Case No. S 147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Of Consolidated Cases A110449, A110450, A110451,
A110463, A110651 and A110652
San Francisco Superior Court Case Nos. 504038, JCCP 4365
Honorable Richard A. Kramer, Judge

CAMPAIGN FOR CALIFORNIA FAMILIES' SUPPLEMENTAL BRIEF IN RESPONSE TO JUNE 20, 2007 ORDER

MARY E. MCALISTER (SBN 148570)
Liberty Counsel
PO Box 11108
100 Mountain View Rd Suite 2775
Lynchburg, VA 24506
court@lc.org
(434) 592-7000 - Telephone
(434) 592-7700- Facsimile

MATHEW D. STAVER
FL Bar No. 0701092*
Liberty Counsel
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
court@lc.org
(800) 671-1776 - Telephone
(407) 875-0770 - Facsimile
*Appearing Pro Hac Vice

Attorneys for Campaign for California Families, Plaintiff- Petitioner in Case No. A110652

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QUESTIONS PRESENTED

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.

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?

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?

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?

LEGAL ARGUMENT

I. REGISTERED DOMESTIC PARTNERS HAVE ALL OF THE SUBSTANTIVE RIGHTS, BENEFITS, DUTIES AND OBLIGATIONS AVAILABLE UNDER STATE LAW TO MARRIED COUPLES.

A. The Domestic Partner Rights and Responsibilities Act Bestowed All Of The Substantive Rights, Benefits and Responsibilities Of Marriage On Registered Domestic Partners.

Since the passage of the Domestic Partner Rights and Responsibilities Act of 2003, members of registered domestic partnerships have enjoyed the same rights, protections, and benefits, and been "subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Family Code §297.5(a). Prior to January 1, 2007, registered domestic partners could not file joint state income tax returns and their earned income could not be treated as community property for state income tax purposes. However, in 2006, the Legislature passed and Governor Schwarzenegger signed Senate Bill 1827, which removed those exclusions. As a result, as of January 1, 2007,

> For purposes of the statutes, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, and benefits, and the responsibilities, obligations, and duties of

> registered domestic partners in this state, as effectuated by this section, with respect to community property, mutual responsibility for debts to third parties, the right in particular circumstances of either partner to seek financial support from the other following the dissolution of the partnership, and other rights and duties as between the partners concerning ownership of property, any reference to the date of a marriage shall be deemed to refer to the date of registration of a domestic partnership with the state.

Family Code §297.5(k)(1).Consequently,"the substantive rights and responsibilities granted to and imposed upon domestic partners **are the same** as those granted to and imposed upon spouses." *Koebke v. Bernardo Heights Country Club* (2005) 35 Cal.4th 824, 847 [31 Cal.Rptr.3d 565, 115 P.3d 1212] (emphasis added). Domestic partners cannot be discriminated against on the grounds that they are not married. *Id.*[1]

B. Only Minor Procedural Differences Set Domestic Partnerships Apart From Marriage.

The only remaining state law differences between registered domestic

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[1] This Court's ruling in *Koebke* and the explicit language in Family Code §297.5 case significant doubt upon a recently publicized trial court order in which the judge ruled that a registered domestic partnership is not the same as a marriage for purposes of nullifying a support order. *Garber v. Garber* Orange County Superior Court case 04D006519, as reported in the Los Angeles Times at www.latimes.com/news/local/la-me-gaywed22jul22.1.1655839.full.story? In addition, the news story indicates that the dispute revolved around a contractual issue – whether the no modification clause in the support agreement meant that it could not be changed upon remarriage. Therefore, it does not, as Petitioners may attest, exemplify a "gap" in the rights between married couples and registered domestic partners.

partnerships and marriage concern procedures for formation and dissolution. Family Code §302 provides that individuals under the age of 18 can get married with parental consent, but there is no similar provision for those wanting to enter into a registered domestic partnership. Under Family Code §§ 297(b)(1), a couple must share a residence before they can register as domestic partners, but there is no similar prerequisite for a marriage license. A couple can establish a registered domestic partnership by simply filing a Declaration of Domestic Partnership with the Secretary of State under Family Code §298.5. However, couples who want to marry must obtain a marriage license and have their union solemnized. Family Code §§ 300, 420.

Under Family Code §299, domestic partners who have been registered for less than five years, have no children and meet certain property and debt requirements can summarily dissolve their domestic partnership by simply filing a Notice of Termination of Domestic Partnership with the Secretary of State. Married couples meeting the same criteria can utilize a summary dissolution procedure, but it requires court action. Family Code §§2400-2405. Domestic partners do not have to be residents of California to terminate their partnership, Family Code §299(d), but residency is required for dissolution of a marriage. Family Code §2320.

II. THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO MARRY INCLUDES THE RIGHT TO ENTER INTO A LEGALLY RECOGNIZED UNION OF ONE MAN AND ONE WOMAN, DIRECT THE UPBRINGING OF CHILDREN, MANAGE AND CONTROL PROPERTY AND TRANSFER PROPERTY WITHOUT REASSESSMENT, AND THESE RIGHTS CANNOT BE ABROGATED OR ELIMINATED EXCEPT BY A CONSTITUTIONAL AMENDMENT.

A. The Fundamental Right To Marry Under The United States And California Constitutions Is The Right To Enter Into A Legally Recognized Union Of One Man And One Woman.

The right to marry is not merely the right to enter into a civil contract subject to regulation, and therefore to legislative adjustments, by the state. *Perez v. Sharp* (1948) 32 Cal.2d 711,714 [198 P.2d 17]. Instead, the right to marry "is a fundamental right of free men" protected by the United States and California constitutions. *Id.* Certainly, the state has the right to regulate certain attributes of the marital relationship, such as procedures for solemnizing the relationship, procedures for dissolving the relationship and contractual rights arising out of the relationship. *See id.* However, as a fundamental right, the right to marry is not an amorphous lump of clay that the legislature or the voters can mold to fit their current view of societal norms.

