Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

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

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SUPPLEMENTAL QUESTION 1

What differences in legal rights or benefits and legal obligations or duties exist under current California law affecting those couples who are registered domestic partners as compared to those couples who are legally married spouses?

As the California Court of Appeal has recognized, domestic partnership is a lesser status than marriage: "The Legislature has not created a 'marriage' by another name or granted domestic partners a status equivalent to married spouses." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 30, *review denied* S133961 (June 29, 2005) (hereafter *Knight*.) In subsequent sections and in Respondents' Reply Brief, Respondents explain that from a constitutional standpoint, the most important differences between domestic partnership and marriage derive from the broader impact on lesbian and gay couples of being consigned to a "different" and of necessarily lesser status than marriage. In this section, however, Respondents focus exclusively on specific legal differences between domestic partnership and marriage under state law.

1. Unlike Marriage, Domestic Partnership Does Not Require The Issuance Of A License Or Solemnization.

Marriage requires a government-issued license and solemnization in the presence of at least one witness. (Fam. Code §§ 306, 359.) In contrast, a domestic partnership is formed simply by filling out and mailing a form, the notarized Declaration of Domestic Partnership. There is no licensing or solemnization requirement. (Fam. Code § 298.)

The difference sends the implicit message – both to the couple and to third parties and society – that domestic partnership is a less weighty,

substantial and esteemed institution than marriage. "[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership. More than the mere filing of documents with the Secretary of State is required to form or dissolve a marriage." (*Knight*, *supra*, 128 Cal.App.4th at 31.)[1]

2. Domestic Partners Are Forced To Disclose Their Sexual Orientation On All Forms Requesting Marital Status.

Persons in domestic partnerships are forced to disclose their sexual orientation every time they are required to disclose their marital status (such as filling out employment records, renting a car, identifying who should be contacted in case of emergency, or describing oneself in a job interview or to a new acquaintance).[2] (See, e.g., Brill, *Domestic partnerships aren't marriages*, Sac. Bee (July 1, 2007) p. E5 <http://www.sacbee.com/110/story/249447.html> [as of July 11, 2007] (hereafter Brill) [describing demeaning experience of filling out juror form requesting one's "marital status"].)

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[1] In addition, the absence of any licensing or solemnization requirement creates a potential for fraud and abuse based on one partner inducing the other to enter into a registered domestic partnership without a full understanding that it imposes legally binding rights and obligations that one would not expect from a status that can be entered into merely by dropping a form in the mail.

[2] To be clear, this forced disclosure is not objectionable because there is anything wrong with being in a same-sex relationship. Rather, what is objectionable is the requirement that lesbian and gay persons must disclose their sexual orientation every time they identify or describe their legal relationship status – just as it would be objectionable were the law to require persons in interracial or interfaith marriages to refer to their relationships by a distinct legal term.

3. Unlike Married Couples, Domestic Partners Must Share A Common Residence And Have A Pre-Existing Committed Relationship.

People entering a domestic partnership must "have a common residence" at the time of filing their Declaration of Domestic Partnership. (Fam. Code § 297, subd. (b)(1).) There is no similar requirement for persons who marry. In *Lewis v. Harris* (N.J. 2006) 908 A.2d 196, 224, fn. 28, the New Jersey Supreme Court recognized that this type of differential treatment is discriminatory and makes it more difficult for same-sex couples to enter into a legal union than for heterosexual couples to do so. (*Ibid.* [stating that the "common residence" requirement of New Jersey's then existing domestic partnership law was not required for married couples and thus could not be required for same-sex couples].)

The common residence requirement imposes a burden on same-sex couples who do not wish to live together prior to domestic partnership for personal, religious or moral reasons. In contrast, heterosexual persons who wish to refrain from living together until after marriage are free to do so. In addition, the common residence requirement prevents same-sex couples who are in a long-distance relationship from entering into a legal union unless they are able to establish a common residence at the time of registration, while there is no barrier for similarly situated heterosexual couples who wish to marry. For example, a heterosexual person who is forced to live apart from his or her different-sex partner because of work or education requirements, or to care for a sick or elderly family member, can legally marry without establishing a common residence with his or her spouse. A lesbian or gay person, facing identical circumstances, would be barred from entering into a legal union.

The common residence requirement also prevents lesbian and gay people who are incarcerated from entering into domestic partnerships, while similarly situated heterosexual persons can marry. (See *Knight*, *supra*, 128 Cal.App.4th at p. 30 ["prison inmates have the right and ability to marry . . . ; however, similarly situated homosexual inmates cannot register as domestic partners."].) This discrimination is particularly stark since California *expressly* protects the right of heterosexual state prisoners to marry. (*Ortiz v. L.A. Police Relief Assn.* (2002) 98 Cal.App.4th 1288, 1304 (hereafter *Ortiz*) ["In California, the right to marry is so fundamental that state legislation and the Constitution protect an *inmate's* right to marry" (italics in original) (citing Pen. Code § 2601, subd. (e) [state prisoners "shall have" the right "[t]o marry"])].) The U.S. Supreme Court has also held that the fundamental right to marry cannot be denied to prisoners. (*Turner v. Safley* (1987) 482 U.S. 78 (hereafter *Turner*).)

4. The Requirements For Summary Dissolution Of A Domestic Partnership Are Different Than For Summary Dissolution Of A Marriage.

Apart from the death of a spouse, which automatically terminates a marriage, a marriage may be terminated only by a judicial ruling of divorce or nullification. (Fam. Code § 310.) In contrast, parties may dissolve a domestic partnership without any judicial ruling, simply by filing a Notice of Termination of Domestic Partnership with the Secretary of State, when certain conditions are met. (Fam. Code §§ 299, subd. (a), 2400.)

Family Code section 2400 also permits married couples to obtain a summary dissolution; however, the requirements differ in two significant respects from those regarding registered domestic partnerships. (Fam. Code § 2400.) First, section 2400, subdivision (a)(2) requires that:

"Irreconcilable differences have caused the irremediable breakdown of the marriage and the marriage should be dissolved." (Fam. Code § 2400, subd. (a)(2).) There is no such requirement for the summary dissolution of a domestic partnership, which reinforces the message that domestic partnership is a less valued status and that the state does not have an equal interest in supporting and preserving domestic partnerships.

Second, the summary dissolution of a marriage requires filing a court petition and entry of a court judgment. (Fam. Code §§ 2401-2404.) There are no similar requirements for the summary dissolution of a domestic partnership. (See Fam. Code § 299.)[3]

5. The Residency Requirements Are Different For A Divorce And A Domestic Partnership Dissolution.

A married couple cannot divorce unless one of the parties has been a resident of California for six months and of the county in which the proceeding is filed for three months preceding the filing of the petition. (Fam. Code § 2320.) In contrast, "proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state may be filed in the superior courts of this state even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed." (Fam. Code § 299, subd. (d).)

[3] Being able to dissolve a domestic partnership without obtaining a court ruling deprives former domestic partners of the certainty and security provided by having a court judgment, including the requirement that other jurisdictions must give judgments full faith and credit.

6. Marriage And Domestic Partnership Have Different Age Requirements.

The current marriage statutes permit minors (persons under 18) to marry with parental consent or a court order. (Fam. Code §§ 302-303.) There is no similar exception for people entering a domestic partnership, who must be 18 years of age. (Fam. Code § 297, subd. (b)(4).)

7. The Law Requires A Separate, Centralized Registry For Domestic Partners That Is Readily Available To The Public.

The state has set up a central, public, searchable record of who registers as domestic partners. (Cal. Sect. of State, Domestic Partner Registry Frequently Asked Questions (undated) ques. 11 (hereafter Domestic Partner FAQ) <http://www.sos.ca.gov/dpregistry/dp_faqs.htm> [as of July 11, 2007].)

In contrast, marriage licenses are registered with the local County Clerk, and, as a practical matter, lists of married couples are available only when requested county-by-county. (Health & Saf. Code § 102285.).

The domestic partnership statutes require the Secretary of State to maintain a separate registry of all Declarations of Domestic Partnership filed with the Secretary of State. (Fam. Code § 298.5, subd. (b).) The Attorney General has opined that the common residence listed on a declaration of domestic partnership is generally subject to public disclosure by the Secretary of State despite the fact that "harassment of domestic partners may result from the disclosure of their common residence addresses." (84 Ops.Cal.Atty.Gen. 55, *3 (2001).) The current practice of the Secretary of State is to make the list of registered domestic partners

available upon request and payment of a nominal fee. (Domestic Partner FAQ, at ques. 11.)

8. Unlike Married State Employees, Domestic Partners Employed By The State Cannot Purchase Long-Term Care Insurance To Protect Their Domestic Partners.

The domestic partnership statutes expressly exempt the state from having to provide equal long-term care benefits to the domestic partners of state employees. (Fam. Code § 297.5, subd. (g) ["nothing in this section applies to modify eligibility for long-term care plans pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2 of the Government Code"].)[4] Accordingly, registered domestic partners of state employees are not eligible to participate in the state long-term care program, a voluntary program through which all California public employees may purchase long-term care coverage for themselves, as well as for their spouses, parents, and spouses' parents. (See Gov. Code §

[4] CalPERS is a "Qualified long-term care insurance contract" for federal income tax purposes, which means that premiums are tax-deductible expenses for federal income tax purposes. (See Int. Rev. Code, §§ 7702B(f)(2), 152(d)(2).) To qualify as a tax-qualified plan under this provision, a long-term care plan for public employees may only allow payments to insure spouses and individuals who qualify as a taxpayer's dependent under Internal Revenue Code § 152, which does not include domestic partners. The Appropriations Committee Fiscal Summary Analysis of Assembly Bill 205 indicates that the amendment adding (now) section 297.5, subdivision (g) was intended to safeguard the tax-qualified status of the CalPERS long-term care insurance plan by making explicit that public employees in registered domestic partnerships would not be eligible for that employment benefit. (Sen. Com. on Appropriations, Analysis of Assem. Bill No. 205 (2002-2003 Reg. Sess.) as amended July 13, 2003.) Given the federal tax law, domestic partners cannot participate in the existing tax-qualified insurance plan and enjoy the benefits of the preferential treatment under federal law.

31696.1 [authorizing the board of retirement to provide long-term care coverage for retired and active employees, and their spouses, their parents, and their spouses' parents]; Gov. Code § 21661 [making various classes of retired and active employees, and their spouses, their parents, and their spouses' parents eligible to enroll in long-term care coverage]; Gov. Code § 19867, subd. (a) [finding that providing long-term care benefits to state employees is in California's interest].)

9. Unlike Marriages, a Domestic Partner Relationship Cannot Be Confidential.

Couples who are over 18 years old who have been living together as spouses may obtain a confidential marriage license. (Fam. Code §§ 500-503.) Persons other than the bride or groom requesting copies of a confidential marriage license may only do so by presenting a court order issued upon a showing of good cause to the County Clerk in the county where the license is registered. (Fam. Code § 511, subd. (a).) There is no comparable “Confidential Registration of Domestic Partnership.”

10. Domestic Partners Lack Constitutional Protections Relating To Property Provided To Married Couples.

The California Constitution contains a number of provisions that expressly protect the property rights of spouses in a variety of situations. Two of the most significant are: state constitutional guarantees against the assessment of property taxes based upon transfers between spouses (Cal. Const., art. XIII A §§ 1-2, added by initiative, Gen. Elec. (June 6, 1978), commonly known as Prop. 13); and state constitutional guarantees for protection of separate property (see Cal. Const., art. I, § 21).

