Case No. S147999

IN THE
Supreme Court of the State of California



In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

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

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

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## INTRODUCTION

Respondent Proposition 22 Legal Defense and Education Fund (the "Fund") hereby replies to the Supplemental briefs filed by Petitioners City and County of San Francisco ("City"), Joshua Rymer, et al. ("Rymer"), Gregory Clinton, et al. ("Clinton"), and Respondents State of California ("Attorney General"), and Governor Arnold Schwarzenegger ("Governor").[1]

All persons in California have the same constitutional rights in regard to marriage: the right (1) to enter a legal union – marriage – with an eligible person of the opposite sex, (2) to have that legal union recognized by the state, (3) to try to sexually reproduce within the bounds of marriage, (4) to use birth control to avoid sexual reproduction, (5) to direct the upbringing and education of marital children, (6) to pass property intestate to their biological children, (7) to inherit property intestate from a spouse, (8) to dispose of a spouse's bodily remains, and (9) to ownership of separate and community property. (Fund Supplemental Brief ("Fund Sup.") at 5-11.) The first seven of those rights are substantive rights associated with the federal fundamental right to marriage, and may not be eliminated even by an amendment to the California Constitution. (*Id*. at 4-5.) While any individual possesses all of those constitutional rights, none of those rights apply to a same-sex relationship. (*Id*. at 5-11.) The only rights that same-sex couples possess under California law *as couples* have been granted by statute.[2]

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

[2]This is the exact opposite of the experience of African-Americans. They obtained legal rights only after the adoption of three constitutional amendments designed to give them legal protection – the Thirteenth,

Petitioners' claim of a constitutional right to marriage for same-sex couples is grounded in unsubstantiated assumptions: that the terms "marriage" and "spouse" are amorphous enough to encompass same-sex couples, and that there are no substantive differences between same-sex and opposite-sex couples when it comes to marriage. There is no authority for those assumptions. This Court should not accept the implicit invitation to rewrite the marriage laws from whole cloth. That is not the province of the Courts. (See Fund Answer to Petitioners' Opening Briefs on the Substantive Issues ("Fund Answer") at 14-23; cf. City Supplemental Brief ("City Sup.") at 59 n.28 [Court has "no authority to rewrite section 308.5"].)

Significantly, only the Attorney General and the Governor believe that married couples possess no substantive constitutional rights. That abdication of any defense of the substance of the fundamental right to marriage highlights the importance of the Fund's presence in this litigation.

## I. THE DIFFERENCES BETWEEN REGISTERED DOMESTIC PARTNERSHIPS AND MARRIAGE ARE CONSTITUTIONALLY INSIGNIFICANT.

Regardless of the differences between registered domestic partnerships and marriage, there is no constitutional requirement that persons in same-sex relationships be treated as though they were married. All differences, therefore, are constitutionally insignificant.

Petitioners identify numerous differences between registered domestic partnerships and marriage that the Fund did not list. To the extent those differences are the result of federal law or the actions of private persons or entities, they are beyond the power of the state to change. To the extent any

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Fourteenth, and Fifteenth Amendments to the federal Constitution. It was many years after those constitutional amendments before legislatures began enacting statutes to protect African-Americans. This Court's decision in *Perez v. Sharp* (1948) 32 Cal.2d 711, came eighty years after the enactment of the Fourteenth Amendment, and before significant legislative protections.

differences have to do with "recognition" in other jurisdictions, those likewise are beyond the power of the state to change – there is no basis for assuming that other jurisdictions would give more recognition to one kind of same-sex relationship than another.

In addition to the differences listed in opening supplemental briefs, the substantive rights of the fundamental right of marriage are constitutional rights of married couples only, not of registered domestic partners. (See Fund Sup. at 5-11.) It would be impossible to extend some of those rights to same-sex couples.

## II. PETITIONERS HAVE NOT ESTABLISHED A BASIS FOR ANY SUBSTANTIVE RIGHTS ASSOCIATED WITH THE FUNDAMENTAL RIGHT TO MARRIAGE OTHER THAN THOSE IDENTIFIED BY THE FUND.

The City's response to the Court's second question involves extensive discussions of the "core attributes of marriage" (City Sup. at 18-27), and argues that the marriage laws deny those core attributes to same-sex couples. (*Id*. at 28-30.) Rymer engages in a lengthy discussion of the "core" or "essence" of marriage. (Rymer Supplemental Brief ("Rymer Sup.") at 22-29.) This Reply will not address those arguments except to the extent they actually relate to the Court's question.

