of "a person who claims an interest in the proceeding in accordance with" Judicial Council Rules. (*Id*. §2021.) Rules of Court 5.150-5.162

govern such joinder and permit "a person who claims or controls an interest subject to disposition in the proceeding" to be joined as a party." (Cal. R. Ct. 5.150.) Rule 5.154 sets forth the "Persons Who May Seek Joinder," and includes "a person . . . who has or claims custody or physical control of any of the minor children of the marriage or visitation rights with respect to such children or who has in his or her possession or control or claims to own any property subject to the jurisdiction of the court in the proceeding." Family Code Sections 2021(b) and 2060 and California Rule of Court 5.162 also include within the persons permitted to be joined "employee pension benefit plan[s] in which either party to the proceeding claims an interest that is or may be subject to disposition by the court." (Fam. Code § 2060(a); *see id*. §2021(b) and Cal. R. Ct. 2060.) Both the Code and the Rules adopted pursuant to it make plain that besides the parties to the marriage, the only others who can be joined as parties in a proceeding to dissolve or nullify a marriage are persons with certain defined relationships to one of the marital partners (parents, guardians, conservators, etc.) who are in limited circumstances allowed to act on that partner's behalf[1] or parties who either have a relationship (custody, control or visitation rights) with the *children* of the marriage or an interest in the *property* of the parties to the marriage. The Attorney General does not fall into any of these categories and therefore lacks standing to challenge the validity of the marriages.

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[1] *Greene v. Williams* (1970) 9 Cal.App.3d 559 discusses this type of standing. Holding a parent's right to seek annulment of a marriage entered into by her underage child does not survive the death of the child, the court reasoned that actions by a marital partner for dissolution or annulment do not survive the death of either marital partner, and that because a parent's right to seek annulment of the child's marriage is derivative of the child's own right it likewise does not survive the child's death.

> The statute speaks of an action in the child's behalf brought by a parent, guardian, or other person having charge of the child. Clearly, such an action is wholly derivative and is designed to permit one person to act on behalf of another at a time when the latter is presumed incapable of action prudently on his own behalf. The parent, as representative, is to be guided by the child's welfare and by what appears to be the child's best interest. (*Id*. at 563-64)
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> While the holding of Greene regarding survivability of actions to nullify a marriage has been questioned (*see In re Marriage of Goldberg* (1994) 22 Cal.App.4th 265, 270), its characterization of the basis for standing by parents, guardians and the like has not.

D. The Parties To A Marriage Challenged As Void Or Voidable Are Indispensable Parties To Any Action Seeking To Invalidate The Marriage.

Even if the State had standing to seek a declaration that the existing marriages are invalid, the Court may not make such a declaration and thereby strip the couples of the rights of marriage in a proceeding to which the individuals who were married — or at least class members representing them — are not parties. Where the petitioner "seeks some other type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined that third person is an indispensable party." (*Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522.) In *Greif v. Dullea*, the court clarified: "A necessary party may be eliminated if under certain circumstances his presence can not be obtained and his interest will not thereby be impaired, but if the plaintiff or petitioner prays for the cancellation of a legal right in a certificate, permit or license issued in the name of and being the property of a third person, such person is an indispensable party to the action." (*Greif v. Dullea* (1944) 66 Cal.App.2d 986, 993-94 [holding that whether or not a company had a valid right to operate 125 taxicabs whose licenses petitioners prayed to have voided and cancelled, the company was entitled to appear as a party and defend its legal right].); *accord Sierra Club, Inc. v. California Coastal Com*. (1979) 95 Cal.App.3d 495, 500-502 [contemplating situation "virtually indistinguishable from *Greif v. Dullea*," and concluding that requirements for an indispensable party under section 389 of the Code of Civil Procedure were present.]; Civ. Code § 389(a)(2) [person who would not deprive court of jurisdiction shall be joined as party if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest"].

Marriage invalidation proceedings are no exception to the indispensable party doctrine. In *McClure v. Donovan* (1949) 33 Cal.2d 717, 725, the Court observed that "the judgment of the annulment action, brought for the purpose of dissolving the marriage . . . would necessarily affect [the husband's] rights and so would require his presence before the court."

