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' CONSOLIDATED BRIEF IN REPLY TO SUPPLEMENTAL BRIEFS PURSUANT TO JUNE 20, 2007 ORDER

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INTRODUCTION

Campaign for California Families ("The Campaign") submits this Consolidated Brief in reply to the Supplemental Briefs filed by the City and County of San Francisco ("CCSF"), the Woo[1] Plaintiffs, the Attorney General and the Governor, which address the four questions raised by this Court in its June 20, 2007 order. While the briefs differ in their approaches to the questions, each fails to recognize the fundamental nature of marriage as a universal social institution. That foundational error taints each party's responses to this Court's questions so that the briefs fail to provide this Court with the information it sought as part of its review. In the case of the CCSF and Woo Plaintiffs' briefs, the discussion wanders off the straightforward path of simply answering the court's questions onto a circuitous detour of purported Hobson's choices, social commentary and ad hominem attacks. The detour does not contribute to the goal of providing this Court with the information it needs to analyze the fundamental constitutional questions at issue. Instead, it merely furthers the parties' agenda to raze the institution of marriage and erect

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[1] According to the Petition for Review filed in Case No. A110451, Plaintiffs Lancy Woo and Cristy Chung are not continuing as parties and did not join the Petition. However, for ease of reference and consistency with the underlying case names, the Campaign will refer to the Plaintiffs in Case No. A110451 as the "Woo Plaintiffs."

a "genderless"[2] amorphous substitute defined by nothing more than whether the people involved love each other.

At least CCSF and the Woo Plaintiffs acknowledge that marriage is a unique institution that the Legislature cannot rename, albeit for the wrong reasons. The Attorney General and the Governor, by contrast, have turned their backs on the institution and the people of California. The public officials charged with upholding the marriage statutes and the Constitution declare that the terms "marriage" and "marry" have **no essential constitutional significance,**" that the Legislature can abrogate or eliminate all of the substantive rights and obligations of marriage and even change the name of marriage.[3] These stunning assertions violate the California Constitution, precedents of this Court and the United States Supreme Court and millennia of human history during which marriage has attained constitutional significance and universal meaning that no Legislature or court can abrogate. Not surprisingly, neither the Attorney General nor the Governor cite any legal authority for their statements, which defy logic as well as the law.

Neither CCSF and the Woo Plaintiffs nor the Attorney General and

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[2] See CCSF's Supplemental Brief at p. 11, in which the CCSF plaintiffs refer to a "non-gendered marriage law."

[3] See Attorney General Brown's Supplemental Brief, at pp. 3-6; Governor Schwarzenegger's Supplemental Brief at p. 3.

Governor have provided this Court with the legally sound, constitutionally grounded answers requested in the June 20, 2007 order. As a result, the Court is presented with a muddled mix of emotional social commentary and indifference that does nothing to assist this Court in its analysis.

By contrast, a reasoned look at the history, meaning and regulation of marriage reveals that marriage is a universal social institution based upon the complementary relationship that is necessary to sustain society. Marriage is an institution that has developed over thousands of years and cannot be abrogated, eliminated or renamed by the Legislature, the people or the courts.

LEGAL DISCUSSION

I. REGISTERED DOMESTIC PARTNERS IN CALIFORNIA HAVE THE SAME SUBSTANTIVE STATE LAW RIGHTS AND OBLIGATIONS AS DO MARRIED COUPLES; ONLY MINOR PROCEDURAL DIFFERENCES SET DOMESTIC PARTNERSHIPS APART FROM MARRIAGE.

CCSF and the Woo Plaintiffs provide a laundry list of purported differences between domestic partnerships and marriages in California, while the Attorney General and Governor contend that there are no differences in legal rights and benefits between domestic partnerships and marriages. Neither party is correct.

As this Court recently stated, "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). Since the passage of AB 205 in 2003, registered domestic partners 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). In addition, since January 1, 2007 registered domestic partners have had the right to file joint state income tax returns and to treat their earned income as community property. Family Code §297.5(k)(1).