Petitioners all agree that the state may not eliminate the right to enter the institution of marriage, and may not refuse to recognize marriage. They fail to acknowledge, however, that the term "marriage" has a settled meaning both in California and under federal law. (See Fund Answer at 2-12.) Because they fail to face that inconvenient truth, Petitioners assume that the fundamental right to enter the union of a man and woman somehow includes the right for same-sex couples to enter a legal union. That position assumes an unsupported, radical redefinition of "marriage." (See *id*. at 6-9.) Moreover, Petitioners have not proposed a definition they would like the Court to adopt, nor have they cited any authority for a different definition.

The City asserted six additional substantive rights associated with the fundamental right to marriage that it says cannot be eliminated absent a compelling interest: (1) the right to obtain a marriage license (the state "could not cease issuing marriage licenses"); (2) the right to decide "who to marry"; (3) the right to decide "when and how to engage in sexual intimacy"; (4) the right to decide "whether and when to have children and how many"; (5) the right to decide "how to share the responsibilities of supporting their family, maintaining a household"; and (6) the right to raise and educate any children." (City Sup. at 27-28.) The City premises this list on "the core attributes of marriage protected by the California Constitution" (*id*. at 27), but fails to connect any of these rights to the California Constitution or any authority. That is because the relevant authorities either would not support these as constitutional rights (right number 1) or would not support them as constitutional rights of same-sex couples (rights numbers 2-6). Indeed, nearly all of the relevant case law in the City's discussion of the "core attributes of marriage" was federal law, which relates to the union of a man and woman. (See *id*. at 20-27.) To the extent the City's list of rights are explicit in the marriage jurisprudence, the Fund's Supplemental Brief tied them to pertinent authorities and explained why the constitutional rights do not apply to same-sex couples. (See Fund Sup. at 6-8.) The City's discussion of the "core attributes of marriage" does not change that analysis.

Rymer opined that the state would need a compelling interest to infringe upon decisions relating (1) "to sexual intimacy," (2) whether and when to have children," (3) "how to raise . . . children," and (4) "how to allocate responsibilities within the marital relationship." (Rymer Sup. at 20 n.10, citing *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940 [quoting *Washington v. Glucksberg* (1997) 521 U.S. 702, 719]; *Griswold v. Connecticut* (1965) 381 U.S. 479, 488; *Meyer v. Nebraska* (1923) 262 U.S. 390, 399.) The sole basis

for this list of rights is federal law, despite Rymer's claim to be relying solely upon the California Constitution for its arguments. (See *id*. at 19 n.9.) Again, the Fund has already addressed why the authorities supporting these rights have no application to same-sex couples. (Fund Sup. at 6-8.)

Rymer and Clinton rely heavily on this Court's reference to "the freedom to marry the person of one's choice" in *Perez v. Sharp* (1948) 32 Cal.2d 711, 717 ("*Perez*"). (Rymer Sup. at 29-31; Clinton Supplemental Brief ("Clinton Sup.") at 11-12.) That reliance is misplaced for several reasons. First, when this Court used the term "marriage" in *Perez*, it was using the term according to its ordinary sense of the union of a man and a woman. (See *Perez, supra*, 32 Cal.2d at p. 712 [white woman and African-American man].) As Justice Parrilli observed below, "[h]ad the case[] involved same-sex couples of different races, one can imagine the opinion[] would have read very differently." (*In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 728 n.3 [conc. opn. of Parrilli, J.].) The decision in *Perez* did not require a redefinition of marriage, but addressed "what restrictions the state could legitimately impose based on the racial characteristics of the man and woman applying for a license." (*Ibid*.) Thus, it has no application to same-sex couples. (*Ibid*. ["no amount of imagination entitles us to rely upon cases as authority for issues not addressed"].)

Second, there has never been an absolute legal right to marry any person of one's choice. States have always had the ability to place restrictions on the entry to marriage, such as procedural requirements, the age of the parties, their ability to consent, consanguinity limits, and the number of partners (one). (See *Meister v. Moore* (1877) 96 U.S. 76, 78-79 [states may "regulate the mode of entering into the contract"].) Otherwise, the polygamy challenges of the late Nineteenth Century and the more recent challenges to incest laws would have turned out very differently. The point in *Perez*, as in all the federal

fundamental right to marriage cases, is that the state may not utilize illegitimate criteria to preclude a man and woman from marrying. (See *Perez, supra*, 32 Cal.2d at p. 714.) Again, that has nothing to do with the demands of same-sex couples.

