

Case No. S147999

IN THE SUPREME COURT 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,
Consolidated on Appeal with Case Nos.
A110449, A110450, A110451, A110463, A110652
San Francisco Superior Court Case Nos. 503943, 428794
Honorable Richard A. Kramer

**CAMPAIGN FOR CALIFORNIA FAMILIES'
PETITION FOR REHEARING AND MOTION FOR STAY; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

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INTRODUCTION

This Court's May 15, 2008 Decision and Order will create a Gordian Knot that even Alexander the Great would be unable to unbind. This Court's determination that same-sex couples should be permitted to "marry," if suddenly thrust upon the current legal landscape, will open the door to polyamory, polygamy, and hopelessly entangled property, custody, visitation and other rights that would travel like a tsunami across the country.

Unlike its counterparts in Massachusetts, which redefined marriage to include same-sex couples without offering an alternative legal structure, or Vermont, Connecticut and New Jersey, which retained the traditional definition of marriage while also offering a civil union alternative, this Court has created a system in which a same-sex couple (or even an opposite-sex couple) could be married, in a domestic partnership, and in a separate civil union all at the same time. Without further revision of the law by the Legislature or a modification of this Court's decision, a person could have the rights, benefits and obligations of marriage with one same-sex partner in a California domestic partnership and/or a California marriage, and all the rights, benefits and obligations of a civil union with a *different* partner, especially since California has no residency requirement for marriage licenses. As a result, three or more people could claim community property rights in the same

piece of property, parental rights over children, and the rights to alimony, child support, death benefits, insurance proceeds and employee benefits belonging to one of the other parties. If one or more of the parties moves out of state, then courts of various jurisdictions would be faced with the daunting task of untangling legal knots created by this decision using different and possibly contradictory laws and public policies.¹ The result would be chaos of a magnitude never before seen in this nation, and never contemplated by this Court.

In addition, the sudden change in the law will cause confusion and concern among those who issue marriage licenses, as questions will arise about those who have sincerely held religious beliefs that would be violated if they have to issue marriage licenses to same-sex couples. Some county clerks are trying to address this issue, but in light of the state's Unruh Act, Civil Code §51, questions arise as to whether and how to integrate employees' religious beliefs and the Court's directive. When coupled with the uncertainty of the interrelationship between domestic partnerships and marriage for same-sex

¹ Already Governor Paterson of New York has ordered the revamping of New York's marriage licensure and certification process in order to allow recognition of California's newly-minted same sex marriages. *See, e.g., "Gay Rights Advocates Score Wins in N.Y., Calif.,"* <http://www.foxnews.com/story/0,2933,359547,00.html> (May 29, 2008) Exhibit F to Request for Judicial Notice.

couples, these questions demonstrate that this Court's May 15, 2008 decision should not go into effect, but that this Court should grant a rehearing in order to prevent these disastrous consequences and carefully consider and address these difficulties.

Furthermore, the imminent certification of a proposed amendment to the California Constitution defining marriage as the union of one man and one woman for the November 2008 ballot means that any same-sex "marriages" performed between June 2008 and November 2008 could be of questionable validity. Certainly, if the constitutional amendment is approved by the voters, then the basis for this Court's decision – that the marriage statutes violate the California Constitution – would evaporate. Preventing these additional legal complications provide more than sufficient cause to stay this Court order until the results of the November 2008 election have been certified by the Secretary of State.²

² Plaintiff City and County of San Francisco ("CCSF") has objected to a similar motion brought by the Proposition 22 Legal Defense and Education Fund (the "Fund") on the grounds that the Fund lacks standing. Campaign for California Families anticipates CCSF raising a similar objection to this motion, but urges this Court to reject the challenge. The trial court and this Court have treated the Fund and the Campaign as parties, allowing them to raise new arguments, to participate in oral argument, and in essence to do all that parties can do. Continuing such considerations would be consistent with this Court's actions throughout this case. In addition, the Campaign filed the first case in these consolidated matters, has been intimately involved since the very beginning of the litigation, and has continuously raised issues not raised by