The domestic partnership statutes expressly disclaim “amend[ing] or modify[ing] any provision of the California Constitution . . . .” (Fam. Code § 297.5, subd. (i).) It currently is disputed whether the Legislature and the Board of Equalization, therefore, have the power to enact laws and rules to require that domestic partners be treated as spouses are treated for purposes of property tax reassessment. (See, e.g., *Strong v. Board of Equalization* (AS 01701, app. pending); see also Assem. Com. on Revenue and Taxation, Analysis of Sen. Bill No. 559 (2007-2008 Reg. Sess.) Jul. 2, 2007 [the California Assessors Association opposes the bill contending that any such change requires a constitutional amendment].)

In addition, there are some property-related protections for spouses that are mandated by the California Constitution that the Legislature has not extended to registered domestic partners. For example, spouses are eligible for a partial exemption from property tax for survivors of certain veterans. (Cal. Const., art. XIII, § 3, subd. (p).) It remains an open question whether domestic partners are entitled to this exemption.

11. There Is No State-Funded Debt Relief For Publicly Funded Nursing Home Care For Domestic Partners.

Under the federal Medicaid statute, if one spouse incurs a debt to the Medicaid program for publicly funded nursing home care, the government does not enforce a lien against the family home for repayment of the debt during the surviving spouse’s lifetime. (42 U.S.C. § 1396p(a)(2)(A).) Federal law does not offer that protection to same-sex partners, but states can do so through a state-funded program. (See, e.g., Vt. Code R. 13 170 008, Section M159.2 [authorizing a homestead exemption for civil union partners]; see also Vt. Agency of Human Services, bulletin No. 02-11, Aug. 1, 2003, 2003 Reg. LEXIS 33606, <http://www.dsw.state.vt.us/

PED_rules/Bulletin_02_11.pdf> [as of Aug. 16, 2007] [bulletin explaining changes to Vermont rules to allow for separate, state funding for civil union spouses' long-term care].) California does not do so.[5]

12. The Putative Spouse Doctrine Has Been Deemed To Exclude Domestic Partners.

Where a marriage is void or voidable, a party who had a reasonable good faith belief that the marriage was valid may be entitled to relief under the putative spouse doctrine. (Fam Code § 2251.) "[O]n dissolution of a putative marriage the property which the de facto spouses have acquired as a result of their joint efforts is to be treated as though it was the accumulation of a valid marriage. [Citations.]" (*Kunakoff v. Woods* (1958) 166 Cal.App.2d 59, 63.)

In *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1173-1174, the First District held that the putative spouse doctrine does not apply to domestic partnerships: "[G]iven the different and less stringent requirements for formation of a domestic partnership, the Legislature may not have wanted

[5] See also National Health Law Program (HealthCareCoach.com), Domestic Partners and Health Coverage (undated) <http://www.healthcarecoach.com/resources/index.php?view=detail&id=528&node=4> [as of Aug. 16, 2007] ["States can use other state funds instead of Medicaid to shield registered same-sex partners from the threat of losing the family home just like spouses. Some states, like Vermont and Massachusetts, have already begun to address this problem while others, like California, have not"]; Ocamb, *Domestic Partners: Separate and Unequal* (2007) IN LA Magazine <http://www.inlamagazine.com/1012/special_reports/sprt1.html> [as of Aug. 13, 2007] [reporting collection efforts taken by state against surviving registered domestic partner due to inheritance of deceased partner's interest in family home to repay state for medical services received through MediCal].)

to create a putative domestic partnership status to grant parties dissolution rights despite the invalidity of the relationship due to a legal infirmity."

13. Unlike Remarriage, Domestic Partnership Registration May Not Affect Entitlement To Alimony.

Registering as a domestic partner may not sever the obligation of a former spouse to pay alimony. (Dolan, *Alimony Provides A Same-Sex Union Test, An Orange County Man Appeals An Order To Pay Spousal Support To His Ex-Wife, Who Is In A Domestic Partnership*, L.A. Times (July 22, 2007) <http://www.latimes.com/news/local/la-me-gaywed22jul22,1,5066981.story?coll=la-headlines-california&ctrack=1&cset=true> [discussing Orange County Superior Court order that former husband must continue to pay alimony to ex-wife despite her post-divorce domestic partnership registration with her new female partner because domestic partnership is not the same as marriage].)

14. Domestic Partnerships Are Frequently Unrecognized, Even Where Legally Required To Be Honored.

Being excluded from marriage exposes same-sex couples to practical difficulties because many people do not understand what California's domestic partnership law requires. As a result, domestic partners experience pervasive discrimination even in areas where the law technically protects them.

- Many registered domestic partners continue to experience discrimination by health care providers and hospital staff. (See, e.g., Hagedorn, *Couple: Hospital's Refusal Of Visit Was Discrimination,*

The Bakersfield Californian (Mar. 8, 2007) p. A1 <http://www.bakersfield.com/102/story/103906.html> [describing incident in which one of the partners in a same-sex registered domestic partnership was denied access to the couple's child during an emergency room visit to San Joaquin Community Hospital].)

- Many businesses discriminate against domestic partners in their provision of services, even though such discrimination is unlawful. (See, e.g., Cyphers, *Countrywide Home Loans: Domestic Partners May Be Excluded*, Buzz Magazine (July 6, 2007) at p. 14 [describing allegations that California loan company discriminates against domestic partners].)

- Many domestic partners continue to experience discrimination from family members, businesses, creditors, public agencies and others when one of the partners passes away. (See. e.g., Forbes, *California Domestic Partnership Act*, La Parola: The Online Newsletter for the Gay, Lesbian, Bisexual and Transgender Community at Summitlake.com (Feb. 25, 2007) <http://www.summitlake.com/LA_PAROLA/WP/?p=28> [as of July 11, 2007] [describing difficulties encountered by surviving domestic partner].)

- Even though required to do so by law, the State of California refused to provide overnight "conjugal" visits to the domestic partners of incarcerated persons until an inmate's partner threatened litigation against the state. (See *Gay, Lesbian Inmates Getting Conjugal Visits*, L.A. Times (June 2, 2007) p. B4; McKinley, *Gay Inmates To*

Be Granted Conjugal Visits In California, N.Y. Times (June 3, 2007) p. 28.)

- Even state agencies frequently discriminate against domestic partners. (See, e.g., Ocamb, *Domestic Partners: Separate and Unequal* (Jul. 24-Aug. 6, 2007) IN LA Magazine <http://www.inlamagazine.com/1012/special_reports/sprt1.html> [reporting refusal by California Department of Veterans Affairs to treat registered domestic partner equally to a spouse within California tuition assistance program for veterans and family members].)

15. Many Private Employers Refuse to Provide The Same Benefits To Domestic Partners That They Provide to Married Spouses.

Many employers who are self-insured or whose insurance policies are issued in other states believe they are not required to provide equal health insurance benefits to domestic partners.[6] In practice, this means that

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[6] Assembly Bill Number 2208, which was enacted in 2004, prohibits insurance companies from issuing, providing, offering or selling policies in the State of California that discriminate between spouses and domestic partners. (Assem. Bill No. 2208 (2003-2004 Reg. Sess.) (hereafter AB 2208) [amending Health & Saf. Code § 1374.58].) AB 2208 does not apply to employers who are self-insured or who obtain insurance plans that are issued in another state. (See AB 2208 (2003-2004 Reg. Sess.) [requiring only health care service plans and insurers regulated by the Insurance Code to provide equal benefits].) For example, one insurer's website states:

> AB 2208 requirements do not apply to:
> 1. California residents covered under policies issued outside of California. For example, a California employee covered by a

many domestic partners are unable to obtain health insurance benefits for their partners. (See, e.g., Pondel, *More Companies Offer Benefits To Same-Sex Couples, But Others Won't Till It's Required By Law*, Daily News of L.A. (Aug. 29, 2004) p. B1, reprinted by Evan Pondel <http://www.evanpondel.com/aug1904.htm> [as of Aug. 1, 2007] [quoting a number of California businesses that refuse to provide equal benefits to domestic partners]; Rostow, *Civil Unions and Domestic Partnerships: A Distinction With A Difference The Importance of Marriage Increasingly Clear as Alternatives Fall Short*, S.F. Bay Times (August 2, 2007) <http://www.sfbaytimes.com/?sec=article&article_id=6680> [as of Aug. 16, 2007] [reporting on large private employers that voluntarily provide benefits to cover legal spouses of gay and lesbian employees, but have resisted providing similar benefits to employees with a civil union partner or a registered domestic partner].)[7]

> policy issued in Texas will not be able to cover their registered domestic partner. This holds true even if there is a large California based operation, but the policy is written outside CA.
>
> 2. Self-funded plans do not have to comply. These plans are governed by ERISA (Federal law) and are not subject to state laws and therefore are not required to comply with AB 2208."

(California Assembly Bill 2208 – California Insurance Equality Act: Requires insurers to treat Domestic Partners in the same manner as spouses, Athens Benefits Insurance Services, Inc. (Dec. 2004) <http://athensbenefits.com/client/benefittrendsarticle.cfm?record_no=846> [as of July 27, 2007].)

[7] In other states, as well, several private employers have refused to extend spousal benefits to employees in civil unions or domestic partnerships. (See, e.g., Associated Press, *Civil Unions found to Fall Short, New Jersey Civil Unions Are Proving Not To Be The Equivalent Of Marriage Licenses, As Many Employers Deny Same-Sex Partners Health Benefits Because They Only Recognize Marriages* (May 30, 2007) <http://www.app.com/apps/pbcs.dll/article?AID=/20070530/NEWS03/705 300327/1007>; Schwaneberg, *In Denying Benefits, Firm Says Civil Union*

16. Private Employers Who Provide Domestic Partner Benefits Often Require That Employees "Authenticate" Their Domestic Partner Status.

Many employers require that, in order for an employee's registered domestic partner to receive benefits, the employee must complete an affidavit disclosing private information about the couple's relationship (such as how long they have been together and whether they are financially inter-dependent). Employers do not impose the same requirement on married employees. (See, e.g., Johnson, et al., *Domestic Partners in California: The Employment and Employee Benefits Implications of AB 205*, 16(9) Morrison & Foerster, LLP Emp. Law Comment. 1 (Sept. 2004) <http://www.mofo.com/news/updates/bulletins/bulletin1326.html> [as of Aug. 1, 2007] (hereafter Johnson) [noting that employers generally require domestic partners "to provide affidavits, certificates, or other documentation of their status before they become eligible for domestic partner benefits," but "do not require spouses to provide copies of their marriage licenses"].) In general, these affidavits reflect the discriminatory belief that people might falsify a domestic partnership in order to obtain

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Not Marriage's Equal, Star-Ledger (July 8, 2007) [reporting a company's refusal to provide benefits to employees with civil union partners, although the company provides benefits to married gay employees in Massachusetts]; Kelley, *2 Months After New Jersey's Civil Union Law, Problems Finding True Equality*, N.Y. Times (April 13, 2007) <http://www.nytimes.com/2007/04/13/nyregion/13civil.html> [as of Aug. 13, 2007] [reporting on private companies refusing to offer health insurance to civil union partners]; Fahim, *In Civil Unions, New Challenges Over Benefits*, N.Y. Times (August 1, 2007) <http://www.nytimes.com/2007/08/01/nyregion/01civil.html?_r=1&oref=slogin&pagewanted=print> [as of Aug. 1, 2007].)

health or other benefits. In contrast, employers generally presume asserted marriages to be authentic.[8]

17. Other States Generally Do Not Recognize California Domestic Partnerships.

"[U]nlike a marriage, a domestic partnership will not automatically be recognized by other states." (*Knight*, *supra*, 128 Cal.App.4th at 31.) "[I]f the domestic partners move out of California, the rights bestowed by our state's domestic partnership law may well become illusory." (*Ibid.*) "[M]any of the rights bestowed upon domestic partners, such as the right to visit their hospitalized partner and to make medical decisions for him or her, may not be acknowledged by other states." (*Ibid.*) Domestic partners may not even be able to dissolve their relationship in other jurisdictions. (*Ibid.* [citing *Rosengarten v. Downes* (2002) 802 A.2d 170].) "Consequently, domestic partners do not have the same freedom to travel and retain the benefits associated with their union as do married persons." (*Ibid.*)

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[8] This discriminatory belief is so widely held that it is the premise of a recent movie entitled "I Now Pronounce You Chuck and Larry," in which two characters pretend to be gay domestic partners so that one of them can pass his pension along to his children. (I Now Pronounce You Chuck and Larry (Universal Pictures 2007) <http://www.chuckandlarry.com> [as of Aug. 1, 2007].) In reality, there is no evidence that employees are more likely to engage in fraud in order to obtain domestic partner benefits than to obtain spousal benefits. (See, e.g., Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)* (1990) 51 Ohio St. L.J. 1067, 1082-83 ["Where domestic partner provisions exist . . . no evidence of fraud has been demonstrated"].)