A decision regarding the validity of the existing marriages of could impair the ability of the married individuals to protect their rights and interests in being married, and the individuals who are married – or at least representatives of them -- are indispensable to any action that will decide that issue. In view of this, the Court should defer any ruling on the validity of the marriages until it decides the constitutionality of the marriage statutes and the effect of such decision on the marriages in a proceeding to which the married couples or a class representing them are parties.

E. It Would Violate The Due Process Rights Of The Married Couples For This Or Any Court To Adjudicate The Validity Of Their Marriages Without Giving Them Notice And An Opportunity To Be Heard.

Article I, Section 7(a) of the California Constitution, like the Fourteenth Amendment of the United States Constitution, provides that a person may not be deprived of life, liberty, or

property without due process of law. The core and "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [citation omitted].); *accord Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32, 46; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 174. When the state would remove certain rights or liberties in a court proceeding, due process requires that "the affected person must receive notice plus an opportunity to be heard and participate in the litigation." (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-12.)

Marriage status, and its license and certification, constitute property rights that trigger due process protection. (*Loving v. Virginia* (1967) 388 U.S. 1, 12 ["The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. [¶] Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."]; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 ["liberty" within meaning of fourteenth amendment "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry*, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."] [emphasis added]; *Perez v. Sharp* (1948) 32 Cal.2d 711, 714 ["Marriage is . . . something more than a civil contract subject to regulation by the state; it is a *fundamental right of free men*. There can be no prohibition of marriage except for an important social objective and by reasonable means."].)

The California Supreme Court long ago recognized that "to annul [a] marriage on the ground of [one's] unsoundness of mind without giving him any notice or opportunity for a hearing on that issue would clearly involve issues of due process." (*McClure v. Donovan*, *supra*, 33 Cal.2d at 725 [citations omitted].) *Amici* cite a series of government-issued licenses far less significant than a marriage license that have likewise been held subject to due process requirements before they may be revoked. (*See* Marriage Equality Cal. Brief, p. 18, n. 6 [observing, for example, this Court's holding in *Traverso v. People ex rel. Dept. of Transportation* (1993) 6 Cal.4th 1152, 1162 that the revocation of a billboard permit could not be accomplished without meeting procedural due process requirements].)

At a minimum, due process requires that the State afford notice and an opportunity to be heard to same-gender couples whose rights will be affected by a determination as to the validity of their marriages and marriage licenses. In *Ash v. Superior Court*, the appellate court so held when it restrained the superior court from proceeding in an action to compel the county clerk to cancel the registration of a large number of voters who had not been made defendants and had not been served with notice. (*Ash v. Superior Court* (1917) 33 Cal.App. 800 [holding that "[a]fter his affidavit has been received and has become a part of the register of elections, he

cannot be deprived of this right without some procedure which complies with the requirements of due process of law."]; *see also Pierce v. Superior Court in and for Los Angeles County* (1934) 1 Cal.2d 759 [prohibiting adjudication affecting the rights of any of the 24,130 persons that had not been served or had not appeared in a proceeding brought by the Attorney General that sought to strike their names from election rolls because of fraudulent practices in obtaining voting registration].)

Petitioners cannot assert their contention that the licenses in question were illegally issued as a basis for depriving the married individuals of due process. California and federal courts have required adherence to due process even in instances where the government issued a permit improperly (*see Stanson v. San Diego Coast Regional Com.* (1980) 101 Cal.App.3d 38, 49), or the license or permit was "null and void" when issued. (*See Kerley Industries, Inc. v. Pima County* (9th Cir. 1986) 785 F.2d 1444, 1446). Indeed, where the State fails to serve notice on an indispensable party, this Court has refused to allow the State to revoke that party's rights or liberties, even where there is proof positive that those rights or liberties are held unlawfully. (*See Younger v. Jordan* (1954) 42 Cal.2d 757 [reluctantly declining to require Secretary of State and Registrar of Voters to omit Younger's name from primary election ballots without personal service upon her, despite "prima facie showing" that she had been committed to a mental hospital and was disqualified from voting or holding office].)

