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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
CITY AND COUNTY OF SAN FRANCISCO

15 Coordination Proceeding
16 Special Title (Rule 1550(b))

17 **MARRIAGE CASES**

18 **PROPOSITION 22 LEGAL DEFENSE**
19 **AND EDUCATION FUND**, a California
nonprofit public benefit corporation, et al.

20 Petitioners/Plaintiffs,

21 v.

22 **CITY AND COUNTY OF SAN FRANCISCO**,
a charter city and county, et al.,

23 Respondents/Defendants.
24

ENDORSED
FILED
San Francisco County Superior Court

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Judicial Council Coordination
Proceeding No. 4365

Case No. 428794
(Consolidated with 503943)

**REPLY BRIEF IN SUPPORT OF
DECLARATORY JUDGMENT THAT THE
CALIFORNIA MARRIAGE LAWS ARE
CONSTITUTIONAL**

Action Filed: February 13, 2004
Hearing Date: December 22, 2004
Hearing Time: 9:30 A.M.
Department: 304
Judge: Richard A. Kramer

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1 **Introduction**

2 Defendants ask the question, “why should the State exclude same-sex couples from
3 marriage?” That puts the cart before the horse. The first question that must be addressed in a
4 challenge to the California marriage laws is, “why does the State recognize marriage?” The answer
5 to that question as a matter of historical fact is that California and all civilizations throughout
6 history have given marriage a special status because of its relationship to procreation. The State
7 has a legitimate interest in making marriage an attractive option in order to steer procreation into
8 marriage. Notwithstanding the City’s surprising suggestion that same-sex couples procreate (State
9 Opp. at 29), no same-sex couple can do so. Any same-sex “procreation” that occurs is between
10 one member of the same-sex couple and a third person, not the same-sex couple. Thus, same-sex
11 couples are not similarly situated with opposite-sex couples in regard to the State’s legitimate
12 purpose of recognizing marriage, and, accordingly, same-sex couples cannot meet the threshold
13 requirement for an equal protection claim.

14 Regardless of the City’s repeated reference to the marriage laws as a “marriage ban,” the
15 only marriages that are banned in California are those that are incestuous, polygamous or involve
16 a person unable to give legal consent. Same-sex relationships simply do not qualify as marriages
17 under the meaning of “marriage” in the California Constitution, the California statutes, the history
18 of the meaning of the term, or the way the term is understood in the vast majority of the world.
19 Defendants offer no explanation of how this Court could redefine “marriage” to include same-sex
20 couples without also creating a constitutional right to polygamous and incestuous marriages. They
21 cannot offer a principled theory because there is none. In fact, the case for polygamous and
22 incestuous marriages may be easier than the case for redefining marriage to include same-sex
23 couples. As the Intervenors effectively pointed out in their Opposition, permitting polygamous or
24 incestuous marriages would not require redefining the term. (See Woo/Martin Opp. at 4-5.)

25 No state appellate or Supreme Court has ruled that same-sex couples have a fundamental
26 right to marry each other. No state appellate or Supreme Court majority has ruled that marriage
27 laws constitute sex discrimination. And no state appellate or Supreme Court has ruled that
28 marriage laws discriminate on the basis of sexual orientation. In fact, Defendants have virtually

1 no authority for the proposition that California’s marriage laws violate the California Constitution,
2 which incorporates the concept of marriage as the union of a man and a woman.

3 Having little substantive argument to offer on the merits in opposition to the Funds’
4 motion, Defendants attack the motion procedurally. The irony is that the present procedural
5 posture is the result of these parties’ efforts to push the court into an unseemly rush to judgment
6 on one of the most controversial social issues of our day. Instead of the usual deliberative judicial
7 process, including discovery and sufficient time for all parties to develop the case, Defendants have
8 been seeking an immediate decision—until now. Although Defendants objected to the Fund and
9 the Campaign’s participation in the coordinated proceedings on the ground that they would delay
10 the case, suddenly it is the Defendants who want to delay it. They assume that the Court may
11 consider the thousands of pages of materials they submitted with no discovery by opponents, but
12 that the comparatively short submissions of the Fund and Campaign require a lengthy discovery
13 process. The inconsistency of their position highlights its invalidity. The reality is that the court
14 should consider no evidence without opposing parties having a full opportunity to test its validity
15 through discovery. Indeed, no evidence is relevant to the decisive issues before the Court: the
16 substance of the fundamental right to marry, and the inability of same-sex couples to raise an equal
17 protection claim regarding marriage.

18 Defendants’ arguments are premised upon three demonstrably invalid assumptions: (1) the
19 term “marriage” has no essential meaning apart from its legal incidents; (2) the fundamental right
20 to marriage has an independent meaning beyond the context of the cases describing it; and (3)
21 same-sex couples are similarly situated with opposite-sex couples in regard to the state’s legitimate
22 purpose in recognizing marriage.

23 **I. MARRIAGE MEANS THE UNION OF A MAN AND A WOMAN**

24 The City has virtually no substantive response to the extensive authorities demonstrating
25 that the term “marriage” has always meant the union of a man and a woman. Instead, the City
26 asserts ipsi dixit that “[c]ivil marriage is but the sum of its legal incidents.” (City Opp. at 15.)
27 However, in its reply to the State in *CCSF v. State*, the City acknowledged that if “the different-sex
28 restriction is part of the ‘definition’ of marriage, then it is semantically impossible to ‘marry’

1 someone of the same sex, and the City’s constitutional challenge can be rejected as non-sensical
2 [sic] without any further consideration.” (City’s Reply to State at 8-9.) It is indeed semantically
3 impossible to “marry” someone of the same-sex, and the Defendants’ constitutional challenge
4 should be rejected that simply.

5 There is no authority whatsoever for the proposition that marriage “is but the sum of its
6 legal incidents.” Defendants have cited no dictionary or legal opinion that has attempted to define
7 marriage by all of its legal incidents, and Counsel for the Fund are unaware of any. *Cf. Sesler v.*
8 *Montgomery*, 78 Cal. 486, 487 (1889) (“in the Codes there is no attempt made to change the
9 essential nature of marriage, *or to state its manifold incidents and consequences*”) (emphasis
10 added). As the Massachusetts Supreme Judicial Court recognized in *Goodridge v. Department of*
11 *Public Health*, 798 N.E.2d 941, 965 (Mass. 2003), the court had to make “a significant change in
12 *the definition of marriage* as it has been inherited from the common law, and understood by many
13 societies for centuries” in order to include same-sex couples. (Emphasis added.) The South Africa
14 appellate court that Intervenor’s cite likewise recognized that it had to redefine “the common law
15 definition of marriage” in order “to encompass same-sex marriages.” *Fourie v. Minister of Home*
16 *Affairs*, Case No. 232-2003, par. 27 (Nov. 30, 2004).¹ The Fund pointed out in its opening brief
17 that this Court does not have the authority to redefine terms that are used in the Constitution.
18 (Fund Open. Br. at 10-12.) Defendants have cited no authority for the Court to do so.²

19
20 ¹Intervenor’s referred to the “South Africa high court” (Woo/Martin Opp. at 6), but it was
21 actually the intermediate court, the Supreme Court of Appeal. *See Fourie*, par. 4 (referring to the
22 courts, in order, as the “Constitutional Court, the Supreme Court of Appeal and the High Courts”).

23 ²The Fund’s opening brief established that California neither created nor defined marriage.
24 (Fund Open. Br. at 2-3.) The City makes no response to the cited authorities. Instead, it makes
25 the unsupported assertion that “civil marriage in California is entirely *a creature of statutory law*.”
26 (City Opp. at 14; emphasis by City.) Intervenor’s make a similar assertion in arguing that “[c]ivil
27 marriage . . . is a legal construct—created . . . by the California legislature.” (Woo/Martin Opp. at
28 9.) Defendants’ assertions are inconsistent with the reality of history. States “do not confer the
right” to marry. *Meister v. Moore*, 96 U.S. 76, 78 (1877). Marriage predated California and even
the United States. It existed at common law as the union of a man and a woman long before
statutes began defining it. *See, e.g., id.* at 79; *Goodridge*, 798 N.E.2d at 965; *Jones v. Hallahan*,
501 S.W.2d 588, 589 (Ky. 1973) (“Marriage was a custom long before the state commenced to
issue licenses for that purpose”); Fund Open. Br. at 2.