18. Domestic Partners Do Not Have Standing To Seek Equal Treatment Under Federal Laws.

Federal law currently provides numerous rights and benefits to married persons, but does not recognize marriages of same-sex couples for any federal law purposes. (1 U.S.C. § 7.) Unlike marriage, domestic partnership does not confer standing to seek equal treatment of one's state-conferred relationship status for federal law purposes. (*Smelt v. Orange County* (9th Cir. 2006) 447 F.3d 673 [holding that domestic partners lack standing to challenge federal DOMA because not married].)

SUPPLEMENTAL QUESTION 2

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

Respondents certainly wish to enjoy all of the legal rights and obligations provided by marriage, which cannot be adequately provided through a separate status. Much more fundamentally, however, they wish to marry for the same reason that most people do: because they deeply love their partners and wish to express their love and commitment, and to publicly join their lives together, in the way that marriage – and only marriage – makes possible. They also wish to participate in the shared life of the community as equal citizens, not as outsiders who are excluded from what they and others view not only as a fundamental human right, but as a fundamental dimension of human experience and belonging.

The core protections encompassed by the fundamental right to marry are (1) the right to participate in a state-sanctioned civil marriage and to have one's marriage recognized and respected by the State, including the right to dignity, privacy and autonomy within the marital relationship; and (2) the freedom to choose one's spouse without unjustified interference from the State. These core protections constitute the minimum, constitutionally-guaranteed substantive attributes or rights that are

embodied within the fundamental constitutional right to marry.[9] It is these core protections that Respondents seek.

A. Individuals Have A Constitutionally Protected Interest In The Legal Status Of Marriage.

As this Court held in *Perez*: "Marriage is . . . something more than a civil contract subject to regulation by the state; it is a fundamental right of free men." (*Perez, supra*, 32 Cal.2d at p. 714.) For the reasons explained below, the right to marry referred to in *Perez* and other cases is primarily a right to participate in the state-sanctioned institution of civil marriage. The fundamental right to marry also requires that, once a marital relationship has been formally established, the State must recognize and respect that relationship by acknowledging the couple's legal status as married, enabling the couple to knit their lives together, and protecting the privacy

[9] This Court and the California Court of Appeal have repeatedly held that there is a fundamental right to marry that is protected under the state and federal constitutional guarantees of privacy, due process, and freedom of intimate association and expression. (See, e.g., *Perez v. Sharp* (1948) 32 Cal.2d 711 (hereafter *Perez*); *Ortiz*, *supra*, 98 Cal.App.4th 1288.)

Respondents rely exclusively on the fundamental right to marry (and other guarantees) secured by the California Constitution; they do not rely on any federal constitutional protections. Nonetheless, because the protections afforded by our state charter must be at least as great as those protected under the federal constitution, federal and state decisions construing the nature and scope of the right to marry under the federal constitution are persuasive. (See, e.g., *People v. Smith* (1983) 34 Cal.3d 251, 265 ["decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law. [Citation.]" (internal quotation marks omitted)].)

and dignity of the marital couple against unwarranted intrusions by others or by the State.[10]

Since its inception as a state, California has recognized marriage as a state-sanctioned institution that creates a legally binding relationship between two persons. (See, e.g., *Mott v. Mott* (1890) 82 Cal. 413, 416 [marriage is a civil contract "of so solemn and binding a nature . . . that the consent of the parties alone . . . will not constitute marriage . . . but . . . the consent of the state is also required"].).[11]

In contrast, the specific rights and obligations attached to marriage have changed substantially. For example, at one time California followed "the general common-law rule that the civil existence of the wife is merged in that of her husband." (*Sesler v. Montgomery* (1889) 78 Cal. 486, 487.)

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[10] Without a compelling justification, the State may not infringe upon the couple's constitutionally protected decision-making with regard to sexual intimacy, whether and when to have children, how to raise their children, or how to allocate roles and responsibilities within the marital relationship. (See, e.g., *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940; *Griswold v. Connecticut* (1965) 381 U.S. 479, 488; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399.) Of course, the State must respect these rights for unmarried persons in many circumstances as well. (See, e.g., *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841; *Eisenstadt v. Baird* (1972) 405 U.S. 438, 453-454; *Troxel v. Granville* (2000) 530 U.S. 57, 65; *Lawrence v. Texas* (2003) 539 U.S. 558, 565.)

[11] While the procedural requirements for forming a legally valid marriage have changed, the recognition of marriage as a state-sanctioned institution has remained constant. The most significant change in these requirements was the abolition of common law marriage in 1895. (See, e.g., *Norman v. Norman* (1898) 121 Cal. 620, 628 [discussing abolition of common law marriage and other changes in the formalization requirements for marriage].) Even a common law marriage created a legal relationship and effected a corresponding change in the party's legal status; it was not merely a private agreement. (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 112 [distinguishing marriage from contractual relationships].)

"Upon this principle of the legal union of husbands and wives, most of their rights, duties, and disabilities depended." (*Ibid.*) Today, this rule has long since been abandoned. The rights and duties of spouses do not vary based on their sex in any way. (See, e.g., *In re Marriage of Pendleton and Fireman* (2000) 24 Cal.4th 39, 53 [noting a "sea change" in the legal "position of married women" under California law]; *In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 643-644 [describing elimination of "virtually all sex-specific differences in property rights of spouses" and other areas of marriage law].) The substance of marriage law has changed in many other respects as well and will no doubt continue to evolve. (See, e.g., *In re Marriage of Pendleton and Fireman*, *supra*, at p. 52 [enforcing pre-marital waiver of spousal support]; *In re Marriage of Walton*, *supra* 28 Cal.App.3d at p.113 [rejecting wife's constitutional challenge to no-fault divorce law and holding that state generally has plenary power to alter the substantive terms and conditions of the marital relationship].)

Notwithstanding these significant changes in the substance of the law governing marriage, both California and federal courts have continued to hold that individuals have a constitutionally protected right to enter into a state-sanctioned civil marriage. (See, e.g., *Turner*, *supra*, 482 U.S. 78, 95; *Zablocki v. Redhail* (1978) 434 U.S. 374, 384 (hereafter *Zablocki*); *Boddie v. Connecticut* (1971) 401 U.S. 371, 376; *Loving v. Virginia* (1967) 388 U.S. 1, 12 (hereafter *Loving*); *Perez*, *supra*, 32 Cal.2d at p. 716; *Ortiz*, *supra*, 98 Cal.App.4th at p. 1303; *In re Carrafa* (1978) 77 Cal.App.3d 788, 791.) These decisions show that, for purposes of the fundamental right to marry, the legal status of marriage is at least of equal significance as the material rights and obligations provided by marriage.[12]

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[12] In this regard, marriage is like parentage. Both are legal statuses with tremendous personal, social, and spiritual significance; and both exist

For the individual, the *core* of the constitutionally protected interest in marriage is not in any particular material entitlement or benefit, but in the opportunity to enjoy the unique quality of intimacy and emotional connection, on the one hand, and the unique public validation, on the other, that are available only through marriage.[13] Andrea Perez and Sylvester Davis, for instance, surely were not motivated by a desire for a particular tax status or the benefits of marital property regimes. Rather, they wanted to marry in order to express their love and devotion to one another, to honor their shared religious beliefs, and to be treated as equal and respected members of society. (*Perez, supra,* 32 Cal.2d at p. 744.) They wanted to participate in one of "the most socially productive and individually fulfilling relationship[s] that one can enjoy in the course of a lifetime" (*Marvin*, *supra*, 18 Cal.3d at p. 684) – the institution through which society

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independently of the rights and duties ascribed to them, which have changed over time and may vary significantly in different states. (See Karst, *The Freedom of Intimate Association* (1980) 89 Yale L.J. 624, 636, fn. 69 [noting that a person may wish to establish parentage "for reasons centered on the status itself (as opposed to any material rights or obligations associated with the status)"].)

[13] As this Court has held repeatedly, the unique value of marriage and California's strong public policy favoring marriage does not mean that the State does not also have a strong interest in supporting other types of family and personal relationships. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 844, fn. 5; *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 438; *Marvin v. Marvin* (1976) 18 Cal.3d 660, 683-684.) These and other similar cases show that California courts and the California Legislature have acted to promote a degree of fairness and equal treatment for adults and children in non-marital families, while continuing to recognize and protect marriage as a both a valuable social institution and a fundamental right.

uniquely recognizes, validates, and enhances the mutual commitment of intimate partners.[14]

The U.S. Supreme Court recognized the constitutional importance of these personal, social, and spiritual aspects of marriage in *Turner v. Safley*, *supra*, 482 U.S. 78. In *Turner*, the Court found that the attributes "sufficient to form a constitutionally protected marital relationship" included: (1) the function of marriages as "expressions of emotional support and public commitment"; (2) the "spiritual significance" of marriage in "many religions" and the fact that "the commitment of marriage may be an exercise of religious faith"; (3) the expectation of consummation; (4) the fact that "marital status often is a precondition to the receipt of government benefits, (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock)." (*Id.* at pp. 95-96.) Likewise, in *Perez*, this Court also emphasized the emotional, expressive, and dignitary aspects of marriage – not material legal rights and benefits. (*Perez*, *supra*, 32 Cal.2d at pp. 714-715, 725 [discussing an individual's fundamental autonomy and dignity interests in marriage].)

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[14] Similarly, in a recent editorial commemorating the fortieth anniversary of *Loving v. Virginia*, Mildred Loving wrote that she and her "late husband, Richard" married because "[w]e were in love, and we wanted to be married." (Mildred Loving, Loving For All (June 12, 2007), reprinted by Stephen J. Hyland, Esq. <http://www.stephenhyland.com/2007/06/loving_for_all.html> [as of Aug. 16, 2007] ["Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of . . . how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the 'wrong kind of person' for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry"].)

As *Turner* and *Perez* show, the constitutionally protected right to marry is primarily about the personal, social, and spiritual significance of marriage and about the government's acknowledgment of marriage as a special status that deserves protection and support, rather than particular government benefits or property rights.