CCSF and the Woo Plaintiffs attempt to downplay the substantive state law equality between registered domestic partnerships and marriage by claiming that registered domestic partnerships lack the "status" or "stature" of marriage. CCSF in particular devotes considerable attention to the difference in legal status between marriage as a revered social institution and domestic partnership as a more recently created relational status. CCSF's discussion not only misstates the reason why marriage is a revered institution (discussed *infra*), but also fails to answer the Court's question, which focused on legal rights, benefits and obligations.

CCSF and the Woo Plaintiffs also list numerous federal employment and tax benefits which are not available to domestic partners, but these are not rights or benefits that the State has the power to grant or deny. CCSF and the Woo Plaintiffs also refer to news accounts that allegedly report on instances in which private employers and business establishments treat domestic partners differently than married couples. However, such instances, even if true, do not reflect a deficit in state law rights or benefits granted to same-sex couples. As Plaintiffs acknowledge, state law already requires equal treatment in these circumstances, so failure to accord equal treatment is a violation of existing laws, not an absence of rights or benefits.

CCSF and the Woo Plaintiffs also point to the confidential marriage license provisions of Family Code §§ 500-535 and contend that those statutes provide for a confidential relationship that is unavailable to same-sex couples. However, the Family Code provisions do not, as Plaintiffs claim, create a secret marriage in which participants can hide the fact that they are married. Instead, they merely create a means by which a couple who has lived together can obtain a marriage license without having to obtain the health certificates required for conventional licenses. *See* Family Code §500. A couple who receives a confidential marriage license does not gain a right to keep the relationship secret, nor would the couple want to since that would mean that

they could not claim marital rights and benefits. Under the same reasoning, same-sex couples who are seeking benefits equivalent to marriage would not want to enter into a secret domestic partnership, since that would mean that they could not claim the equivalent marital benefits available under the Family Code and through employers. Plaintiffs want to have their cake and eat it too – they want public recognition for their relationships and the ability to keep their relationships secret. There is no statutory basis for such a right, either for married couples or domestic partners.

CCSF and the Woo Plaintiffs claim that domestic partners are not entitled to utilize the putative spouse doctrine in Family Code §2251, based upon a decision by the First District Court of Appeal. *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1173-1174. In *Velez*, the Court determined that AB205 could not be applied retroactively to a partnership that was not registered with the state and was dissolved before the act went into effect. *Id.* The First District panel stated that it did not believe that the putative spouse doctrine was included in the rights granted to domestic partners. *Id.* However, that finding is not consistent with this Court's ruling in *Koebke* or the language of Family Code §297.5(a) that domestic partners are "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."

The Woo Plaintiffs claim that domestic partners are somehow compelled to disclose their sexual orientation when they are asked to disclose their marital status while married couples are not. They do not explain how this reflects a substantive right or benefit of marriage granted by the state. More importantly, the claim lacks merit. The domestic partnership law, like the marriage laws, is silent with regard to sexual orientation. Domestic partnerships are available to adults who have chosen to share one another's lives, have a common residence, are not related, and not already married. Family Code §297. Domestic partners may be members of the same sex, or members of the opposite sex so long as one person is at least age 62. Family Code §297. Therefore, stating that someone is a member of a domestic partnership reveals nothing whatsoever about the person's sexual orientation.

CCSF and the Woo Plaintiffs also incorrectly claim that Family Code §297's requirement that the parties "have a common residence" somehow places a differential and substantial burden on same-sex couples. The Plaintiffs claim that the common residence requirement means that a same-sex couple must live together before they can enter into a domestic partnership. However, the common residence requirement only applies to registration of a domestic

partnership with the state. A same-sex couple can make a commitment to be domestic partners and even participate in whatever ceremony they choose before they move in together. They only need to have a common residence before they file the form with the Secretary of State. Furthermore, the statute does not require that the parties actually live together for the duration of their union, as Plaintiffs claim. The parties need to establish a common residential address when they register with the Secretary of State, but are free to maintain additional residences as necessary for work, education or family responsibilities, as are married couples.