1 **A. The Court May Not Change Common Law Concepts in the Constitution**

2 It is well established that California courts may not change the meaning of provisions
3 adopted into the Constitution from the common law. The importance of the common law to
4 California’s Constitution was described in *Dow v. The Gould & Curry Silver Mining Co.*, 31 Cal.
5 629 (1867):

6 It will readily be seen, on an examination of the Constitution, that its
7 leading principles and most of its details have a common law origin. . . . [T]he
8 common law formed the basis of almost every right secured and remedy provided
9 by the Constitution. The only marked exception is found in the section under
10 consideration, providing for the separate property of the wife and the common
11 property of both husband and wife.

12 *Id.* at 640. The California Supreme Court has ruled that “the common law, except so far as it is
13 inapplicable to our conditions, or has been modified by statute, still remains in force.” *In re Estate*
14 *of Elizalde*, 182 Cal. 427, 433 (1920). Statutes—or constitutional provisions—are presumed to
15 codify the common law unless there is clear evidence of an intent to change a common law rule.
16 *See Saala v. McFarland*, 63 Cal. 2d 124, 130 (1965).

17 The most familiar example of the presumption that a common law concept has been
18 codified in the Constitution involves the constitutional right to trial by jury. As was recently held
19 by the Court of Appeal:

20 “It is the right to trial by jury *as it existed at common law* which is preserved; and
21 what that right is, is a purely historical question, a fact which is to be ascertained
22 like any other social, political or legal fact.”

23 *Wisden v. Superior Ct.*, 2004 WL 2757631, *2 (Cal. App. 2 Dist., Dec. 3, 2004) (emphasis added),
24 quoting *People v. One 1941 Chevrolet Coup*, 37 Cal. 2d 283, 287 (1951). The constitutional
25 provision has been amended numerous times, but the right remains “as it existed at common law.”
26 *See id.* The California Supreme Court in an early case explained that what is embedded in the
27 Constitution is the common law right to trial by jury, but that qualifications for jurors “is a matter
28 subject to legislative control.” *Ex parte Mana*, 178 Cal. 213, 214 (1918).

 The common law concept of marriage has likewise been codified in the Constitution from
the earliest days of the State. (See Fund Open. Br. at 8.) The initial codification of marriage in the
Constitution was for the purpose of expressly departing from the common law to give married
women the right to own separate property, but that did not change the essence of marriage. *See*

1 *Dow*, 31 Cal. at 640; *Sesler*, 78 Cal. at 487; Cal. Const. 1849, Art. 11, § 14 (referring to marriage,
2 husband and wife). The common law meaning of marriage as the union of a man and a woman has
3 remained in the California Constitution and statutes unchanged from 1849 through the present.
4 The current provision dealing with the separate property of married couples no longer explicitly
5 refers to husband and wife.³ The provision, Article 1, § 21, was shortened in the legislatively
6 proposed constitutional amendments in 1970. (*See* Fund Request for Judicial Notice.) The
7 detailed analysis by the Legislative Counsel of the change explained that “[t]his measure would
8 restate this section *without substantive change*.” (*Id.*, Ex. A at 25, Separate Property; emphasis
9 added.) The Assembly Committee on Elections and Constitutional Amendments summary stated
10 that the revision “[r]etains and rewords section identifying the separate property rights of husband
11 and wife,” and commented that it retained “the status quo.” (*Id.*, Ex. B, Section 8.) It is evident
12 from these comments that the Legislature deemed explicit reference to husband and wife in the
13 provision redundant because the meaning of marriage includes a husband and wife. Thus, even
14 though the terms “husband” and “wife” are no longer contained in the Constitution, the meaning
15 of “marriage” remains the same. While the legislature may regulate the qualifications for marriage,
16 *Ex parte Mana*, 178 Cal. at 214, the essence of the institution remains “as it existed at common
17 law.” *One 1941 Chevrolet Coup*, 37 Cal. 2d at 287. At common law, marriage meant the union
18 of a man and a woman, a husband and wife. *See Dow*, 31 Cal. at 641.

19 Intervenor’s asserted reliance on constitutional principles of due process and equal
20 protection (*Woo/Martin Opp.* at 10-12) provide no basis for this Court to redefine marriage. They
21 cite no California or federal case that has redefined the basic meaning of a term in order to create
22 a new constitutional right. Intervenor’s assertion that “[f]or decades, the legal definition of
23 ‘marriage’ in California excluded marriages between non-whites and whites,” (*Id.* at 11), is simply
24 not true—if it were, Intervenor would certainly have cited the definition. The undeniable reality
25

26
27 ³The Fund’s opening brief erroneously referred to the title of Article 1, Section 21, as part
28 of the constitutional provision. Regardless of whether “husband and wife” are part of the section,
the term “marriage” in Section 21 means the union of a man and a woman, as it did at common
law.

1 is that the prohibition on interracial marriage was a legislative regulation that was a departure from
2 the common law. (See Fund Open. Br. at 12-16.)⁴

3 **B. The Universal Nature of Marriage Has Not Changed**

4 Defendants' arguments about the meaning of marriage confuse the universal attributes of
5 marriage across time, religion (or non-religion), and culture with its variables. It is undeniable that
6 different cultures have applied different rules to which men and women could marry one another,
7 how they would marry, and to whether persons could have more than one marriage at a time. (See
8 Woo/Martin Opp. at 4-6.) But all of those marriages involved a man and a woman. Prior to the
9 legislatively created right of same-sex couples to marry in the Netherlands in 2001, no country in
10 the world had ever defined "marriage" in a way that included same-sex couples.⁵

11 The recent South Africa case of *Fourie* does not show otherwise. Rather than noting that
12 "marriages between same-sex couples have long been common in many traditional African
13 societies," as Intervenors assert, the South Africa appellate court in *Fourie* merely stated, without
14 elaboration: "Same-sex marriage is not unknown to certain African traditional societies." *Fourie*,
15 par. 13(i). As Peter Lubin & Dwight Duncan have pointed out in *Follow the Footnote or the*
16 *Advocate As Historian of Same-Sex Marriage*, 47 Cath. U.L. Rev. 1271, 1281-82 (1998), the

18 ⁴Intervenors' analogy to the term "jury" in the Constitution (Woo/Martin Opp. at 12)
19 shows (1) that they are having an extremely difficult time trying to make a claim without relying
20 upon federal law, and (2) that they are unfamiliar with the history of qualifications for jurors. The
21 Fourteenth Amendment did not give women the right to vote or to serve as jurors. *Ex parte Mana*,
22 178 Cal. at 215. Women in California did not have the right to be jurors until after the 1911
23 constitutional amendments giving them the right to vote and hold office. *Id.* at 216. Women in
24 Massachusetts did not have the right to serve on a jury until after the Nineteenth Amendment gave
all women the right to vote. *In re Opinion of the Justices*, 130 N.E. 685, 686 (Mass. 1921). The
prohibition of excluding women from juries in the case Intervenors cited, *Taylor v. Louisiana*, 419
U.S. 522 (1975), arose under federal law.

25 ⁵Intervenors assert that William Eskridge, Jr. has described "various religious, cultural,
26 and legal traditions in which same-sex relationships have been treated as marriages."
(Woo/Martin Opp. at 6, n.15.) However, as is evident by the quotation of Dr. Eskridge in the text
27 of Intervenors' brief, he repeatedly used "same-sex unions" as the equivalent of "same-sex
28 marriage." (*Id.* at 6.) Moreover, the unreliability of Dr. Eskridge's historical analysis was
thoroughly described in Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate As*
Historian of Same-Sex Marriage, 47 Cath. U.L. Rev. 1271 (1998).

1 evidence of same-sex “marriage” in Africa involves a powerful woman taking a “wife.” The
2 “female husband” would take a young girl as a “wife” “in order to have her produce a male heir”
3 or ‘for company’ or ‘to do errands.’” *Id.* at 1282. Such relationships did not include sexual
4 relations between the women. *Id.* Thus, the African same-sex “marriages” in “certain African
5 traditional societies” are not what Defendants are seeking from this Court.

6 Intervenor’s argument that “the legal definition of marriage” has changed over time in
7 California again confuses the essential or universal element of marriage with its legal variables or
8 incidences—its regulation. (Woo/Martin Opp. at 6-10.) They cite no definition of marriage in
9 support of their arguments, but simply refer to legislative changes in the regulation of marriage.⁶
10 The Legislature has always had the authority to enact regulations regarding marriage. *See In re*
11 *Gregorson’s Estate*, 160 Cal. 21, 24 (1911) (Legislature “may fix the conditions under which the
12 marital status may be created or ended, as well as the effect of an attempted creation of that
13 status”). The fact that the Legislature has exercised its prerogative has not changed the universal
14 meaning of marriage.