FACTUAL BACKGROUND

On March 7, 2000, 61.4 percent – 4,618,673 – of California’s voters adopted Proposition 22, which added Section 308.5 to the Family Code: “Only marriage between a man and a woman is valid or recognized in California.” Family Code §300 already provided that marriage is the union of one man and one woman, and this Court had upheld that definition since the state’s founding. *See Baker v. Baker* (1859) 13 Cal. 87; *Marvin v. Marvin* (1976) 18 Cal.3d 660

When it became apparent that the long-standing definition of marriage was being challenged, California voters began an initiative drive to make the language of Family Code 308.5 part of the California Constitution. The effort to gather sufficient signatures to qualify the measure for the ballot was ongoing for a number of years while this case was making its way through the courts.

On April 24, 2008, shortly after this Court heard oral arguments, proponents of the marriage amendment, known at the “California Marriage

Defendants. The same is true with this Petition and Motion, as both the Governor and Attorney General have indicated that they will not be seeking similar relief. The exigency and seriousness of the issues presented in this Petition and Motion should be addressed by this Court, so the Campaign should be permitted to raise them.

Protection Act,” submitted signed petitions to county elections offices.³ County elections officials submitted the tally of signatures, known as the “raw count” to the Secretary of State between April 24 and May 13, 2008.⁴ The raw count revealed that a total of 1,120,590 signatures had been gathered statewide.⁵ Since the total number of signatures gathered exceeded the total number of signatures needed to qualify the measure for the ballot (694,354 or 8 percent of the total votes cast for governor in the last gubernatorial election), the Secretary of State directed county elections officials to begin a random sample signature verification process.⁶ Under the random sampling process, county elections officials have 30 business days to verify 500 signatures or 3 percent of the total number of signatures filed in the county, whichever is greater.⁷ If the random sampling projects that less than 95 percent of the required number of petition signatures are valid, then the measure fails to qualify for the ballot.⁸

³ See Secretary of State’s Report on Initiative 1298. Limit on Marriage. Constitutional Amendment at http://www.sos.ca.gov/elections/pend_sig/init_sample_1298.pdf (last visited May 28, 2008), Exhibit A to Request for Judicial Notice.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

If the random sampling projects 110 percent or more of the signatures are valid, then the measure qualifies for the ballot.⁹ If the random sampling projects that between 95 percent and 110 percent of the signatures are valid, then the signature verification process proceeds to a full check of signatures in all counties.¹⁰ In order to reach the 110 percent threshold to qualify without a full check, the random sampling will have to project that 763,790 of the 1,120,590 signatures submitted are valid.¹¹

As of May 27, 2008, 41 of California's 58 counties had submitted random sampling results that project that 83.36 percent of the signatures are valid.¹² The most populous counties, Los Angeles, Orange, Riverside and San Diego had not submitted their random sampling results as of May 27, 2008.¹³ If those counties, and the other remaining counties submit totals that project an 83 percent average for valid signatures, then the projected total would be 930,089 signatures, more than the 110 percent threshold. Even a final average of 70 percent would yield 784,413 signatures, which is more than the 110

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

percent threshold. It therefore appears likely that the measure will qualify for the November ballot following the random sampling.

The California Marriage Protection Act (the “Act”) would add “Only marriage between a man and a woman is valid or recognized in California” to the California Constitution. If the Act is approved by voters in November, then the very language that this Court ruled violates the California Constitution would be part of the Constitution. Since the signature gathering process had not been completed at the time of oral argument, the potential effect of the Act vis-a-vis this Court’s decision was not addressed.

The Court’s ruling also does not address the interaction between its determination that same-sex couples should be permitted to “marry” and the existing AB 205 domestic partnership system. AB 205 grants to domestic partners “the same rights, protections, and benefits,” and subjects them to the “same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.” Family Code §297.5(a). Domestic partnerships are available to same-sex couples over the age of 18 and to opposite sex couples if at least one person is age 62 or older. Family Code §297(b). In its May 15, 2008 ruling, this Court held that same-sex couples must be permitted to marry,

but did not address how marriage would affect same-sex couples who are already in AB205 domestic partnerships.