The only true differences between domestic partnerships and marriage under California law are minor procedural differences related to entering into and dissolving the unions. CCSF and the Woo Plaintiffs interject their opinions that these differences "signify" that same-sex relationships are less worthy than other relationships or "send a message" that domestic partnerships are less valued.[4] However, focusing on the factual issues that this Court asked the parties to address, the only differences in legal rights between domestic partnerships and marriages under California law are that domestic partnerships can be entered into by simply filing a document with the Secretary of State and

[4] See CCSF's Supplemental Brief at p. 7, Woo Plaintiffs' Supplemental Brief at p. 5.

in some cases can be dissolved in the same manner, that domestic partnerships can be dissolved without either party residing in California, and that domestic partnerships do not have a specific provision permitting a person under the age of 18 to enter into a union with parental consent. When considered in the context of the sweeping substantive rights granted to domestic partners, these procedural differences are of little consequence.

II. THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO MARRY INCLUDES SUBSTANTIVE RIGHTS AND OBLIGATIONS THAT CANNOT BE ABROGATED OR ELIMINATED, BUT THESE ATTRIBUTES ARISE FROM THE INHERENT NATURE OF MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN, NOT A STATE-SANCTIONED UNION OF ANY TWO PEOPLE WHO LOVE EACH OTHER.

Contrary to the Attorney General's and Governor's assertions, married couples possess substantive rights and obligations that cannot be eliminated or abrogated by legislative action. However, these rights and obligations do not arise, as Plaintiffs claim, because marriage is merely a state-sanctioned institution that creates a legally binding relationship between any two people who happen to love each other.[5] Marriage is not universally recognized and revered by society because it bears the state's imprimatur, as CCSF claims. (CCSF Supplemental Brief, p. 23). Rather, marriage bears the state's

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[5] See Woo Plaintiffs' Supplemental Brief at p. 20, CCSF's Supplemental Brief at p. 23.

imprimatur because it is universal and fundamental to the continuation of society. *See Elden v. Sheldon* (1988) 46 Cal.3d 267, 275 [250 Cal.Rptr. 254; 758 P.2d 582].

Consequently, the right to marry is not, as the Woo Plaintiffs claim, "primarily a right to participate in the state-sanctioned institution of civil marriage," *i.e.* a legal relationship of any two people who love each other. (Woo Plaintiffs' Supplemental Brief at p. 19). Neither is it, as the Attorney General and Governor claim, an amorphous "ability to choose and declare one's life partner in a reciprocal and binding contractual commitment of mutual support."[6] Instead, 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. *See*, *Murphy v. Ramsey* (1885) 114 U.S. 15, 45; *Mott v. Mott* (1890) 82 Cal. 413, 416 [22 P. 1142]; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 [134 Cal.Rptr. 815, 557 P.2d 106].

The Woo Plaintiffs correctly cite *Mott* for the proposition that marriage is a solemn and binding contract, but omit this Court's description of why the contract is solemn – because it is between one man and one woman.[7] Marriage is a civil contract "'by which **a man and woman** reciprocally engage to live

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[6] Attorney General's Supplemental Brief at p. 5, Governor's Supplemental Brief at p. 3 (identical language).

[7] Woo Plaintiffs' Supplemental Brief at p. 20.

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,* 82 Cal. at 416 (emphasis added). Similarly, Plaintiffs accurately quote this Court's statement that "marriage is recognized as the most important relation in life, and one in which the state is vitally interested,"but omit the description of marriage as the union of a husband (man) and wife (woman).[8]*Deyoe v. Superior Court* (1903) 140 Cal.476, 482 [74 P. 289]. The Woo Plaintiffs also cite this Court's statement in *Marvin* that marriage is the "most socially productive" relationship, but omit this Court's explanation[9]:

> [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, 18 Cal.3d at 684. (emphasis added). Similarly, CCSF correctly cites this Court's statement in *Elden* that marriage is accorded special consideration and dignity, but omits the explanation for why marriage is so honored.[10]

> 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.'

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[8] Woo Plaintiffs' Supplemental Brief at p. 24.

[9] Woo Plaintiffs' Supplemental Brief at p. 22

[10] CCSF's Supplemental Brief at p. 22.

> [Citation.] Consonant therewith, the state is most solicitous of the rights of spouses.

Elden, 46 Cal.3d at 275(emphasis added). It is the joining of one man and one woman, not the joining of any two people in love, that is the most socially productive relationship. That is due in large part to the fact that it is the joining of the man and the woman that produces future members of society. The "unique public validation" available only through marriage is not, as Plaintiffs assert, because it permits two people to enjoy an emotional connection,[11] but because it provides the means through which society can be sustained.