Finally, this Court's reference to the freedom to marry the person of one's choice in *Perez* must be understood in its context. In describing the right at issue, the Court quoted the U.S. Supreme Court's description of rights protected under the due process clause of the Fourteenth Amendment in *Meyer, supra,* (1923) 262 U.S. at 399, including the right to marry. The end of the quotation summarized the due process rights as "'generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" (*Perez, supra*, 32 Cal.2d at p. 714 [quoting *Meyer*].) There can be no contention that same-sex relationships had any protection under the common law.[3] This Court also quoted the U.S. Supreme Court's language in *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, which described marriage and procreation together as "'fundamental to the very existence and survival of the race.'" (*Perez, supra*, 32 Cal.2d at p. 715 [quoting *Skinner*].) That, again, is something that can have no relevance for same-sex couples. (See Fund Sup. at 6-7.) Thus, this Court's reference in *Perez* to the right to marry "the person of one's choice" (*Perez, supra*, 32 Cal.2d at p. 715), is of no help to Petitioners.[4]

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[3]In contrast, interracial marriage was protected under the common law, when not countered by statutory law. (See *Pearson v. Pearson* (1875) 51 Cal. 120 [Utah common law marriage between former slave and master recognized].)

[4]Rymer's reliance upon the "personal, social, and spiritual aspects of marriage" identified in *Turner v. Safley* (1987) 482 U.S. 78, 95-96 (*Turner*) is likewise unavailing. (See Rymer Sup. at 23, 29.) *Turner* undoubtedly identified aspects of the fundamental right to marry that exist "*in the prison*

To summarize, the fundamental right to marriage identified in *Perez* has no relevance for same-sex couples. It is an individual right, protected by the federal Constitution, to enter into a union of a man and a woman. The U.S. Supreme Court has affirmed that the right does not extend to same-sex couples. (*Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185], *appeal dismissed for want of a substantial federal question*, (1972) 409 U.S. 810.[5] As the intermediate appellate court in New York said in rejecting the same arguments, "[m]arriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society . . . ." (*Hernandez v. Robles* (2005) 805 N.Y.S.2d 354, 360, aff'd (2006) 7 N.Y.3d 338 [821 N.E.2d 1].)

## III. THE CONSTITUTIONAL SIGNIFICANCE OF "MARRIAGE" IS RELATED TO CHILDREN, NOT ADULTS.

Marriage is not important because of its unique place in our culture as a "state-sanctioned relationship" or because of its "expressive and dignitary interests." (Cf. City Sup. at 31, 32.) Nor is it protected because of its "intangible elements" related to "the human capacity for love and commitment." (Rymer Sup. at 36.) Instead, marriage has a unique place in

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*context*." (*Turner, supra*, 482 U.S. at p. 96 [emphasis added].) The prison context, however, was the crucial factor for the discussion of those attributes of marriage. The Court was not discussing why marriage is a fundamental right, but why prisoners may exercise the fundamental right while in prison. (*Id*. at p. 95.) The key issue was that "a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" (*Ibid*. [citation omitted].) Moreover, the standard of review for the prison regulation at issue was not the strict scrutiny standard for fundamental rights, but the "reasonably related to legitimate penological interests" standard announced in *Turner*. (*Id*. at p. 89.)

[5]The dismissal in *Baker* was a ruling on the merits of all the issues raised. (See Fund Answer at 22 n.14 [citing cases].)

our culture as a state-sanctioned relationship and a fundamental right because of its importance to our culture and its survival. That importance relates to the bearing and raising of a married couple's biological children:

> The core need that marriage aims to meet is the child's need to be emotionally, morally, practically, and legally affiliated with the woman and the man whose sexual union brought the child into the world. That is not *all* that marriage is or does, but nearly everywhere on the planet, that is *fundamentally* what marriage is and does.

(David Blankenhorn, *The Future of Marriage* 175 ("Blankenhorn").) This core need is an aspect of marriage in which same-sex couples can never participate – they can only imitate this fundamental purpose of marriage with the assistance of at least one third party, a member of the opposite sex. Accordingly, while the Fund agrees with Petitioners that the terms "marriage" and "marry" have constitutional significance, and that California could not rename the legal institution, Petitioners' reasons are inapposite.