15 Neither California nor the common law ever included the ideal of “for life” as an essential
16 element or requirement of marriage. (*Cf.* Woo/Martin Opp. at 7-8, arguing that the “for life”
17 definition of marriage has changed.) Divorce was possible at common law, and the first California
18 legislature included a provision regarding divorce in the statutes. *Baker v. Baker*, 13 Cal. 87, 90-91
19 (1859) (citing common law rules for divorce and 1851 statute). The universal and unchanged
20 aspect of marriage in all the dictionaries and legal opinions the Fund cited in its Opening Brief is
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⁶Intervenor’s cite one judicial departure from a common law *regulation*, *People v. Statley*,
91 Cal. App. 2d Supp. 943 (1949), where the Appellate Department of the Superior Court of Los
Angeles County rejected a common law defense to a misdemeanor (that her husband ordered her
to do it). (*See* Woo/Martin Opp. at 9 & n.31). Notwithstanding Intervenor’s implication, *Statley*
did not overrule the Supreme Court’s decision in *Sesler*, 78 Cal. at 486-87, which relied upon a
common law rule to draw the sensible conclusion that a man’s statement to his wife, in his home,
about a third party does not constitute “publication” for purposes of slander. The *Sesler* Court did
not rule that “the civil existence of the wife is merged in that of her husband.” *See id.* at 487; *cf.*
Woo/Martin Opp. at 9, n.30. Instead, the Court explicitly referred to California’s departure from
that rule. *Id.* at 486-87.

1 that marriage is the union of a man and a woman.⁷ That is the meaning of the term “marriage” in
2 the California Constitution and in all the legal opinions referring to a fundamental right to
3 marriage.

4 **C. Civil Versus Religious Marriage Is Not a Meaningful Distinction**

5 The meaning of “marriage” is not dependent upon what any religion says it is. The
6 universal meaning has been established for thousands of years. (See Fund Open. Br. at 2-3.)⁸
7 There simply is no meaningful difference between “civil” and “religious” marriage because a
8 relationship is not a legal “marriage” unless it complies with the civil law. Moreover, notwith-
9 standing Intervenor’s assertion that this case cannot effect “the constitutionally protected right[s]
10 of religious bodies,” their citation of *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983),
11 demonstrates their recognition that this case could have a significant impact. In *Bob Jones*, the
12 Court upheld the withdrawal of tax exempt status from the University because of racial
13 discrimination. If marriage in California were redefined to include same-sex couples, there would
14 inevitably be an effort to remove tax exempt status from churches, seminaries or other educational
15 institutions that refused to recognize “marriages.” Cf. *Russell J. Upton, Bob Jonesing Baden-*
16 *Powell: Fighting the Boy Scouts of America’s Discriminatory Practices by Revoking Its State-*
17 *Level Tax-Exempt Status*, 50 Am. U.L. Rev. 793 (February 2001).

18 **II. DEFENDANTS CANNOT RELY UPON THE FUNDAMENTAL RIGHT TO MARRY**

19 **A. Defendants Have Not Carefully Described a Fundamental Liberty Interest**

20 Defendants cannot avoid the fact that “marriage” means the union of a man and a woman.
21 Despite Intervenor’s claim that they “do not seek a right to ‘same-sex marriage,’” but “seek to
22 exercise the same fundamental right to marry that is available to same-sex couples,” (Woo/Martin
23

24 ⁷Even the American dictionary the Intervenor’s cite at note 13 of their Opposition, THE
25 AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1073 (2000), gives “[t]he legal
26 union of a man and woman as husband and wife” as the primary meaning. While the fact that a
27 few dictionaries are beginning to redefine “marriage” is evidence of societal change, it has no
bearing on the meaning of “marriage” in the Constitution or case law.

28 ⁸The Fund’s quotation of *Baker v. Nelson*, 191 N.W.2d 185, 186 (1971), *appeal dismissed*
for want of a substantial federal question, 409 U.S. 810 (1972), about marriage being “as old as
the book of Genesis” refers to the age of marriage, not a religious basis for it.

1 Opp. at 20), they simply do not qualify for the right without redefining it. *Goodridge*, 798 N.E.2d
2 at 965; *Fourie*, Case No. 232-2003, par. 27. All of the fundamental right to marry cases mean a
3 right of a man and a woman to marry. (Fund Open. Br. at 4-7.) There is no independent body of
4 California case law addressing the fundamental right to marry apart from federal law. (*Id.* at 5-6
5 & n. 5.) Thus, the fact that Defendants base their claims on the California Constitution (*see*
6 *Woo/Martin Opp.* at 21; *City Opp.* at 16) is not decisive because it has not been independently
7 interpreted to create a fundamental right to marriage different from that under federal law.
8 Moreover, it certainly has not been construed to redefine marriage.

9 Defendants fail to address the controlling California authority on how to determine whether
10 a right is fundamental, *Dawn D. v. Superior Ct.*, 17 Cal. 4th 932, 941 (1998). (*See* Fund discussion
11 in Opening Brief at 7.) Instead, Intervenorors rely on *Planned Parenthood v. Casey*, 505 U.S. 833,
12 847 (1992), to argue that the Fund’s view of the fundamental right is too narrow. (*Woo/Martin*
13 *Opp.* at 21.) However, *Planned Parenthood* does not state the test for California or federal law.
14 *See Dawn D.*, 17 Cal. 4th at 941; *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).
15 Defendants make no effort to carefully describe the liberty interest at issue, show how it is a
16 fundamental right, or show how the asserted interest finds support in California’s history, traditions
17 or the conscience of the people. *See id.* The carefully described liberty interest cannot be
18 “marriage,” for the term does not include same-sex couples without redefining it. Thus, the right,
19 “carefully described,” must be “same-sex marriage.” There obviously is no support in California’s
20 history, traditions, or the conscience of its people for “same-sex marriage.” *See Cal. Const. Art.*
21 *1, § 21; Cal. Fam. Code §§ 300, 301, 308.5.*

22 The City’s assertion that *Turner v. Safley*, 482 U.S. 78 (1987), held that “marriage, even
23 when entirely devoid of the capacity for sexual intimacy or procreation, is a fundamental right that
24 cannot be denied” is inaccurate. (*See City Opp.* at 35.) In *Turner*, the issue was not whether
25 inmates could be married—many obviously were. The question was whether imprisonment
26 eliminated the fundamental right of marriage during the course of the internment. *Turner*, 482 U.S.
27 at 94-95. The Court concluded that prisoners in general retain the right. *Id.* at 96. At the same
28

1 time, however, the Court distinguished an earlier case holding that the right to marry could be
2 withheld from inmates imprisoned for life. *Id.* (referring to *Butler v. Wilson*, 415 U.S. 953 (1974)).

3 Contrary to Intervenor’s claim that “the Constitution requires that the State must explain
4 why . . . the right to marry must exclude same-sex couples,” (Woo/Martin Opp. at 20), the State
5 has no burden whatsoever in the absence of a fundamental right. Absent a fundamental right to
6 “same-sex marriage,” same-sex couples have no due process claim. Moreover, the South Africa
7 case of *Fourie* has no bearing on whether the fundamental right to marriage should be redefined
8 to include same-sex couples. The fundamental right to marriage under the Due Process Clause is
9 based on the U.S. Constitution. (Fund Open. Br. at 4-8.)

10 **B. *Baker v. Nelson* Is Controlling on the Federal Fundamental Right to Marry**

11 While Defendants repeatedly say that their claims are grounded in the California
12 Constitution, not the federal one, they also repeatedly cite federal case law in support of their
13 arguments. Because *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want*
14 *of a substantial federal question*, 409 U.S. 810 (1972), is decisive on the meaning of the
15 fundamental right to marriage under federal law, its continuing vitality is relevant to this case.

16 *Baker* rejected the specific claims presented in a jurisdictional statement to the U.S.
17 Supreme Court. The jurisdictional statement claimed a fundamental right to “same-sex marriage”
18 based on sex discrimination, privacy, due process and equal protection. (Fund Open. Br. at 20.)
19 The sex discrimination claim expressly relied upon the U.S. Supreme Court’s seminal case of *Reed*
20 *v. Reed*, 404 U.S. 71 (1971). The dismissal for want of a substantial federal question foreclosed
21 other courts from coming to an opposite conclusion on those issues. *Mandel v. Bradley*, 432 U.S.
22 173, 176 (1977); Fund Open. Br. at 19.