Similarly, the United States Supreme Court has consistently referred to marriage as "creating the most important relation in life,"*Maynard v. Hill* (1888) 125 U.S. 190, 205, not because it is a state-sanctioned commitment between two individuals,[12] but because it is the joining together of one man and one woman. *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

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[11] Woo Plaintiffs' Supplemental Brief at p. 22.

[12] CCSF's Supplemental Brief at p. 25.

political improvement.

Id (emphasis added). It is that legal union of one man and one woman, not an undefined union of two "committed individuals" that is "older than the Bill of Rights – older than our political parties, older than our school system." *Griswold v. Connecticut* (1965) 381 U.S. 479, 486. Marriage could only be regarded as the "foundation of the family in our society," *Zablocki v. Redhail* (1978) 434 U.S. 374, 386, if it consists of the only union that can, without intervention, create a family – one man and one woman.

Redefining marriage, as Plaintiffs desire, to mean a committed relationship between any two people who love each other, regardless of sex, would destroy the very uniqueness that Plaintiffs claim to be seeking for same-sex couples. A committed relationship between any two people who love each other describes any number of relationships – parent and child, brother and sister, roommates, friends. What sets marriage apart as a unique social institution, and the reason that it has endured for thousands of years across cultural and geographic boundaries, is that it is the union of one man and one woman, the union that creates a new generation. As is true with any definition, the definition of marriage necessarily excludes some people, *e.g.*, people who want to marry children, people who want to marry close relatives, people who want to marry more than one other person, and people who want to marry a

person of the same sex.

Therefore, it is not true, as Plaintiffs claim, that the marriage laws deprive homosexuals of a right enjoyed by every other individual – "the autonomy to marry the one person who is 'irreplaceable' to them."[13] No one has the right to marry any other person whom they love regardless of sex, age or kinship, but can only marry a person of the opposite sex who is not closely related, over the age of 18 (or younger with parental consent), and not already married. The marriage laws do not place homosexuals in a "Hobson's choice" of choosing "between the associational and happiness interests that come from creating a family with someone whose companionship and love will be deeply fulfilling, on the one hand, and the expressive and dignitary interests that come from entering into the one state-sanctioned relationship that is universally recognized and revered on the other."[14]

As is true with any social institution, marriage is governed by boundaries, which necessarily means that certain people are excluded from the institution. Because society universally defines the institution as the union of one man and one woman, marriage necessarily excludes those who want to join with someone of the same sex, with more than one other person or with

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[13] CCSF's Supplemental Brief at p. 28.

[14] CCSF's Supplemental Brief at p. 28.

someone who is not yet mature. Without such boundaries marriage would cease to be unique or universal.

The necessity for boundaries for the institution of marriage further illustrates the absurdity of Plaintiffs' continued insistence that marriage in California is defined as the right to marry anyone a person chooses.[15] Plaintiffs repeat what has become a mantra throughout this litigation – that this Court has defined the right to marry as the right to join in marriage with the person of one's choice regardless of sex, age, kinship or any other characteristic. Plaintiffs have taken this Court's statement that a person should be free to marry whomever they choose regardless of race out of context and used it as a megaphone to proclaim that all boundaries surrounding marriage have been torn down. *See Perez v. Sharp* (1948) 32 Cal.2d 711,715 [198 P.2d 17]. In fact, when viewed in the context of the facts of the *Perez* case and this Court's precedents before and after *Perez*, it is apparent that this Court has consistently maintained that marriage is the union of one man and one woman. *Mott v. Mott* (1890) 82 Cal. 413, 416; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 275.

Plaintiffs correctly maintain, contrary to the Attorney General and

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[15] Woo Plaintiffs' Supplemental Brief at p. 29, CCSF's Supplemental Brief at p. 26.