As this Court noted in *Perez*, the right to marry falls within the area of personal liberty protected by the due process clause of the Fourteenth Amendment. *Id.* The right to marry is not a right conferred on individuals by

the state, and therefore cannot be invalidated because certain state-imposed formalities were not followed. *Meister v. Moore* (1877) 96 U.S. 76, 78-79.

> If the parties agreed presently to take each other for **husband and wife**, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations.

Id. at 82-83 (emphasis added). The "right to marry" protected under the due process clause of the Fourteenth Amendment, therefore, is the right to join together as husband (male) and wife (female). *See Murphy v. Ramsey* (1885) 114 U.S. 15, 45.

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the **union for life of one man and one woman in the holy estate of matrimony**; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Id (emphasis added). The United States Supreme Court has also recognized that the right to marry is part of the right of privacy implicit in the due process clause of the Fourteenth Amendment. *Griswold v. Connecticut* (1965) 381 U.S. 479, 486.

> We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school

> system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. Marriage is an institution that has been built around the most fundamental human relationship – the joining of a man and a woman as the necessary union for the propagation of the human race.. That is why the United States Supreme Court has referred to marriage as "creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill* (1888) 125 U.S. 190, 205. Marriage is the most important relation in life because "[m]arriage **and** procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 (emphasis added).

The union of one man and one woman is **the** fundamental human relationship, since the union of a man and a woman is necessary to create another human being and therefore ensure that society will continue. Certainly, assisted reproduction technology has meant that a human being can be created without a man and a woman directly engaging in sexual intercourse. However, technology has not changed the biological fact that only the union of sperm from a man and ova from a woman can create a new human being. That fundamental fact is the genesis of the right to marry as the right to enter into

a legally recognized union of one man and one woman.

States can regulate marriage by establishing laws about formation, dissolution, property disposition and financial support, but only so long as those regulations do not interfere with the essential right – the joining of one man and one woman – "a fundamental human relationship." *Boddie v. Connecticut* (1971) 401 U.S. 371, 383.

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Zablocki v. Redhail (1978) 434 U.S. 374, 386. A regulation that prohibits someone who is behind in child support from entering marriage significantly interferes with the right to marry and is unconstitutional. *Id.* Similarly, a statute that prohibits an African-American from marrying a white person significantly interferes with the right to marry and thereby deprives citizens of liberty without due process of law. *Perez*, 32 Cal.2d at 716; *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." *Loving*, 388 U.S. at 12.

In *Perez*, this Court denominated the right as the "right to join in

marriage with the person of one's choice." *Perez*, 32 Cal.2d at 715. Petitioners have latched unto the "person of one's choice" clause to claim that the fundamental right to marry in California is not the right to join in a union of one man and one woman, but a right of any two people of any gender to enter into a legal relationship. However, when viewed in context, this Court's definition of the fundamental right to marry comports with the fundamental facts of nature, common law and United States Supreme Court precedent, which define the right as the right to enter into the union of one man and one woman. In addition, this Court's decisions both before and after *Perez* clearly and consistently establish the right to marry as the right to enter into a union of one man and one woman. "That [civil] contract is one 'by which **a man and woman** reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife.'" *Mott v. Mott* (1890) 82 Cal. 413, 416 [22 P. 1142] (emphasis added). "[T]he structure of society itself largely depends upon the institution of marriage....The joining of **the man and woman in marriage** is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 [134 Cal.Rptr. 815, 557 P.2d 106] (emphasis added). "Marriage is accorded this degree of dignity in recognition that '[t]he **joining of the man**

and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.' [Citation.] Consonant therewith, the state is most solicitous of the rights of spouses." *Elden v. Sheldon* (1988) 46 Cal.3d 267, 275 [250 Cal.Rptr. 254; 758 P.2d 582](emphasis added).

As these authorities make apparent, the fundamental right to marry under the United States and California constitutions is the right to enter into a legally recognized union of one man and one woman. The Legislature or voters can enact statutes which regulate how a union of a man and a woman is solemnized, how a union of a man and a woman is legally dissolved, and what benefits and obligations married couples obtain as a result of the solemnization of the marriage. However, such legislation cannot create impediments to the entering into the union of one man and one woman, such as restrictions based upon race (*Loving, Perez*) or unpaid debts (*Zablocki*), or to the dissolution of the union of one man and one woman, such as statutes requiring the payment of fees to obtain a divorce (*Boddie*).

Most importantly, neither the Legislature nor the voters can enact legislation that abrogates or eliminates the fundamental nature of the right to marry as the right to enter into a union of one man and one woman without amending the Constitution. Neither can the Legislature or the voters insist that

this Court abrogate or eliminate the fundamental nature of the right to marry as the union of one man and one woman absent an amendment to the Constitution.

B. The Fundamental Right To Marry Includes The Right To Direct The Upbringing Of Children.

The "area of personal liberty" protected by the due process clause of the Fourteenth Amendment encompasses not merely the right to enter into the union of one man and one woman, but "to marry, establish a home and bring up children." *Perez v. Sharp* (1948) 32 Cal.2d 711, 714. The wording and placement of that clause within this Court's discussion of the liberty interest demonstrates that the right to establish a home and bring up children is an integral part of the constitutionally protected right to marry:

> The due process clause of the Fourteenth Amendment protects an area of personal liberty not yet wholly delimited. "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it 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." Italics added: *Meyer v. Nebraska* [1923], 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 29 A.L.R. 1446.

Perez, 32 Cal.2d at 714(emphasis added). In *Meyer*, the United States Supreme

Court established that the right to marry, establish a home and bring up child included "the natural duty of the parent to give his children education suitable to their station in life," which in that case included the right to have their child instructed in German. *Meyer v. Nebraska*, 262 U.S. at 400. The *Meyer* court found that a state statute which prohibited teaching any subject in any language but English and prohibited the teaching of foreign languages before the ninth grade unreasonably interfered with the parents' fundamental right to direct the upbringing of their children *Id.* at 401.