Thus, even if the State had standing and the married individuals were not indispensable parties within the meaning of Civil Code Section 389, this Court would violate those individuals' right to due process if it proceeded to adjudicate the validity of their marriage licenses without providing them notice and an opportunity to be heard.

II. THE MARRIAGES ARE NEITHER VOID NOR VOIDABLE.

A. Marriages Are Void Or Voidable Only On Enumerated Statutory Grounds, None Of Which Is Present Here.

The Family Code sets forth the only grounds on which a marriage can be held void or voidable. These include that the marriage is incestuous (*see* Fam. Code §§ 2200) or bigamous (*id*. § 2201)[2], that one party lacked capability to consent, that one party's former, presumed dead, spouse, turns out to be living, that either party was of unsound mind, that consent obtained by

[2] These provisions state that incestuous marriages (as defined therein) are "void from the beginning" and that most bigamous or polygamous marriages (again as defined) are "illegal and void from the beginning." They provide that marriages between underage youth, or between a person of unsound mind, or to which consent was obtained by fraud or force are "voidable and may be adjudged a nullity." No California statute provides that marriages between persons of the same gender are either "void from the beginning" or "voidable" and subject to being "adjudged a nullity."

fraud or force, or that one party was physically incapable of entering into marriage state and the disability is permanent (*id.* § 2210).

The Family Code provisions stating the grounds on which a marriage is void or voidable do *not* include the fact that a marriage is between two persons of the same gender. The absence of any such provision means that a license cannot be invalidated on the ground that it was issued to two persons of the same-gender. To hold otherwise would be in derogation of the State's policy in favor of marriage.

In *Argonaut Ins. Co. v. Industrial Accident Com.* (1962) 204 Cal.App.2d 805, the Court of Appeal refused to hold invalid a marriage that was entered into by parties using false names, in derogation of the license requirements of then Civil Code Section 69. (See Fam. Code § 351, successor provision to Civ. Code § 69.) *Argonaut* involved a challenge by a workers compensation insurance company to an award made by the Industrial Accident Commission to the wife of a man who had been injured in his employment. The company claimed the marriage between the wife and deceased husband was invalid because the two had used false names in applying for the marriage license. (They apparently had done so to avoid the embarrassment of having conceived a child prior to being married.)

The court rejected the insurance company's argument. In so holding, it reasoned that the Legislature had specifically provided the grounds for holding a marriage void or voidable, and that if it had wanted to include the provision of false information it could have done so. The court refused to infer that the Legislature intended, by requiring the parties to provide their "identity" and "real and full names," to make the failure to comply with that requirement a ground for invalidation: "In view of the policy of the law to promote and protect the marriage relationship, *it cannot be held that the Legislature meant to declare by inference an additional ground upon which a marriage must be found void.*" (*Argonaut,* 204 Cal.App.2d at 810.)

Similar is *Vaughn v. Vaughn* (1944) 62 Cal.App.2d 260, 263-64, in which the court addressed an Arizona marriage made in violation of a statute requiring the clerk to obtain consent of a parent before issuing a license to a couple in which the male or female was younger than 21 or 18, respectively. The court held that the marriage was valid in Arizona and therefore would be recognized by California, reasoning:

> To us it seems immediately apparent that the section just quoted is a prohibition against the right, authority or capacity of the clerk of the superior court to issue a marriage license. It resembles and is similar to section 69 of the California Civil Code. It is noteworthy that while section 63-109 of the Arizona Code makes it a misdemeanor for the clerk of the superior court knowingly to issue a marriage license to a male person under the age of twenty-one years or to a female person under the age of eighteen years without the consent in writing of the parent or guardian

> lawfully entitled to give such consent, no penalty whatever is visited upon the contracting parties to the marriage; nor does any provision of the Arizona law declare that a marriage of persons over eighteen and sixteen years respectively, to which the parental or guardian's consent has not been procured, shall in any wise be impaired or invalidated because of the failure of the clerk to procure such consent. Section 63-107 of the Arizona Code declares what marriages are void in that state, but nowhere does it appear therein that a marriage wherein consent shall be required, and is not obtained, is either void or voidable.