Governor, that marriage is a unique social institution with attendant rights and obligations that cannot be abrogated or eliminated by the Legislature. However, Plaintiffs, the Attorney General and the Governor all incorrectly assert that marriage is nothing more than the ability to "choose and declare one's life partner in a reciprocal and binding contractual commitment of mutual support."[16]

Plaintiffs, the Attorney General and the Governor all fail to answer this Court's question regarding the minimum constitutionally guaranteed substantive attributes or rights embodied in the fundamental constitutional right to marry. Those constitutionally guaranteed substantive rights include the right to enter into the legal relationship of one man and one woman, to direct the upbringing of children, to have property classified as separate or community, to have property pass to heirs by intestacy, and to have property transfers exempt from reassessment.(See The Campaign's Supplemental Brief at pp. 6-23).

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[16] Woo Plaintiffs' Supplemental Brief at p. 29, CCSF's Supplemental Brief at p. 26, Attorney General's Supplemental Brief at p. 5, Governor's Supplemental Brief at p. 3.

III. CONTRARY TO THE ATTORNEY GENERAL AND GOVERNOR'S ASSERTIONS, "MARRIAGE" HAS CONSTITUTIONAL SIGNIFICANCE WHICH ARISES FROM THE NATURE OF MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN. NOT FROM APPROBATION BY THE STATE.

A. The Terms "Marriage" And "Marry" Have Constitutional Significance As Denoting A Universal Social Institution Defined As The Union Of One Man And One Woman.

In what can be defined as nothing short of an abdication of their responsibilities to the people of California, the Attorney General and the Governor have declared that the term "marriage" has no constitutional significance. In the words of the Attorney General: "the words 'marry' and 'marriage' have no essential constitutional significance under the California Constitution. Thus the Legislature could change the name of the legal relationship now known as 'marriage' to some other name without any constitutional impediment."[17] Similarly, the Governor states that "the use of the words 'marry' and 'marriage' is not required by the California Constitution. Thus, the name of the legal relationship now known as 'marriage' could be changed."[18]

Even the Plaintiffs, who seek to overturn the marriage laws, do not

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[17] Attorney General's Supplemental Brief at p. 6.

[18] Governor's Supplemental Brief at p. 3.

espouse the extreme position adopted by these public servants who are obligated to uphold and defend the marriage laws. Plaintiffs correctly assert that the terms "marriage" and "marry" have constitutional significance under the California Constitution, and that the Legislature could not replace "marriage" with a differently named institution.[19] Plaintiffs err, however, when they assert that "marriage" has constitutional significance because it is a state-sanctioned institution.[20] CCSF incorrectly claims that marriage is held in high esteem because of "the approbation our State and others have long given to the institution through the entry and exit requirements the State imposes, the process of licensing and solemnization the State prescribes, and the myriad rights and benefits the State accords to those who choose to enter into the union."[21] In fact, the State has given approbation to the institution of marriage because marriage is a legally recognized union of one man and one woman that 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). Marriage "is an institution in the maintenance of which in its purity the

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[19] Woo Plaintiffs' Supplemental Brief at p. 32, CCSF's Supplemental Brief at p. 31.

[20] CCSF's Supplemental Brief at p. 31, Woo Plaintiff's Supplemental Brief at p. 32.

[21] CCSF's Supplemental Brief at p. 32.

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. Therefore, the term "marriage" is not significant because it is protected by the Constitution, but is protected by the Constitution because it is significant to society.

As the Woo Plaintiffs correctly assert, "the cases that establish a right to marry are not premised on particular tangible benefits, but upon the majestic status of the marital relationship itself."[22] That "majestic status" is not, as Plaintiffs claim,"the affirmation of the human capacity for love and commitment,"[23] but the universal social institution of the union of one man and one woman. *Murphy v. Ramsey* (1885) 114 U.S. 15, 45; *Mott v. Mott* (1890) 82 Cal. 413, 416. Similarly, as CCSF says, entering into marriage is a "momentous" occasion, not because it is an act of "self-definition,"[24]but because "[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." *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684 (emphasis added).

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[22] Woo Plaintiffs' Supplemental Brief at p. 36.

[23] Woo Plaintiffs' Supplemental Brief at p. 36.

[24] CCSF's Supplemental Brief at p. 34.

