Case No. S147999

IN THE

Supreme Court of the State of California

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Case Nos. JCCP4365, 428794, 429539,
429548, 503943, 504038, Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND SUPPLEMENTAL BRIEF REQUESTED BY JUNE 20, 2007 ORDER

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INTRODUCTION

Respondent Proposition 22 Legal Defense and Education Fund (the "Fund") hereby answers the questions this Court asked by order of June 20, 2007.[1]

The differences between registered domestic partners and married spouses under current California law are minimal. As becomes evident when examining the substantive attributes of the fundamental right to marriage, none of the constitutionally-mandated rights or obligations associated with marriage are relevant for same-sex couples. The right to procreate as a couple is not relevant because same-sex couples do not have the capacity to reproduce sexually together (i.e., the couple must involve a third person of the opposite sex to procreate). The right to use birth control to prevent procreation is irrelevant to same-sex couples for the same reason. Because both parties to a same-sex relationship cannot be biologically related to a child, they cannot both have a constitutionally protected right to raise a child or to pass property to a child intestate, and cannot both have a duty to support a child absent adoption or a statutorily imposed duty. Finally, same-sex couples do not have a constitutionally protected right to intestate inheritance from a partner, to dispose of a partner's bodily remains, or to share in each other's property. In short, neither the state nor federal Constitution mandates the extension of the rights or obligations of marriage to same-sex relationships.

Marriage is a precise legal term of art. Neither the state nor the federal Constitution permits the Legislature to rename the institution of "marriage" to some other name. The California Constitution precludes changing the name

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[1]The Fund is a Petitioner in regard to the Court of Appeal's decision on justiciability, but is a Respondent in regard to the decision on the substantive issues. Because the Court's questions go to the substantive issues, the Fund will refer to itself as a Respondent herein, and the opposing parties as Petitioners.

because "marriage" is a common law concept incorporated into the Constitution through the separate marital property provision. The federal Constitution precludes changing the name because doing so would eliminate its universal recognition and effectively eliminate the fundamental right itself. The Legislature could choose to stop regulating the entry to marriage, but it cannot stop recognizing marriage without violating the federal Constitution.

Finally, both the ordinary rules of statutory construction and the federal Privileges and Immunities Clause militate in favor of interpreting Family Code section 308.5 to apply to marriages contracted within and outside of the state of California. The Full Faith and Credit Clause of the federal Constitution, however, has no bearing on whether a state should recognize a marriage from another state.

I. THE DIFFERENCES BETWEEN MARRIED COUPLES AND REGISTERED DOMESTIC PARTNERS UNDER CALIFORNIA LAW ARE MINIMAL.

> 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.

This Court has held that both marriage and registered domestic partnerships involve "the creation of a new family unit with all of its implications in terms of personal commitment as well as legal rights and obligations." *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 843 [31 Cal.Rptr.3d 565].) The only differences that currently exist between the relationships do not involve differing rights or benefits and legal obligations or duties, but relate solely to eligibility, formation, and dissolution. Those differences are as follows:

1. Minors: A person under eighteen may marry with parental consent, (California Family Code § 302),[2] but there is no similar provision for minors to register as domestic partners.

2. Shared residence: A couple must share a residence to register as domestic partners, (§ 297(b)(1)), but that is not a requirement for marriage.

3. Formation: A registered domestic partnership may be formed by filing a Declaration of Domestic Partnership with the Secretary of State. (§ 298.5.) Marriage requires a license and solemnization. (§§ 300, 420.)

4. Dissolution: Registered domestic partners without children who have been registered for less than five years may dissolve their partnership by filing a Notice of Termination of Domestic Partnership with the Secretary of State, providing they both desire the termination and meet certain conditions relating to property and debt. (§ 299.) The qualification for this termination are the same as for the summary dissolution of a marriage set forth in sections 2400-2405, but the marriage dissolution requires judicial involvement. Other domestic partners must use the same dissolution process as marriage. (§ 299(d).) Unlike with marriage, there is no residence requirement for dissolution of a domestic partnership. (*Ibid*.)

As demonstrated below, there is no constitutional reason that the state needs to continue treating registered domestic partners the same as married couples. To the extent same-sex couples have the same rights as married couples, it is only because the rights have been extended by statute.

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[2]Unless otherwise noted, subsequent statutory references are to the California Family Code.