Rymer asserts that "[t]he 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."[6] (Rymer Sup. at 38.) Significantly, Rymer cites only one case in support of that proposition, a *federal* case. Moreover, the case cited – *Griswold* – was not a fundamental-right-of-marriage case. The passing reference to a "bilateral loyalty" in *Griswold*, in the context of finding that married couples have a right to use birth control, is hardly definitive on the essence of the fundamental right to marriage. If it were, subsequent cases such as *Loving v. Virginia* (1967) 388 U.S. 1, *Zablocki v. Redhail* (1978) 434 U.S. 374, and *Turner, supra* 482 U.S. 78 would have focused on the phrase. No case has. Indeed, *Loving* and

[6]If "commitment" were the essence of marriage, there would be no rational basis for refusing to extend marriage to "committed" brothers and sisters or to "committed" groups of three or more.

*Turner* did not even cite *Griswold*. There simply is no repeated reference in judicial decisions to "granting recognition to a committed relationship between a couple." There are repeated references in the cases, however, to procreation as the essential reason for protecting marriage. (See Fund Answer at 43-46.) The courts have overwhelmingly held that sexual reproduction and the rearing of the biological children of a man and a woman are the reasons for regulating marriage. (*Ibid*.)

The City's jaundiced view of the motives of those who oppose redefining marriage misses the mark. (City Sup. at 34.) The issue is not the nature of same-sex couples, but the nature of marriage itself. The nature of marriage is fundamentally about connecting children with their biological parents, as Blankenhorn puts it, or about "responsible procreation," as some courts have phrased it. (See *Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859, 867; *Morrison v. Sadler* (Ind. App. 2005) 821 N.E.2d 15, 30; *Standhardt v. Superior Court* (Ariz. App. 2003) 206 Ariz. 276, 288 [77 P.3d 451]; see also Fund Answer at 43-46.) Redefining marriage to include same-sex couples "would require publicly and legally renouncing the idea of a mother and a father for every child. Across history and cultures . . . marriage's *single most fundamental idea* is that every child needs a mother and a father. Changing marriage to accommodate same-sex couples would nullify this principle in culture and in law." (Blankenhorn, *supra* at p. 178.) Such a revolution in marriage law would transform the institution from a pro-child institution to simply "another name for a private committed relationship" (*ibid*.) that is primarily about adult desires.

## IV. FAMILY CODE SECTION 308.5 APPLIES IN CALIFORNIA.

The City and the Attorney General have suggested that this Court need not decide the scope of Family Code section 308.5 (enacted through the voter initiative, Proposition 22) at this time because its constitutionality will be

resolved along with that of section 300.[7] Those assertions ignore the significant limits that section 308.5 places on California's public policy on marriage. (See Fund Opening Brief at 28-29.) This Court should decide the scope of section 308.5 before deciding the constitutionality of section 300.

### A. Section 308.5 Applies to All Marriages in California Under Rules of Statutory Construction.

#### 1. Extrinsic evidence is not necessary because section 308.5 unambiguously applies to all marriages "in California".

Petitioners have gone to extraordinary lengths to persuade this Court to consider certain items of "extrinsic evidence" selected by Petitioners to give section 308.5 a different legal meaning than what appears on its face.[8] In circular fashion, the Petitioners offer extrinsic evidence designed to make section 308.5 appear "ambiguous" – which in turn justifies resort to extrinsic evidence to construe its true meaning. This is exactly the type of evidentiary quagmire the courts must avoid except in true cases of ambiguity. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23 [26 Cal.Rptr.3d 687] ["However, if the language is not ambiguous, not even the most reliable

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[7]Unless otherwise noted, all subsequent statutory references will be to the Family Code.

[8]As just one example, along with their Supplemental Brief, Rymer requested judicial notice of legal arguments set forth in a trial court brief by the Attorney General in litigation surrounding the ballot title of section 308.5 before its enactment. Even if the brief is judicially noticeable as a record of a court of this state, Rymer has made no showing that a legal brief is competent evidence of the legislative intent of the voters with regard to a ballot initiative. At best, it offers only the *Attorney General's* arguments and characterizations of the Fund's positions and "avowed purposes" in promoting section 308.5. Notably, Rymer did not request judicial notice of the Fund's brief in that case. In any event, the request for judicial notice should be denied as irrelevant to the intent of the voters.

document of legislative history . . . may have the force of law" [internal quotations and citations omitted] (*Knight*).)