The social importance of marriage and its value and significance to individuals are mutually reinforcing. "[M]arriage is recognized as the most important relation in life, and one in which the state is vitally interested." (*Deyoe v. Superior Court* (1903) 140 Cal. 476, 482.) The State seeks "to foster and promote the institution of marriage" because "the structure of society itself largely depends upon the institution of marriage." (*Marvin*, *supra*, 18 Cal.3d at pp. 683-684.) Marriage is "the center of the personal affections that ennoble and enrich human life. (*De Burgh v. De Burgh* (1952), 39 Cal.2d 858, 863-864 (hereafter *De Burgh*).)

Because marriage plays such a central role in our society, being free to marry is a pre-requisite to equal citizenship – an essential aspect of civil and political equality.[15] (See, e.g., Davis, Neglected Stories: The Constitution And Family Values (1997) pp. 38-39 (hereafter Davis) [explaining that the "widespread commitment among antislavery Americans to protect rights to marry and to form and maintain families" played an important role "in crafting the Thirteenth and Fourteenth Amendments"].)[16]

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[15] Of course this does not mean that individuals in our society who *choose* not to marry are any less respected or equal than others. It is the freedom to make the choice whether and whom to marry – not how an individual exercises that choice – that is the hallmark of equal citizenship and respect.

[16] As Professor Davis further notes: "The inability of slaves to form and maintain marital bonds and the inalienability of their right to do so

Lesbian and gay couples also yearn for the public affirmation and support that only marriage gives. "Gays and lesbians seek not only the tangible benefits that would accompany a recognition of same-sex marriage, but also the societal acknowledgment of the humanity and normative goodness that they believe inheres in . . . their relationships." (Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism* (1997) 85 Geo. L.J. 1871, 1930.)[17] The exclusion of same-sex couples from marriage deprives them of the validation given to married couples in the myriad interactions of daily life. Regardless of their own values or desires or the choices they would like to make, it pushes them outside of the common framework and vocabulary of family and civic life; it forces them to be outsiders. For some, it prevents them from being able to fully express their religious beliefs or to conform to the tenets of their religious faith. These harms do not turn on the

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were recurring topics in the debates of the Reconstruction Congress. Speaker after speaker pronounced marriage rights were fundamental and resolved that freedom in the United States would entail the right to marry." (*Id.* at pp. 38-39.) "When the institution of slavery began to crumble, former slaves seized the right to marry . . . not only for its private but also for its social meaning. . . . The formation of legally recognized marriage bonds signified . . . acceptance as people and as members of the political community." (*Id.* at p. 35.) "When military chaplains were authorized to solemnize marriages between African-Americans [after the Civil War], they were inundated with requests. A Freedmen's Bureau agent . . . reported legalizing seventy-nine marriages in a single day." (*Id.* at p. 36.)

[17] Other commentators have recognized that it diminishes the humanity of lesbian and gay people to suppose that they wish to marry only in order to gain material rights. (See, e.g., Karst, *The Freedom of Intimate Association*, *supra*, 89 Yale L. J. at p. 651 [same-sex couples do not wish to marry only to gain "material benefits" but, just as is true for different-sex couples, to "say something about who they are and to obtain community recognition of their relationship"].)

particular rights and benefits associated with marriage, but instead on the fact that marriage, in our society, denotes a unique social institution.[18]

The rights and obligations given to spouses *reflect* and affirm the dignity and importance of marriage, but they do not *create* or define the marriage relationship in the way, for example, that a contractual relationship is defined by the sum of specified rights and obligations. (*De Burgh*, *supra*, 39 Cal.2d at p. 863 ["marriage is a great deal more than a contract"].) Rather, "[t]he laws relating to marriage and divorce have been enacted because of the profound concern of our organized society for the dignity and stability of the marriage relationship. This concern relates primarily to the status of the parties as [spouses]. The concern of society as to the property rights of the parties is secondary and incidental to its concern as to their status." *In re Haines* (1995) 33 Cal.App.4th 277, 287-288 [citing *Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 651].)

Thus, in order to comply with the fundamental right to marry, it is not enough for the State to provide formal legal recognition and a legal framework whereby two people can become a legal unit. If that were all that the right to marry required (as the State in this case essentially asserts),

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[18] Thus, contrary to the State's position, the State's action in barring same-sex couples from civil marriage does not merely leave lesbian and gay people free to form whatever relationships they choose and to give those relationships whatever meaning they choose. As Professor David Meyer has explained: "One of the reasons marriage appears to matter to spouses in shaping their conduct is that society regards marriage as the ultimate marker of commitment and permanence. . . . Couples who are excluded from marriage, therefore, must construct their relationship . . . in the face of state-backed norms denigrating the seriousness and substantiality of all non-marital relationships. In this sense, the state's exclusion of some persons from marriage . . . may not simply deny them a positive benefit, but do them a distinct harm." (Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption* (2006) 51 Vill. L.Rev. 891, 910.)

then domestic partnership or civil unions or some other status might suffice. But what is entirely missing from that legalistic understanding of marriage is the essence of marriage itself. As Chief Justice Poritz rightly stated in her dissenting opinion in the New Jersey marriage case, lesbian and gay couples do not seek merely a legally recognized union, but rather "the right to marry in the deepest sense of that word." (*Lewis v. Harris*, *supra*, 908 A.2d at p. 226 (dis. opn. of Poritz, C.J.).)

Even if domestic partnership provided all of the substantive rights and duties of marriage (which it falls well short of doing), it would be unable to replicate the constitutionally protected substance of marriage. No package of specific rights and duties – however comprehensive – can compensate for the insult to human dignity in being deprived of a uniquely valued and rewarding personal relationship and excluded from a primary social institution that is one the hallmarks of adulthood, civic belonging, and equal citizenship. Likewise in *Brown v. Bd. of Education*, the Court held that no amount of "tangible" equality could render "separate" schools equal in a constitutional sense. (*Brown v. Bd. of Education of Topeka, Shawnee County, Kan.* (1954) 347 U.S. 483 (hereafter *Brown*).) Rather, the Court found that the essence of a "separate" status was its implicit declaration that those relegated to it were, in some fundamental sense, lesser citizens—lesser human beings. (*Id*. at p. 494)

The fundamental right to marry includes a commitment to equality as an essential attribute. It is based on the "core concept of *common* human dignity." (*Goodridge v. Dept. of Public Health* (Mass. 2005) 798 N.E.2d 941, 948, italics added (hereafter *Goodridge*); see also *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 276, fn. 22, 282, fn. 28 (hereafter *Myers*) [holding that fundamental autonomy rights have an

intrinsic equality component].)[19] Indeed, as the Massachusetts Supreme Judicial Court recognized, marriage ultimately is a fundamental human right because it "fulfils yearnings for security, safe haven, and connection

[19] The experience of lesbian and gay people in Massachusetts and Canada has confirmed the predictions of family law scholars that being able to marry "would be a civic recognition of shared humanity like no other that gay people have ever experienced. But it could only come with marriage. There is no simulacrum that would do the same." (Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values By A "Simulacrum of Marriage"* (1998) 66 Fordham L.Rev. 1699, 1783-84.) In Massachusetts, even within the three years since same-sex couples have been able to marry, lesbian and gay people have experienced unprecedented acceptance and a marked lessening of perceived social differences based on sexual orientation. In the words of one Massachusetts resident, "Living in a state that allows same sex couples to marry has been a surprising experience as a gay man. It seems like within days of legal same sex marriage, the social 'walls' eroded and the gay community was accepted and completely integrated into society. There almost isn't 'gay' anymore in Massachusetts; it's the two guys/girls next door, my boss and his husband, my teacher and her wife, and no political or social lines in between." (*Your Emails: The Politics of Homosexuality*, CNN (June 21, 2007) <http://edition.cnn.com/2007/US/06/19/lgbt.politics.ireport/index.html> [as of Aug. 16, 2007]; see also, e.g., Price, *Gay marriage digs roots, gains momentum,* The Detroit News (June 25, 2007) p. 7A [reporting on increasing public support for ability of same-sex couples to marry, including the experience of an "elderly Massachusetts woman [who] felt her opposition to gay marriage melt away after 'this lovely couple' moved in next door with their children"].)

Domestic partnership does not have this transformative effect. Rather than including same-sex couples within the boundaries of a universal human experience, domestic partnership serves as a constant reminder of an assumed difference.

that express our common humanity." (*Goodridge*, *supra*, 798 N.E.2d at p. 955.)

In sum, the tangible rights and benefits provided through marriage have great practical importance; however, the essential constitutionally protected attributes of marriage primarily center upon the profound personal, social, and spiritual significance of the marital bond and its recognition by the State as a fundamental right that must be available to all.

B. The Freedom To Marry The Person Of One's Choice

Another essential attribute of the fundamental right to marry is the freedom to choose whether and whom to marry. In *Perez,* this Court held that "*the essence* of the right to marry is freedom to join in marriage with the person of one's choice." (*Perez*, *supra*, 32 Cal.2d at p. 717, italics added]; see also *Loving*, *supra*, 388 U.S. at p. 12 ["Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State"].)

The government may not prohibit marriage "except for an important social objective and by reasonable means." (*Perez*, *supra*, 32 Cal.2d at p. 714) "Legislation infringing [the right to marry] must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." (*Id.* at p. 715; see also Karst, *The Freedom of Intimate Association*, *supra*, 89 Yale L. J. at pp. 672-673 ["Some independent harm must justify" restrictions on the right to marry].)

In *Perez*, *supra*, 32 Cal. 2d 711, this Court held that the freedom to marry the person of one's choice is protected because it is essential to human dignity. The statutes challenged in *Perez* permitted an individual to

select a spouse from within his or her own racial group and thus did not completely bar marriage for any group. (*Id.* at pp. 712-713.) In this respect, the challenged restriction in this case is even more categorical; rather than requiring lesbians and gay men to marry only within a particular group, it bars them from marrying any person they may love. In either case, however, the fundamental insult to human dignity is the same. As this Court eloquently explained: "A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them . . . interchangeable . . . ." (*Id.* p. 725.)

The freedom to marry the person of one's choice is also protected because it plays a central role in shaping and expressing an individual's values and identity. "[T]he decision whether and whom to marry is among life's momentous acts of self-definition." (*Goodridge*, *supra*, 798 N.E.2d at p. 955.) Under the current California marriage laws, the State has unconstitutionally usurped that decision for lesbian and gay persons by depriving them of the ability to marry the person they love. [20]

The freedom to decide whether and whom to marry also plays a critical role in our democratic system of government. People do not meaningfully govern themselves if the state has unlimited power to mold every aspect of their lives into standardized roles. Justice Douglass famously described this connection between privacy and democracy as follows: "[O]ne of the earmarks of the totalitarian understanding of society

[20] "The one most clearly established feature of the constitutional freedom of intimate association is the freedom to marry, which radically restricts the state's power to withhold the status of marriage from a willing couple." (Karst, *The Freedom of Intimate Association*, *supra*, 89 Yale L. J. at p. 652.)

is that it seeks to make all subcommunities – family, school, business, press, church – completely subject to control by the State." (*Poe v. Ullman* (1961) 367 U.S. 497, 521-522 (dis. opn. of Douglass, J.).) As an institution in which individuals exercise freedom of choice without undue interference from the State, marriage "nurtures and develops the individual initiative that distinguishes a free people." (*De Burgh v. De Burgh*, *supra*, 39 Cal.2d at p. 864.)