II. THE SUBSTANTIVE ATTRIBUTES OF THE "RIGHT TO MARRY" MAY NOT BE ABROGATED BY A STATE.

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

A. The Fundamental Right to Marry Is a Federal Right that Cannot Be Eliminated by a State.

The fundamental right to marry discussed in *Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17] (*Perez*) is firmly grounded in the *federal* Constitution. *Perez* never cited the California Constitution, but relied solely upon the Fourteenth Amendment to the United States Constitution. (See *id*. at pp. 714-15.) Subsequent cases from this Court referring to the fundamental right to marriage simply cite *Perez*. (See, e.g., *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 [219 Cal.Rptr. 387]; *People v. Belous* (1969) 71 Cal.2d 954, 963 [80 Cal.Rptr. 354].) Thus, this Court has never developed the concept of a fundamental right to marriage under the California Constitution. Even if it had, an amendment to the California Constitution could not take away any federal substantive rights or obligations embodied in the fundamental right to marry referenced in *Perez*, absent a compelling state interest.

The U.S. Supreme Court has recognized marriage as a right that is independent of the state. (*Meister v. Moore* (1877) 96 U.S. 76 (*Meister*).) In *Meister*, the defendant disputed the validity of a common law marriage in Michigan, which had statutes prescribing how marriages should be

solemnized. The defendant argued that any marriage that did not comply with the statutory criteria was invalid. The U.S. Supreme Court rejected that argument:

> Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, *but they do not confer the right*. Hence they are not within the principle, that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive.

(*Id*. at pp. 78-79 [emphasis added].) While the context was the validity of a common law marriage, the relevance for the fundamental right to marriage identified in later cases is that marriage exists independently of the states. This Court recognized long ago that marriage is a right that pre-existed California law. (See *Graham v. Bennet* (1852) 2 Cal. 503, 506 [ruling in reference to an 1845 marriage that "[m]arriage is regarded as a civil contract, and no form is necessary for its solemnization"] (*Graham*).) Subsequent legislative regulation cannot transform a pre-existing right into a statutorily created right. (See Fund Answer to Petitioners' Opening Briefs on the Substantive Issues ("Fund Answer") pp. 5-6.)

The state cannot redefine marriage in a way that no longer means the union of a man and a woman because that would change the institution and the fundamental right itself.

B. The Substantive Rights and Obligations of the Fundamental Right to Marry Do Not Implicate Same-Sex Couples.

The first of the "minimum, constitutionally-guaranteed substantive attributes or rights that are embodied within the fundamental constitutional 'right to marry'" is the right in general to enter a union of a man and a woman. That right is clear from the meaning of the term "marriage," and its usage in all of the case law discussing the fundamental right. (Fund Answer, pp. 3-6, 23-29, incorporated herein by reference.) A corollary of the right to enter the union of a man and a woman is the right to have the union of a man and

woman legally recognized. Although the mode of, and certain qualifications for, entering marriage have always been subject to state regulation, the underlying nature of the right to legal recognition of the union of a man and a woman is beyond state regulation. (See *Meister, supra*, 96 U.S. at pp. 78-79.)

Legal recognition of a marriage is the prerequisite for invoking constitutional protection of the relationship for each of the following substantive rights or obligations. Some, if not all, of the substantive rights or obligations existed at common law. The fact that a right or practice was protected at common law obviously does not elevate it to a constitutionally protected status. The absence of a right at common law, however, ensures that it does not have constitutional protection as a fundamental right without an express provision granting such protection.

Right to try to reproduce sexually within marriage. Given the connection in the case law between sexual reproduction and marriage, a state could not constitutionally bar a married couple from trying to reproduce sexually. The right to try to reproduce sexually is "one of the basic civil rights of man." (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 (*Skinner*); *Perez, supra*, 32 Cal.2d at p. 715 [quoting *Skinner*].) That right is intrinsically tied to marriage: "*Marriage and procreation* are fundamental to the very existence and survival of the race." (*Skinner, supra*, 316 U.S. at p. 541 [emphasis added].) The right to procreate is not a right to reproduce regardless of the natural ability to do so, or the state would be obligated to make artificial reproductive technology available to couples who cannot have children. Such a possibility did not even exist when the Court decided *Skinner*. Thus, references to "procreation" in *Skinner* and subsequent cases must be understood as sexual reproduction rather than artificial methods of reproduction.