Citing *Meyer*, the United States Supreme Court reinforced the fundamental constitutional right of parents to direct the upbringing of their children when it invalidated a law that required that all children attend public schools. *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The 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.

Id. at 535. Since then, the Supreme Court has consistently upheld the fundament right of parents to make decisions regarding the care, custody and control of their children.

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

> freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters, supra*. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

Prince v. Massachusetts (1944) 321 U.S. 158, 166. In *Santosky v. Kramer* (1982) 455 U.S. 745, 753, the Supreme Court more specifically described the right as "the fundamental constitutional liberty interest of **natural parents** in the care, custody, and management of their child." (emphasis added).

The Supreme Court's emphasis on constitutional protection of the relation between biological parents and their children is apparent in *Stanley v. Illinois* (1972) 405 U.S. 645, 651, in which the Court upheld the right of an unwed father to a fitness hearing before his children could be declared wards of the state after the death of their mother. Citing *Meyer, Skinner* and *Prince*, the *Stanley* court reiterated that the right to conceive and raise one's children is an essential civil right that cannot be hindered by the state. *Id.* "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'"*Id.* The integrity of the family unit is protected not only by the due process clause, but also the equal protection clause of the Fourteenth Amendment and the Ninth Amendment. *Id.* That constitutional protection means that the state is not free to draw "legal

parentage" lines that infringe upon the biological parents' fundamental constitutional right in the companionship, care, custody, and management of their children. *Id.* at 652.[2]

Similarly, in *Troxel v. Granville* (2000) 530 U.S. 57, 66, the Supreme Court again emphasized "that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." In fact, "[t]he liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65. The *Troxel* Court found that Washington's non-parental visitation statute unconstitutionally infringed upon that fundamental right. *Id.* at 67. Under the statute, any person could petition for visitation rights, and once the petition was filed the state court could make a visitation determination without regard to the parents' determination about the best interest of their child. *Id* The trial court failed to provide any

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[2] Adoption does not run afoul of the fundamental right of parents to direct the upbringing of their natural children because it creates a parent-child relationship only with the consent of the biological parents or after a judicial process that terminates parental rights in accordance with due process. *See* Family Code §§ 8600-9212. It is attempts to grant parental rights to third parties who are not biological parents or who have not undertaken the judicial process, such as statutes bestowing rights on domestic partners without adoption proceedings, *e.g.* Family Code §297.5(d), that infringe upon the fundamental right to marry and bring up children.

protection for the mother's fundamental constitutional right to make decisions concerning the rearing of her children. *Id.* Consequently, the visitation statute presented a circumstance in which "the State's recognition of a third party interest in a child can place a substantial burden on the traditional parent-child relationship."*Id.* at 64. *See also Punsly v. Ho* (2001) 87 Cal.App.4th 1099, 1110; *Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, 862 (Finding that Family Code §3102 infringed upon the fundamental constitutional rights of fit biological parents by providing that third parties be granted parental rights over the parents' objections).

Family Code §297.5(d) creates a similar circumstance. Under Section 297.5(d), a registered domestic partner acquires parental rights over the children of his or her partner by merely filing a Declaration of Domestic Partnership with the Secretary of State. There is no judicially supervised process for securing the consent of the other biological parent or termination of his or her parental rights. The father or mother who is not part of the domestic partnership is forced to relinquish his or her right to direct the upbringing of his or her child to a third party without any opportunity to either consent or object. This is a textbook example of violation of due process. Since the due process right at issue here is the oldest fundamental right recognized by the Supreme Court, *Troxel,* 530 U.S. at 65, the violation is

particularly egregious.

The fundamental constitutional right of parents to direct the upbringing of their children established in *Meyer* and further delineated in *Pierce, Prince, Santosky, Stanley* and *Troxel*, is part of the personal liberty right "to marry, establish a home and bring up children" that is protected under the Fourteenth Amendment to the Constitution. *Perez v. Sharp* (1948) 32 Cal.2d 711, 714. "Marriage **and** procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 (emphasis added). Consequently, the right to marry includes not only the right to enter into a legally recognized union of one man and one woman, but also the rights and obligations attendant to the care, custody, and control of the children of that union. Any legislative enactment that attempts to grant parental rights to third parties who are not biological or adoptive parents or to remove parental rights from biological or adoptive parents without due process is an impermissible infringement upon the fundamental constitutional right to marry, establish a home and raise a family. Absent a constitutional amendment, neither the Legislature nor the people have the authority to enact statutes such as Family Code §297.5(d) that grant custody, visitation, support and other parental rights to domestic partners or others who are not biologically related to and have not adopted a child.

C. The California Constitution Explicitly Provides That The Classification Of Property As Separate Or Community, With The Attendant Benefits, Applies Only To Husbands And Wives.

Since the state's founding in 1849, the Constitution has specifically defined marriage as the union of one man and one woman and delineated property rights arising from that union. Art. 11 §14 of the Constitution of 1849 provided:

> All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

At the time of the state's founding, therefore, marriage under the California Constitution was the union of one man (the husband) and one woman (the wife) and community property did not include property that the wife acquired before the marriage or acquired via gift, devise or descent after marriage. In the Constitution of 1879, the provision was rewritten to say "All property, real and personal, owned by either husband or wife before marriage, and that acquired by either of them afterwards by gift, devise, or descent, shall be their separate property." 1879 Const. Art. 20 §8. A 1970 constitutional amendment created the current language: "Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property," and a 1974

amendment renumbered the provision as Art. 1 §21. Property owned by husbands and wives that is not defined as separate under the Constitution is community property. *See* Family Code §760.

Therefore, a husband (a man married to a woman) has a constitutional right to full ownership, custody and control of property that he owned prior to marriage or that he receives via gift, bequest or inheritance during marriage. Likewise a wife (a woman married to a man) has a constitutional right to full ownership, custody and control of the property that she owned prior to the marriage and that she receives via gift, bequest or inheritance during the marriage. The Legislature has no constitutional power to enact a statute that would subject the proceeds or income of the wife's separate property to the claims of the husband's creditors, and thereby effectively transmute separate property into community property. *George v. Ransom* (1860) 15 Cal. 322, 323.