Thus, the freedom to marry the person of one's choice is also protected in order to safeguard diversity of thought and belief. As Justice Blackmun noted in his dissenting opinion in *Bowers*, "in a Nation as diverse as ours, . . . there may be many 'right' ways of conducting [intimate] relationships," and "much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds." (*Bowers v. Hardwick* (1986) 478 U.S. 186, 205 (dis. opn. of Blackmun, J.) overruled by *Lawrence v. Texas* (2003) 539 U.S. 558; see also *id*. at p. 211 ["It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority"].)

This freedom of choice is an essential aspect of the fundamental right to marry that is expressly protected by our State Constitution. Accordingly, in California, the question of whether an individual person should or should not marry a person of the same sex "is not a matter that may be put to a vote of the Legislature." (*Myers*, *supra*, 29 Cal.3d at p. 284 [holding that an individual's fundamental right of procreative freedom may not be overridden by the preferences of the majority].)

SUPPLEMENTAL QUESTION 3

Do the terms "marriage" or "marry" themselves have constitutional significance under the California Constitution? Could the Legislature, consistent with the California Constitution, change the name of the legal relationship of "marriage" to some other name, assuming the legislation preserved all of the rights and obligations that are now associated with marriage?

The words "marriage" and "marry" have constitutional significance under the California Constitution. As explained in Section II above, the right to marry discussed in *Perez* and other California cases includes a right to participate in the government-sanctioned institution of civil marriage and to recognition and respect for one's marital status. These protected attributes cannot be separated from the social and personal meaning attached to the words "marriage" and "marry."

Shorn of its recognized appellation, the right to marry would be stripped of much of its resonance and power. It would be reduced to a functional status more like domestic partnerships or civil unions, with which the State asks same-sex couples to be content. That is, the State essentially argues that marriage in its constitutional dimension can be reduced to a set of benefits – a bundle of marital "sticks" with no meaning greater than the wooden sum of its discrete legal parts. Thus understood, the right to marry, itself, has little meaning and (so the State's argument implicitly goes) little is lost if a different term is applied to that bundle when provided to same-sex couples.

That argument is wrong at the most fundamental level. Marriage is far more profound than its tangible embodiments. Denying the right to marry to same-sex couples would violate the fundamental right to marry because it would strip marriage of the attributes that cause it to be protected in the first place – its power to express a unique quality and level of

commitment, to command public validation, and, for many, to serve as an expression of religious belief. (See, e.g., *Turner*, *supra*, 482 U.S. at pp. 95-96 [describing the attributes of marriage that warrant constitutional protection].)

To illustrate the point, if the State were to abolish parentage as a legal concept and decree that, as of a certain date, all "parents" would henceforth be known as "registered guardians," more than semantics would be at stake. Even if the substantive rights and obligations attached to parentage did not change, any such re-naming would diminish the stature and dignity of being a parent. The automatic recognition and respect given to parents, based on the substantial overlap between the legal and social meanings of the term, would be severely undermined. The State's unilateral re-naming of the term would suggest that rather than a fundamental right, parentage is merely a creation and creature of the State, which would diminish its valued social and personal meaning.[21]

While the intangible essence of marriage – as captured in the term itself – provides a sufficient answer to the Court's question at the most profound level, there are practical considerations as well. Changing the word "marriage" to a different term would place all Californians in the precarious situation now faced by lesbian and gay couples in California and other states that have created a separate family law status for same-sex

[21] Practically, moreover, a significant part of the protection and meaning secured by being a "parent" in everyday life derives from the universal familiarity and intelligibility of the word. For example, if a child must be rushed to the hospital, the words "I am the parent," immediately will be understood and convey an entire universe of shared assumptions about the nature of the relationship and the parties' mutual expectations about how to interact. The clarity and efficiency of such communications – which help to ensure that the parent-child relationship is acknowledged and respected – depend on the depth of historical, social, and legal meaning and continuity provided by the word "parent."

couples. In these jurisdictions, same-sex couples face continual difficulties based on the unfamiliarity and uncertainty of these new statuses, as well as problems when they travel or move to another place. (See, e.g., Editorial *Legal Convolutions for Gay Couples*, N.Y. Times (May 24, 2007) p. A12 [contrasting the practical difficulties inherent in "separate and unequal new legal regimes, like civil unions" with the "universally understood framework" of marriage].) Putting all Californians – or all U.S. residents — in this boat would impair the fundamental right to marry by depriving them of a very significant part of the practical protection provided by the word "marriage."[22]

In addition, because the concept of marriage would continue to have social and religious significance for many people, using a different term for what is now the legal status known as civil marriage would introduce a destabilizing disjuncture between the social and legal meaning of marriage. This disjuncture inevitably would sow confusion and, ultimately, diminish respect for the law and undermine the stability and protection afforded by the right to marry. Lesbian and gay couples in California and other jurisdictions with domestic partnership or civil unions already experience

[22] Although some have suggested that this confusion may dissipate over time, expecting individual families (and particularly those in a minority group) to shoulder the burden of winning social acceptance and understanding of these new terms, as well as clarifying their legal meaning, is fundamentally unfair. In addition, because the purpose of creating a separate status (rather than simply permitting such couples to marry) is to signal that the government does not intend to give same-sex relationships the same official approbation and value as marriage, these new statuses are extraordinarily unlikely ever to achieve equal recognition or respect. (See, e.g., opn. at p. 2, fn. 2 (conc. opn. of Parrilli, J.) ["'Domestic partnership' connotes neither the achievement nor dignity of 'marriage'"].) Certainly, past efforts to create "parallel" institutions for other disfavored groups provide a strong basis for skepticism on this point.

this diminished protection. Many of these couples consider themselves to be married in the personal and social sense of the term, and many have married in religious sacraments or ceremonies. For all legal purposes, however, they must describe themselves as "domestic partners," not as married spouses. This dissonance between the law and the lived reality of social and personal values and meaning is part of why "domestic partnership" has little or no personal, social, or spiritual significance, either for same-sex couples or for others, and also part of why being consigned to domestic partnership rather than marriage is demeaning. For a married heterosexual couple, the law acknowledges and reflects, and in so doing, strengthens the couple's personal, social (and often religious) status as *married*. In contrast, for a same-sex couple who may consider themselves to be "married" in a private or spiritual sense, the law pointedly refuses to acknowledge or support their status and permits them only to be "registered domestic partners." Abolishing marriage and replacing it with domestic partnership or a similar status would infringe the fundamental right to marry for everyone, just as the current domestic partnership law does for lesbian and gay couples, by eliminating one of the most valuable and protective aspects of marriage – its ability to reflect, strengthen, and reinforce what in a personal, social, and often religious sense, is a pre-existing "marital" bond.

An alternative way to think about the Court's question is to view it as inquiring whether it would be permissible (and, perhaps, preferable) to remove the State from the more intangible aspects of marriage, reducing what is now called "marriage" to a bundle of legal rights and benefits—and calling that "bundle" by a different name. To the extent that is the Court's question, the answer – one which Respondents are confident would be embraced by all parties in this litigation (not to mention by Californians

generally in great numbers) – is that such a result would not be either desirable or permissible. 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. "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." (*Zablocki*, *supra*, 434 U.S. at p. 383.) "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 . . . for as noble a purpose as any." (*Griswold v. Connecticut* (1965) 381 U.S. 479, 486.) Indeed, were it not for those intangible elements, it is hard to imagine there would be a constitutionally-protected status here at all. The command of the constitution is for the state to affirm and support the human capacity for love and commitment, not merely to distribute legal rights.

Respondents understand the Court's question as a request to assume that the term "marriage" is abolished for all California citizens, which (for the reasons discussed previously) Respondents believe is not constitutionally permissible. Also implicit in the question, however, is the State's fundamental thesis that "marriage" can be reserved for couples of a different sex, with gay and lesbian couples being entitled to "domestic partnership." That is utterly impermissible. Whatever discretion California may have to abandon the term "marriage" generally, it unquestionably may not continue to use that term for some of its citizens only. The point is as fundamental as the premise underlying the United States Supreme Court's opinion in *Brown*, *supra*, 347 U.S. 483, that one cannot bestow a separate status on people (whatever its tangible "equality") without fundamentally, and impermissibly, diminishing their humanity. (*Id.* at p. 494.)

In the marriage context, itself, the majority opinion in *Lewis v. Harris* illustrates the danger of failing to grasp this point. (*Lewis v. Harris*, *supra*, 908 A.2d 196.) In declining to hold, at the time of its ruling, that the State of New Jersey necessarily had to provide marriage, as opposed to a separate family law status, for same-sex couples, the majority wrote: "New language is developing to describe new social and familial relationships, and in time . . . *the proper labels will take hold*. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship." (*Id.* at p. 223, italics added.)

Missing from this analysis is a recognition of the common humanity of lesbian and gay people, who do not differ from other people with respect to the universal human capacity for forging enduring intimate bonds and creating families. To suppose that there is an inherent need for separate "labels" for these families is no less offensive and unwarranted than the notion that there is a need for separate labels for families based on race, religion, ethnicity, ability, or any of the other myriad characteristics that are irrelevant to a person's ability to form relationships.

As Chief Justice Poritz noted in her dissenting opinion in the New Jersey marriage case, "[w]hat we 'name" things matters." (*Lewis v. Harris*, *supra*, 908 A.2d at p. 226 (conc. & dis. opn. of Poriz, CJ.) Prohibiting same-sex couples from using the word "marriage" to describe their relationships sends a message "that what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage." (*Id.* at pp. 226-227; see also *In re Opinions of the Justices to the Senate* (2004) 802 N.E.2d 565, 570 ["The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a

demonstrable assigning of same-sex, largely homosexual, couples to second-class status"].) Similarly, because marriage is so highly esteemed, requiring all couples to use a word other than "marriage" to describe their legal relationships almost certainly would be seen as a loss of status for all. This would eliminate the current invidious discrimination against same-sex relationships within California, but it would do so not by giving same-sex couples equal rights, but by violating the rights of all. Respondents in this case do not advocate or seek this result. They value the institution of marriage and wish to participate in it; they do not wish to see this fundamental freedom curtailed for others.

Finally, the State and other Appellants have argued that marriage is constitutionally protected as a term and that the protection derives from a common, historically-grounded, understanding that marriage means (or at least includes) a relationship between a man and a woman. That argument is wrong.

The essential, constitutionally-based, character of marriage – as it has been described repeatedly in judicial decisions – depends upon granting recognition to a committed relationship between a couple. (See, e.g., *Griswold v. Connecticut*, *supra*, 381 U.S. at p. 486 [marriage is a "bilateral loyalty"].). Absent the untenable suggestion that same-sex relationships are incapable of embodying the essential characteristics of that bond, it is constitutionally forbidden to deny them the right to marry. The fact that, as a matter of contemporary history, marriage is typically reserved to different sex couples is no more pertinent than the fact that it used to be reserved to couples of the same race (who, also, were capable of loving and being committed to one another – and who, thus, could not be deprived of the right to marry), or any of the once- "traditional" characteristics of the

marital relationship that have been relegated to the dustbin of history without affecting the essence of marriage itself.