The Court implicitly recognized the relationship between marriage and sexual reproduction early on when it described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress."[3] (*Maynard v. Hill* (1888) 125 U.S. 190, 211 (*Maynard*).) The Court expressly relied upon the connection between sexual reproduction and marriage in *Zablocki v. Rehail* (1978) 434 U.S. 374 (*Zablocki*). The plaintiff in *Zablocki* was challenging Wisconsin's law that prohibited deadbeat dads from marrying. Wisconsin law also made it illegal to reproduce sexually outside of marriage by forbidding fornication. (*Id*. at p. 386 n.11.) The Court held that "if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." (*Id*. at p. 386.)[4] While unmarried persons also have the capacity to reproduce sexually, that is not a capacity or a right that same-sex *couples* can ever enjoy *as a couple*. Each member of a same-sex couple may have the capacity to procreate with a member of the opposite sex, but not with the same-sex partner.

Right to use birth control. The U.S. Supreme Court has also held that married couples have a constitutional right to use birth control. (*Griswold v. Connecticut* (1965) 381 U.S. 479 (*Griswold*); see also *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 28 [26 Cal.Rptr.2d 834] [describing *Griswold* as protecting "decisions made by married persons regarding the use of birth control devices"].) The statutes at issue in *Griswold*

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[3]Marriage obviously would not be fundamental to the existence and survival of the human race or the foundation of the family and society absent its connection to procreation.

[4]Regardless of whether a state has the power to prohibit sex outside of marriage following *Lawrence v. Texas* (2003) 539 U.S. 558, the right to reproduce sexually remains a constitutionally protected right within the bounds of marriage.

made it illegal to use or prescribe birth control. (*Griswold, supra*, 381 U.S. at p. 480.) In overturning the laws, the Court observed that to "allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . [would be] repulsive to the notions of privacy surrounding the marriage relationship." (*Id*. at pp. 485-486.) This right to use birth control, now extended to single persons as well,[5] is likewise meaningless to same-sex couples, who cannot reproduce sexually together.

Right to direct the upbringing and education of marital children. The due process clause of the Fourteenth Amendment includes the right "to marry, establish a home and bring up children . . . ." (*Perez, supra*, 32 Cal.2d at p. 714 [quoting *Meyer v. Nebraska* (1923) 262 U.S. 390, 399 (*Meyer*)] [emphasis omitted].) It is evident from *Meyer* and subsequent cases that the U.S. Supreme Court was referring to the right to establish a home and bring up children as a part of the right to marry. In the context of discussing the right to marry in *Perez*, this Court stated that the state may not "take away the right of parents to 'direct the upbringing and education of children under their control.'" (*Ibid*. [citation omitted].) The Court was quoting *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535 (*Pierce*), where the U.S. Supreme Court ruled that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (*Pierce, supra*, 268 U.S. at p. 535.)

All of these cases were discussing parental rights in the context of the biological children of a married couple, where both parents were entitled to

[5]The U.S. Supreme Court extended its *Griswold* holding regarding birth control to single persons in *Eisenstadt v. Baird* (1972) 405 U.S. 438.

constitutional protection of their parental rights. Some unmarried parents have constitutionally protected parental rights as well.[6]

The constitutional protection of parental rights, however, does not extend to persons who are not biologically related to, and have not legally adopted, a child. Parental rights for a person biologically unrelated to the child arise only by adoption or some statutory law. (Cf. *Scott v. Family Ministries* (1976) 65 Cal.App.3d 492, 502 [135 Cal.Rptr. 430] ["'Adoption, the creation by law of the parent-child relationship, was unknown to the common law'"] [citation omitted]; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108 [33 Cal.Rptr.3d 46] [construing Uniform Parentage Act to apply to same-sex domestic partner].) Because parental rights for a person biologically unrelated to a child are not based in the federal or state Constitution, such *constitutional* rights cannot naturally belong to both partners in a same-sex relationship.

Duty to support children of the marriage. "'The law is very well settled, that parents are under obligation to support their children . . . ." (*Swartz v. Hazlett* (1857) 8 Cal. 118, 123 [citation omitted]; see also *In re Ricky H.* (1970) 2 Cal.3d 513, 520-21 [468 P.2d 204] [duty includes obligation to provide legal counsel for minor].) However, this historical obligation does not extend to step-children. (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 752 [45 Cal.Rptr.2d 333]; cf. *In re Gates* (1892) 95 Cal. 461, 462 [30 P. 596] ["no legal obligation to support a step-child"].) Therefore, no same-sex partner can become liable to support a partner's child absent adoption or a statutorily imposed duty.