The California Constitution is clear that the categorization of property as either "separate" or "community," with the attendant obligations and benefits is applicable only to husbands (men married to women) and wives (women married to men). Since the holders of the property rights are specifically described as husbands and wives in the Constitution, neither the Legislature nor voters can statutorily grant those property rights to other individuals who are neither a man married to a woman nor a woman married

to a man without amending the Constitution. Consequently, the Legislature exceeded its authority in 2002 when it passed Senate Bill 1827 which extended community property rights and benefits to registered domestic partners.

D. Property Rights Inuring To Married Couples Include The Right To Have Property Pass Intestate To The Surviving Spouse And Children.

The constitutional right to full ownership, custody and control of separate property granted exclusively to husbands and wives under Art. 1 §21and the concomitant rights related to community property include the right to have property pass by operation of law to the surviving spouse and children when a husband or wife dies.

Under Probate Code §6401, a surviving spouse receives the deceased spouse's one-half interest in community property and property identified as "quasi-community" under the Probate Code. If there is no surviving spouse, then the deceased's children receive the property. Probate Code § 6401.A surviving spouse acquires the entire interest in the deceased spouse's separate property if the deceased spouse did not have any surviving issue, parent, brother, sister or issue of a deceased brother or sister. Probate Code §6401(c) (1). If the deceased husband or wife had one surviving child or the issue of one surviving child or had no issue, but a surviving parent or the issue of a deceased parent, then the surviving spouse receives a one-half share of the

deceased's separate property. Probate Code §6401(c)(2). Finally, if the deceased spouse had more than one surviving child, a surviving child and the issue of one or more deceased children, or the issue of two or more deceased children, then the surviving spouse receives a one-third share of the separate property. Probate Code §6401(c)(3).

The separate property rights acquired under Article 1 §21 of the California Constitution include these rights of intestate succession. The express language of Article 1 §21 provides that only husbands and wives can acquire these rights. Consequently, only husbands and wives have the right to an intestate share of the deceased's separate property. That right cannot be statutorily extended to domestic partners or other individual who is not a husband or a wife without amending the Constitution. Therefore, the Legislature had no authority to simply add "domestic partners" to the text of Probate Code §6401 by enacting Assembly Bill 2216 in 2002.

E. Under The California Constitution, Only Husbands And Wives Have The Right To Exemption From Reassessment Upon A Change Of Ownership Of Real Property.

In California, the fundamental constitutional right to marry also includes the right to have real property transfers exempt from re-assessment. On June 6, 1978, California voters approved Proposition 13, which added Article 13A to the California Constitution. Article 13A established a maximum

ad valorem tax rate of one percent on the "full cash value" of real property. Art. 13A § 1. Under Article 13A, a real property's "full cash value" was initially set at the county assessor's valuation as of 1975-76, with subsequent re-assessments upon change of ownership. Art. 13A §2(a). Purchases and transfers of interest between spouses are excluded from the definition of "change of ownership" for re-assessment. Art. 13A §2(g). A similar exemption is available for parents and children. Art. 13A §2(h).

Consequently, only husbands and wives have a constitutional right to transfer real property interests without facing re-assessment for a change in ownership. Since the Constitution specifically uses the terms "spouses" and "marriage," neither the Legislature nor the people can grant a similar right to domestic partners or other unmarried partners without amending Article 13A.

The fundamental "right to marry" protected under the Fourteenth Amendment of the United States Constitution encompasses the right to enter into the legally recognized union of one man and one woman and to direct the upbringing of the children of the union. *Perez v. Sharp* (1948) 32 Cal.2d 711, 714. In addition, under the California Constitution, the right to marry encompasses the right to custody, management and control of separate property and interests in community property. Art. 1 §21. That includes the right to have separate property and interests in community property pass to a

surviving spouse by operation of law. Art. 1 §21; Probate Code §6401. In California, the constitutional right to marry also encompasses to right to make inter-spousal transfers of real property without facing re-assessment. Art. 13A. Neither the Legislature nor voters can statutorily abrogate or eliminate these rights without amending the Constitution.

III. THE TERM "MARRIAGE" HAS CONSTITUTIONAL SIGNIFICANCE APART FROM THE RIGHTS AND OBLIGATIONS ATTENDANT TO THE LEGAL RELATIONSHIP, AND THE LEGISLATURE DOES NOT HAVE THE POWER TO CHANGE THE NAME.

"What's in a name?"[3] In the case of marriage, millennia of human history encompassing basic physiological facts and social constructs designed to maximize the potential for the continuation of the human race. While a rose by any other name might smell as sweet,[4] marriage by any other name would cease to be marriage, no matter what substantive rights, benefits and obligations are included in the new relationship. Marriage transcends geographic and political boundaries, governments, constitutions, statutes and religious traditions and stands as the cornerstone upon which human society was built and upon which it is dependent for survival. As a transcendent institution, marriage is more that the sum of whatever rights, obligations and

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[3] William Shakespeare, ROMEO AND JULIET, act 2, sc. 2.

[4] *Id.*

benefits the state might bestow as part of its legal recognition of the institution.

Marriage as it existed for thousands of years before California became a state was incorporated into the California Constitution, both explicitly and implicitly, when California joined the union. Similarly, since the early days of the Republic the United States Supreme Court has acknowledged that the institution of marriage is part of the United States Constitution. *See Meister v. Moore* (1877) 96 U.S. 76, 78-79. As an integral part of both the United States and California constitutions the term "marriage" cannot be changed by the Legislature.

A. Marriage Has Independent Constitutional Significance As The Institution Upon Which Society Is Built And Is Able To Continue.