Marriage is not a "zero sum" game. (See, e.g., *Hernandez v. Robles* (2005) 26 A.D.3d 98, 141 (dis. opn. of Kaye, J.) ["There are enough marriage licenses to go around for everyone"].) Same sex couples do not want to appropriate the right of marriage. They want to share in it. Those who wish to exclude gay couples from marriage seek to preserve a fundamental right only for some at the expense of others, by treating marriage as somehow a vested and exclusive right of a particular group. This argument is no more legitimate than it would have been for the Commonwealth of Virginia to openly acknowledge that it wished to preserve the rich history and tradition of VMI only for men – or closer to the context in this case, for the Commonwealth of Virginia to assert that it wished to preserve the benefits of marriage only for couples of the same race. As Ronald Dworkin has noted: "The argument [that permitting gay couples to marry will diminish the meaning of marriage] supposes that the culture that shapes our values is the property only of some of us – those who happen to enjoy political power for the moment – to sculpt and protect in the way we admire." (Dworkin, Is Democracy Possible Here? (2006) at p. 89.) "That is a deep mistake; in a genuinely free society, the world of ideas and values belongs to no one and to everyone." (*Ibid.*) Indeed, the argument that permitting lesbian and gay couples to marry would diminish its value "contradicts the premise of our shared ideals of liberty." (*Id.* at p. 88.)

There is no basis, and no need, to change the name of "marriage" for everyone, or anyone. All that is required is to acknowledge that gay men and lesbians, no less than others, are capable of participating in the

inestimably valued institution of marriage, properly and fully understood. Their right to do so should be recognized.

SUPPLEMENTAL QUESTION 4

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

Proposition 22 created a new section 308.5 of the Family Code stating, “Only a marriage between a man and a woman is valid or recognized in California.” The scope of an initiative statute is ascertained using standard statutory construction principles. (*Lesher Communications v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.) “In interpreting a statute, [courts] first consider its words, giving them their ordinary meaning and construing them in a manner consistent with their context and the apparent purpose of the legislation.” (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 168 [citing *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818].) When construing initiative statutes, the court’s principal task is to discern the initiative’s scope in light of the voters’ intent. “In the case of a voters’ initiative statute, too, [courts] may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.” (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 (hereafter *Hodges*).)

Accordingly, section 308.5 should be construed by considering its text, its placement in the Family Code, and the statements contained in the official voter guide for Proposition 22, all of which confirm that the initiative's purpose was to provide that California would not have to recognize same-sex couples' marriages celebrated in other states. In other words, the electorate's intent in enacting Proposition 22 was to protect state sovereignty with respect to treatment and recognition of foreign marriages, not to divest the Legislature of power to regulate who may marry within the state of California.

A. The Text Of Section 308.5 Is Ambiguous As To Whether It Applies Only To Marriages Entered Outside California Or Also To Marriages Entered Within California.

Section 308.5's text is ambiguous about whether Proposition 22 simply created an exception excluding the marriages of same-sex couples from Family Code section 308's comity rule, according to which California otherwise respects valid marriages from other jurisdictions, or whether Proposition 22 also reiterated section 300's restriction of in-state marriages to different-sex couples. As the Court of Appeal recognized in this case (opn. pp. 13-15), appellate courts have come to opposing conclusions in *dicta* on this issue. (Respondents' Opening Br. at p. 79; compare *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424 [concluding the initiative statute "was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming, in reliance on Family Code section 308, that their marriages must be recognized as valid marriages."], review denied June 15, 2005, No. S133795, with *Knight*, *supra*, 128 Cal.App.4th at pp. 23-24 [opining in dicta that Proposition 22 means that "California will

not legitimize or recognize same-sex marriages from other jurisdictions, as it otherwise would be required to do pursuant to section 308, and that California will not permit same-sex partners to validly marry within the state"], review denied June 29, 2005, No. S133961.)[23]

California courts use both the term "valid" and the term "recognized" to apply to out-of-state marriages, which may be treated as "valid" for all purposes or "recognized" only for limited purposes. (See, e.g., *Estate of Bir* (1948) 83 Cal.App.2d 256, 261 [holding that even though California would not regard the decedent's out-of-state polygamous marriage as a *valid* marriage, the state would *recognize* that marriage for the limited purpose of permitting both wives to share in the decedent's estate].) In considering a bill to allow same-sex couples to marry in California, the Assembly Judiciary Committee addressed the ambiguity of section 308.5's language and concluded:

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[23] The Fund incorrectly asserts that the statement in *Knight* was not dicta, but rather a holding. A dictum is a "discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498.) In *Knight*, the Court of Appeal determined that section 308.5 does not limit the Legislature's power to enact protections for same-sex couples through the status of domestic partnership because section 308.5 applies only to marriages and not to other types of legally recognized relationships. (*Knight, supra*, 128 Cal.App.4th at pp. 17-19.) The *Knight* court's conclusion that Proposition 22 does not limit the Legislature's authority to regulate domestic partnerships in no way required the court to decide whether section 308.5 applies both to out-of-state and in-state *marriages*.

> Proposition 22 uses language long used by courts in California and elsewhere to describe two different ways that a state may regard an out-of-state marriage as entitling a claimant to inheritance rights or other incidents of marriage. The state may choose to treat the out-of-state marriage as a "valid" marriage for all purposes, or the state may choose to "recognize" the marriage for certain limited purposes (such as inheritance rights) even if the marriage will not be treated as valid for other purposes. Proposition 22 used precisely this language — "valid or recognized in California."

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1967 (2003-2004 Reg. Sess.) p. H.) Because the words used in section 308.5 can apply equally well solely to foreign marriages or to both out-of-state and in-state marriages, the initiative's meaning cannot be determined from its text alone.

1. Section 308.5's Placement In The Family Code Immediately Following Section 308 Indicates That Section 308.5 Applies Solely To Marriages Entered Outside California.

In construing an initiative statute, "[w]hen the statutory language is ambiguous," courts consider a variety of extrinsic aids, including "the context in which the language appears." (*People v. Jefferson* (1999) 21 Cal.4th 86, 94; see also *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 ["When the language is susceptible of more than one reasonable interpretation . . . , we look to a variety of extrinsic aids, including . . . the statutory scheme of which the statute is a part"].)

As codified, Proposition 22 follows, and modifies, section 308, "Foreign marriages; validity." Section 308 provides: "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."

Section 308 codified the long-standing conflict-of-laws rule that a marriage valid where entered shall be deemed valid in other jurisdictions whether or not those jurisdictions would permit celebration of the marriage. (See, e.g., *Colbert v. Colbert* (1946) 28 Cal.2d 276, 280; *Norman v. Norman*, *supra*, 121 Cal. at p. 624 [“A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here” (internal quotation marks omitted); Rest.2d, Conf. of Laws (1971) § 283, subd. (2) .)

As this Court has held, the location of a statutory provision within a part of a particular code can be instructive in the construction of that statute. (See *People v. Seneca Insurance Co.* (2003) 29 Cal.4th 954, 958 [“[T]he organization of the Penal Code and the [order of] placement of section 1166 within that code strongly suggest that section 1166 does not apply in the case of a guilty plea.”].) The same reasoning is applicable here. Proposition 22’s placement as section 308.5 shows an obvious intention to amend the rule stated by section 308. Because that reading is fully consistent with the text of the initiative, the placement of section 308.5 is strong indication of its meaning. (*Seneca*, *supra*, at p. 966; *Granberry v. Islay Investments*, *supra*, 9 Cal.4th at p. 744.)

2. Proposition 22’s Ballot Materials Described Its Purpose As Protecting California’s Sovereign Power To Decide How To Treat Out-of-State Marriages Of Same-Sex Couples.

When the text of a ballot measure is ambiguous, the Court should consider “the electorate’s purpose, as indicated in the ballot arguments.”

(*Hodges, supra,* 21 Cal.4th at p. 114); see also *In re Lance W.* (1983) 37 Cal.3d 873, 888, fn.8 [“Ballot summaries and arguments are accepted sources from which to ascertain the voters’ intent and understanding of initiative measures.”].) Where a particular interpretation was presented to the electorate, that interpretation must prevail, even if a different, “broad literal interpretation” of the language also is possible. (*Hodges, supra*, at p. 118.) In *Hodges*, this Court held that, where the ballot materials for an initiative that precluded recovery of non-economic damages by uninsured motorists did not expressly mention product liability claims, the voters could not be presumed to have intended to affect such claims, even though the literal text of the initiative could have been construed broadly to include such claims. (*Id.* at p. 114.) This Court emphasized in *Hodges*, “We may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.” (*Ibid.*)

The implications of *Hodges* for interpretation of section 308.5 are clear. Proposition 22’s ballot materials expressly identified the problem the initiative was designed to address — that out-of-state judges ostensibly were poised to allow lesbian and gay couples to marry and that such couples might enter California and expect their marriages to be treated as valid or recognized for certain purposes, without California having decided for itself that same-sex couples may marry. Following the Hawaii Supreme Court’s ruling in *Baehr v. Lewin* (Hawaii 1993) 852 P.2d 44, that denying marriage licenses to same-sex couples appeared to violate the Hawaii Constitution’s proscription against sex discrimination, and as that case went to trial in September of 1996,[24] Congress enacted the so-called “Defense of

[24] See Goldberg, *Hawaii Judge Ends Gay-Marriage Ban,* N.Y. Times (Dec. 4, 1996).

Marriage Act," purporting to authorize the states to deny recognition to same-sex couples' marriages entered in other jurisdictions. (Pub.L. No. 104-199 (Sept. 21, 1996) 110 Stat. 2419, codified as 28 U.S.C. § 1738C.)[25] Numerous states responded with their own so-called "Defense of Marriage Acts." The late Senator William "Pete" Knight proposed Proposition 22 while same-sex couples were seeking the right to marry outside California, but not in California. Proposition 22 appeared on the ballot just months after the Vermont Supreme Court held that denying lesbian and gay couples the protections afforded through marriage violated the Vermont Constitution. (*Baker v. State* (Vt. 1999) 744 A.2d 864.)[26]

Referencing that landscape, the ballot arguments in favor of Proposition 22 said that the measure was designed to "close a loophole" that otherwise would require California to honor marriages that same-sex couples might soon be able to celebrate in other states. Explaining the ostensible need for the amendment, Proposition 22's proponents said:

> When people ask, "why is this necessary?" I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages . . . .

(See Respondents' Appendix, Case No. A110652, vol. I p. 99 [*Voter Information Guide*, at 52 (March 7, 2000 Primary Election]; see also

[25] See Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges* (2005) 153 U.Pa. L.Rev. 2143, 2165-2194 [providing appendix with a compilation of state laws prohibiting the recognition of marriage for same-sex couples as of June 2005].

[26] The Canadian Supreme Court also held in 1999 that same-sex partners must be considered spouses for certain purposes. (*M. v. H.* (Can. 1999) 2 S.C.R. 3.)

Knight, supra, 128 Cal.App.4th at p. 25.) The Rebuttal to Argument Against Proposition 22 further emphasized this point: "*UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE "SAME-SEX MARRIAGES" PERFORMED IN OTHER STATES*." (*Id.* at 98 [capitalization and italics in original]; *Knight, supra*, 128 Cal.App.4th at p. 26.)

The problem Proposition 22's proponents asked the voters to solve thus was a purported threat to state sovereignty ostensibly posed by out-of-state judges. The arguments in favor of the initiative affirmed that marriage eligibility within California already was limited to different-sex partners. *The measure's proponents said nothing to indicate a need or an intention to reinforce the in-state rule against possible legislative change.* (Compare *People v. Hazelton* (1996) 14 Cal.4th 101, 107 [in deciding scope of ambiguous language in "three strikes" law, it was proper to read ambiguous initiative language as including full substance of legislature's version of statute, despite ballot measure's possibly narrower scope, because the initiative's proponents had informed voters explicitly that the initiative's substance was the same as the existing statute, and that the initiative was intended "to 'strengthen' the legislative version"].)