B. The Legislature Does Not Have The Authority To Change The Name Of Marriage.

Contrary to the Attorney General and Governor, Plaintiffs correctly state that the Legislature could not "consistent with the California Constitution, change the name of the legal relationship of 'marriage' to some other name, even if it purported to preserve all of the rights and obligations that are now associated with marriage."[25] That is so, in large part, as Plaintiffs assert, because "marriage is well understood by everyone in our culture,"[26]but not in the way that Plaintiffs understand it. Marriage is universally understood, and for millennia has been understood, throughout human society as the union of one man and one woman, not a public recognition of a private expression of love between two people. *See Baker v. Nelson* (1971) 291 Minn. 310, 312 ("The 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."); *Murphy v. Ramsey* (1885) 114 U.S. 15, 45; *Mott v. Mott* (1890) 82 Cal. 413, 416. Consequently, using a different term for marriage would, as the Woo Plaintiffs stated, "introduce a destabilizing disjuncture between the social and legal meaning of marriage,"[27] the same disjuncture that will occur under

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[25] CCSF's Supplemental Brief at p. 35.

[26] CCSF's Supplemental Brief at p. 35.

[27] Woo Plaintiffs' Supplemental Brief at p. 34.

Plaintiffs' proposal to redefine marriage to include same-sex couples.

Contrary to Plaintiffs' assertions, the fact that marriage is defined as the union of one man and one woman is not "a matter of contemporary history" and **is** more pertinent than were the anti-miscegenation laws and inequitable property laws invalidated by this Court. *See Perez v. Sharp* (1948) 32 Cal.2d 711 (invalidating anti-miscegenation law); *In re Marriage of Pendleton and Fireman* (2000) 24 Cal.4th 39, 53 (describing how laws that gave the husband exclusive control over community property and prohibited the wife from entering into contracts, among others, have been abolished). Laws forbidding interracial marriage or imposing inequitable burdens upon one of the two parties placed conditions upon marriage that were unrelated to the essence of the relationship as the union of one man and one woman. Neither *Perez* nor its United States Supreme Court counterpart, *Loving v. Virginia* (1967) 388 U.S. 1 either stated or intimated that marriage was anything other than the union of one man and one woman. What those cases and similar cases which struck down antiquated property ownership laws did was to remove hindrances to individuals entering into, equitably participating in or dissolving the union of one man and one woman.

Since marriage is an institution universally defined as the union of one man and one woman, neither the courts nor the Legislature could simply

"change the name" so as to admit same-sex couples. As the Woo Plaintiffs requested, homosexuals can participate in the institution of marriage so long as they marry a person of the opposite sex. They cannot participate in an institution defined as the union of one man and one woman by entering into a union of a man and a man, a woman and a woman or any other combination. Such combinations are not marriage. Placing the name of "marriage" or any other name on such unions will not transform them into marriages any more than calling a dog a cat will transform the dog into a cat.

As the Woo Plaintiffs acknowledge, "[w]hat we 'name' things matters."[28] The name "marriage" matters because it is universally understood to be the union of one man and one woman, a union long recognized as "the foundation of the social system." *Baker v. Baker* (1859) 13 Cal. 87, 94. Therefore, contrary to the Attorney General's and Governor's contentions, the terms "marriage" and "marry" are constitutionally significant apart from the attendant rights and obligations, and the Legislature is not free to change the name of the institution.[29]

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[28] Woo Plaintiffs' Supplemental Brief at p. 37 (quoting *Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 226 (Poriz, C.J., concurring and dissenting).

[29] CCSF's emotional harangue about the supposed viewpoints of the Campaign and others seeking to uphold the marriage laws (Supplemental Brief at p. 34) is hardly worth a response. However, the Campaign will briefly respond only by saying its efforts to uphold the definition of marriage as the union of one man and one woman are not borne of any animus toward or moral

IV. FAMILY CODE §308.5 UNAMBIGUOUSLY PROVIDES THAT MARRIAGE IN CALIFORNIA IS DEFINED AS THE UNION OF ONE MAN AND ONE WOMAN REGARDLESS OF WHETHER THE UNION ORIGINATES IN CALIFORNIA OR ELSEWHERE, AND THAT IS THE ONLY INTERPRETATION OF THE STATUTE THAT COMPORTS WITH THE UNITED STATES AND CALIFORNIA CONSTITUTIONS.

A. The Language In Section 308.5 Is Unambiguous And Provides That Marriage Is Solely The Union Of One Man And One Woman Regardless Of Where The Union Originates.