23 *Baker v. Nelson* is still controlling authority on federal law. *Lockyer v. City and County*
24 *of San Francisco*, 33 Cal. 4th 1055, 1126 (2004) (Kennard, J., concurring in part and dissenting
25 in part).⁹ There have been no doctrinal developments in federal law in regard to marriage for same-

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27 ⁹Intervenor’s reliance upon *Jones v. Bates*, 127 F.3d 839, 852 n. 13, *rev’d*, 131 F.3d 843
28 (9th Cir. 1997), for the proposition that “extensive intervening doctrinal developments” makes
reliance upon a summary reversal improper is unavailing. Although the court referred to
intervening developments, it then distinguished the alleged controlling authority to show that it

1 sex couples. (Fund Open. Br. at 21.)¹⁰ Although the bankruptcy court in *In re Kandu*, 315 B.R.
2 123, 137-38 (Bankr. W.D. Wash. 2004), refused to apply *Baker* to a Fifth Amendment challenge
3 to a federal statute, it readily concluded that there is no fundamental right to marriage for same-sex
4 couples. *Id.* at 140 (undertaking fundamental rights analysis and concluding that there is no
5 fundamental right to “same-sex marriage”).

6 **C. The Interracial Marriage Cases Do Not Help Defendants**

7 *Perez v. Sharp*, 32 Cal. 2d 711 (1948), and *Loving v. Virginia*, 388 U.S. 1 (1967), were
8 grounded in the fundamental right of a man and woman to marry. Neither case redefined or
9 expanded that fundamental right. Instead, both cases rejected miscegenation laws based on their
10 incompatibility with the Fourteenth Amendment’s purpose of eradicating racial discrimination—
11 contrary to the claims that the laws treated the races equally, the Courts recognized that the laws
12 were designed to denigrate African-Americans. (Fund Open. Br. at 12-17.) Defendants have no
13 response to the fact that interracial marriage was valid at common law, and was restricted solely
14 by statute. (*See id.* at 12-14.) Nor do they have any explanation of how the express decisions
15 based upon the Fourteenth Amendment create a far different right under the California
16 Constitution. (*See id.* at 17.) The unavoidable reality is that Defendants’ desire to redefine
17 marriage has nothing in common with the statutory prohibitions of certain marriages that were
18 overturned in *Perez* and *Loving*. Redefining “marriage” would constitute a fundamental rewriting
19 of California’s marriage jurisprudence.

20
21 was not controlling. *Id.* Moreover, the case was reversed.

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23 ¹⁰The City’s cases regarding summary disposition do not favor rejecting *Baker* as a binding
24 precedent. (City Opp. at 15-16.) *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 173
25 n.33 (3rd Cir. 2002), stands for the unremarkable proposition that a summary disposition should
26 not be taken to have affirmed reasoning in a lower court’s opinion that is counter to other
27 Supreme Court authority. In *Lecates v. Justice of the Peace Ct.*, 637 F.2d 898, 904 (3rd Cir. 1980),
28 the court held that “the precedential value of a summary disposition by the Supreme Court is to
be confined to the exact facts of the case and to the precise question posed in the jurisdictional
statement.” The questions posed in the *Baker* jurisdictional statement are on point for this
litigation. (Fund Open. Br. at 20.) *Indianapolis Airport Auth. v. American Airlines*, 733 F.2d
1262, 1272 (7th Cir. 1984), *abrogated by Northwest Airlines, Inc. v. County of Kent, Mich.*, 510
U.S. 355 (1994), has no bearing on the issue of summary dismissals.

1 The City suggests that only animus or bigotry could cause a person to think that marriage
2 should be limited to opposite-sex couples. (City Opp. at 17.)¹¹ In other words, according to the
3 City every major culture in recorded history has shown animus or bigotry toward same-sex
4 relationships. If so, that bigotry is unlike every other kind of prejudice or bias that has ever
5 existed—Defendants have pointed to no other alleged bigotry that was universal or that was
6 embodied in the very meaning of the term “marriage.” The prejudice against interracial marriage
7 was never unanimous even in America. (Fund Open. Br. at 15.) The California Supreme Court
8 recognized that interracial marriages were in fact “marriages” in its 1875 decision in *Pearson v.*
9 *Pearson*, 51 Cal. 120, 124-25 (1875). The reality is that marriage always has been related to
10 procreation. There is a fundamental difference between same-sex and opposite-sex couples in
11 regard to the reason for the existence of the institution.

12 **D. “Privacy” Adds Nothing to the Fundamental Right to Marriage**

13 Privacy is not an additional basis for a claim of a fundamental right to marriage, but the
14 essential basis. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“the right to marry is part of
15 the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause”).
16 Accordingly, Defendants’ claims of a right to marry under the right to privacy does not have any
17 independent weight apart from the arguments addressing a fundamental right to marriage. (Fund
18 Open. Br. at 34.) Moreover, the privacy provision of the California Constitution “is to be
19 interpreted and applied in a manner consistent with the probable intent of the body enacting it: the
20 voters of the State of California.” *Hill v. National Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 16
21 (1994). Defendants have pointed to nothing in either the language or the official ballot pamphlet
22 suggesting that the voters intended the Privacy Initiative to redefine marriage to include same-sex
23 couples. *See id.* (explaining that the language of the measure itself or the ballot pamphlet are the
24 appropriate sources of determining the meaning of the amendment).

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27 ¹¹The City also suggests that the Fund’s arguments are grounded in religion. (City Opp.
28 at 18.) Of course, all it can cite is the unfounded religious arguments against interracial marriage,
since the Fund has not grounded any arguments in religion. Regardless, the source of the Fund’s
beliefs is no more relevant to the validity of its arguments than is the source of the City’s opposing
beliefs.

1 **III. DEFENDANTS DO NOT HAVE AN EQUAL PROTECTION CLAIM**

2 **A. Defendants Cannot Meet the Threshold Requirement**

3 The Court need not decide whether it should consider Respondent’s equal protection
4 arguments under rational basis or strict scrutiny because same-sex couples are not similarly situated
5 with opposite-sex couples in regard to procreation. As the California Supreme Court has held,
6 “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that
7 the state has adopted a classification that affects two or more similarly situated groups in an
8 unequal manner.” *In re Eric J.*, 25 Cal. 3d 522, 530 (1979). The Courts of Appeal have stated the
9 prerequisite as follows: “At the threshold, the proponent of an equal protection claim must
10 demonstrate that the challenged state action results in disparate treatment of persons who are
11 similarly situated with regard to a given law’s legitimate purpose.” *People v. Raszler*, 169 Cal.
12 App. 3d 1160, 1166-67 (1985); *see also, e.g., People v. Moore*, 226 Cal. App. 3d 783, 786 (1991)
13 (same); *People v. Caddick*, 160 Cal. App. 3d 46, 50-51 (1984) (same); *In re Strick*, 148 Cal. App.
14 3d 906, 912 (1983) (same); *cf. Johnson v. Robison*, 415 U.S. 361, 382-83 (1974) (no invidious
15 discrimination where two groups “are, in fact, not similarly circumstanced”).

16 These cases establish two crucial issues in regard to Defendants’ equal protection
17 arguments. First, the burden of establishing that they are similarly situated is on the proponents
18 of the equal protection claim or argument. Second, the proponents must establish that they are
19 similarly situated “with respect to the purpose of the law.” *Strick*, 148 Cal. App. 3d at 913
20 (emphasis original). Defendants have made no effort to establish the legitimate purpose behind
21 California’s recognition of marriage. Nor have they tendered an explanation of why the Court
22 should reject the legitimate purpose of the marriage laws, based on California law, that the Fund
23 has offered.

24 The fact that the California cases articulating the threshold requirement for an equal
25 protection claim involve criminal laws does not detract from Defendants’ burden here. Indeed,
26 courts must be more sensitive to equal protection claims in the criminal context: “In this context,
27 where the power of the State weighs most heavily upon the individual or the group, we must be
28 especially sensitive to the policies of the Equal Protection Clause” *McLaughlin v. Florida*,

1 379 U.S. 184, 192 (1964). Thus, Defendants have the same burden as the proponents of equal
2 protection claims in *Eric J., Raszler, Moore, Caddick, and Strick*.

3 **1. Procreation is the only interest that justifies State regulation of**
4 **marriage**

5 It is well established in California case law and that of other jurisdictions that procreation
6 is the reason the State regulates marriage. (Fund Open. Br. at 21-23.) Defendants have no
7 response to the case law establishing that procreation is the reason for the State's regulation of
8 marriage.¹² (City Opp. at 27-32; Woo/Martin Opp. at 13-19.) Instead, Defendants merely argue
9 that the Court should not consider the interest identified, or that there is no compelling interest or
10 rational basis in excluding same-sex couples from the benefits of marriage. Defendants fail to
11 identify any countervailing state interest in regulating marriage.