Marriage is not a legal institution that was created when the Founding Fathers drafted the Constitution in 1787 or when Congress first convened to draft the statutes to govern the Republic. Instead, "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Baker v. Nelson* (1971) 291 Minn. 310, 312, *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972) (Rejecting a same-sex couple's claims that Minnesota's marriage laws violated due process, equal protection and the Ninth Amendment to the United States Constitution). Marriage is one of the

"basic civil rights of man."*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541. "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* Marriage is "the traditional relation of the family – a relation as old and as fundamental as our entire civilization." *Griswold v. Connecticut* (1965) 381 U.S. 479,496 (Goldberg, J., concurring).

These pronouncements echo the words of John Locke, one of the people who deeply influenced the Founding Fathers. "God planted in Men a strong desire also of propagating their Kind, and continuing themselves in their Posterity."[5] The union of one man and one woman is the "First Society," and "the seedbed of all human society."[6]Anthropologist Claude Levi-Strauss described marriage as "a social institution with a biological foundation,"[7] recognizing the fundamental biological fact that human beings reproduce sexually and therefore must join together in order to sustain society. That transcendent biological foundation explains why family is "everywhere based on a union, more or less durable, but socially approved, of two individuals of

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[5] John Locke, TWO TREATISES OF GOVERNMENT (1698; Cambridge, U.K.: Cambridge University Press, 1965) 179, cited in David Blankenhorn, THE FUTURE OF MARRIAGE 26 (Encounter Books, 2007).

[6] *Id.* at 318-319.

[7] Claude Levi-Strauss, *Introduction*, in A HISTORY OF THE FAMILY, vol. 1, DISTANT WORLDS, ANCIENT WORLDS, Burguiere, ed. p.5, quoted in Blankenhorn, at p. 29.

opposite sexes who establish a household and bear and raise children."[8] The fundamental nature of the union of one man and one woman further explains why Mr. Levi-Strauss concludes that the conjugal family based upon monogamous marriage is practically a universal phenomenon, present in every type of society.[9]

It is that universally recognized social institution, not a legislatively created bundle of individual rights, that is protected by the due process clause of the Fourteenth Amendment. *Perez v. Sharp* (1948) 32 Cal.2d 711,714; *Murphy v. Ramsey* (1885) 114 U.S. 15, 45; *Griswold v. Connecticut* (1965) 381 U.S. 479, 486. The term "marriage" is not significant because it is protected by the United States and California constitutions, but is protected by the United States and California constitutions because it is significant to society. Marriage "is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill* (1888) 125 U. S. 190.

Consequently, marriage is significant not because it is a well-packaged bundle of individual rights, but because it is an enduring social institution upon

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[8] Claude Levi-Strauss, THE VIEW FROM AFAR 40-41 (New York: Basic Books, 1985) quoted in Blankenhorn, at p. 29.

[9] *Id.*

which the future of society depends. The term "marriage" is not merely a label that can be removed and attached to an ever-changing bundle of rights, but is a universally recognized social construct that is constitutionally significant wholly apart from whatever rights or benefits a particular group might assign to it.

B. The Legislature Cannot Change The Name Of The Legal Relationship Of Marriage, Regardless of Whether It Retains Any Or All Of The Statutory Rights And Obligations Associated With Marriage.

Since it denotes a social institution with a universal meaning independent of whatever rights, benefits or obligations might be associated with it, the term "marriage" cannot be changed by the Legislature.

A social institution is not a bundle of individual rights created to validate a particular private relationship, but is a universally recognized "pattern of rules and structures intended to meet basic social needs."[10] Social institutions "solve basic problems and meet core needs."[11] "Marriage" as a social institution addresses the fundamental problem that human beings reproduce sexually and meets the needs for a shared life between the sexes and the successful raising of children.[12]

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[10] Blankenhorn, at p. 60.

[11] *Id.* at 61.

[12] *Id.*

The Legislature can and has created a package of rights, benefits and obligations to regulate the institution of marriage, but that package is not the institution. *See Meister v. Moore* (1877) 96 U.S. 76, 78-79 (Statutes "regulate the mode of entering into the contract, but they do not confer the right."). Marriage is not a creation of the state subject to revision or amendment in order to adapt to perceived changes in societal norms. Marriage is an institution that over the course of several millennia has developed universally shared meanings and expectations essential to an orderly and effective society. The Legislature could no more change the name of the institution from "marriage" to "X" than it could change the name of the Roman Catholic Church, the army or the police. Any such attempted change would be meaningless in that it would destroy the shared meanings and expectations that define the institutions. No matter what the Legislature might decide to call the union of one man and one woman, it will continue to be "marriage" everywhere else in the world. Only unions with the name of "marriage" would be recognized as such outside of California.

The Legislature cannot change the name of the legal relationship known as "marriage," regardless of whether any or all of the rights and obligations of marriage are preserved under the new definition. "Marriage" is a universal social institution that cannot be changed by legislative fiat.

IV. FAMILY CODE §308.5 MUST BE INTERPRETED TO BOTH PROHIBIT SAME-SEX "MARRIAGE" IN CALIFORNIA AND PROHIBIT THE RECOGNITION OF SAME-SEX "MARRIAGES" ENTERED INTO IN ANOTHER STATE OR COUNTRY; ANY OTHER INTERPRETATION WOULD VIOLATE THE CONSTITUTION.

A. The Plain Meaning Of The Language of Family Code §308.5 Is That Same-Sex "Marriage" Is Prohibited In California And That Out of State Same-Sex "Marriages" Will Not Be Recognized In California.

The language of Family Code 308.5 is straightforward and simple: "Only marriage between a man and a woman is valid or recognized in California." When interpreting the meaning of a voter-enacted statute, the court must "construe the words from the perspective of the voters, attributing the usual, ordinary, and commonsense meaning to them; [the court does] not interpret them in a technical sense or as terms of art." *Howard Jarvis Taxpayers Assoc. v. County of Orange* (2003) 110 Cal. App.4th 1375, 1381. The common sense meaning of the fourteen words of Section 308.5 are that only the union of a man and a woman is valid as a marriage or will be recognized as a marriage in California. The text of the Family Code, rules of statutory construction and judicial precedent demonstrate that Section 308.5 can only be interpreted as prohibiting same-sex "marriage" in California, whether the union originates in California or elsewhere.