The Governor correctly concludes that the language of Family Code §308.5 is unambiguous and that it defines marriage as the union of one man and one woman regardless of where the legal union originates.[30] Plaintiffs, on the other hand, claim that the statute is ambiguous but should be interpreted to prohibit only recognition of same-sex unions from other states as marriages.[31] The Attorney General acknowledges that the language clearly prohibits the recognition of out of state same-sex unions as marriages, but does not take a position on whether the statute also prevents the state from validating same-sex

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judgment against any particular group, but out of the desire to ensure that California continues to follow the rule of law instead of the whims of perceived societal change.

[30] Governor's Supplemental Brief at p. 4.

[31] CCSF's Supplemental Brief at p. 42, Woo Plaintiff's Supplemental Brief at p. 42.

unions entered into in California as marriages.[32]

The straightforward language of Section 308.5, "Only marriage between a man and a woman is valid or recognized in California," when viewed in light of the rules of statutory construction and judicial precedent can only be interpreted as prohibiting same-sex "marriage" in California, whether the union originates in California or elsewhere. When words are used in the alternative, such as "valid" and "recognize" in Section 308.5, 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 the case of "valid," statutory construction and judicial precedent dictate that it applies to a determination of whether a union originating in California comports with the law. *Estate of DePasse*, (2002) 97 Cal. App.4th 92, 106-108; Division 3, Section 1 of the Family Code. "Recognize," on the other hand, applies to a determination of whether a union originating outside of California will be regarding as comporting with California law. *Etienne v. DKM Enterprises, Inc.* (1982) 136 Cal. App.3d 487, 490. Consequently, the phrase "only marriage between a man and a woman is valid or recognized in California" means that unions of same-sex couples (or other unions other than the union of one man and one woman) will not be validated as marriages if

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[32] Attorney General's Supplemental Brief at p. 7.

entered into within California, nor recognized as marriages within California if entered into outside the state.

Plaintiffs attempt to inject ambiguity into the statute by claiming that the language could be read either to reaffirm that marriage in California must be between a man and a woman or construed to mean that California will only consider out of state marriages as valid marriages and not recognize out of state "marriages" of same-sex couples for any purpose.[33] Since only the former reading reflects the plain meaning of the language and avoids rendering "valid" and "recognize" redundant, it is the only interpretation that would comport with the rules established by this court in *Lungren* and *Dyna-Med, Inc. v. Fair Employment & Housing Comn'n.* (1987) 43 Cal.3d 1379, 1386-87 [241 Cal.Rptr. 67, 743 P.2d 1343].

Nevertheless, Plaintiffs attempt to justify an alternative interpretation with a number of circuitous arguments founded upon supposition and deduction. None of these arguments overcome the plain meaning rule and precedent. Plaintiffs claim that the placement of Section 308.5 within the Family Code and the Attorney General's ballot title and summary should be used to construe the language to only apply to out of state marriages.[34] They

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[33] CCSF's Supplemental Brief at p. 42.

[34] CCSF's Supplemental Brief at p. 46, Woo Plaintiffs' Supplemental Brief at pp. 45-49.

also claim that since ballot materials describe concerns about courts recognizing out of state same-sex "marriages" that necessarily means that the voters did not intend that Section 308.5 would apply to validation of same-sex "marriages" within California.[35] Plaintiffs surmise that including a prohibition on same-sex "marriage" within California could not serve any purpose except **possibly** removing power from the Legislature.[36] Based upon that supposition, Plaintiffs conclude that since voters did not expressly indicate that they intended to limit the Legislature's power, then regulating in-state marriages must not be part of the statute.[37] Finally, CCSF acknowledges that the Court of Appeal has interpreted Section 308.5 as applying to both in-state and out of state marriages, *Knight v. Superior Court* (2005) 128 Cal.App. 4th 14, but concludes that the Court's reasoning is flawed and therefore the decision should be disregarded.[38]

Plaintiffs' dismissal of court precedent as "flawed," supposition and reasoning from the absence of a statement neither create ambiguity nor change the clear meaning of Section 308.5 – that marriage in California is defined

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[35] CCSF's Supplemental Brief at p. 44, Woo Plaintiffs' Supplemental Brief at p. 46.