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[6]Unmarried men will generally be presumed to have no parental rights unless they take action to assert them. Men who father a child through an adulterous relationship with a married woman will not be accorded parental rights. (See *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 124-127; *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 941 [72 Cal.Rptr.2d 871].)

Right to pass property to marital children intestate. One of the essential consequences of marriage historically was that it determined the intestate distribution of property to heirs. A valid marriage was the *sine qua non* for a child to inherit a deceased parent's property intestate. (See *Meister, supra*, 96 U.S. 76 [validity of marriage determined daughter's right to inherit property, as opposed to the claim of the deceased's mother]; see also *In re De Laveaga's Estate* (1904) 142 Cal. 158 [75 P. 790] [illegitimate son of deceased man could not inherit in his stead.)[7] The difference again, for same-sex couples, is that the absence of a biological relationship with a partner's child precludes a constitutional right to pass property intestate. The partner can obtain the right to pass property to a partner's child intestate only by adoption or by operation of some other provision of statutory law.

Right of spouse to intestate inheritance. A spouse likewise has a right to inherit intestate, although that right is shared with the children. For example, in *Pearson v. Pearson* (1875) 51 Cal. 120, the deceased's daughter by a previous marriage challenged the right of an African-American woman and her children to share in her father's estate. The plaintiff claimed that her father's marriage to the African-American woman was invalid because the woman was his slave. This Court held that the woman and her children had the right to share in the intestate estate because the common law marriage was valid where it was contracted, thereby manumitting the woman. (*Id*. at pp.

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[7]The U.S. Supreme Court has ruled that the equal protection clause of the Fourteenth Amendment invalidated laws precluding illegitimate children from sharing in or inheriting the estate of an intestate deceased father. (*Trimble v. Gordon* (1977) 430 U.S. 762, 770-771.) The Court ruled, however, that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates . . . ." (*Id*. at p. 770.) The protection of illegitimate children under the Fourteenth Amendment in no way reduces the right to pass property to marital children intestate; it simply expands the number of potential heirs.

124-125.) The relationship did not need to be sanctioned by statutory law to create the right to inherit intestate.

In contrast, there is no constitutional right for a same-sex partner to inherit an intestate estate. Absent specific statutory authorization for same-sex partners to have rights in a partner's estate, the only potential claim against a partner's estate is quasi-contract law. (See *Marvin v. Marvin* (1976) 18 Cal.3d 660 [134 Cal.Rptr. 815] (*Marvin*).)

Disposition of spousal remains. A husband or wife has a right to dispose of the body of a deceased spouse without interference, unless the deceased made prior arrangements. (*O'Donnell v. Slack* (1899) 123 Cal. 285, 288-289 [55 P. 906].) The surviving spouse or other next of kin actually has "property rights in the body which will be protected . . . ." (*Id*. at p. 289.) This is not a right that a same-sex partner holds absent a statutory basis.

Right to ownership of separate property and to share marital property. Married couples have a right to ownership of their separate property as well as to share in ownership of marital property under the California Constitution. (See Cal. Const. 1849, Art. 11, § 14; Cal. Const. Art. 1, § 21; see also Fund Answer pp. 17-18.) That constitutional right may not be extended to same-sex couples without amending the Constitution, since the term "marriage" in the Constitution means the union of a man and a woman. (See Fund Answer pp. 17-23, incorporated herein by reference.) Accordingly, same-sex couples may share in property rights only through statutory provisions or contractual arrangements.

In summary, to the extent these rights are protected by the federal Constitution, they may not be eliminated or abrogated even by a state constitutional amendment. Nor may they be claimed by same-sex couples because the rights and duties are simply inapplicable.

III. THE CONSTITUTIONAL SIGNIFICANCE OF THE TERMS "MARRIAGE" AND "MARRY" PRECLUDE THE LEGISLATURE FROM CHANGING THE NAME OF THE LEGAL RELATIONSHIP.

> 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?

A. The Terms "Marriage" and "Marry" Have Constitutional Significance Under the California Constitution.

"Marriage" is a common law concept that was incorporated in the California Constitution in 1849, and remains there to the present. (See Cal. Const. 1849, Art. 11, § 14 [separate property of wife before and after marriage and property held in common with husband]; Cal. Const. Art. 1, § 21 [current version].) Because "marriage" was incorporated in the Constitution, its meaning cannot be changed by the Legislature. (See Fund Answer pp. 17-19, incorporated herein by reference.) Accordingly, the terms "marriage" and "marry" have constitutional significance.