Division 3, Section 1 of the Family Code (which includes §§ 300 - 310)

defines a marriage *in* California, establishes licensing requirements for marriages performed *in* California, and explains who can consent to a marriage *in* California under the title "Validity of Marriage." The question for marriages originating in California is whether the marriage is valid, while the question for marriages originating outside of California is whether they will be recognized as marriages in California. *See, e.g., Estate of DePasse*, (2002) 97 Cal. App.4th 92, 106-108 (repeatedly describing the issue at hand as whether a legal union entered into between a man and a woman in California was valid); *Etienne v. DKM Enterprises, Inc.* (1982) 136 Cal. App.3d 487, 490 (describing the issue as whether a common law union that was regarded as a marriage in another state would be recognized as a valid marriage in California).Consequently, "valid" in Section 308.5 refers to marriages originating in California while "recognize" refers to marriages originating outside of California.

Giving independent meaning to "valid" and "recognize" is also consistent with this Court's rulings regarding statutory construction. When interpreting a statute, "a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be

avoided." .*Dyna-Med, Inc. v. Fair Employment & Housing Comn'n.* (1987) 43 Cal.3d 1379, 1386-87 [241 Cal.Rptr. 67, 743 P.2d 1343]. Consequently, when words are used in the alternative, they are presumed to have independent meaning so as to avoid surplusage. *Lungren v. Superior Court* (1996) 14 Cal.4th 294, 302 [58 Cal. Rptr.2d 855, 926 P.2d 1042].

In this case, since "valid" and "recognize" are used in the alternative in Section 308.5, they are to be presumed to have independent meaning. Under *DePasse* "valid" refers to relationships which originate in California, while under *Etienne* "recognized" refers to relationships which originate outside California. *DePasse*, 97 Cal. App.4th at 106-108, *Etienne*, 136 Cal. App.3d at 490. Therefore, Section 308.5 must be interpreted to mean that same-sex unions originating in California cannot be validated as marriages and that same-sex unions originating outside California shall not be recognized as marriages in California.

B. California Cannot Validate Same-Sex Unions Originating In California As "Marriages" And Deny Recognition Of Same-Sex "Marriages" Originating Outside California Under The United States Constitution.

Article IV of the United States Constitution delineates the "Reciprocal Relationship Between States and With the United States." U.S. Const. art. IV. The reciprocal relationship between the states includes the concepts of "Full

Faith and Credit" and "Privileges and Immunities." U.S. Const. art. IV §§ 1, 2, respectively. Under each of those concepts California cannot validate same-sex unions originating in California as marriages without also recognizing same-sex "marriages" entered into outside of California.

1. Under the Full Faith and Credit Clause, California could not validate same-sex "marriages"entered into in California without recognizing same-sex "marriages" originating outside California.

The Full Faith and Credit Clause of the United States Constitution, Art. IV, §1, provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit Clause requires that each State give effect to official acts of other States. *Nevada v. Hall* (1979) 440 U.S. 410, 421. This means that "[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter. Moreover, in certain limited situations, the courts of one State must apply the statutory law of another State." *Id.* The United States Supreme Court has referred to the Full Faith and Credit Clause as a "strong unifying principle" that looks toward "maximum enforcement in each state of the obligations or

rights created or recognized by the statutes of sister states." *Hughes v. Fetter* (1951) 341 U.S. 609, 612.

However, the rule is not absolute. *Id.* The Court has recognized a public policy exception that in certain circumstances permits states to decline to give effect to another state's laws or acts. *See Hall*, 440 U.S. at 422 ("The Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."). However, the exception is also not absolute. *Hughes*, 341 U.S. at 612. "[I]t is for this Court to choose in each case between the competing public policies involved." *Id.* Therefore, Wisconsin's policy against certain wrongful death claims had to "give way" to an Illinois statute that would permit such a claim in an accident that occurred in Illinois. *Id.* However, California's tort laws did not have to give way to Nevada's limitations on recovery against state actors in an accident that occurred in California with a vehicle owned by the State of Nevada. *Hall*, 440 U.S. at 422. A federal court in New Hampshire was compelled to apply Vermont law in a particular dispute arising from a Vermont contract in one case, *Bradford Electric Company v. Clapper* (1932) 286 U.S. 145, but a California court was not compelled to apply Massachusetts law in a particular dispute involving Massachusetts residents who had agreed to abide by Massachusetts law. *Pacific Accident Co. v. Industrial Accident Comm'n*

(1939) 306 U.S. 493.

Therefore, in general, each state is required to honor a judgment, law, or other public act validly established in another state. If honoring a sister state's law or public act would violate the public policy of a state, then that state **might** be able to decline to recognize the sister state's act, depending upon the circumstances. The uncertainty of the public policy exception, in part, led Congress to pass the Defense of Marriage Act,("DOMA") Pub. L. 104-199 in 1996 under the authority granted to it in the second sentence of the Full Faith and Credit Clause. *See* H.R. Rep. 104-664, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2913[13]. DOMA provides that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. 1738C. DOMA, therefore, made the public policy exception a certainty so that states which prohibit same-sex "marriage"could not be compelled to honor same-sex "marriages" entered into in other states. H.R.

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[13] DOMA has been upheld as a legitimate exercise of Congress' power under the Full Faith and Credit clause against challenges brought in two federal district courts. *Wilson v. Ake* (M.D.Fla.,2005) 354 F.Supp.2d 1298; *Bishop v. Oklahoma* (N.D. Okla. 2006) 447 F.Supp. 2d 1239.

Rep. 104-664, at 13. DOMA "aims to relieve states of any potential obligation to comply with the Full Faith and Credit Clause." *Bishop*, 447 F.Supp.2d at 1249.