In this regard, the Third District Court of Appeal got it right in *Knight* insofar as it refused to be dragged into a battle of extrinsic evidence regarding section 308.5's meaning. The City sharply criticizes and dismisses the Third District's decision in *Knight* as "not persuasive authority" because the court did not consider extrinsic evidence. (City Sup. at 47.) However, since the Third District found section 308.5 to be plain and unambiguous, delving into extrinsic evidence would have been in excess of the court's judicial function. (*Knight, supra*, 128 Cal.App.4th at p. 25 ["Since the language of the initiative is unambiguous, we need not look to other indicia of the voters' intent"]; see also *City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1339 [18 Cal.Rptr.2d 478] ["The statutory language expresses the intention of the Legislature and where it is free from doubt and ambiguity, it must be followed even if it may appear from other sources that the Legislature had a different object in mind"].)

*Knight* is no anomaly. At least three federal decisions have followed the *Knight* interpretation of section 308.5 or came to the same conclusion independently. (See *In re Rabin* (9th Cir. BAP Cal. 2007) 359 B.R. 242, 248 [section 308.5 limits the "status" of marriage, but not the rights and responsibilities associated with marriage, to opposite-sex couples in California]; *Butler v. Adoption Media*, LLC (N.D. Cal. 2007) 486 F.Supp.2d 1022, 1045 [discussing section 308.5 and concluding, "Thus, like Arizona, California does not allow same-sex couples to marry"]; *Triche-Winston v. Shewry*, Slip Copy, 2007 WL 891894 (E.D. Cal. Mar. 22, 2007) [same-sex couples "are not qualified to be married under the laws of the state of California or receive the benefits that those laws confer. Cal. Fam. Code § 308.5 (marriage is only valid between man and woman in California)"].)

Other courts have not followed the contrary dicta found in *Armijo v. Miles* (2005) 127 Cal.App.4th 1405 [26 Cal.Rptr.3d 623].

"A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776 [72 Cal.Rptr.2d 624].) Both the City and Rymer unreasonably contort the simple language of section 308.5 in an attempt to fashion two possible meanings – that it applies only to out-of-state marriages, or that it applies to both out-of-state and in-state marriages. (City Sup. at 42; Rymer Sup. at 42.) From the perspective of the voters, the former construction is patently unreasonable in light of the short and simple text of the initiative itself. It preserves "marriage . . . in California," without regard to where the marriage was contracted. All legal argument aside, as a matter of common sense it is totally illogical to suggest that the voters read section 308.5 to mean, as the Petitioners imply: "Only marriage between a man and a woman is valid or recognized in California, *unless the Legislature decides to legalize same-sex marriage*."

Section 308.5 should be read only as its plain language states. It preserves marriage "in California" as the union of a man and a woman. It therefore does not render sections 300 and 301 superfluous (City Sup. at 43), because those sections do more than define marriage as the union of a man and woman. Section 300 imposes a licensing and solemnization requirement, thereby preventing the formation of common-law marriages. Section 301 establishes the minimum age requirements for marriage in California. Thus, even after section 308.5's adoption, the Legislature is free to repeal or change the licensing, solemnization or age provisions of sections 300 and 301 – as long as it does not provide for the validity or recognition of "marriages" other than between a man and a woman, as required by section 308.5.

### 2. The Ballot Arguments described Proposition 22 as preventing the redefinition of "marriage" in California, regardless of the jurisdiction that tried to redefine it.

If this Court examines the ballot arguments as extrinsic evidence of voter intent, it should note that the Petitioners' supplemental briefs totally ignore key portions of the ballot arguments that undermine their theory, and instead incorrectly allege that the ballot arguments "were completely silent" with regard to the meaning of marriage within California. (See, e.g., Rymer Sup. at 49.) As more fully briefed in the Fund's Answer Brief on the substantive issues, the ballot arguments written by section 308.5's proponents addressed both the need to prevent out-of-state same-sex "marriages" from coming to California, and to preserve and protect the institution of marriage within California. (Fund Answer at 75-77.) The Ballot Argument in Favor of Proposition 22 spoke broadly of preserving all marriage in California:

> Proposition 22 is exactly 14 words long: "Only marriage between a man and a woman is valid or recognized in California." That's it! No legal doubletalk, no hidden agenda. Just common sense: Marriage should be between a man and a woman.
>
> . . .
>
> California is not alone in trying to keep marriage between a man and a woman. . . . So far, 30 states have passed laws defining marriage as between a man and a woman.
>
> . . .
>
> I believe that marriage should stay the way it is.

(RA 0099.)

The Rebuttal to Argument Against Proposition 22 similarly set forth language referring to all marriage in California:

> THE TRUTH IS, we respect EVERYONE'S freedom to make lifestyle choices, but draw the line at re-defining marriage for the rest of society.
>
> . . .