The failure to address AB 205 domestic partnerships has generated substantial questions among same-sex couples and state officials. For example, Secretary of State Debra Bowen is quoted as saying that

The Court's decision did not invalidate or change any of the Family Code laws relating to registered domestic partners, which are very clear about how domestic partnerships are formed and dissolved. As long as a couple meets the legal criteria for a domestic partnership, it can remain on California's Domestic Partnership Registry.¹⁴

Secretary Bowen said that her Domestic Partners Registry office has received over 50 calls a day and the most common question is, "How does the court's ruling affect my registered domestic partnership?"¹⁵ Even though neither this Court nor the Legislature has addressed this question, Secretary Bowen is apparently telling callers that this Court's ruling will have no effect on existing AB 205 domestic partnerships.¹⁶ State Senator Carole Migden similarly reports that she has obtained an oral opinion from the Legislative Counsel's office to

¹⁴ See, *LGBT Registered Partners Free To Marry*, State Senator Carole Migden's Web site entry addressing this Court's opinion, available at <http://dist03.casen.govoffice.com/index.asp?> . (Last visited May 28, 2008), Exhibit B to Request for Judicial Notice.

¹⁵ *Id.*

¹⁶ *Id.*

the effect that same-sex couples will be permitted to be both married and in an AB 205 domestic partnership.¹⁷

State Senator Carole Migden (D-San Francisco/North Bay), creator of the state's domestic partner laws, said that the legal opinion clarifies that LGBT registered domestic partners can remain in their legal partnership or marry if they so choose, but either way there is no need to dissolve their registered domestic partnership. "Domestic partners do not need to dissolve their legal partnerships in order to marry," said Migden. "Couples will legally be able to marry beginning June 16."¹⁸

According to these state officials, same-sex couples who are presently in AB 205 domestic partnerships will also be able to marry after June 16, 2008. However, neither this Court nor the Legislature has addressed the issue. Therefore, the actual legal effect of the co-existence of same-sex "marriage" and AB205 domestic partnerships is unknown. Without clear direction on this issue from the Legislature or the Court, same-sex couples could face a host of problems arising from being both married and in a domestic partnership.

This Court's order also raises questions regarding how county clerks are to address potential conflicts between the requirement that marriage licenses be issued to same-sex couples and employees' sincerely held religious beliefs that would prevent them from issuing such licenses. Some county clerks, such as San Diego County's Greg Smith, have tried to address the issue

¹⁷ *Id.*

¹⁸ *Id.*

prospectively by asking employees to express their objections and perhaps be exempted from issuing licenses.¹⁹ However, other government officials, such as Los Angeles City Attorney Rocky Delgadillo, have stated that “County clerks have no legal standing to grant county employees the authority or ability to choose which marriages they wish not to officiate at, based on their personal views or biases.”²⁰ While California’s Unruh Act, Civil Code §51, provides broad protection against discrimination on the basis of sexual orientation, it cannot negate employees’ rights under Title VII of the federal Civil Rights Act. How to resolve the potential conflict between those rights is another significant question arising from and unanswered by this Court’s order.

Since California does not have a residency requirement for marriage licenses, these issues reach far beyond this state, but could affect same-sex couples, judges and legislatures throughout the nation. Because of the magnitude of the issues raised, it is vitally important that this Court’s order not go into effect in 30 days, but that implementation be stayed and a rehearing

¹⁹ See Gustafson, *San Diego County workers may be excused from gay weddings*, San Diego Union Tribune, May 21, 2008, available at <http://www.signonsandiego.com/news/metro/20080521-1146-bn21clerk.html>. (Last visited May 29, 2008), Exhibit C to Request for Judicial Notice.