See also Barnett v. Hudspeth (1962) 211 Cal. App.2d 310, 312-13 [holding absence of witnesses as required by Nevada statute did not invalidate marriage where statutes did not so provide].

The limitation on the grounds for holding a marriage void or voidable has a long history in this State and is rooted in this State's strong public policy in favor of marriage – *in general*. Thus, this Court has stated:

> "Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, *the law raises a strong presumption of its legality* -- not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of presumption, the truth of law and fact that it is illegal and void." (*Wilcox v. Wilcox* (1916) 171 Cal. 770, 774 [quoting with approval 1 Bishop on Marriage and Divorce] [emphasis added].)

So strong is this policy that in *Pearson v. Pearson* (1875) 51 Cal. 120, this Court refused to hold invalid a marriage – in that case entered into out-of-state – between a man and his former slave notwithstanding the miscegenation statutes in effect in California at the time (which made marriages between persons of the white and Negro races void). In holding the marriage valid, the Court observed that the only exceptions to the California statute recognizing out-of-state marriages that are valid in the state where they occurred are for bigamous and incestuous marriages (*see id.* at 125).[3] Moreover, even as to polygamous marriages an exception was made

[3] There is a case involving a marriage performed outside the state that makes clear that the statute providing for recognition of out-of-state marriages does not apply unless the out-of-state marriage in performed in accordance with the law of another state or country. *Norman v. Norman* (1889) 121 Cal. 620 involved a marriage performed on the high seas specifically to avoid requirements of California law, including those requiring parental consent for marriages of underage persons. The Court reasoned that even though a motive of evading the laws of this state by marrying elsewhere will not invalidate a marriage validly entered into elsewhere, there

whereby such a marriage valid under foreign law was not invalidated for purposes of distributing property of the husband after his death. *Estate of Bir (1948)* 83 Cal. App.2d 256.

The reasoning of the above cases applies here. Like the provision involved in *Argonaut* that required the parties to a marriage to obtain a license showing their "identity" and "real and full names" (Former Civ. Code § 69; see 204 Cal. App. 2d at 807) and the provision in *Vaughn* that required a clerk to obtain parental consent before marrying underage partners, Family Code Section 300 requires that the parties to a marriage be "a man and a woman." But again as in *Argonaut* and *Vaughn* failure to observe that statutory requirement is not among the enumerated grounds for invalidation.[4]

B. Defects Stemming From The Action Or Inaction Of A Third Party Involved In Issuing A Marriage License Or Solemnizing Or Registering A Marriage Are Not Grounds For Invalidating A Marriage.

Nor does the Clerk's failure to deny same-gender couples a license — even if her doing so violated the Family Code — permit the marriages between such couples, once entered into, to be invalidated. Family Code section 306 specifically provides that noncompliance with the Family Code by a nonparty to the marriage "does not invalidate the marriage." This provision prevents a marriage from being held void or voidable on the grounds of a county clerk or other third party's failure to comply with the provisions generally governing who can marry.

Again, *Argonaut* is on point. In rejecting the argument that the Clerk's issuance of a license that contained false names made the license and the marriage invalid, the court relied in part on Civil Code Section 68 — which, like current Family Code Section 306, stated that noncompliance by nonparties did not invalidate a marriage. Besides rejecting the notion that the

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was no law governing marriage on the high seas that would make the rule of validity to marriages legally performed elsewhere apply. (*Id*. at 624.)

[4] The State will most likely argue that, in adopting the initiative ("Proposition 22" or "the Knight initiative") that has become Family Code Section 308.5, the voters did provide that the gender identity of the participants is a ground for invalidating a marriage. However, as discussed in the City's initial brief in opposition to Petitioners' Applications for Immediate Stay and Peremptory Writ at 10 n.1 and in the materials included in the City's Request for Judicial Notice (Ex. K), Section 308.5 deals only with recognition by California of marriages entered into outside the state. The City has briefed this point more fully in the pending Superior Court proceedings and the relevant excerpts from one such brief are attached hereto as Exhibit 1. Moreover, if it had been the voters intent to make Proposition 22 a ground for invalidating a marriage celebrated in state, they would have added gender-identity as a ground for determining a marriage to be void or voidable under Family Code Sections 2200, 2201 and 2210 which purport to set forth the grounds for invalidation.