Therefore, under DOMA, so long as a state such as California does not permit same-sex couples to marry within the state it cannot be compelled to recognize same-sex "marriages" from other states. However, if California were to permit same-sex couples to marry in California, then the state's public policy would no longer conflict with the policies of other states which permit same-sex "marriage." DOMA would no longer provide an exemption from the Full Faith and Credit Clause and there would not be conflicting public policies to balance for a judicial exemption. Consequently, California would be required to recognize same-sex "marriages" entered into outside of California.

Therefore, under the Full Faith and Credit Clause California could not validate same-sex "marriage" within California and deny recognition to same-sex "marriages" entered into outside of California.

2. Under the Privileges and Immunities Clause, California could not validate same-sex "marriages"entered into in California without recognizing same-sex "marriages" originating outside California.

The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the

several States." U.S. Const. art. IV, § 2, cl. 1. Similar language is contained in the Fourteenth Amendment:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

In one of the earliest analyses of the Privileges and Immunities Clause, the United States Supreme Court explained its purpose:

> It was undoubtedly the object of the clause in question [article IV, § 2] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Paul v. State of Virginia (1868) 75 U.S. 168, 180 *overruled in part on issues unrelated to the Privileges and Immunities Clause in United States v. South-Eastern Underwriters Ass'n.* (1944) 322 U.S. 533. The *Paul* court further

explained that the Privileges and Immunities Clause was not intended to make all rights granted to citizens in one state binding upon all other states. *Id.* Instead, the "privileges and immunities" secured in the Clause are those "which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." *Id.* at 180-181.

The Court later clarified that the Privileges and Immunities Clause means "that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. C.I.O.* (1939) 307 U.S. 496, 511. In other words, the Clause bars "discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of others States." *Toomer v. Witsell* (1948) 334 U.S. 385, 396. "The Clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire* (1975) 420 U.S. 656, 660.

While the Clause does not specify which "privileges and immunities" are protected, the Court has provided some guidance. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as

a single entity must the State treat all citizens, resident and nonresident, equally." *Baldwin v. Fish and Game Commission of Montana* (1978) 436 U.S. 371, 383-384. Consequently, a state can treat residents differently from nonresidents in determining voting rights, qualifications for elective office and access to certain resources and benefits such as hunting licenses. *Id.* at 388.

However, when "fundamental" rights or activities are at issue, the states are not so free to differentiate between residents and non-residents, or between those who have lived in the state for many years and those who just arrived. The fundamental rights and activities that the Court has found implicit in the Privileges and Immunities Clause include the right to engage in a commercial enterprise in the state. *Toomer* 334 U.S. at 396 (Invalidating a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents to obtain a commercial shrimp fishing license); *Ward v. Maryland* (1870) 79 U.S. 418, 432 (Invalidating state laws that imposed differential requirements on nonresidents seeking to engage in retail sales in Maryland). The Court has also struck down a law that required that private employers give hiring preference to state residents. *Hicklin v. Orbeck* (1978) 437 U.S. 518, 531. A state scheme that offered differential dividend distributions to citizens based upon length of residency was found to violate the Privileges and Immunities Clause because it burdened the "essential activity" of establishing

a residence in a new state. *Zobel v. Williams* (1982) 457 U.S. 55, 76-77 (O'Connor, J., concurring). Most recently, the Supreme Court used the Privileges and Immunities Clause to strike down a durational residency requirement for welfare benefits contained in California Welfare and Institutions Code § 11450.03. *Saenz v. Roe* (1999) 526 U.S. 489, 505. As the *Saenz* court explained, the central idea of the Privileges and Immunities Clause is "that a citizen of the United states can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."*Id.* at 503.

As one of the "basic civil rights of man,"*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, marriage is one of the rights "which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens" that is specifically protected by the Privileges and Immunities Clause. *See Paul v. State of Virginia*, 75 U.S. at 180-181. Consequently, California cannot define a relationship as "marriage" when it is entered into in California but refuse to define the same relationship as marriage when it originates in another state. If same-sex relationships are not defined as marriage in California, then California is not required to recognize same-sex relationships entered into outside of California as "marriages," even if they are so defined in the other jurisdiction. However, if California were to permit

same-sex couples to marry within the state, then it would have to recognize same-sex "marriages" validly entered into in other jurisdictions.

Under the Privileges and Immunities Clause, therefore, California could not grant same-sex couples the right to marry within California without also recognizing that same-sex couples who are "married" in other states are "married" in California. If California same-sex couples were to have the right to marry, then nonresident "married" same-sex couples would have the right to be recognized as married when they move into California.

C. Family Code §308.5 Must Be Interpreted To Prohibit Validating Same-Sex Relationships Originating In California As Marriages And Recognizing Same-Sex "Marriages" Entered Into Outside California As Valid Marriages In Order To Comply With The United States Constitution.

The constitutional rights enumerated in the Full Faith and Credit Clause and the Privileges and Immunities Clause dictate that Family Code § 308.5 be interpreted to prohibit both the validation of same-sex "marriages" in California and the recognition of same-sex "marriages" entered into in other jurisdictions. When interpreting a statute, the Court presumes that the Legislature (or in this case, the voters) did not intend to violate the Constitution when it enacted the law. *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828 [142 P.2d 297]. Therefore,

If a statute is susceptible of two constructions, one of which will

> render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court **will adopt** the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

Id. (emphasis added). If Section 308.5 is interpreted as permitting the validation of same-sex "marriages" entered into in California, but prohibiting the recognition of same-sex "marriages" entered into elsewhere, then the statute would violate the Fair Faith and Credit Clause and the Privileges and Immunities Clause. By contrast, if Section 308.5 is interpreted as prohibiting both the validation of same-sex "marriages" in California and the recognition of same-sex "marriages" entered into elsewhere, then it will be constitutionally valid. Consequently, this Court must adopt the latter construction.

Construing Section 308.5 to prohibit same-sex "marriages" regardless of whether they originate in California or elsewhere not only comports with this Court's presumption of constitutionality rule in *Miller*, but also with the "plain meaning" rule as articulated in *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n.* (1987) 43 Cal.3d 1379, 1386-87.