²⁰ See San Francisco Chronicle, *County employees can't opt out of officiating gay marriages*, May 19, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/05/19/state/n185311D31.DTL&type=politics>. (Last visited May 29, 2008), Exhibit D to Request for Judicial Notice.

granted to consider these issues.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
FOR PETITION FOR REHEARING AND MOTION FOR STAY**

SUMMARY OF ARGUMENT

Campaign for California Families (the "Campaign") respectfully requests that this Court grant a rehearing and/or stay its May 15, 2008 decision because of significant legal consequences that will result from the simultaneous institution of same-sex "marriage" licenses and AB205 domestic partnerships. This Court's decision directing that marriage licenses be issued to same-sex couples while leaving in place the AB 205 domestic partnership law and the absence of a residency requirement will create a hopelessly entangled legal knot that will throw not only California's, but also other states' legal system into chaos. In addition, it is almost certain that a constitutional amendment that would place the very language struck down as unconstitutional into the California Constitution will be on the November ballot. Passage of that amendment would create further confusion for couples and the courts as perhaps thousands of same-sex "marriages" would be rendered legally questionable and subject to further litigation.

These significant unforeseen consequences constitute good cause to grant a rehearing of the matter and/or to stay the decision pending the election on November 4, 2008. Campaign for California Families respectfully requests

that this Court grant a rehearing and/or stay its decision until the results of the November 2008 election are finalized.

LEGAL ARGUMENT

I. THIS COURT SHOULD GRANT THE CAMPAIGN'S PETITION FOR REHEARING BECAUSE THIS DECISION LEGALIZES POLYGAMY AND POLYAMORY.

This Court May 15, 2008 decision, if permitted to become final on June 16, 2008 will create a “perfect storm” that will sweep across the United States leaving chaos and devastation in its wake. The congruence of same-sex “marriage” with AB205 domestic partnerships, the availability of marriage licenses to non-residents and current statutory language will create an unprecedented legal labyrinth that could takes years to navigate. Unlike other decisions that have granted marriage or marriage substitutes to same-sex couples, this Court’s decision makes both marriage and a marriage substitute available to same-sex couples simultaneously. Members of existing AB 205 domestic partnerships could not only marry each other, but could marry another person. In addition, since there is no residency requirement for obtaining a marriage license in California, this Court’s decision opens the door for members of same-sex couples already part of a civil union or domestic partnership in another state to marry another person in California.

This Court did not address how same-sex “marriage” would affect

AB205 domestic partnerships, nor did it ask the Legislature to address that question. Therefore, if the Court's order becomes final in its present form, then marriage and AB205 domestic partnerships will co-exist. Family Code § 301 states that an unmarried male over the age of 18 and an unmarried female over the age of 18 who are not otherwise disqualified are capable of consenting to and consummating a marriage. Pursuant to the Court's ruling, "male and female" would be stricken from Section 301, so that it would read than an unmarried person over the age of 18 and an unmarried person over the 18 who are not otherwise disqualified are capable of consenting to and consummating a marriage. As the Plaintiffs and this Court stated, AB205 domestic partnerships are not marriages. Therefore, a person who is part of an AB205 domestic partnership is "unmarried" and able to enter into marriage with another unmarried person over the age of 18. Consequently, if two males are in an AB205 domestic partnership they would be able to get married.

Family Code §297(b)(2) provides that a person can enter into a domestic partnership if he or she is not married to someone else or is not a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity. While this would mean that the two males above could not enter into a domestic partnership after they are already married, it does not prevent them from getting married after entering

into a domestic partnership.

As a further complication, California does not have a residency requirement for marriage licenses. Therefore, couples from other states can come to California to get married even if they do not intend to remain in California. Since Family Code §301 only states that the parties need to be “unmarried,” same-sex couples who are part of domestic partnerships or civil unions in other states would be able to get married in California. This would mean that Parties A and B who are in a Vermont civil union (or New Jersey or Connecticut civil union) , and Parties C and D are also in a civil union, and Parties E and F are also in a civil union, then A and C could come to California to get married, and at the same time B and F could get married, and D and E could get married, *all at the same time*.. After all, since Family Code §301 only says “unmarried,” it says nothing about civil unions. Therefore, this Court’s decision legitimizes polygamy and polyamory. *See* attached diagram marked as Exhibit 1.