Clerk's acceptance of a license without verifying the correct names of the parties did not invalidate the marriage, the court also rejected the argument that the parties' own conduct in giving false names invalidated the marriage, again "[i]n view of the policy of the law to promote and protect the marriage relationship." *Id*. at 810.

Also on point is *Johnson v. Alexander* (1918) 39 Cal.App. 177, which involved a predecessor provision to the Family Code that provided that a county clerk could not issue a license to a minor without the consent of one of the minor's parents. The statutes in force at the time provided that females could consent to marry at age 15 or older, but required that if the female was under 18 (or the male was under 21) the clerk could not issue the marriage license without parental consent. The statutes further provided for annulment in cases where the party was under the legal age of consent. The wife had been 15 at the time of the marriage, i.e., old enough to consent. Despite the fact that the couple had not been entitled to have the clerk issue a marriage license in the first instance because the bride was under 18 and the clerk had not been provided with her parent's consent, the court refused to hold the marriage void or voidable, reasoning:

> [T]he duty of the county clerk is clearly defined, but we are of the opinion that if he fails in this, *either willfully or through mistake*, and issues the license to a female under the age of eighteen years without the consent of parent or guardian, and the marriage is afterward solemnized, that such marriage is not void or voidable because of the failure of the clerk to perform his duty as prescribed. (*Id*. at 179 [emphasis added].)

The court concluded that the marriage could only be annulled under the statutory provisions governing annulment if the party herself was under the legal age of consent, which the wife in this case had not been. The *clerk's* failure to obtain the parental consent he was statutorily required to have obtained for girls under 18 did not itself provide grounds for invalidating the marriage.

These cases establish that the provisions governing the effect of third parties' noncompliance with provisions of the marital statutes mean what they say: that such parties noncompliance will not be grounds for invalidating a marriage as void or voidable. The only bases for such a determination are those set forth in the specific provisions of the marriage statutes delineating when a marriage can be set aside as void or voidable.

C. Unlike Incestuous and Bigamous Marriages -- Both Of Which The Legislature Has Expressly Made Void Ab Initio -- Marriages Between Same-Sex Couples Are Consistent With – Not Against – The Declared Public Policy Of The State.

The Legislature's specific provisions stating that bigamous marriages and incestuous marriages are "void from the beginning" (Fam. Code §§ 2200, 2201) reflects this state's public policies against incest and bigamy.[5] By contrast, it cannot be said that homosexual unions, including same-sex marriages entered into in this State, are against any true public policy of this State, much less a legitimate rational policy.

Even six years ago, a commentator observed:

> The last two decades show an increasing tolerance and acceptance of homosexuality and same-sex relationships in California. This pattern of acceptance began in 1975, when California repealed its consensual sodomy law.[6] During the 1980s California granted gays and lesbians protection from discrimination in public and private employment, housing, and insurance.[7] Anti gay violence is specifically prohibited by civil and

[5] Bigamy, for example, would allow one party to a marriage simply to abandon the other, leaving him or her with no support or division of property such as might be made upon formal divorce, and proceed to marry another. See, e.g., *In re Estate of Richards* (1901) 133 Cal. 524 (husband abandoned wife in Missouri, traveled to California, and purported to marry another; court held second marriage was not valid). Incest has long been thought to pose a serious risk of producing disabled offspring, poses a threat of fraud, undue influence and extreme harm to children, and seriously undermines the stability of families. *See, e.g., People v. Tobias* (2001) 24 Cal.4th 327 335 ("the crime [of incest] very often involves a minor, and the protection of minors is without a doubt one of the important purposes of the law"]. Indeed, incest has long been and remains a crime under California law. Pen. Code § 285; *see Tobias*, 24 Cal.4th at 338 [in context of holding that a minor who has had sexual relations with an adult relative is always a victim, not a perpetrator, of incest, observing adult commission of incest is "highly reprehensible and abusive behavior."]

[6] Stats 1975 ch 71 § 7, ch 877 § 1; *see* Pen. Code § 286, Historical Note.