Moreover, giving the legal relationship of "marriage" another name would render the references to marriage in Article 1, section 21 meaningless. Thus, the Legislature could not change the name of the legal relationship of "marriage" to some other name, consistent with the California Constitution, regardless of the rights and obligations associated with the relationship. An act by the Legislature invalidating a provision of the Constitution is itself invalid. (See *People v. Johnson* (1892) 95 Cal. 471, 475 [31 P. 611] [act in conflict with the Constitution is void].)

B. The Federal Constitution Precludes Changing the Name of "Marriage" to Some Other Name.

"Marriage" is universally recognized as the legal union of a man and a woman. Redefining the term "marriage" to include same-sex couples, however, would not give those relationships universal recognition.[8] A same-sex "marriage" has no more universal effect than a registered domestic partnership because the vast majority of states and countries do not recognize either.

The fundamental right to marry is one of the oldest due process rights recognized by the U.S. Supreme Court. (See *Meister, supra*, 96 U.S. at pp. 78-79; *Maynard, supra*, 125 U.S. at p. 211; *Meyer, supra*, 262 U.S. at p. 399; *Pierce, supra*, 268 U.S. at pp. 534-535.) The marital union of a man and a woman is given legal effect worldwide. "Marriage" is the English term that describes the union in a universally understood manner. (Cf. Fund Answer pp. 3-5.) To change the name of the relationship would eliminate its universal identity and generate confusion as to the nature of the relationship. It would no longer be the same right, and it would no longer be universally recognized. In short, changing the name of the marital relationship would have the effect of eliminating a right that the state did not create. (See *Meister, supra*, 96 U.S. at pp. 78-79.) That would violate the fundamental right to marry by prohibiting entry into that institution. (See *Perez, supra*, 32 Cal.2d at pp. 714-715; *Turner v. Safley* (1987) 482 U.S. 78, 95; *Zablocki, supra*, 434 U.S. at p. 383; *Loving v. Virginia* (1967) 388 U.S. 1, 12; *Skinner, supra*, 316 U.S. at p. 541.) Thus, it is beyond the power of the state to eliminate the institution of marriage or even to preserve it with a different name.

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[8]In contrast, when this Court invalidated the miscegenation laws in *Perez*, the interracial marriages were recognized worldwide, except for the American states with statutory prohibitions on interracial marriage.

The Legislature could choose to stop regulating the entry to marriage. (Cf. *In re Baldwin's Estate* (1912) 162 Cal. 471, 489 [123 P. 267] [common law of marriage was rule in California prior to adoption of statutes regulating marriage].) Even then, however, California could not refuse to recognize marriages valid under the common law or lawfully entered in other jurisdictions, consistent with California public policy. (Cf. *Graham, supra*, 2 Cal. at p. 506 [recognizing validity of marriages under the common law]; *Perez, supra*, 32 Cal.2d at pp. 714-715 [recognizing fundamental right of marriage under the federal Constitution].) The state would still be required to accord the substantive rights and obligations of the fundamental right to marriage to married couples.

IV. RULES OF STATUTORY CONSTRUCTION AND THE FEDERAL CONSTITUTION REQUIRE THAT SECTION 308.5 BE APPLIED TO CALIFORNIA MARRIAGES.

> Question 4: Should Family Code section 308.5 - which provides that "[o]nly marriage between a man and a woman is valid or recognized in California" – be interpreted to prohibit only the recognition in California of same-sex marriages that are entered into in another state or country or does the provision also apply to and prohibit same-sex marriages entered into within California? Under the Full Faith and Credit Clause and the Privileges and Immunities Clause of the federal Constitution (U.S. Const., art. IV, §§ 1, 2, cl.1), could California recognize same-sex marriages that are entered into within California but deny such recognition to same-sex marriages that are entered into in another state? Do these federal constitutional provisions affect how Family Code section 308.5 should be interpreted?