Consequently, if the Court’s ruling goes into effect without modification, individuals could create polygamous and polyamorous relationships with multiple partners. Not only would such results violate long-established legal and public policy, but would also create a plethora of problems. Community property, parental rights, custody, visitation, alimony,

child support, insurance proceeds, inheritance, intestacy, health care directives, employee benefits and a myriad of other rights and benefits would have to be allocated, distributed or applied to multiple parties with possibly conflicting claims. Family law matters that are already complicated and contentious would become more so. If any of the parties moves out of state, then additional issues involving comity, full faith and credit and possibly conflicting public policy and legal standards would arise, creating even more chaos.

These potentialities are unprecedented because no other jurisdiction has had the combination of marriage and a marriage alternative simultaneously available to same-sex couples with the availability of licenses to nonresidents. Therefore, there can be no comparison between the potential effects in California and the actual effects in Massachusetts, Vermont and New Jersey. In Massachusetts, the Supreme Judicial Court refined the common law meaning of marriage. *Goodridge v. Dep't of Public Health* (Mass. 2003) 798 N.E.2d 941, 969. Instead of being defined as the union of one man and one woman, the Massachusetts court ruled that marriage was to be defined as “the voluntary union of two persons as spouses, to the exclusion of all others.” *Id.* In Massachusetts, therefore, same-sex couples were to be permitted to marry, but there was no other alternative institution also made available to them.

In Vermont and New Jersey, the high courts did not redefine marriage

to include same-sex couples but instructed the Legislatures to enact legislation that granted the rights, benefits and obligations of marriage to same-sex couples. See *Baker v. State* (1999) 170 Vt. 194, 224-25 (“We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate.”); *Lewis v. Harris* (N.J. 2006) 188 N.J. 415 (No fundamental right to same-sex “marriage,” but legislature must develop scheme to grant rights to same-sex partners). In each instance, the legislatures enacted a civil union law. Consequently, in each instance, same-sex couples were granted **either** marriage or all the rights and benefits of marriage under another name, but not both.

By contrast, this Court’s ruling gives same-sex couples both the right to marry and the right to enter into a domestic partnership. Opposite-sex couples are not provided with this choice unless at least one of them is age 62 or older. This leads to the kind of multiple-person relationships described above. In addition, it constitutes disparate treatment based upon age and sexual orientation. Same-sex couples over the age of 18 can marry and/or enter into a domestic partnership. Opposite-sex couples over the age of 62 can marry or

enter into a domestic partnership. However, opposite-sex couples between the ages of 18 and 62 can only enter into marriage. Thus, rather than resolving differential treatment based upon sexual orientation, this Court's ruling actually creates a new type of differential treatment.

California Rule of Court 8.536(a) provides that the Supreme Court may order rehearing of any decision that is not final in that court on filing. The unforeseen consequences of this Court's ruling in light of the existing domestic partnership law create serious concerns that should be addressed before the Court's decision becomes final. For these reasons, the Campaign requests that this Court grant a rehearing.

II. THIS COURT SHOULD GRANT A REHEARING TO CONSIDER THE EFFECTS THAT ITS FINDING OF SEXUAL ORIENTATION AS A SUSPECT CLASS HAS ON EXISTING AB205 DOMESTIC PARTNERSHIPS.

This Court held that "California marriage statutes treat persons differently on the basis of sexual orientation." and as such "should be viewed as constitutionally suspect under the California Constitution's equal protection clause." *In re Marriage Cases* (May 15, 2008, No. S147999) ___ Cal.4th ___ [2008 WL 2051892, at pg. 95, 100]. Due to this treatment, "strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation." *Id.* at 101.

In utilizing the suspect classification test, this Court held that "the right

to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples.” *Id.* at 79. Further, “one of the core elements of this fundamental right is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.” *Id.* at 81. In conclusion, this Court held that affording access to the designation of marriage exclusively to opposite-sex couples, “while providing same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples.” *Id.* at 103.

Under this reasoning, this Court held that if the term “marriage” is denied only to same-sex couples, an alternative designation will be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship.” *Id.* at 104. If the use of a term other than marriage casts the shadow of second-class citizenry, this Court’s decision could have the unintended effect of rendering all same-sex couples who remain in a domestic partnership in California second-class citizens. If the decision stands, a separate classification of domestic partnerships for same-sex couples would be deemed discriminatory. This throws into question the validity of AB 205 domestic partnerships as applied to same-sex couples.