12 Defendants have no authority for their innovative theory that Plaintiffs cannot articulate the
13 State's legitimate valid interest in recognizing marriage if the Attorney General has failed to do so.
14 (City Opp. at 28; Woo/Martin Opp. at 13-14.) Moreover, the legitimate interest in regulating
15 marriage that the Fund has identified is not based upon conjecture. (Woo/Martin Opp. at 13,
16 referring to "hypothetical justification.") Rather, it is based on more than a century of California
17 case law. (Fund Open. Br. at 21-22.) While Justice O'Connor's concurring opinion in *Lawrence*
18 *v. Texas*, 539 U.S. 558, 585 (2003), provides some support for the Attorney General's stated
19 interest in "preserving the traditional institution of marriage," that is not an interest that has been
20 articulated in California law. Nor is it the reason for governmental recognition of marriage
21 throughout time and across cultures. The Attorney General's failure to identify the State's
22 legitimate interest in recognizing marriage cannot prevent this Court from accepting the interest
23 that is well-grounded in California law—procreation.

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26 ¹²Rather than address the case law granting annulments because of a party's inability to
27 procreate, Intervenor's simply cite California Family Code § 2210 in support of the proposition
28 that "the ability or intent to procreation [sic] is also not a grounds for annulment of a marriage."
(Woo/Martin Opp. at 19.) The Fund discussed case law holding that procreation is so important
that a misrepresentation about the ability or willingness to procreate justifies an annulment. (Fund
Open. Br. at 21-22.)

1 The State's interest in procreation cannot be assumed to be to an interest in giving
2 incentives to procreate. (*Cf. Woo/Martin Opp.* at 16.) Most opposite-sex couples of child bearing
3 age will procreate if they do not take deliberate steps to avoid doing so. Thus, the incentives
4 provided by the State in regard to procreation must be to encourage opposite-sex couples to do
5 their procreation within marriage.

6 Defendants create a straw man when they try to turn the interest in procreation into an
7 alleged interest in excluding same-sex couples from marriage. (*City Opp.* at 31; *Woo/Martin Opp.*
8 at 16.) Even the legislative history of California Family Code § 300 that Defendants rely upon to
9 show animus in reality confirms the State's interest in procreation. (*City Request for Judicial*
10 *Notice in Support of its constitutional challenge, Ex. E* (referring to historical development of
11 marriage to ensure presence of father "when a woman produces children").) While the State's
12 interest in recognizing marriage may be described in different ways, the interest remains limited
13 to procreation. If the interest becomes anything else, there likely can be no legitimate interest in
14 limiting the relationship to two unrelated persons.

15 **2. Defendants are not similarly situated in regard to the legitimate**
16 **purpose of the marriage laws**

17 The unassailable fact is that same-sex couples are not similarly situated in regard to the
18 State's interest in steering procreation into marriage. It is couples that procreate, not individuals.
19 No same-sex couple can procreate. In general, opposite-sex couples of childbearing age will
20 procreate, and same-sex couples will not. "[L]aw and policy are based on the general rather than
21 the idiosyncratic . . ." *Irizarry v. Board of Ed.*, 251 F.3d 604, 608 (7th Cir. 2001) (rejecting equal
22 protection challenge to domestic partner benefits policy for same-sex couples only). Because
23 same-sex couples are not similarly situated in regard to the State's legitimate interest in
24 recognizing marriage, Defendants cannot meet the threshold requirement for asserting an equal
25 protection defense or claim. *See Eric J.*, 25 Cal. 3d at 530; *Raszler*, 169 Cal. App. 3d at 1166-67;
26 *Moore*, 226 Cal. App. 3d at 786; *Caddick*, 160 Cal. App. 3d at 50-51 (1984); *Strick*, 148 Cal. App.
27 3d at 912.

28 There is no invidious discrimination in California's marriage laws. *See Johnson v.*
Robison, 415 U.S. at 382-83. Accordingly, the Court need not address Defendants arguments

1 about sex or sexual orientation discrimination.¹³ California’s marriage laws are constitutional as
2 a matter of law.

3 **B. The Marriage Laws Do Not Discriminate Against Either Sex¹⁴**

4 Defendants cite no case where a statute that treats men and women equally has been
5 deemed sex discrimination.¹⁵ Instead, they rely primarily upon the *Perez* and *Loving* cases to argue
6 that there can be invidious discrimination even where there is equal treatment. (Woo/Martin Opp.
7 at 23-24.) However, the treatment was not equal in the interracial marriage cases or in the other
8 racial discrimination cases Defendants cite.¹⁶ It is impossible to posit what the outcome might have
9 been in *Perez* and *Loving* if the laws had not been designed to discriminate against African
10 Americans. (Cf. Woo/Martin Opp. at 24, criticizing “logical conclusion” of distinction.) Despite
11 the fact that both *Perez* and *Loving* involved statutes purportedly treating both races the same, the
12 Courts recognized that the statutes were designed to denigrate African Americans. *Perez*, 32 Cal.
13 2d at 719-20, 731-32; *Loving*, 388 U.S. at 11-12. This violated the very purpose of the Fourteenth
14 Amendment, which was enacted to eliminate the race discrimination that arose from slavery.

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17 ¹³Intervenors’ argue that “a statute that excludes an entire class of persons from access to
18 [marriage] . . . must be subject to meaningful judicial scrutiny and review.” (Woo/Martin Opp.
19 at 10.) However, redefining marriage, as they request, to include any two unrelated persons would
20 exclude the entire class of bisexual persons from marrying the multiple persons of their choice,
and the entire class of incestuous couples from marrying the relative of their choice. Intervenors
are not arguing for “equality,” but for a different place for drawing the line on who may marry.

21 ¹⁴Intervenors accuse Plaintiffs of “contend[ing] that the State should be allowed to
22 discriminate on the basis of sex and sexual orientation and infringe the Woo/Martin Parties’
23 fundamental rights” (Woo/Martin Opp. at 18.) The invalidity of this characterization is
24 shown by their later statement that “the Campaign and the Fund erroneously contend that Family
Code Section 300 does not discriminate on the basis of sex” or “sexual orientation.” (*Id.* at 22,
29.)

25 ¹⁵The City does not respond to the Fund’s arguments, but simply refers to its briefs in its
26 coordinated proceeding against the State. (City Opp. at 19.)

27 ¹⁶Intervenors’ analogy of requiring “courts to give custody of male children to fathers and
28 female children to mothers” is inapt. (Woo/Martin Opp. at 24.) Such a rule would arbitrarily
violate the parent’s liberty “interest in the care, custody and companionship” of a child. *In re*
Adoption of Kay C., 228 Cal. App. 3d 741, 748 (1991) (citation omitted).

1 *Perez*, 32 Cal. 2d at 719; *Loving*, 388 U.S. at 10; *see also McLaughlin*, 379 U.S. at 191-92. Unlike
2 the miscegenation laws, the marriage laws do not discriminate against or denigrate men or women.
3 The fact is that the marriage laws treat men and women equally in regard to any legitimate purpose
4 of state recognition of marriage.¹⁷

5 The recent dictum in the Court of Appeal decision in *Holguin v. Flores*, 122 Cal. App. 4th
6 428, 439 (2004), does not constitute a holding that the marriage laws constitute sex
7 discrimination.¹⁸ (*See Woo/Martin Opp.* at 25-26, citing *Holguin*.) “Dicta is not authority upon
8 which [this Court] can rely.” *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal. App. 4th 820, 850
9 (1997).

10 Intervenors apparently object to the notion that the sexes are not fungible, that men and
11 women have inherent differences. They appear to be arguing that any recognition of a difference
12 in the sexes constitutes sex discrimination. (*Woo/Martin Opp.* at 26-29.) That is not the law.
13 (*Fund Open Br.* at 26-27.)