> THE TRUTH IS, "YES" on 22 sends a clear, positive message to children that marriage between a man and a woman is a valuable and respected institution, *now and forever*.

(RA 0098 [emphasis added].)

Both the unambiguous language of section 308.5 and the ballot materials show it was intended as an "absolute refusal to recognize marriages between persons of the same sex." (*Knight, supra*, 128 Cal.App.4th 14, 23-24.)

### 3. The Placement and Numbering of Section "308.5" are not evidence that it was intended solely to "amend" or "modify" Section 308.

For at least a century, this Court has held that the "numbering of sections in statutes is a purely artificial and unessential arrangement, resorted to for purposes of convenience only, and can never be allowed to hinder a correct construction of the entire act." (*In re Bull's Estate* (1908) 153 Cal. 715, 717 [96 P. 366].) This principle was well stated by the Appellate Department of the Los Angeles Superior Court in *People v. Andrade*:

> The numbers used to designate various provisions of the laws of this state have no substantive meaning in and of themselves. When used in a statute, the number of a particular section is simply a shorthand means of describing or designating the substance of the provisions of the law to which they refer. The substance of any legislative enactment is not in the numerals assigned to designate it, but in the language of the law itself.

(*People v. Andrade* (1983) 141 Cal.App.3d.Supp. 36, 39 [190 Cal.Rptr. 738], cited with approval in *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1077 [68 Cal.Rptr.2d 859] [conc. opn. of Werdegar, J.].)

Just as in *People v. Andrade*, this Court "has consistently been wary of ascertaining legislative purpose from the placement of a code section, except where the act itself is ambiguous. Mere code geography is generally among the least helpful indicia of legislative intent." (*Dunlop v. Tremayne* (1965) 62

Cal.2d 427, 430, n.2 [42 Cal.Rprtr. 438].) And, since the Family Code expressly provides that "section headings do not in any manner affect the scope, meaning, or intent of this code" (Fam. Code, § 5), "it would be absurd to conclude that the number assigned to a statute had a greater meaning than a heading." (*People v. Andrade, supra*, 141 Cal.App.3d.Supp. at p. 40 [citing identical provision in Vehicle Code, § 7].) In short, the section heading and the section numbering of Proposition 22 as section "308.5" can have "no substantive meaning." (*Id.* at p. 39.)

Because the substance of the law is found not in the numbering of sections, but rather in the language of the law itself, the various sections within an article of the code dealing with the same subject "are to be considered together," regardless of the order in which they are numbered. (*Renken v. Compton City School District* (1962) 207 Cal.App.2d 106, 117-118 [24 Cal.Rptr. 347], citing *In re Bull's Estate, supra*, 153 Cal. 715, 717.) Thus, section 308.5 must be viewed as an addition to Part 1 of Division 3 of the Family Code dealing with "Validity of Marriage" – not solely as a modification of the statute numbered immediately before it.[9]

There is no merit to the City's argument that the mere numbering and placement of section 308.5 after section 308 in the Family Code somehow means that section 308.5 only "modifies" the immediately preceding section, so as to apply solely to out-of-state marriages. (City Sup. at 46.) The case cited by the City, *Sanchez v. Workers' Comp. Appeals Board* (1990) 217 Cal.App.3d 346, 354-355 [266 Cal.Rptr. 21], does not support the argument. The court in *Sanchez* said that its interpretation of section 5405.5 of the Labor

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[9]Although it is a basic point, it is worth highlighting that section 308.5 is a "section" of the Family Code (see Fam. Code § 8(e), defining "section"), and not a "subdivision," "paragraph," or "subparagraph" of section 308, as the Petitioners would have this Court believe. (See Fam. Code § 8(f), (g) and (h), defining those terms.)

Code took into consideration its "location in the workers' compensation statutory scheme," but it did not find that its location implied a modification of the preceding Section 5405. To the contrary, the issue in *Sanchez* was how the new Section 5405.5 affected higher-numbered sections. (*Id*. at p. 354 ["The issue to be addressed is the effect of section 5405.5 . . . when it is read together with section 5410 and sections 5803 through 5805"].)