CONCLUSION

Under the current version of the Family Code, couples who are registered domestic partners have the same substantive rights, benefits and

legal obligations as do married couples. The fundamental constitutional "right to marry" encompasses the right to enter into a legally recognized union of one man and one woman, to direct the upbringing of children, to hold property in either separate or community ownership, to have property pass through intestate succession, and to transfer property without re-assessment for ad valorem taxes. The terms "marriage" or "marry" have constitutional significance apart from whatever substantive rights and obligations are granted to those who enter into the relationship. "Marriage" describes a universal social institution that predates the Constitution, Legislature, state and religious tradition, and the Legislature cannot change the name of the legal relationship of marriage. Family Code § 308.5 must be interpreted to prohibit both the validation of same-sex "marriages" in California and the recognition of same-sex "marriages" entered into elsewhere. Any other interpretation would violate the rules of statutory construction and both the Full Faith and Credit Clause and Privileges and Immunities Clause of the United States Constitution.

Dated: August 16, 2007

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MARY E. MCALISTER
(SBN 148570)
Liberty Counsel
PO Box 11108
100 Mountain View Rd Suite 2775
Lynchburg, VA 24506

MATHEW D. STAVER
FL Bar No. 0701092*
Liberty Counsel
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
*Admitted pro hac vice

CERTIFICATE OF COMPLIANCE

I hereby certify that this Supplemental Brief has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the "word count" feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes is 12,044 words.

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

Executed on August 16, 2007 at Lynchburg, Virginia.

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Mary E. McAlister

PROOF OF SERVICE

I, Mary E. McAlister, declare that I am over the age of eighteen and am not a party to this action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 24502.

On August 16, 2007, I served the above Supplemental Brief on the interested parties in this action in the manner indicated below:

X By Mail: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail in Lynchburg Virginia (as indicated on the Service List).

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct; that this declaration is executed on August 16, 2007, in Lynchburg, Virginia.

_____

Mary E. McAlister

SERVICE LIST

Clerk of Court Superior Court of California County of San Francisco Civic Center Courthouse 400 McAllister St San Francisco, CA 94102	Clerk of Court California Court of Appeals 1st Appellate District, Division 3 350 McAllister St. San Francisco, CA 94102
Christopher Edward Krueger State of California, Dept. of Justice Office of the Attorney General 1300 I Street #125 PO Box 944255 Sacramento, CA 94244-2550 christopher.krueger@doj.ca.gov Attorneys for State Defendants	Terry L. Thompson 199 East Mesa Linda - Suite 10 Danville, CA 94526 tl_thompson@earthlink.net Attorneys for Plaintiffs Proposition 22 Legal Defense and Education Fund
Benjamin Bull Glen Lavy Dale Schowengerdt Christopher R. Stovall Alliance Defense Fund 15333 N Pima Rd, Suite 165 Scottsdale, AZ 85260 Attorneys for Plaintiffs Proposition 22 Legal Defense and Education Fund	Robert H. Tyler Advocates for Faith and Freedom 24910 Las Brisa Rd, Suite 110 Murrieta, CA 92562 Attorney for Plaintiffs Proposition 22 Legal Defense and Education Fund
Andrew P. Pugno Law Offices of Andrew Pugno 101 Parkshore Dr, Suite 100 Folsom, CA 95630 Attorneys for Plaintiffs Proposition 22 Legal Defense and Education Fund	Gloria Allred Michael Maroko John West Allred, Maroko & Goldberg 6300 Wilshire Blvd. Suite 1500 Los Angeles, CA 90048 mmaroko@amglaw.com Attorneys for Plaintiffs Robin Tyler, et al.

Waukeen Q. McCoy Law Offices of Waukeen Q. McCoy 703 Market Street San Francisco, CA 94103 Attorneys for Plaintiffs Clinton, et al.	Lloyd Pellman Derrick Au 648 Kenneth Hahn Hall of Administration 500 W. Temple St. Los Angeles, CA 90012 Attorneys for Intervenor County of Los Angeles
Therese Stewart Chief Deputy City Attorney City and County of San Francisco Office of the City Attorney 1 Dr. Carlton B. Goodlett Place Room 234 San Francisco, CA 94102-4682 therese.stewart@sf.gov.org Attorneys for Plaintiffs City and County of San Francisco and Gavin Newsom, et al.	Amy Elizabeth Margolin Bobbie Jean Wilson Howard Rice Nemerovski Canady Falk & Rabkin Three Embarcadero Center, 7th Floor San Francisco, CA 94111 amargolin@howardrice.com Attorneys for Plaintiffs City and County of San Francisco and Gavin Newsom, et al.
Jason Hasley Paul, Hanley & Harley LLP 1608 4th St, Suite 300 Berkeley, CA 94710 Attorneys for Plaintiffs Clinton, et al	Stephen Victor Bomse Heller Ehrman White & McAuliffe 333 Bush Street San Francisco, CA 94101 sbomse@hewm.com Attorneys for Intervenors Martin et al. Attorneys for Plaintiffs Woo, et al. Attorneys for Intervenor Equality California

Shannon Minter National Center for Lesbian Rights 870 Market Street, Ste. 570 San Francisco, CA 94014 minter@nclrights.org Attorneys for Martin, et al. Attorneys for Woo, et al. Attorneys for Equality California	David C. Codell 9200 Sunset Blvd, Penthouse Two Los Angeles, CA 90069 Attorney for Martin, et all Attorney for Woo, et al Attorney for Equality California
Jon Davidson Jennifer Pizer Lambda Legal Defense & Education Fund 3325 Wilshire Blvd #1300 Los Angeles, CA 90010-1729 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California	Alan L. Schlosser ACLU Foundation of Northern California 39 Drumm St San Francisco, CA 94111 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California
Christine Sun ACLU Foundation of Southern California 1616 Beverly Blvd Los Angeles, CA 90026 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California	Clyde Wadsworth Steefel Levitt & Weiss 1 Embarcadero Center 30th Fl San Francisco, CA 94111-3719 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California