A. The Rules of Statutory Construction Require that Section 308.5 Be Interpreted to Apply to California Marriages.

The Fund has addressed the scope of section 308.5 in its opening brief as a Petitioner, its answer brief as a Respondent, and its reply brief as a Petitioner. In its opening brief, the Fund pointed out that ordinary rules of statutory construction and the plain meaning of section 308.5 require applying

it to marriages contracted within and outside of the State of California. (Fund Open pp. 29-32.) In its answer brief on the substantive issues, the Fund responded to the Rymer parties' assertion that section 308.5 applies only to out-of-state marriages. (Fund Answer pp. 73-84.) Among other things, the Fund pointed out that the author of section 308.5 had drafted numerous similar provisions in the Assembly and the Senate, but expressly made those bills apply only to out-of-state marriages. (*Id*. at pp. 81-83.) The Fund cited numerous authorities to the effect that when a provision is omitted which was included in prior legislation, the omitted provision cannot be deemed to be included in the latter legislation. (*Id*. at p. 83.) And in its reply brief, the Fund responded to the City's arguments about the scope of section 308.5. (Fund Reply pp. 26-28.) The Fund pointed out that the rules of construction do not preclude a voter initiative, which removes a matter from the Legislature's province, from rendering superfluous a statute enacted by the Legislature. (*Id*. at p. 26.) It also demonstrated that it would be absurd to conclude that the voters intended to remove from the Legislature the ability to recognize same-sex "marriages" from other states, but allow the Legislature to redefine marriage in California. (*Id*. at pp. 27-28.) The Fund hereby incorporates those arguments by reference to avoid burdening the Court with redundant briefing.

B. California Cannot Recognize California Same-Sex "Marriages" without Recognizing Such "Marriages" from Other States.

Interstate recognition of marriage does not arise from the Full Faith and Credit Clause, but is a matter of comity, which implicates the Privileges and Immunities Clause. Under principles of comity, California would have no basis for refusing to recognize an out-of-state same-sex "marriage" if it recognized same-sex "marriages" entered into in California. Thus, the Privileges and Immunities Clause of the federal Constitution rather than the Full Faith and Credit Clause impacts the interpretation of section 308.5.

1. Privileges and Immunities Clauses.

The Privileges and Immunities Clause of Article IV, section 2 of the federal Constitution "'establishes a norm of comity' . . . among the States with respect to their treatment of each other's residents." (*Hicklin v. Orbeck* (1978) 437 U.S. 518, 523-24 [quoting *Austin v. New Hampshire* (1975) 420 U.S. 656, 660] (*Hicklin*).) This "norm of comity" is the basis for California's recognition of out-of-state marriages. (See *McDonald v. McDonald* (1935) 42 P.2d 362, 365 [out-of-state marriages recognized on the basis of comity and marriages contrary to public policy "have been generally considered as not protected by the rule of comity"] [overruled on other grounds, (1936) 6 Cal.2d 457].)[9]

Comity affords respect to other states or countries by generally giving effect to the law of the foreign sovereign. (*Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 134 [216 Cal.Rptr. 412].) Nevertheless, the doctrine is not absolute. It must give way when recognition of another state's law is contrary to the public policy of California. (*Ibid.)* Thus, California is not required to recognize marriages from another state that are contrary to its own public

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[9]Other states recognize foreign marriages for the same reason. (See, e.g., *Mason v. Mason* (Ind. Ct. App. 2002) 775 N.E.2d 706, 709 ["Indiana's recognition of the existence of a foreign marriage is a matter of comity"; rejecting Full Faith and Credit argument]; *Kelderhaus v. Kelderhaus* (1996) 21 Va. App. 721, 725 [467 S.E.2d 303] ["A marriage's validity is to be determined by the law of the state where the marriage took place, unless the result would be repugnant to Virginia public policy"]; *In re Estate of Lamb* (1982) 99 N.M. 157, 159 [655 P.2d 1001] ["New Mexico applies the rule of comity, that the law of the place where the marriage is performed governs the validity of that marriage"]; *Hesington v. Estate of Hesington* (Mo. 1982) 640 S.W.2d 824, 826 ["as a matter of comity, Missouri will recognize a marriage valid where contracted unless to do so would violate the public policy of this state"]; *Brinson v. Brinson* (1957) 233 La. 417, 432-33 [96 So.2d 653] ["the spirit of comity between states does not require a state to recognize a marriage which is contrary to its own public policy"].)

policy. (*Ibid.;* see *In re Kandu* (W.D. Wash. 2004) 315 B.R. 123, 133-134 [affirming that comity does not require a state to recognize a marriage contrary to its own public policy or prejudicial to its interests]; Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 Cap. U.L. Rev. 363, 367-68 (2002) [discussing states' right to refuse to recognize marriages in violation of public policy]; Restatement (Second) of Conflict of Laws § 283 (1969).) The citizens of California have established public policy on marriage through the enactment of section 308.5.