Similarly, the two cases cited by the Rymer Petitioners do not support their contention that section 308.5's placement after section 308 "shows an obvious intention to amend . . . section 308." (Rymer Sup. at 45.) In *People v. Seneca Insurance Co.* (2003) 29 Cal.4th 954 [129 Cal.Rptr.2d 842], this Court's conclusion regarding the placement of section 1166 of the Penal Code had nothing to do with the specific *section* it followed. Rather, its location in *Title* 7 of Part 2 of the Penal Code (which relates to criminal convictions *after* the start of trial) demonstrated that section 1166 applies only to post-trial verdicts – but not to *pre*-trial pleas, which are governed by *Title* 6. (*Id*. at p. 958 ["we would need to distort the logical structure of the Penal Code to relate section 1166 to pleas"].)[10] Nor are the Rymer Petitioners helped by *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 [38 Cal.Rptr.2d 650], which notes that "the statutory scheme of which the statute is a part" may be considered to construe an ambiguous statute. *Granberry* says nothing akin to the point for which Rymer cites it – that the enactment of a new section demarcated ".5" shows an "obvious intention" to amend only the section appearing before it. (Rymer Sup. at 45.) Section 308.5 is obviously part of the statutory scheme defining and regulating marriage.

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[10]If anything, *Seneca* actually supports the Fund's position that section 308.5's placement in Part 1 of Division 3 of the Family Code indicates that it applies throughout Part 1 – including sections 300, 301 and 308.

In short, there is no authority for the novel idea that a section inserted between two integers and numbered ".5" should be read as modifying only the statute bearing the lower integer.

**4. The drafting differences between section 308.5 and the un-passed, prior versions of legislation upon which it was based support applying section 308.5 to marriages in California.**

In its answer brief on the substantive issues, the Fund explained that section 308.5's author had previously drafted numerous similar provisions in the Assembly and the Senate that expressly applied only to out-of-state marriages. (Fund Answer at 81-83.) The Fund cited the line of cases holding that when a provision is omitted which was included in predecessor legislation, the omitted provision cannot be deemed to be included in the later legislation. (*Id*. at 83.) Rymer argues contrary to these authorities that the prior legislation cannot be considered. (Rymer Sup. at 50, n.28.)

This Court, however, has a precedent of considering prior legislation. In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [53 Cal.Rptr.2d 789] (*Romero*), this Court examined whether a trial court may, on its own motion, strike prior felony conviction allegations in cases arising under the "Three Strikes and You're Out" initiative (Proposition 184), as well as under a parallel and nearly identical law passed by the Legislature. (*Id*. at p. 504.) The Court examined the Three-Strikes law "to determine whether the Legislature (and the electorate) did, or did not, intend to give prosecuting attorneys the power to veto judicial decisions to dismiss prior felony convictions in furtherance of justice." (*Id*. at pp. 517-518.) As part of that examination, this Court took judicial notice of a prior, un-passed legislative version of the Three-Strikes law on which "[t]he initiative was loosely based." (*Id*. at pp. 504-505 and n.1.) In doing so, this Court found "notable differences" between the original, un-passed bill and the initiative – including

the fact that the initiative ultimately permitted the prosecutor to move to strike prior felony conviction allegations in furtherance of justice, while the un-passed predecessor bill would have permitted a motion to strike only for insufficient evidence. (*Id*. at p. 505.) In construing the initiative, this Court referred directly to the fact that the drafters of the initiative used different language than had been employed in the earlier, un-passed legislative version. (*Id*. at p. 529.) Thus, the language used in the predecessor legislation could not be deemed to be included in the initiative as ultimately written.

In the same way, language referring to marriages "contracted outside this state" as used in Senator Knight's predecessor legislation to section 308.5 – but which was ultimately omitted from Proposition 22 – cannot be deemed to be a part of section 308.5. (See Fund Answer at 81-83.)

### B. Federal Law Requires Interpreting Section 308.5 to Apply in California.

All of the parties appear to agree that California could not redefine "marriage" for California residents, but refuse to recognize same-sex "marriages" from other states. For the reasons stated in the Fund's Supplemental brief, only the federal Privileges and Immunities Clause requires that result; the Full Faith and Credit Clause has no bearing on the issue.[11] (Fund Sup. at 15-22.) Significantly, no party arguing the Full Faith and Credit Clause cited a case involving marriage because there are none. Marriage licenses are recognized on the basis of comity, not full faith and credit. (*Id*. at

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[11]The City is simply wrong in contending that the Full Faith and Credit Clause requires that judgments relating to same-sex "marriage" must be recognized. (See City Sup. at 51.) Eliminating the requirement of recognizing judgments relating to same-sex "marriage" is arguably the only substantive aspect of the federal Defense of Marriage Act. (See 28 U.S.C. § 1738C ["No State . . . shall be required to give effect to any . . . judicial proceedings . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State"].)