That question could have a nationwide effect . Under Family Code § 299.2, California recognizes domestic partnerships from other states. If this Court's decision renders domestic partnerships discriminatory as to same-sex couples under a suspect classification, then California would have to decide if it would continue to recognize domestic partnerships from outside jurisdictions. Further, a domestic partnership might remain valid in the couple's home state, but cease to be recognized in California. In such a case, the couple might be forced to return to their home state.

Additionally, civil unions in other states, which purport to confer all the rights and benefits of marriage on same sex couples just as the California Domestic Partnership Act does in this state, would also be thrown into question under the reasoning of this Court's opinion.

Thus, the decision could have far-reaching and likely unintended consequences not only in California but all across the country. For these reasons, as well as the others set forth herein, this Court should order a rehearing to reconsider the effect its decision would have on the status of domestic partnerships in California and elsewhere and civil unions in other jurisdictions.

III. THIS COURT SHOULD STAY ITS DECISION PENDING A VOTE BY THE CITIZENS OF CALIFORNIA ON THE MARRIAGE PROTECTION ACT.

Rule 8.540(c)(2) of the California Rules of Court states that “on a party’s or its own motion and for good cause, the court may stay a remittitur’s issuance for a reasonable period or order its recall.” Further, in *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, (1964) 377 U.S. 713, the United States Supreme Court held:

The fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted . . . and will be submitted to the State’s voters at the next election.

Id. at 737. More importantly, in California the people have specifically reserved for themselves the right to amend the Constitution via initiative, Cal. Const. Art. 4 §1. This Court has held that courts must be “zealous to preserve [rights of initiative and referendum] to the fullest tenable measure of spirit as well as letter.” *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [196 P.2d 787].

As discussed more fully above, it appears certain that the Marriage Protection Act will qualify for the November ballot. If enacted, the Act would place the very language struck down by this Court into the California Constitution, effectively overruling the May 15, 2008 decision. Same-sex “marriage” has been unknown in California from the beginning, so there is no

vested right at stake. As the 2004 invalidation of the San Francisco same-sex “marriages” demonstrated, instituting same-sex “marriage” now and then having it declared invalid would create confusion and disarray. Coupled with the significant consequences that will arise should this Court’s order become effective, these issues provide sufficient good cause to stay implementation of the May 15, 2008 order to await the outcome of the November election.

A. This Court Should Stay Its Opinion To Permit The People Of California To Exercise Their Right To Amend The Constitution.

Art. 4, §1 of the California Constitution provides that “the people reserve to themselves the powers of initiative and referendum.” This Court has called Art. 4 “one of the outstanding achievements of the progressive movement of the early 1900’s.” *Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473].

Declaring it “the duty of the courts to jealously guard this right of the people” [citation omitted], the courts have described the initiative and referendum as articulating “one of the most precious rights of our democratic process” [citations omitted]. “[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.” [citation omitted].

Id. At the time of oral argument it was unknown whether supporters of the Act would collect sufficient signatures to submit the measure to the Secretary of

State for verification. Therefore, it was unknown whether the people would be trying to exercise their initiative rights in a manner that would be determinative of the issues in this case. Now it is apparent that the people are seeking to exercise that right. Therefore, it is incumbent upon this Court to zealously preserve that right by staying its May 15, 2008 decision until the results of the November 2008 ballot have been finalized.

B. Since California Has A History Of Recognizing Marriage As Between A Man And A Woman, This Court Should Stay Its Decision Pending The Vote On November 4, 2008.

As this Court said, “From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman.” *In re Marriage Cases* (May 15, 2008, No. S147999) ___ Cal.4th ___ [2008 WL 2051892, at pg. 23]. This Court noted that “although the California statutes governing marriage and family relations have undergone very significant changes in a host of areas since the late 19th century, the statutory designation of marriage as a relationship between a man and a woman has remained unchanged.” *In re Marriage Cases* (May 15, 2008, No. S147999) ___ Cal.4th ___ [2008 WL 2051892, at pg. 25]). In other words, this Court recognizes the monumental change that its decision would create in California’s legal landscape.