[7] *See* Stats 1992 ch 915 (AB 2601) (former Lab. Code § 1102.1); Stats. 1999 ch. 592 (amending current Govt. Code §§ 12920, 12926, 12940); *Hubert v. Williams* (1982) 133 Cal.App.3d Supp. 1 [holding Unruh Act prohibited discrimination in housing against lesbian and person who associated with homosexuals]; Stats. 1990 ch. 1402 § 2 (current Ins. Code § 10140).

> criminal laws.[8] Today, California does not consider sexual orientation an automatic bar to adoption[9], and several California counties and cities currently recognize domestic partnerships. (Cavazos, Harmful to None: Why California Should Recognize Out-Of-State Same-Sex Marriages Under Its Current Marital Choice Of Law Rule, 9 UCLA Women's L. J. 133, 166-67 (1998))

The trend has since continued. In 1999, the State took an important step in the direction of equality for same-sex couples. In Assembly Bill 26 (Stats. 1999 ch.588, § 2), codified as Family Code sections 297-299.6, the State created a statewide registry for domestic partners that allowed two persons of the "same sex" "who have chosen to share one another's lives in an intimate and committed relationship of mutual caring," to register with the state as a domestic partner and granted certain certain significant rights to registered domestic partners. In 2001, the State enacted AB 25, expanding the rights provided to domestic partners. (Stats. 2001 ch.893 § 4.) The State expanded on these rights again, two years later, in enacting the "California Domestic Partner Rights and Responsibilities Act of 2003." (AB 205, Stats. 2003 ch.421 § 1.) About the expansion, the Legislature stated:

> This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article I of the California Constitution . . ..
>
> *The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together. . . . Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises* . . .. (AB 205 . . ., emphasis added.)

The State policy that recognizes the family nature of same-sex relationships is also reflected in its regulations allowing gay men and lesbians to become foster parents, caring for the state's most vulnerable youth. California's administrative regulations allow any adult to apply

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[8] See Civ. Code § 51.7 (prohibiting violence against individuals based on their sexual orientation); Pen. Code §§ 422.6, 422.7 [prohibiting the injury or threatening of a person based on their sexual orientation].

[9] *See Sharon S. v. Superior Court* (2003) 31 Cal. 4th 417, 436 & n. 13 [observing CDSS's change of view regarding second-parent adoptions].

for a foster family home license or adoption agency license regardless of "actual or perceived sexual orientation." (Cal. Admin. Code tit. 22, § 89317 [foster family homes];*id*. § 89002 [adoption agency].) Further, licensed foster family agencies must accept applications from adult applicants and evaluate those applications for certification without regard to sexual orientation. (*Id*. § 88030.)

These legislative and administrative actions and findings demonstrate that the marriages that have been solemnized and recorded between same-sex couples – unlike a marriage found to be bigamous or incestuous – not only violate no public policy against supporting same-gender couples and their families but are fully consistent with the State's current recognition that same-sex couples can and do "form[] lasting, committed and caring relationships," "participate in their communities together," "raise children and care for other dependent family members together" and constitute "family relationships" that are worthy of State recognition and protection.

III. IF SAME-SEX COUPLES HAVE A CONSTITUTIONAL RIGHT TO MARRY, A RULING BY THIS COURT THAT INVALIDATED THEIR MARRIAGES UNTIL SUCH RIGHT COULD BE DECLARED WOULD DEPRIVE THE COUPLES WHO HAVE ALREADY MARRIED—POTENTIALLY FOREVER—OF A FUNDAMENTAL RIGHT AND OF IMPORTANT RIGHTS AND OBLIGATIONS FLOWING FROM THE MARITAL RELATIONSHIP.

As discussed above, there are numerous reasons this Court should decline to address the validity of the already issued marriage licenses at this juncture: (1) the Attorney General has not sought such a determination in the context of a ruling on the only issue this Court has chosen presently to decide; (2) the Attorney General and State lack standing to challenge the marriages; (3) the parties to the marriages have not been joined and are indispensable parties to any action that will rule on the validity of their relationships; (4) lack of authority on the part of local officials or other third parties to issue licenses or solemnize or record the marriages is, as a matter of law, not a ground on which a marriage can be declared void or voidable; and (5) even if the marriages were deemed to violate state law and such law were to be determined to be constitutional, that would not be ground for declaring the marriages void or voidable.