15-19.) Moreover, despite arguments about same-sex "marriage" constituting a fundamental right for privileges and immunities purposes, even the Massachusetts Supreme Judicial Court did not deem it a fundamental right. (See *Goodridge v. Department of Public Health* (2003) 440 Mass. 309, 326 [798 N.E.2d 941] [denying that the right to marry is "'fundamental' for equal protection and due process purposes because the State could, in theory, abolish all civil marriage"].) There is no fundamental right to enter a same-sex relationship. (See Fund Answer at 23-31.)

Petitioners' arguments against a federal impact on the interpretation of section 308.5 are primarily based on their assumption that it applies only to out-of-state same-sex "marriages."[12] That is not a potential construction of section 308.5, as shown above. Regardless, this Court should choose a construction that does not render section 308.5 unconstitutional. (See *Romero, supra*, 13 Cal.4th at p. 509.)

The City's claim that its proposed construction of section 308.5 would not have violated federal law when the initiative was passed is inaccurate. (See City Sup. at 58.) The Petitioners' theory is that the intent of those who adopted section 308.5 was to permanently preclude the Legislature from extending recognition to same-sex "marriages" from other states and countries, while allowing the Legislature to create same-sex "marriage" in California. An initiative that stated such an intent would violate the Privileges and Immunities Clause on its face because it would allow state residents to petition the Legislature for relief for themselves, but not for non-residents. (See Fund

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[12]The Fund agrees with the City that the phrase "same-sex marriage" is a misnomer, but for a different reason. (See City Sup. at 39 n.13.) Because the term "marriage" by definition means the union of a man and woman, a same-sex couple cannot be "married" without redefining the term. That is why the Fund uses the phrase "same-sex 'marriage.'"

Sup. at 15-19.) Thus, that is an implausible construction of the initiative that should not be adopted. (See *Romero, supra*, 13 Cal.4th at p. 509.)

Petitioners' argument that federal law has no bearing on the interpretation of section 308.5 because it violates the California Constitution puts the cart before the horse. (Cf. Rymer Sup. at 51-52.) Whether any of the California marriage laws violate the California Constitution is the central question in this litigation, and the scope of section 308.5 bears on that issue. Much as Petitioners would like the Court to decide the constitutionality of the marriage laws without considering the scope of section 308.5, it would violate due process to do so. This Court cannot determine what California's public policy on marriage is without knowing whether section 308.5 applies to marriages contracted in California.

Rymer's assertion that section 308.5 violates the California privileges and immunities clause (Rymer Sup. at 52) is unsupported by any authority, and thus has been waived. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [42 Cal.Rptr.2d 543] [arguments unsupported by authority are waived].) Regardless, in the absence of redefining marriage under California law, the term means the union of a man and woman. Therefore, section 308.5 would not violate the California Privileges and Immunities Clause because a same-sex "marriage" is not a marriage under California law.

Finally, Rymer's argument that the Legislature could invalidate section 308.5 by enacting a statute that renders section 308.5 unconstitutional is contrary to article 2, § 10(c) of the California Constitution. (Cf. Rymer Sup. at 54-55.) The Legislature cannot modify a voter initiative indirectly if it cannot do so directly. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 [76 Cal.Rptr.2d 342].)

## CONCLUSION

For the foregoing reasons, the fundamental right to marriage is a right of all individuals that simply cannot be enjoyed by a same-sex couple, and California Family Code section 308.5 establishes California's marriage policy. The Fund respectfully requests that this Court clarify that section 308.5 applies to marriages entered in California, uphold the decision of the Court of Appeal on the merits, and order the entry of summary judgment on behalf of the Fund.

Dated: August 30, 2007

Respectfully submitted,

By: GLEN LAVY
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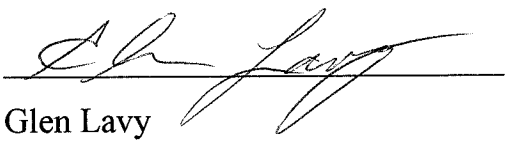
## CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14

I hereby certify that this brief was prepared in Times New Roman 13 font. According to the "Word Count" feature in my Word Perfect for Windows software, this brief, including footnotes but excluding the Table of Contents, Table of Authorities, this Certificate, and any attachments, is 6,503, up to and including the signature lines that follow the brief's conclusion.

Dated: August 30, 2007



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