Much of the jurisprudence on privileges and immunities deals with differential treatment regarding employment opportunities, business requirements, or taxes. (See *Hicklin, supra*, 437 U.S. at pp. 524-525.) The application to such economic issues, however, has not changed "[t]he purpose of the Clause," which was "'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. . . .'" (*Id*. at p. 524 [quoting *Paul v. Virginia* (1869) 8 Wall. 168, 180 [19 L.Ed. 357]].) That is the purpose that comes into focus when applying the Privileges and Immunities Clause to the rights of citizens to travel or to move to another state, which is implicated in state recognition of a marriage.[10] The right to become a citizen of another state, with equal treatment, is also grounded in the Privileges and Immunities Clause of the Fourteenth Amendment.

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[10]The right to travel is a right that falls within the purview of the Privileges and Immunities Clause, and thus meets the first test the U.S. Supreme Court identified in *Supreme Court of Virginia v. Friedman* (1988) 487 U.S. 59, 64 (*Friedman*). The U.S. Supreme Court does not appear to follow the two-part test of *Friedman* in the right-to-travel cases, however. It never cited the test in *Saenz v. Roe* (1999) 526 U.S. 489, which is discussed below.

The U.S. Supreme Court has identified at least three different components to the right to travel, two of which are at issue here: "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." (*Saenz v. Roe* (1999) 526 U.S. 489, 500.) Both of those rights are grounded in the Privileges and Immunities Clause of Article IV, section 2. (*Id*. at p. 501.) The Court expounded on that constitutional protection as follows:

> [B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. . . . Those protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." [Cit.] There may be a substantial reason for requiring the nonresident to pay more than the resident for a hunting license, [cit.], or to enroll in the state university, [cit.] but our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for "the 'citizen of State A who ventures into State B' to settle there and establish a home." [Cit.] Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State.

(*Id*. at pp. 501-502 [citations omitted].) The Court further based the right to become a resident of another state in the Privileges and Immunities Clause of the Fourteenth Amendment. (*Id*. at p. 503.) It observed that "'[a] citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.'" (*Id*. at pp. 503-504 [citation omitted].) Because of that right, the Court held that California could not premise the amount of

welfare benefits during a new resident's first year of residency on the amount of welfare received in the prior state. (*Id*. at pp. 506-507.)

The "perfect constitutional right" to relocate to another state with "an equality of rights with every other citizen" means that California could not recognize same-sex "marriages" entered into in California while denying a new resident recognition of a same-sex "marriage" entered into in another state. (*Saenz, supra*, 526 U.S. at p. 502.) Nor is there any state interest in treating a same-sex "marriage" contracted in California differently than one contracted elsewhere, if state policy in California were to affirm same-sex "marriage." (Cf. *Supreme Court of Virginia v. Friedman* (1988) 487 U.S. 59, 65 [economic privilege of residents may be denied to nonresidents only if the restriction is "closely related to the advancement of a substantial state interest"].) Thus, if California were to recognize same-sex "marriages" contracted in California, it would also have to recognize such "marriages" contracted elsewhere.

2. Full Faith and Credit Clause.

The U.S. Supreme Court has ruled that it is only final judgments that are entitled to unyielding full faith and credit under Article IV, section 1. (*Baker v. General Motors Corp.* (1998) 522 U.S. 222, 234.) Administrative decisions are entitled to far less than "full faith and credit" compared to judgments. As the Supreme Court held in *Thomas v. Washington Gas Light Co*. (1980) 448 U.S. 261, 282-283, administrative agencies have limited power, and their decisions are entitled to full faith and credit only to the extent of the authority they possess. In fact, administrative decisions and actions have no official status under the enabling statute of the Full Faith and Credit Clause, 28 U.S.C. § 1738. Thus, other states are not required to accord the same level of full faith and credit to administrative actions or proceedings as to a valid judgment.

The issuing of a marriage license does not rise to the level of a final judgment or even an administrative action. Unlike judicial proceedings or agency decisions, a marriage license is issued without adverse parties or a neutral decision maker. (See Jeffrey L. Rensberger, *Same-sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 421 (1998).) Accordingly, issuing a marriage license or certificate is a simple ministerial action. (See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082 [issuance of marriage license is a non-discretionary, ministerial function].) The license is not entitled to any full faith and credit, but is recognized only as a matter of comity when consistent with the state's public policy.