But even if the Court disagreed with the City's last point and concluded the marriages could be invalid if the marriage statutes are ultimately upheld, the Court has declined at this juncture to address the constitutional issues, and a final decision on that important question must await further judicial proceedings in the Superior and appellate courts. To decide the validity or invalidity of the marriages before the Court has addressed the constitutionality of the State marriage laws and the constitutional rights of same-sex couples with respect to marriage would be premature and could permanently deprive those couples of their constitutional rights.

For those couples who have married, even while the validity of their marriages is uncertain, by taking the formal steps required to solemnize and record a marriage under State law

they have both assumed obligations to each other and the State and third parties and invoked potentially important rights for themselves and in many instances for their children. Such rights include the right to inherit if a party to the marriage dies intestate, the right to receive certain pension and retirement benefits in case their marital partner dies, the right to care for and make medical decisions for their marital partner if he or she becomes injured or disabled, the right to a division of property according to community property laws if the marriage is dissolved, and the right to have the courts determine custody, visitation, and child support if the marriage is dissolved – to name a few. If this Court now holds these marriages invalid and – before the constitutional issues are finally resolved and the parties can exercise their right to remarry -- one partner to a marriage dies or becomes injured, seriously ill, or disabled, or the relationship is dissolved, the denial of rights associated with invalidating the marriage will become irrevocable. In those circumstances, if the marriage already entered into is invalidated, the couple may be forever deprived of rights to inherit or receive pension benefits, to care for a loved one while they are ill, injured, disabled or dying, or have their jointly acquired property treated as community property and distributed accordingly upon death or dissolution.

Even couples for whom no such catastrophic events occur, if the Court invalidated their marriages now but later ruled they are constitutionally entitled to marry, they would have to go through the process again — and even if they do so, they and their children would lose rights in the interim. For example, community property laws would not attach to the parties' property during the months or years between their marriage in February or March 2004 and the date they marry again after a Court ruling establishing their right to do so. Likewise their rights to certain state, employer, and business-sponsored spousal benefits would not attach. Thus, they could be deprived of insurance benefits needed to deal with illness or property loss, prevented from obtaining family or bereavement leave to attend to their marital partner and family, and forced to pay more for membership in health clubs and insurance coverage and the myriad other services for which spousal discounts are routinely offered. This would impose financial losses on the same-sex couples that – having expressed their commitment through proper solemnization and recordation of their marriages – they should not be forced to suffer.

More significant even than these economic deprivations would be the emotional and psychological harm to same-sex couples and their children of being told once again – and having the world at large told as well – by the highest Court of this State, that their relationships and family bonds are illegitimate and that the government and others may continue to relegate such families to a second class status. It would express the Court's ranking, in the hierarchy of importance, of administrative convenience and avoidance of cost by the state and employers, and avoidance of confusion and uncertainty on the part of institutions (which in other contexts are often required to deal with such matters), above the rights of same-sex couples and their children to be valued as the families that they are, to be recognized for their many contributions to society, and to be accorded the dignity and equal treatment. A declaration now by this Court that such couples' marriages are invalid, whether intended to or not, would send a signal -- loud and

unmistakable -- to all those in California and beyond who harbor hatred and fear of homosexuals, that the bonds between and among same-gender couples and their families are unnatural and unworthy, and that lesbians and gay men are evil and, ultimately, subhuman. Such a ruling would be more than unfortunate; it would be a green light for discrimination of all kinds – by individuals, employers, businesses, universities, schools and other institutions – just as *Bowers v. Hardwick* and other decisions sanctioning unequal treatment were.

For all of the foregoing reasons, the Court should refrain from addressing the validity of same-sex couples marriages at this time and in this proceeding, and leave that issue to appropriate future proceedings once the underlying constitutional issues have been finally resolved.[10]

Respectfully,

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City Attorney

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Proof of Service to All Counsel of Record is Attached.

[10] For the same reason, the Court should not require the City to return the license fees of same-sex couples to those couples.