This Court also recognizes that same-sex couples have not been

afforded the right to marry in the entire history of California statehood. Therefore, there is no vested fundamental right that would be denied to same-sex couples if the decision were stayed to permit the people to exercise their right to amend the Constitution.

C. A Stay Is Justified To Avoid Legal Confusion Similar To That Caused By The Invalidation Of San Francisco’s Same-Sex “Marriages.”

In *Lockyer v. City and County of San Francisco*, (2004) 33 Cal.4th 1055, this Court issued a writ of mandate directing the City to cease issuing marriage licenses to same-sex couples. This Court recognized that “the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated . . .” *Id.* at 1074. Further, “when state law limits marriage to a union between a man and a woman, a same-sex marriage performed in violation of state law is void and of no legal effect.” *Id.* at 1113-14. The *Lockyer* case was brought by the Attorney General in response to Mayor Gavin Newsom’s unilateral decision to begin issuing marriage licenses to same-sex couples on February 12, 2004. On March 11, 2004 this Court issued the writ directing the officials in San Francisco to “enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions.” *Id.* at 1073. This Court ordered further order that the City (1) “identify all same-sex

couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates”; and (2) notify these couples that same-sex marriages performed in California are null and void. *Id.* at 1118.

In the twenty-three days between February 12, 2004 and March 5, 2004, the San Francisco County clerk issued approximately 4,000 marriage licenses to same-sex couples. The City of San Francisco indicated that approximately 4,000 same-sex marriages were also performed during this time. *Id.* at 1071. Justice Moreno noted in his concurrence that the city and county officials in San Francisco “drastically and repeatedly altered the status quo based on their constitutional determination, issuing a multitude of licenses.” *Id.* at 1125 (Moreno, J., concurring).

As a result of this Court’s decision, those nearly 4,000 same-sex couples had to be informed that their “marriages” were of no legal effect. If this Court does not stay its current decision in *In re Marriage Cases*, the confusion which followed the *Lockyer* decision could be greatly magnified since the effect would be statewide rather than limited to the City of San Francisco. As Senator Migden, author of California’s domestic partnerships laws said, if the marriage initiative passes, “the ability for same-sex couples to marry may become muddied and the issue may end up in the courts once

more.”²¹ If the proposed amendment passes in November, this Court will be faced with the question of whether any same-sex “marriage” performed between now and November remain valid.

Also, since California does not have a residency requirement for marriage, same-sex couples may travel to California to get “married” and then return to their state. If passage of the marriage amendment renders the ceremonies performed in California null and void, the question would become whether those “marriages” remain valid in the home state of the same-sex couple. These reasons demonstrate the necessity of this Court to stay its decision pending a vote on the marriage amendment in the November election.

CONCLUSION

In November, the people of California have the opportunity to vote on an amendment to the California Constitution stating “Only a marriage between a man and a woman is valid and recognized in California.” Additionally, extreme chaos will ensue if same-sex “marriage” ceremonies are performed now and then declared null and void in November. Finally, several new issues have developed that were not contemplated at the time of this decision. For these reasons, Campaign for California Families requests that this Court rehear this case or stay its decision and allow the people of California to declare their


²¹ See “LGBT Domestic Partners Free to Marry”

will as to the institution of marriage.

Dated: May 29, 2008

Respectfully Submitted,


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RULE 8.204(c)(1) CERTIFICATE OF COMPLIANCE