14 C. The Marriage Laws Do Not Prohibit Homosexual Persons from Marrying

15 The marriage statutes do not address sexual orientation. No one inquires about sexual
16 orientation prior to issuing a marriage license. There is no allegation that any homosexual person
17 (as opposed to couple) has been prevented from marrying.¹⁹

18
19 ¹⁷Defendants step beyond the line of appropriate advocacy when they quote *Connerly v.*
20 *State Personnel Bd.*, 92 Cal. App. 4th 16 (2001), and add “or sexes” in brackets. (*See Woo/Martin*
21 *Opp.* at 25; *City Reply to State* at 12 (and mis-citing page numbers).) The City extends that
22 inappropriate action by adding “or sex-based” to a quotation of *Loving*. (*City Reply to State* at
23 12-13.) All of that quoted language is limited to race discrimination, despite Defendants’ wishes.
24 Moreover, the statute at issue in *Connerly* did not treat men and women the same.

25 ¹⁸The claim in *Holguin* was that the statute permitting certain domestic partners to sue for
26 wrongful death constituted sex discrimination because it did not permit unmarried opposite-sex
27 couples who had never married to sue. The issue of whether the marriage laws constitute sex
28 discrimination was not before the court. Thus, the discussion of sex discrimination was dicta.
See Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1539 n.11 (1997) (discussion of issue “never
directly presented” was dicta); *Cullinan v. McColgan*, 80 Cal. App. 2d 976, 979 (1947) (same).

¹⁹Although Intervenors rely upon the individual nature of civil rights in discussing sex
discrimination, (*Woo/Martin Opp.* at 23-24), they assert rights as couples in discussing sexual
orientation discrimination. (*Id.* at 29.) Absent an ability to rely upon *Perez* or *Loving*, they have

1 Intervenors attempt to rely upon miscellaneous comments by the California Supreme Court
2 distinguishing same-sex and heterosexual couples to claim that the marriage laws classify on the
3 basis of sexual orientation. (Woo/Marin Opp. at 29-30.) However, neither *Sharon S. v. Superior*
4 *Ct.*, 31 Cal. 4th 417, 442 (2003), nor *Lockyer v. City and County of San Francisco*, 33 Cal. 4th
5 1055, 1126, 1128, 1135 (2004), expressly stated that the domestic partnership laws or the marriage
6 laws classify based on sexual orientation. Moreover, even if the comments could be construed to
7 have stated that the respective laws classified on sexual orientation, they would be dicta because
8 that issue was not squarely before the Court. *See supra*, n.18. Dicta does not constitute controlling
9 authority. *Mattco Forge*, 52 Cal. App. 4th at 850.

10 Intervenors cite no authority for the proposition that the Court should examine the reason
11 for the Legislature refusing to change long-standing law, rather than the initial purpose behind the
12 marriage laws. (Woo/Martin Opp. at 31.) Ironically, Intervenors acknowledge that the reason the
13 Legislature clarified the laws in 1977 was in response to efforts by same-sex couples to redefine
14 marriage. (*Id.*, “the legislative history clearly demonstrates that, in the face of attempts by same-
15 sex couples to marry, the Legislature deliberately chose to reinforce and further codify the already
16 existing discriminatory exclusion of lesbian and gay couples from the right to marry.”) If the City
17 and Intervenors wish to attack the purpose behind the marriage laws, they should attack the purpose
18 that formed the “already existing discriminatory exclusion of lesbian and gay couples” prior to
19 1977. There clearly was no discriminatory purpose in the concept of marriage as a union of a man
20 and a woman that existed in California even before it became a state.

21 Reliance upon cases referring to a “change of conditions,” such as *Perez*, cannot help
22 Defendants’ arguments. (*See Woo/Martin Opp.* at 32.) There has been no change in conditions
23 that would make same-sex couples similarly situated in regard to the legitimate purposes of the
24 State’s recognition of marriage. Same-sex couples remain unable to procreate as a couple.

25 **D. Procreation Is a Compelling Interest for the Marriage Laws**

26 For the reasons explained in the Fund’s Opening Brief, the marriage laws are not subject
27 to strict scrutiny. Nevertheless, the marriage statutes would pass muster even if subjected to this

28 _____
no claim.

1 strict test.²⁰ The State’s only valid interest in regulating marriage is its relationship to procreation.
2 That interest has been recognized as compelling. *See Adams v. Howerton*, 469 F. Supp. 1119, 1124
3 (C.D. Ca. 1980) (“it seems beyond dispute that the state has a compelling interest in encouraging
4 and fostering procreation of the race and providing status and stability to the environment in which
5 children are raised”), *aff’d on other grounds*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 111
6 (1982). The rejection of procreation as a valid state interest in *Goodridge*, 798 N.E.2d at 963 was
7 based on a misconception of the interest as an attempt to “increase the number of couples choosing
8 to enter into opposite-sex marriages in order to have and raise children.” Moreover, the lack of a
9 substantive discussion of constitutional standards in *Goodridge* limits its usefulness as a guide in
10 other cases.

11 The extension of the right to marry to all opposite-sex couples, regardless of their desire
12 or intent to procreate, is narrowly tailored and the least restrictive means of directing procreation
13 into marriage. Numerous courts have recognized that it would violate the right to privacy under
14 *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), to inquire into a couple’s intent, desire, or
15 ability to procreate prior to issuing a marriage license. *See, e.g. Adams*, 469 F. Supp. at 1124-25;
16 *Standhardt v. Superior Ct.*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003), *rev. denied* (May 25, 2004).
17 Accordingly, a state could not define marriage more narrowly without infringing other
18 constitutional rights.²¹

22 ²⁰Intervenors criticize the Fund and the Campaign for not discussing *Children’s Hospital*
23 *and Medical Center v. Belshe* [sic], 97 Cal. App. 4th 740, 769 (2003), and *Homes v. California*
24 *National Guard*, 90 Cal. App. 4th 297 (2001), in regard to heightened scrutiny. (Woo/Martin
25 Opp. at 34, n.57.) There was no reason to address either case, since neither appears to discuss
26 heightened scrutiny in the context of a sexual orientation claim. Indeed, *Children’s Hospital* only
27 refers to sexual orientation once, and that in passing.

28 ²¹The City’s suggestion that the State could penalize persons who bear children outside
of marriage is not well grounded. (City Opp. at 21.) In view of the plethora of cases addressing
the right to privacy in regard to procreative decisions, a law penalizing a decision not to marry
prior to bearing a child would likely be deemed a violation of the right to privacy. *Cf. Hill*, 7 Cal.
4th 49 (procreation is an “autonomy-based privacy right[]”).

1 **E. Procreation Is a Rational Basis for the Marriage Laws**

2 Procreation likewise meets the rational basis test. Notwithstanding the City’s efforts to
3 portray the rational basis test as restrictive, (City Opp. at 25), it is quite lenient and well
4 established:

5 “[T]he burden of establishing the unconstitutionality of a statute rests on him who
6 assails it, and . . . courts may not declare a legislative discrimination invalid unless,
7 viewed in the light of facts made known or generally assumed, it is of such a
8 character as to preclude the *assumption* that the classification rests upon some
rational basis within the knowledge and experience of the legislators. A statutory
discrimination will not be set aside as the denial of equal protection of the laws if
any state of facts *reasonably may be conceived* to justify it.”

9 *York v. Cadenaz*, 9 Cal. 4th 1133, 1152 (1995) (citations omitted; emphasis added). The City’s
10 effort to limit the rational basis to an actual legislative purpose is inconsistent with its recent
11 successful argument to the Court of Appeal. In *City and County of San Francisco v. Flying*
12 *Dutchman Park, Inc.*, 122 Cal. App. 4th 74, 82 (2004), the City argued that it is “incumbent on the
13 court to determine if there might be *any* rational basis justifying” a provision, regardless of whether
14 the City had “established facts explaining its reasoning.” (Emphasis by court.) The Court of
15 Appeal described the rational basis test as follows:

16 “[T]he Equal Protection Clause is satisfied so long as there is a plausible policy
17 reason for the classification, the legislative facts on which the classification is
18 apparently based rationally may have been considered to be true by the
governmental decisionmaker, and the relationship of the classification to its goal
is not so attenuated as to render the distinction arbitrary or irrational.”

19 *Id.* at 83 (citation omitted).

20 The relationship between procreation and marriage is well established in California’s case
21 law. (Fund Open. Br. at 21-22.) It is at least reasonably conceivable that the State recognizes
22 marriage and grants benefits to married couples in order to steer procreation into marriage. *See,*
23 *e.g., Standhardt*, 77 P.3d at 462-63; *Adams*, 469 F. Supp. at 1124-25; *Singer v. Hara*, 522 P.2d
24 1187, 1195 (Wash. Ct. App. 1974); *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C. App.
25 1995). Even if reasonable minds may differ, the Court must uphold the challenged statute. A state
26 of facts may reasonably be conceived to justify the law where other courts have deemed the
27 rationale valid.