There was no need in March 2000 for an initiative to prohibit same-sex couples from marrying within California because Family Code section 300 already served that purpose. The only possible purpose for repeating that exclusion in Proposition 22 might have been to remove the Legislature's power to alter the eligibility requirements for marriage in California. There is no indication in the ballot materials, however, that Proposition 22 had any such purpose of limiting the California Legislature's authority over marriage eligibility. Rather, while the ballot materials repeatedly alerted voters to the need to limit the power of "judges

in [other] states," the materials were completely silent with regard to any need to limit the power of the Legislature. (See Respondents' Appendix, Case No. A110652, vol. I p. 99.)

It would be improper to construe section 308.5 broadly to apply to both in-state and out-of-state marriages, and thereby to restrict the Legislature's power, when the voters were given no notice that such a broad interpretation was intended. (*Hodges, supra*, 21 Cal.4th at p. 114.) Construing Proposition 22 as *sub silencio* modifying section 300 when it explicitly modified section 308 would run counter to the intent of voters who approved Proposition 22 with the understanding and the intent (consistently conveyed by the ballot materials) that the initiative simply would protect California's sovereignty against foreign judges, not strip California's own Legislature of the authority to determine California's own marriage policy in the future.

Furthermore, the Attorney General's title and summary for Proposition 22 offered the voters no indication that the measure would not only limit the existing foreign marriage recognition rule, but also would strip the Legislature of the power to modify the existing law regarding in-state marriages. Instead, the ballot summary simply explained that a "no" vote meant that in-state marriages would continue to be restricted to different-sex couples, and out-of-state marriages would continue to be honored, including if another state started marrying same-sex couples. (See Respondents' Appendix, Case No. A110652, vol. I, p. 97 [*Quick Reference Voter Guide*, at 6 (March 7, 2000 Primary Election]; see also *Knight, supra*, 128 Cal.App.4th at p. 25.)[27]

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[27] In the course of defending the selection of the title "Limit on Marriages" for Proposition 22, then-Attorney General Lockyer explained that the voters needed to be alerted that the "measure [was] intended to

The placement of section 308.5 in the Family Code immediately following section 308 on "foreign marriages," the materials presented to voters, and the Attorney General's ballot title and summary establish that section 308.5 applies only to out-of-state marriages.[28]

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extend [the] limitation contained in Family Code section 300 to preclude recognition of out-of-state marriages under other provisions of the Family Code." (Attorney General Bill Lockyer's Memorandum of Points and Authorities, *Stutzman v. Jones*, Sacramento Superior Court Case No. 99CS02549, at p. 6 (Sept. 7, 1999), a true copy of the Attorney General's Memorandum is included as Exhibit 1 to Respondents' Request for Judicial Notice (RRJN).) In the *Stutzman* litigation, the Attorney General noted further, "[t]he avowed purpose of Proposition 22's proponents is to prevent recognition of [] marriages [other than those between a man and a woman] under Family Code Section 308." (*Id*. at p. 9.)

[28] There is no merit to the contention of Proposition 22 Legal Defense and Education Fund (hereafter the Fund) that multiple failed bills proposed by the late Senator William "Pete" Knight prior to Proposition 22 support a broader reading of Proposition 22. (Fund's Answer Br. at pp. 81-83). Of course, the only evidence that the Court may consider in construing Proposition 22 is ballot material presented to the voters. (See *Hodges*, *supra,* 21 Cal.4th at p. 118, fn. 6 ["There is no necessary correlation between what the drafter understood the text to mean and what the voters enacting the measure understood it to mean." (internal quotation marks omitted)].) But even if Mr. Knight's unsuccessful efforts in the Legislature properly could be considered in construing section 308.5, those efforts would support the conclusion that the purpose of Proposition 22 was to alter the rule in section 308, not to reinforce the rule in 300. While in the California Assembly and Senate, Mr. Knight sought not only to amend section 308.5 to prohibit California from treating as valid or recognizing out-of-state marriages of same-sex couples, but also to strengthen and reinforce the existing prohibition against allowing same-sex couples to marry *within* California. He pursued this double goal with a bill that would have amended section 308 by adding a new section 308.5 and also would have amended section 300 by adding a new section 300.5. (Sen. Bill No. 911 (1997-1998 Reg. Sess.); see also Sen. Judiciary Com., Analysis of Sen. Bill No. 911 (1997-1998 Reg. Sess.) Apr. 22, 1997; see also Assem. Bill No. 800 (1997-1998 Reg. Sess).) When in the Assembly and then in the Senate, Mr. Knight also authored bills aimed just at amending section 300

B. 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?

1. Neither the Full Faith and Credit Clause Nor the Privileges and Immunities Clause Of The Federal Constitution Affects How This Court Should Interpret Family Code Section 308.5.

Neither the federal Full Faith and Credit Clause nor the federal Privileges and Immunities Clause should, as a practical matter, affect how this Court interprets Family Code section 308.5, given that section 308.5 is invalid under the *California* Constitution. First, section 308.5 violates the same numerous provisions of the California Constitution that are the subject of Respondents' claims in this lawsuit challenging California's prohibition of marriages by same-sex couples entered within California. In particular, section 308.5 violates the California constitutional guarantees of privacy and liberty interests by denying recognition of same-sex couples' out-of-state marriages; violates the California equal protection clause by

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to include an explicit policy against allowing lesbian and gay couples marrying in California and to provide grounds for restricting the benefits of marriage just to heterosexual couples. (See, e.g., Assem. Bill No. 3227 (1995-1996 Reg. Sess.).) Considering together Mr. Knight's marriage-related bills cited by the Fund (See Fund's Answer Br. at pp. 80-83) and those referenced by Respondents here, what is obvious is that *not one single bill sought to affect both section 300 and section 308 by amending just one of those sections*. There is a common sense reason for this: sections 300 and 308 have had distinct roles from the inception of their predecessor statutes.

impermissibly discriminating on the bases of sex, sexual orientation, and exercise of a fundamental right; and infringes on freedom of expression. In addition, as explained more fully below in part IV.B.2, section 308.5 separately violates California's equal protection clause by singling out married same-sex couples for differential treatment as compared to California's longstanding practice of treating out-of-state marriages as valid. Furthermore, section 308.5 violates the California Constitution's privileges or immunities clause, which provides that "a citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, § 7.) Currently a heterosexual married couple who moves to California is entitled to recognition of their marriage, and all privileges and immunities that accompany marriage under state law, without any need to remarry. In contrast, a married same-sex couple, whether from Massachusetts, Canada, or another country that permits same-sex couples to marry, is categorically barred by section 308.5 from having their marriage recognized for any purpose in California, including for purposes of entitlement to any legal protections that accompany marriage, unless that same-sex couple registers as domestic partners here in California. Plainly that registration requirement, which is impractical for visitors and demeaning for new residents, does not constitute the "same terms" under which heterosexual married couples who marry out-of-state and come to California may obtain "privileges or immunities." Accordingly, section 308.5 currently offends the privileges and immunities clause of the California Constitution.

Given the state constitutional infirmities of section 308.5, there is no need for this Court to consider whether federal constitutional provisions would drive further nails into section 308.5's coffin were California to permit same-sex couples to marry. Although it is true that courts should

construe statutory measures to avoid constitutional difficulties, section 308.5 simply cannot be construed in a manner that would save it from invalidity.

Moreover, statutes are to be construed as of the time of their enactment, in light of the statutory framework into which they were adopted. Upon section 308.5's enactment in March 2000, California refused to treat as valid or otherwise recognize marriages of same-sex couples from other states and also, pursuant to Family Code section 300, refused to permit same-sex couples to marry within California. The enactment of section 308.5, which affected California's treatment only of marriages entered into out-of-state, did not result in differential treatment of in-state same-sex couples and out-of-state same-sex couples at that time (including because no state then permitted same-sex couples to marry). Section 308.5 thus presented no federal Full Faith and Credit Clause or Privileges and Immunities Clause problem at that time with respect to differential treatment of same-sex couples *depending on their residency*. This Court should not construe (as opposed to invalidate) section 308.5 more than seven years later based on constitutional problems that may exist as a result of section 308.5's interaction with subsequent changes in the law (such as this Court's possible invalidation of section 300 or the Legislature's possible amendment of section 300). Moreover, this Court should not attempt such a construction to save section 308.5 from federal constitutional problems when, no matter how this Court construes section 308.5, the measure will be invalid under the California Constitution.

Were the Legislature to enact a measure permitting same-sex couples to marry within California, and were such a measure to place section 308.5 in even more constitutional jeopardy than already exists, such a legislative enactment would not vitiate the intent of the electorate in

enacting section 308.5. As explained above in section IV.A, Proposition 22's purpose was to ensure that *other states'* decisions would not be determinative of whether California must recognize the marriages of same-sex couples. Proposition 22's ballot materials expressed no interest in preventing California's own Legislature, consistent with its traditional role in regulating marriage eligibility, from considering and deciding the question of whether same-sex couples should be permitted to marry. In other words, were section 308.5's practical effect to be limited to the period between March 2000 and the Legislature's eventual enactment of a measure permitting same-sex couples to marry, Proposition 22 would have fully accomplished the intent of the electorate to leave *to California* the question of whether same-sex couples should be permitted to marry. There is no merit to any argument that the Legislature's power to enact marriage equality legislation is curtailed by section 308.5 because of the California Constitution's provision that the Legislature may not amend or repeal an initiative provision without submitting the matter to the voters. (Cal. Const., art. II, § 10, subd. (c).) Enactment of marriage equality legislation by this state's own Legislature would not conflict with the state-sovereignty-protecting purpose of Proposition 22.

Where the Legislature is permitted to regulate in a particular area (here, eligibility for marriage within California) that the people have not regulated in an initiative (here, Proposition 22, which applies only to out-of-state marriages), the possibility that, based on changed circumstances, the two statutes may interact in a way that eventually poses a constitutional question or difficulty does not render the Legislature's enactment an impermissible amendment of the initiative under article 2, section 10 of the California Constitution. (*Brown v. Merlo* (1973) 8 Cal.3d 855, 869 ["a classification which once was rational because of a given set of

circumstances may lose its rationality if the relevant factual premise is totally altered"].) A law that was constitutional at the time it was enacted (which section 308.5 was not, in any event) can later become unconstitutional in light of its interaction with other statutes. (*Ibid*.) For example, a statutory penalty valid when enacted could become unconstitutional in light of subsequently enacted legislation treating similarly situated persons unequally. (Cf. *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1206 [finding equal protection violation in differential consequences of certain unlawful forms of oral copulation and sexual intercourse where interplay of relevant statutes had changed over time].) This principle is no different even if the original statute were an initiative and the subsequent statute were validly enacted by the Legislature in a "related but distinct field, such that legislative enactments related to the subject of an initiative statute may be allowed." (*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 43.)

Because section 308.5 is presently invalid under numerous state constitutional provisions, the Legislature's enactment of a measure permitting same-sex couples to marry in California would not, in itself, alter section 308.5's legality or illegality. As explained below, the combination of an in-state marriage bill and section 308.5 would call the latter into further doubt under the federal Privileges and Immunities and Full Faith and Credit clauses, but in light of section 308.5's patent unconstitutionality under the California Constitution, these are matters which this Court need not, and should not, reach. These questions, of course, are unnecessary to the resolution of this case. Respondents have carefully limited their claims in these Marriage Cases to state constitutional claims and, as explained above, this Court can make clear that section

308.5, like section 300, is invalid under the California Constitution. Respondents urge the Court to do so, and to make clear in its opinion in these cases that the Court's resolution of all issues in this lawsuit rests on independent and adequate state grounds.[29] As vital as Respondents' constitutional claims are, those claims rest fully and independently on California's Constitution and this litigation is not, and should not be turned into, a federal case.