[36] Woo Plaintiffs' Supplemental Brief at p. 48.

[37] Woo Plaintiffs' Supplemental Brief at p. 48.

[38] CCSF's Supplemental Brief at p. 47.

only as the union of one man and one woman regardless of where the marriage originates. The plain meaning rule and this Court's precedents require that Section 308.5 be so interpreted.

B. The Full Faith And Credit Clause And Privileges And Immunities Clause Affect The Interpretation of Section 308.5 And Dictate That It Be Interpreted To Prohibit Validation Of Same-Sex "Marriages" Within California And To Prohibit Recognition of Same-Sex "Marriages" Originating Outside California.

Interpreting Section 308.5 to prohibit the validation of same-sex "marriages" originating in California and recognition of same-sex "marriages" originating outside of California not only comports with the plain meaning of the statute and the rules of statutory construction, but also is the only interpretation that comports with the Full Faith and Credit Clause and Privileges and Immunities Clause of the United States Constitution.

Plaintiffs claim that neither the Full Faith and Credit Clause nor the Privileges and Immunities Clause affect how Section 308.5 should be interpreted, but go on to say that under both clauses California could not permit same-sex couples to marry in California and deny same-sex couples recognition of "marriages" entered into elsewhere. The illogic of Plaintiffs' argument is apparent – if the Full Faith and Credit Clause and Privileges and Immunities Clause mean that the statute can only be interpreted in one way then they necessarily affect how the statute is to be interpreted. Statutes are

presumed to be constitutional. *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828 [142 P.2d 297]. Furthermore, when a statute is susceptible to two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, the Court "will adopt" the construction that will render the statute valid. *Id.* (emphasis added).

Construing Section 308.5 to prohibit only the recognition of same-sex "marriages" entered into outside of California would leave open the possibility of validating same-sex "marriages" within California, *e.g.* by repealing Family Code §300. That would provide California residents with a benefit that is denied to non-residents or new residents, which would violate the Constitution. By contrast, construing Section 308.5 to prohibit both the recognition of same-sex "marriages" entered into outside of California and the validation of same-sex "marriages" inside California, would create an equality of benefits between residents and non-residents or new residents, in keeping with the Constitution.

Plaintiffs agree that denying recognition to same-sex "marriages" originating outside California and validating same-sex "marriages" originating in California would violate the Privileges and Immunities Clause.[39] Under *Miller*, the latter construction should be adopted. Plaintiffs also agree that

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[39] CCSF's Supplemental Brief at p. 56, Woo Plaintiffs' Supplemental Brief at p. 61.

denying recognition to same-sex "marriages" originating in California and validating same-sex "marriages" within California would violate the Full Faith and Credit Clause.[40] That being the case, under *Miller*, the Court should construe Section 308.5 as prohibiting both the validation of same-sex "marriages" within California and recognition of same-sex "marriages" entered into outside of California.

CONCLUSION

Neither the Attorney General and Governor nor the Plaintiffs have properly responded to this Court's questions. As the foregoing discussion demonstrates, "marriage"is constitutionally significant as denoting a universal social institution defined as the union of one man and one woman. The Legislature cannot rename the institution. Nevertheless, the Legislature has provided to same-sex couples all of the substantive rights and obligations available under state law to married couples in the form of registered domestic partnerships. The Legislature has even attempted to bestow rights on same-sex couples that are constitutionally limited to husbands and wives.

Family Code §308.5 provides that marriage can only be defined as the union of one man and one woman regardless of whether the marriage

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[40] CCSF's Supplemental Brief at p. 48, Woo Plaintiffs' Supplemental Brief at p. 56.

originates within or outside of California. Any other construction of the statute would violate the Full Faith and Credit Clause and Privileges and Immunities Clause of the United States Constitution, as well as the expressed will of the millions of Californians who enacted Family Code §308.5 in 2000.

Dated: August 30, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 but excluding the Table of Contents, Table of Authorities and this Certificate, is 6,866 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 30, 2007 at Lynchburg, Virginia.

_____
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 30, 2007, I served the above Consolidated Brief in Reply To Supplemental Briefs 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 30, 2007, in Lynchburg, Virginia.

_____

Mary E. McAlister

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