28

1 **IV. SECTION 308.5 RELATES TO CALIFORNIA MARRIAGES**

2 Intervenor incorrectly assert that the purpose of Proposition 22 is only to protect against
3 recognition of same-sex marriages created outside of California. (Woo/Martin Opposition at 36-
4 42). While Proposition 22 (codified as Family Code § 308.5) was created to prohibit California’s
5 recognition of same-sex marital-type relationship entered into in other states, it was also intended
6 to prevent the redefinition of marriage in California.

7 Section 308.5’s unambiguous language states that “[o]nly marriage between a man and a
8 woman is valid or recognized in California.” This voter-enacted initiative is meant to ensure that
9 the institution of marriage will always remain between a man and a woman whether created in-state
10 or out-of-state, unless the voters decide otherwise. In other words, the definition of marriage as
11 provided in Family Code § 300 will remain the law unless the voters amend § 308.5. Thus, § 308.5
12 prevents the Legislature from amending California’s statutes concerning the fundamental principles
13 underlying the institution of marriage. *See* Cal. Const., Art. II, Sec. 10(c). Intervenor are simply
14 wrong in asserting that “[t]he only ‘Limit on Marriages’ that Proposition 22 put into effect was an
15 exemption of out-of-state marriages” (Woo/Martin Opp. at 37.) Proposition 22 also limits
16 the Legislature.

17 The California Supreme Court has established rules of construction for analyzing voter-
18 enacted initiatives. Generally, the same principles that govern statutory construction govern
19 initiative measures as well. *People v. Rizo*, 22 Cal. 4th 681, 685 (2000). In *Rizo* the Court
20 explained that “in interpreting a voter initiative . . . we turn first to the language of the statute,
21 giving the words their ordinary meaning.” *Id.* at 685 (citation omitted). Considering the ordinary
22 meaning of the words, §308.5 states that only marriage between a man and a woman is valid in
23 California, and only marriage between a man and a woman can have legal recognition in
24 California. The reference to “valid” obviously refers to marriages within the state, and the
25 reference to “recognition” refers to same-sex “marriages” from out-of-state. This is consistent with
26 the case law discussed by Intervenor (Woo/Martin Opp. at 38-39), and with the Supreme Court’s
27 recent discussion of the question of the validity of marriage licenses issued to same-sex couples
28

1 in San Francisco. *See Lockyer*, 33 Cal. 4th at 1072 (referring to “uncertainty as to whether certain
2 marriage certificates issued in California are valid under state law”).

3 Indeed, a California trial court recently came to the same seemingly obvious conclusion—
4 that § 308.5 applies to in-state as well as out-of-state marriages. *Knight v. Schwarzenegger*, 2004
5 WL 2011407 (Sacramento Superior Court, September 8, 2004) (See RJN Ex. C.) In that case, the
6 court found that “the plain language of Family Code section 308.5 means that California cannot
7 recognize a ‘marriage’ between same-sex partners that has taken place in another state, and cannot
8 enact [a] law authorizing same-sex couples to enter ‘marriage’ in California unless first approved
9 by the voters.” *Id.* at * 6. This conclusion is plainly right. If section 308.5 could prohibit
10 recognition of marriages of same-sex couples from out-of-state, but allow marriages for same-sex
11 couples in-state, a whole host of constitutional infirmities would arise, spanning from equal
12 protection to privileges and immunities. Courts must construe statutes “in a fashion that avoids
13 rendering [their] application unconstitutional.” *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*,
14 20 Cal. 4th 1178, 1216 (1999). Accordingly, this Court must reject Intervenors’ arguments that
15 section 308.5 applies only to out-of-state marriages.

16 **V. THE COURT, AT DEFENDANTS’ REQUEST, ESTABLISHED THE TIMING FOR PLAINTIFFS’**
17 **MOTIONS**

18 By its actions, a party may waive the notice requirement under California Civil Procedure
19 § 437c. *See Carlton v. Quint*, 77 Cal. App. 4th 690, 697 (2000) (holding that because the
20 defendant responded to the summary judgment motion, he had waived the notice requirement).
21 Because the Court established the timing for the Plaintiffs’ motions at Defendants’ request, and
22 because it was Defendants who insisted on an expeditious hearing, they have effectively waived
23 section § 437c’s notice requirement. Defendants cannot plausibly argue that they were improperly
24 surprised by the Fund’s evidentiary submissions in opposition to their own extensive submissions.

25 The Defendants have made extraordinary efforts to prevent the Fund and Campaign from
26 participating in this litigation in any capacity. They have argued that there is not a live controversy
27 between the parties, that the Plaintiffs do not have standing, and that the Plaintiffs’ declarations
28 cannot be considered, while placing before the Court a substantial number of declarations. The
Defendants now argue that the Plaintiffs’ motions for summary judgment cannot be considered by

1 the Court because notice of the motion was not received 75 days before the hearing date. This
2 argument is inconsistent with Defendants' former zeal to quickly reach a judgment on all of the
3 claims in the coordinated proceedings, which include the Plaintiffs' declaratory judgment actions
4 in this case. Furthermore, it should be noted that after Interveners' motion to dismiss was denied
5 on October 14, 2004, the Defendants continued to agree to the briefing schedule even though they
6 knew Plaintiffs would need to move the court on their claims for declaratory relief.

7 The Defendants have waived the 75 day notice requirement under § 437c by expressly
8 advocating for and agreeing to the briefing schedule with the full knowledge of Plaintiffs'
9 declaratory judgment claims. With the full agreement of the Defendants, this Court set, and the
10 Defendants expressly agreed to, the December 22, 2004, hearing on the merits for all claims in the
11 coordinated proceedings. At no time did the Defendants object to the scheduling order but rather
12 fully supported its brevity. The Defendants' feigned surprise at the Plaintiffs' motions for
13 summary judgment, and their claim they are entitled to more time to respond are not well
14 grounded.

15 At the hearing on Interveners' motion to dismiss, Interveners argued that if the Fund and
16 the Campaign were allowed to participate in these proceedings, they would submit evidence that
17 would cause delay. *See* Transcript of Hearing for Interveners' Motion to Dismiss, October 15,
18 2004 at p. 11-12, line 26-28, 1-2. But, in connection with their opening briefs on the merits,
19 Defendants themselves submitted mounds of evidence to the Court that they are asking the Court
20 to consider without having it subjected to discovery. *See* Declarations accompanying City's
21 Opening Brief, September 2, 2004. The Fund does not believe the Court needs to consider any
22 evidence in order to rule that the California marriage laws are constitutional. However, the Fund
23 also believes that if the Court is going to consider evidence, it should consider the Fund's evidence
24 as well as that proffered by Defendants in the coordinated proceedings.

25 The reality is that it is now Defendants who are seeking to delay the ultimate determination
26 of this litigation, or to have the Court consider only one-sided evidence. (*See* City Opp. at 4 n.3,
27 "while it would be premature to consider plaintiffs' evidence here, the City's evidence is properly
28

1 before the Court in the coordinated case.”)²² The unmistakable implication is that the Defendants
2 would like the Court to consider their evidence, without subjecting it to discovery, but consider
3 opposing evidence only if it is first subjected to discovery. That is not an appropriate procedure
4 for resolving such a contentious and controversial social issue.²³

5 Plaintiffs included motions with their opening briefs so that the Court could rule on their
6 requests for relief. Defendants should not have been surprised that Plaintiffs would give the Court
7 a procedural vehicle for granting relief. The Fund is certainly willing to have the credibility of its
8 evidence tested, and would be anxious to conduct discovery on the evidence that the City has filed.
9 But as the Fund has consistently argued, this Court need not look at any evidence in order to hold
10 that California’s marriage laws are constitutional. See Fund Opening Brief at 23 lines 15-21.
11 Thus, the Court need only look to the pleadings and the law to make its determination, without
12 considering the evidence submitted by either the City or the Campaign and Fund Petitioners. The
13 Fund would not object, however, if the Court continues the hearing on the merits to permit
14 discovery. If the Defendants are truly concerned about taking discovery, they should have
15 requested a continuance.