2. Were California To Permit Same-Sex Couples To Marry Within The State, The Full Faith and Credit Clause Would Require California To Recognize Out-Of-State Marriages Of Same-Sex Couples.

Although there is no need for the Court to reach any federal issues in this case, it is plain that, under the Full Faith and Credit Clause, California could not deny recognition to marriages of same-sex couples entered into in another state while recognizing same-sex marriages entered into within California. The Full Faith and Credit Clause 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

[29] See *Michigan v. Long* (1983) 463 U.S. 1032, 1041 ["If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision"]; *Ohio v. Robinette* (1996) 519 U.S. 33, 44 (conc. opn. of Ginsburg, J.) ["It is incumbent on a state court, therefore, when it determines that its State's laws call for protection more complete than the Federal Constitution demands, to be clear about its ultimate reliance on state law. Similarly, a state court announcing a new legal rule arguably derived from both federal and state law can definitively render state law an adequate and independent ground for its decision by a simple declaration to that effect"].)

> Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

(U.S. Const., art. IV, § 1.) The United States Supreme Court has interpreted the clause and its implementing statute, Title 28 United States Code section 1738, to differentiate between "the credit owed to laws (legislative measures and common law) and to judgments." (*Hyatt v. Franchise Tax Bd. of Cal.* (2003) 538 U.S. 488, 494 (hereafter *Hyatt*).) "Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment,' it is less demanding with respect to choice of laws." (*Ibid.* [quoting *Baker v. General Motors Corp.* (1998) 522 U.S. 222, 232].)[30]

Whereas a state must unconditionally enforce sister-state judgments, a state is not required to apply the laws of another state "in violation of its own legitimate public policy." (*Nevada v. Hall* (1979) 440 U.S. 410, 422.) As the Supreme Court has explained, "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" (*Hyatt*, *supra*, 538 U.S. at p. 494 [quoting *Sun Oil v. Wortman* (1988) 486 U.S. 717, 722].) This rule applies as long as the forum has "a

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[30] For example, the Supreme Court held in *Williams v. North Carolina* (1942) 317 U.S. 287, 288, that a divorce decree validly entered into under the laws of one state is binding upon the forum state, even if the divorce would have been invalid under the forum state's bigamous cohabitation law. In response to the assertion that granting full faith and credit to the divorce decree would frustrate the forum state's policy of strictly controlling the institution of marriage, the Court noted that enforcement of such a judgment is "part of the price of our federal system." (*Ibid.*)

significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." (*Ibid.* [quoting *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 818].)

In short, although Full Faith and Credit jurisprudence typically permits a state to refuse to enforce another state's laws and to refuse to recognize another state's acts or records, there must be some legitimate public policy reason for the refusal, and the choice of law must be neither arbitrary nor fundamentally unfair.

Were California to permit same-sex couples to marry within the state, California would have no legitimate public policy reason for refusing to recognize the marriages of same-sex couples entered in other states. This is so for at least four reasons.

First, by permitting same-sex couples to marry within the state, California would have established as the public policy of the state that same-sex couples should be permitted to participate in the status of marriage and to share in the benefits and responsibilities of marriage.

Second, by generally treating as valid or otherwise recognizing the marriages of heterosexuals entered outside the state, pursuant to Family Code section 308, the state would have expressed a general policy in favor of recognizing out-of-state marriages. Section 308.5's purported requirement that same-sex couples married outside California, unlike any other couples married outside California, must *re-marry* within the state in order to participate in the status of marriage or share in the benefits and responsibilities of marriage would be arbitrary, rather than reflective of any legitimate concern of the state.

Third, were California to permit same-sex couples to marry, the state-sovereignty policy underlying section 308.5 would have been served.

Section 308.5 was designed to ensure that *another state's* decision to permit same-sex couples to marry would not be the impetus for California having to permit same-sex couples to marry. Were California itself (whether by judicial decision or by act of the Legislature) to decide that same-sex couples may marry within the state, there would be no offense to state sovereignty (if ever there were one in the first place) for California to recognize same-sex marriages entered outside California. The policy of section 308.5 – that California should decide for itself whether its marriage laws should apply to same-sex couples – would have been satisfied.

Fourth, as explained above, section 308.5 in any event does not express a valid public policy of the state of California because it violates the California Constitution. Given these considerations, California would be unable to articulate any rational reason for refusing to treat as valid marriages of same-sex couples entered outside California while permitting same-sex couples to marry within California.

Indeed, the history of California's treatment of out-of-state marriages highlights just how arbitrary and out of keeping with California's traditions 308.5 is. California courts have routinely applied the *lex loci celebrationis* rule respecting marriages valid where celebrated, [31] have focused on the facts presented by particular cases, and have been willing to apply equity and common law to avoid unfair harm to spouses even for marriages that contravene the public policy of the state. California's courts have consistently treated foreign marriages as valid or recognized foreign

[31] California codified this rule as Civil Code section 63, and then as Family Code section 308, and has followed it, without codified exception, until adoption of section 308.5, exclusively carving out same-sex couples' marriages from the previously uniform rule.

marriages for specific purposes to prevent injustice, even when California not only would not have licensed the marriages but actually disapproved strongly of the relationships and, in some cases, even imposed criminal penalties on those who entered such marriages within the state.[32] This Court emphasized the sound policy reasons for that approach in *Estate of Wood*, in 1902:

> At the outset it may be said that the policy of the law of the civilized world is to sustain the validity of marriage contracts. In this case an opposite conclusion to that declared by the majority of the court would nullify hundreds of marriages, place the stamp of illegitimacy upon scores of children, and change the source of title to great property interests. Unless the law points plainly to that end, such a conclusion should not be declared. And, as the court views the law, it is not plain to that end, but plain to the contrary.

(*Estate of Wood* (1902) 137 Cal. 129, 131-132.) Against this backdrop of California law, section 308.5's singular negation of the rights of one minority group violates the equal protection requirement of the California Constitution. The state has no rational reason for doing so, and in the situation the Court posits, in which same-sex couples would be free to marry in California, the lack of valid California public policy for enforcing section 308.5 would be even more patent.

3. Were California To Permit Same-Sex Couples To Marry Within The State, California Would Violate

[32] See, e.g., *Estate of Bir, supra*, 83 Cal.App.2d at p. 261 [recognizing inheritance claim of second wife, despite California law prohibiting bigamy]; *McDonald v. McDonald* (1936) 6 Cal.2d 457, 459-460 [treating as valid Nevada marriage of underage California domiciliaries, despite couple's evasion of both the marriage law and statutory rape law of their home state]; *Pearson v. Pearson* (1873) 51 Cal. 120 [recognizing Utah marriage of white man and black woman who had been his former slave].

The Federal Privileges And Immunities Clause If It Refused To Recognize Out-Of-State Marriages Of Same-Sex Couples.

Under the Privileges and Immunities Clause of the United States Constitution, California could not refuse to recognize marriages of same-sex couples entered into in another state while marrying same-sex couples in California. The federal 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.) Its object was to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. 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." (*Hicklin v. Orbeck* (1978) 437 U.S. 518, 524 [citing *Paul v. Virginia* (1869) 75 U.S. 168, 180].)

Two components of the right to travel are protected by this clause: "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." (*Saenz v. Roe* (1999) 526 U.S. 489, 500 (hereafter *Saenz*); see also *Burnham v. Superior Court of California* (1990) 495 U.S. 604, 637-638 [clause protects individual against discrimination based on lack of residency when visiting a state, and secures new arrival's right to be treated the same as that state's residents].)

The Privileges and Immunities guarantee secures equal access to "fundamental rights," a term that has been given broader meaning in this context than in substantive due process jurisprudence.[33] There cannot be any serious question that marriage, which long has been recognized as a fundamental right under the narrower substantive due process doctrine, qualifies as a fundamental right under the Privileges and Immunities Clause. (See generally Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel* (2000) 52 Rutgers L. Rev. 553, 558-559.)

The Privileges and Immunities Clause prohibits not only laws that facially discriminate against nonresidents,[34] but also those that burden or chill entry of nonresidents by treating them as "unwelcome." (*Saenz*, *supra*, 526 U.S. at p. 500 [interstate travelers have the right not to be treated as an "unfriendly alien"].) A rule may discriminate against out-of-staters

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[33] "Fundamental rights" for Privilege and Immunities Clause purposes have been held to include diverse economic interests, such as free pursuit of one's livelihood and eligibility for public benefits. (See, e.g., also *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 281 (hereafter *Piper*) [right to practice law]; *Hicklin*, *supra*, 437 U.S. 518 [eligibility for jobs]; *Zobel v. Williams* (1982) 457 U.S. 55 [residency-based cash dividends from the state]; see also *Saenz*, *supra*, 526 U.S. at p. 489 [need-based welfare benefits].) The term "fundamental rights" in this context also has been held to include personal services such as access to medical care. (*Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250 [striking down durational residency requirement for free, nonemergency care]; *Doe v. Bolton* (1973) 410 U.S. 179 [state could not limit abortion services to instate residents].

[34] If California had a residency requirement for marriage license eligibility (as it does for divorce), that would be an explicit restriction on the privileges and immunities of non-residents, and the state would have to justify that "unfriendly" treatment. Section 308.5 does not distinguish based on residency, but rather on the place where a marriage was celebrated, so it presents no facially different treatment based on residency.

even if some in-state residents also are disfavored because non-citizens may be disadvantaged unfairly by their lack of access to the political process to try to change the law. (*United Bldg. and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden* (1984) 465 U.S. 208, 217-18 (hereafter *United Building*).) In *United Building*, a Camden, New Jersey ordinance required that at least 40 percent of employees working on city construction contracts be Camden residents; hence, city residents had an advantage unavailable to both other New Jersey citizens and out-of state residents. (*Id*. at p. 210.) Holding that Privileges and Immunities review was required, then-Justice Rehnquist explained:

> It is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens. And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause. [Citation.] But New Jersey residents at least have a chance to remedy at the polls any discrimination against them. Out-of-state citizens have no similar opportunity, [citation] and they must "not be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation." [Citation.] We conclude that Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged.

(*Id*. at pp. 217-18; see also *Hillside Dairy, Inc. v. Lyons* (2003) 539 U.S. 59, 66-67 [absence of express restriction based on state citizenship not sufficient to dismiss Privileges and Immunities Clause claim, applying *Chalker v. Birmingham & Northwestern Ry. Co*. (1919) 249 U.S. 522, 527, which negated a rule imposing a higher tax on businesses with their principal office out-of-state, upon concluding that "the practical effect" of such a rule was discriminatory].)

It seems beyond dispute that, like Camden's residency requirement for city construction jobs, Section 308.5 disproportionately burdens out-of-staters when it refuses to respect valid marriages same-sex couples have celebrated outside California, despite the fact that it also burdens some married gay California residents who similarly got married outside California. When a state disproportionately burdens nonresidents regarding a privilege such as marriage, that discrimination still may, under certain circumstances, prove constitutional. "The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." (*Piper, supra,* 470 U.S. at p. 284.) However, if California permits same-sex couples to marry in-state, the State would have no "substantial reason" not to recognize the non-California marriages of same-sex couples – and only those couples – simply because they married out-of-state. Failure to recognize non-California marriages of same-sex couples, while recognizing in-state marriages of same-sex couples, would violate the privilege and immunities clause of the Constitution.

Dated: August 17, 2007 Respectfully submitted,

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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 8.520(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Supplemental Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 18,546 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: August 17, 2007   Respectfully submitted,

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