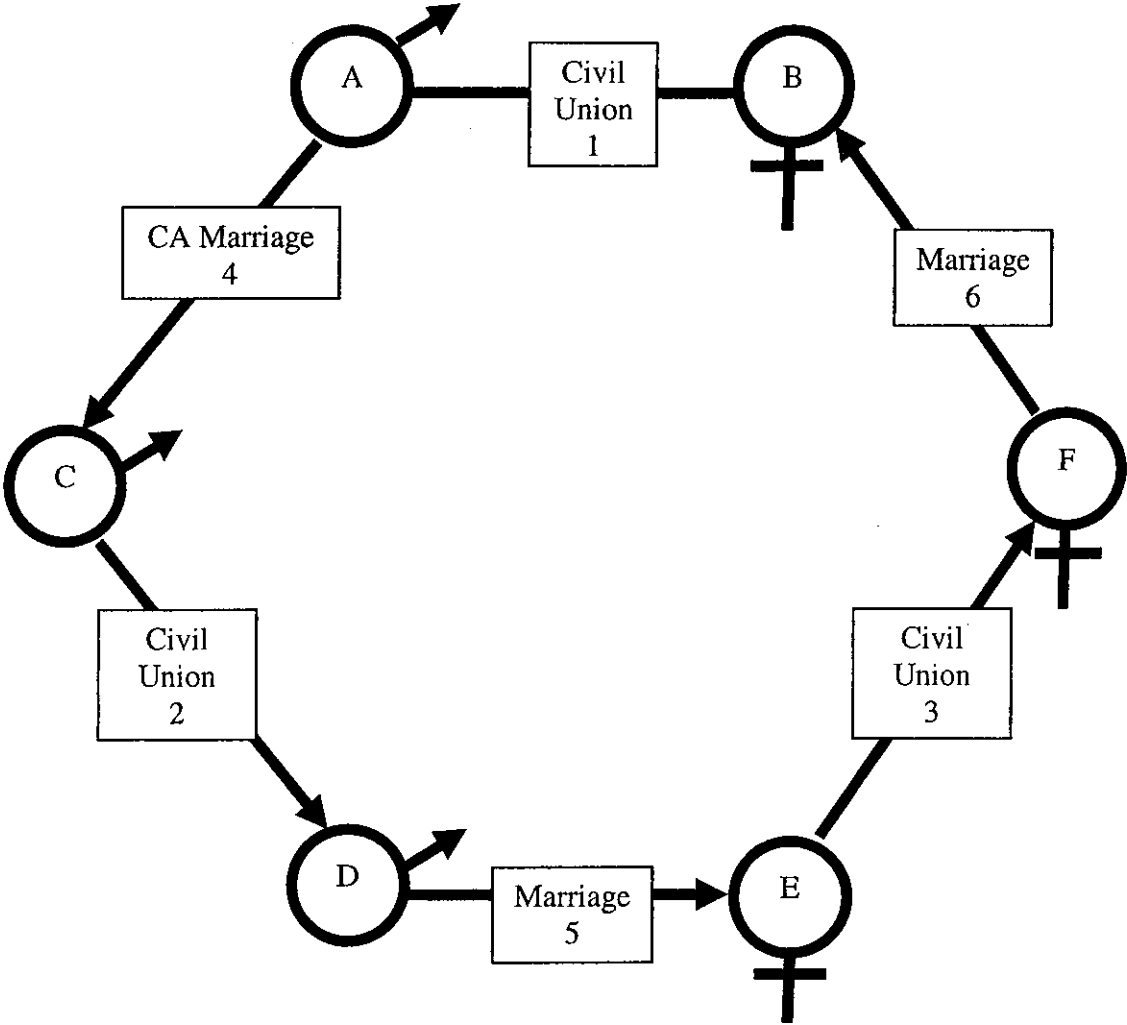
Pursuant to California Rules of Court 8.204(c)(1), I , Mary E. McAlister, hereby certify that this Motion to Stay is proportionately spaced, has a typeface of 13 points or more, and the number of words contained in the foregoing Motion, including footnotes but excluding the Table of Contents, Table of Authorities and this Certificate is 6,253 as calculated using the word count feature of the computer program used to prepare the brief.

Dated: May 29, 2008



Mary E. McAlister

EXHIBIT 1



PROOF OF SERVICE

I am over eighteen (18) years of age. I am not a party to this action. I am employed in the City of Lynchburg and my office address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 25402.

On May 29, 2008, I served the foregoing document, described as Request for Rehearing and Motion to Stay of Campaign for California Families on the parties of record in this case by placing true and correct copies thereof enclosed in sealed envelopes, with first class postage thereon prepaid, addressed as stated in the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on May 29, 2008 at Lynchburg, Virginia.


Mary E. McAlister

SERVICE LIST

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