Some have claimed that the purpose of the Full Faith and Credit Clause is to make "one nation" out of the many states by requiring states to recognize each others' laws. This argument fails to take into account the fact that the states, while equal, do not have to be identical. In fact, despite the Full Faith and Credit Clause and the constitutional powers granted to the federal government, states retain "their status as residuary sovereigns and joint participants in the governance of the Nation." (*Alden v. Maine* (1999) 527 U.S. 706, 748 [holding that state's choice to retain immunity from suit was exercise of sovereignty]; see also *Pacific Employers Insurance v. Industrial Accident Commission* (1939) 306 U.S. 493, 501 [noting that "attributes of sovereignty" "precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own"] (*Pacific Employers Insurance*).)

States clearly do not have the power to enact legislation that would impose their policy choices on other states:

> "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial

> jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'"

(*Healy v. Beer Institute* (1989) 491 U.S. 325, 337 n.13 [citations omitted].) The U.S. Supreme Court long ago noted that states cannot legislate beyond their own borders. (*Bonaparte v. Tax Court* (1881) 104 U.S. 592, 594 [holding that a state may not determine tax consequences in another state of its own tax-free debt instruments].) It "has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to which the laws and policy of one state may be subordinated to those of another." (*Pink v. A.A.A. Highway Express, Inc*. (1941) 314 U.S. 201, 210.) Although the purpose of the Full Faith and Credit Clause is to preserve rights a person obtains in a state,

> the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others.

(*Id*. [rejecting application of one state's law to another state's residents]; see also *Pacific Employers Insurance, supra*, 306 U.S. at p. 501 [same].) Clearly, states are restricted to regulating rights within their own borders and not in other states. (See *United States v. Edge Broadcasting Co.* (1993) 509 U.S. 418, 429 ["Virginia's lottery policy" could not "dictat[e] what stations in a neighboring State may air"]; *Bigelow v. Virginia* (1975) 421 U.S. 809, 824 [Virginia could not regulate medical services provided in New York or prevent Virginia residents from traveling to New York to obtain such services]; *New York Life Ins. Co. v. Head* (1914) 234 U.S. 149, 163 [rejecting notion that "because a state has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other states"]; *Huntington v. Attrill* (1892) 146 U.S. 657, 669 ["Laws have no force of themselves beyond the jurisdiction of the state which enacts them"].) Therefore, the Full Faith

and Credit Clause does not require a state to give any deference to the marriage laws of another state.

3. The federal impact on the interpretation of section 308.5.

This Court has held that statutes must be construed "in a fashion that avoids rendering [their] application unconstitutional." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1216 [86 Cal.Rptr.2d 778].) When there are two reasonable interpretations of a statute, it must be construed in a manner that "will render it valid in its entirety, or free from doubt as to its constitutionality, even though [an]other construction is equally reasonable." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 [53 Cal.Rptr.2d 789].) Under normal rules of statutory construction, section 308.5 should be interpreted to apply to marriages contracted in California. But even if another construction were equally reasonable, section 308.5 should still be interpreted to apply to marriages entered into in California as well as those entered into in other states to avoid violating the federal Privileges and Immunities Clauses. (See *id*.; see also *Saenz, supra*, 526 U.S. at pp. 501-503.)

CONCLUSION

For the foregoing reasons, the fundamental right to marriage has no relevance to same-sex couples, and California Family Code section 308.5 establishes California's marriage policy. The Fund respectfully requests that this Court clarify that section 308.5 applies to marriages entered in California, uphold the decision of the Court of Appeal on the merits, and order the entry of summary judgment on behalf of the Fund.

Dated: August 16, 2007

Respectfully submitted,

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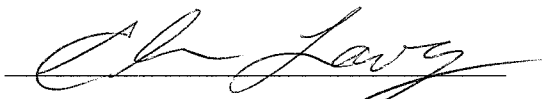
CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14

I hereby certify that this brief was prepared in Times New Roman 13 font. According to the "Word Count" feature in my Word Perfect for Windows software, this brief, including footnotes but excluding the Table of Contents, Table of Authorities, this Certificate, and any attachments, is 7,002, up to and including the signature lines that follow the brief's conclusion.

Dated: August 16, 2007



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