16 Intervenor’s continuing efforts to prevent Plaintiffs from participating in the consolidated
17 litigation contributes not to the resolution of the questions at issue, but to the impression that they
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19
20 ²²Defendants are seeking a writ of mandate under CCP §§ 1085 and 1087, a form of relief
21 designed to compel an official to perform a non-discretionary, ministerial act. The Supreme Court
22 has already held, however, that a public official has a non-discretionary, ministerial duty to issue
23 marriage licenses only to opposite-sex couples that qualify under the state’s marriage statutes.
24 *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055 (2003). Thus, a public official
25 cannot have a non-discretionary, ministerial duty to issue marriage licenses to same-sex couples
26 when such action would be in direct violation of *Lockyer* and the object of mandamus relief. It
is obvious that no such non-discretionary duty exists. Defendants otherwise ill-advised decision
to pursue writ relief after *Lockyer* is calculated to get a quick decision on their evidence and
prevent the Court from considering anything in opposition. Defendants should not be allowed to
pursue writ relief for this purpose.

27 ²³It should be noted that the Plaintiffs responded to the Defendants’ brief and multiple
28 expert and lay declarations only 20 days after learning that they would remain parties to the
litigation. Defendants had 29 days—the time frame to which they had agreed—to respond to
Plaintiffs’ fewer number of declarations.

1 are unwilling to allow the issues to be fully and fairly litigated. That is particularly troubling in
2 a case where the Attorney General has failed to even articulate the most fundamental interest the
3 State has in regulating the age-old institution of marriage.

4 If the Court chooses not to consider Plaintiffs motions as motions for summary judgment,
5 it may still consider them as motions for judgment on the pleadings. Cal. Civ. Proc., § 438. There
6 are no facts in dispute that would prevent the Court from granting Plaintiffs declaratory relief.

7 **VI. THE COURT PROPERLY FOUND PLAINTIFFS' CLAIMS JUSTICIABLE IN DENYING THE**
8 **MOTION TO DISMISS**

9 **A. Plaintiffs' Claims Are Not Moot**

10 This Court rightly denied the Defendants motion to dismiss for mootness at the October
11 26, 2004 hearing, reading the Plaintiffs claim as broad enough to state a claim for relief. As this
12 Court stated, "There is a controversy for sure." Transcript of Hearing for Intervenors' Motion to
13 Dismiss, October 15, 2004 at p. 25 line 22. Nonetheless, the Defendants wish to re-litigate this
14 issue.

15 A clear controversy has existed between the Plaintiffs and Defendants with regard to the
16 validity California's marriage statutes since the beginning of this litigation. See *Blair v. Pitches*,
17 5 Cal.3d 258, 269 (1971) ("if an action meets the requirements of section 526a, it presents a true
18 case or controversy"). Previous briefing noted that the Plaintiffs' original complaint requested a
19 permanent injunction to prohibit the Defendants from issuing marriage licenses to same-sex
20 couples, and a ruling that marriages between any couple other than an unmarried male and an
21 unmarried female are invalid. As repeatedly argued by the Defendants in originally opposing
22 Plaintiffs' claims, such relief necessarily requires a declaration that California's marriage statutes
23 are constitutional.

24 The *Lockyer* order mandating that the City Defendants comply with the laws does not
25 render Plaintiffs' claim for injunctive and declaratory relief moot. Even if it would otherwise have
26 been moot, the City's ongoing efforts to overturn Plaintiffs' current victory preserves a live
27 controversy between Plaintiffs and Defendants over whether the City must permanently issue
28 marriage licenses solely to opposite-sex couples. If the Defendants were to consent to a permanent
injunction banning the issuing of marriage licenses to same-sex couples, and the Court were to

1 enter that injunction, there would no longer be a case or controversy—but that would also prevent
2 the Defendants from attacking the validity of the marriage statutes in the coordinated proceedings
3 because their claims would have become moot. *See Estate of Jackson*, 2 Cal. 2d 283, 284-85
4 (1935) (where same issue adversely decide in final judgment, party may not collaterally attack in
5 another proceeding). Thus, so long as Defendants are challenging the constitutionality of the
6 marriage statutes, and Plaintiffs have not obtained a permanent injunction or a final judgment that
7 any further marriage licenses issued, or marriage solemnized, for a same-sex couple is invalid, the
8 case and controversy remains.

9 **B. Plaintiffs Have Standing**

10 The Fund has organizational standing to bring this suit to protect the collective interests of
11 its members. California courts view favorably the right of public interest groups, such as the Fund,
12 to bring suit as “members of the public and in the public interest.” *McKeon v. Hastings College*
13 *of Law*, 185 Cal. App. 3d 877, 893 (1986) (citations omitted). “Of late courts have noted a
14 ‘marked accommodation of formerly strict procedural requirements of standing . . . where matters
15 relating to the social and economic realities of the present-day organization of society’ . . . are
16 concerned and a corresponding ‘relaxation of former, more rigid standing requirements in order
17 to permit an assertion of a ‘public’ cause of action.’” *Id.* These rules give the public a voice in the
18 litigation when the public interest is at stake. *See also Residents of Beverly Glen, Inc. v. City of*
19 *Los Angeles*, 34 Cal. 3d 117, 121-22 (1973) (California Supreme Court found that a homeowner’s
20 association had standing to assert environmental claims that were affecting the neighborhood).

21 Here, the Fund represents the interests of the proponents and campaign organizers of the
22 Fund who had direct involvement in the initiative’s enactment and now have a direct interest in
23 the continued validity of Proposition 22 and the other marriage statutes that it reinforces. This
24 interest is greater than any general interest held by the public at large, and is directly adverse to,
25 and directly implicated and threatened by, the City’s current litigation position that the measure
26 is unconstitutional, or alternatively, that it does not apply to locally-licensed marriage
27 notwithstanding its plain language. If the City were to succeed in its action against the State, the
28

1 Fund's and its members efforts in supporting and promoting Proposition 22 will have been
2 nullified.

3 California Code of Civil Procedure § 526a permits suits against government actors to
4 restrain illegal expenditures. The purpose of § 526a is to enable challenges to unauthorized
5 government action that would go unchallenged absent taxpayer standing. *Blair v. Pitchess*, 5 Cal.
6 3d 258, 267-68 (1971). "California courts have consistently construed section 526a liberally to
7 achieve this remedial purpose." *Id.* A non-profit organization does not itself need to be a taxpayer.
8 *Warth v. Seldin*, 422 U.S. 490, 515 (1975); see also *Brotherhood of Teamsters & Auto Truck*
9 *Drivers v. Unemployment Ins. Appeals Bd.*, 190 Cal. App. 3d 1515, 1521-22 (1987) (adopting and
10 applying *Warth*); cf. *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal. App. 4th 1473
11 (1998) (non-profit public interest organization successfully brought suit to enforce Proposition
12 103). Plaintiffs have associational taxpayer standing to represent the interests of the members of
13 the Fund. "Even in the absence of injury to itself, an association may have standing solely as the
14 representative of its members." *Warth*, 422 U.S. at 511. Since the Fund has approximately 15,000
15 members, some of whom reside and pay taxes in San Francisco, there can be no doubt that
16 Plaintiffs have standing to seek declarative and injunctive relief. The unsettled status of Plaintiffs'
17 demand for a permanent injunction provides ongoing standing to pursue that ultimate relief. The
18 City is continuing its efforts to extend marriage licenses to same-sex couples, albeit through the
19 courts.

20 Plaintiffs also have standing to pursue their declaratory judgment associated with the
21 injunctive action. The California Supreme Court has ruled that § 526a permits standing for
22 declaratory judgments as well:

23 While [the] language [of § 526a] clearly encompasses a suit for injunctive relief,
24 taxpayer suits have not been limited to actions for injunctions. Rather, in
25 furtherance of the policy of liberally construing section 526a to foster its remedial
26 purpose, our courts have permitted taxpayer suits for declaratory relief, damages
27 and mandamus. To achieve the "socially therapeutic purpose" of section 526a,
28 "provision must be made for a broad basis of relief."

Van Atta, Jr. v. Scott, 27 Cal. 3d 424, 449-50 (1980) (footnotes and citation omitted), unrelated
proposition superceded by statute, as recognized in *In re York*, 9 Cal. 4th 1133, 1143 n.7 (1995).
Thus, the Fund has standing to continue its request for declaratory relief regardless of whether the


1 City has ceased its illegal expenditure of taxpayer funds. The Fund has not yet obtained a
2 declaratory judgment that the prior expenditures were illegal, and the City has not conceded that
3 they were.

4 **CONCLUSION**

5 For the foregoing reasons, the Court should enter a declaratory judgment that California
6 Family Code §§ 300, 301, and 308.5 are in compliance with the California Constitution's due
7 process, privacy, and equal protection provisions.

8
9 Dated: December 14, 2004

10 Respectfully Submitted,
11 Alliance Defense Fund

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13 By: 
14 Glen Lavy
15 Attorney for Plaintiffs

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