Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

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

RESPONDENTS' ANSWER TO PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND'S PETITION FOR REHEARING

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INTRODUCTION

Pending before this Court is an extraordinary Petition by the Proposition 22 Legal Defense and Education Fund (hereinafter "Fund") for rehearing in a case that has received more attention from this Court than virtually any decision in its recent history. The Fund's Petition asks this Court to "grant hearing on the limited issue of the remedy," or alternatively to modify the remedy by staying the Court's decision until after the November, 2008 election. (Petn. for Rehg., at p. 1.) The Court should deny the Petition for numerous reasons.

In its recent decision, the Court unanimously held that the Fund lacks standing to participate as a party in the *Marriage Cases*. The Fund's Petition does not question that holding, nor is the Fund able to point to any way in which it or its members might be harmed by the Court's determination that the right to marry applies to same-sex couples—a determination that in no way limits the rights of different-sex couples who are married, or who may wish to marry in the future. Therefore, the Fund is not situated differently from any other organization with a political interest in the Court's decision, and this Court need not even consider the Fund's Petition.

Moreover, the Fund's Petition does not assert that any aspect of this Court's substantive ruling was incorrect or should be reconsidered. Instead the Fund simply urges the Court to stay its decision – thereby continuing the denial of fundamental rights and equal protection of the law to couples who already have waited far too long to enjoy the same right to marry that is now enjoyed (and will continue to be enjoyed) by different-sex couples. The ostensible reason for doing so is because of the possibility that in the future voters may amend the state Constitution in an attempt to reverse the current decision. The Fund claims that, if that were to happen, the

combination of this Court's ruling and that amendment could create various forms of uncertainty for same-sex couples.

That wholly speculative possibility of harm *to others who do not seek rehearing or a stay* furnishes no basis for rehearing or for continuing to deny Petitioners their constitutional rights. If the state's Constitution is amended, and if that amendment itself is determined to be lawful, there will be time enough at that point to determine the consequences of that amendment. For the moment, however, this Court's carefully considered decision should be allowed to go into effect in accordance with the ordinary rules that govern such matters so that couples who have been waiting patiently for many years to enter into the cherished institution of marriage in this state may proceed to do so without further delay.

Nor is there any need to "clarify" the remedy ordered by the Court's decision. That remedy is straightforward and state officials have already made clear that they understand the constitutional requirements explained by this Court's decision and have taken all necessary steps to comply with those constitutional requirements when this Court's decision becomes final. The California Office of Vital Records, on the letterhead of the California Department of Public Health, already has created new California marriage forms and has instructed all county clerks in the state to use those forms and to comply with the constitutional requirements set forth in this Court's decision beginning June 17, 2008, after this Court's decision is expected to be final. (See Letter from Janet McKee, Deputy State Registrar and Chief, Office of Vital Records, to County Clerks and County Recorders (May 28, 2008) [hereinafter "OVR Letter"], a true copy of Janet McKee's letter is included as Exhibit 1 to Petitioners' Request for Judicial Notice.)

In sum, the Petition for Rehearing is without merit. The Court should deny the Petition summarily and expeditiously so that this Court's

carefully considered and important decision can be given effect without further delay.

ARGUMENT

I. THIS COURT NEED NOT CONSIDER THE FUND'S ARGUMENTS IN SUPPORT OF REHEARING BECAUSE THE FUND DOES NOT CHALLENGE THIS COURT'S HOLDINGS THAT THE FUND LACKS STANDING AND THAT ITS LAWSUIT IS MOOT.

The Court should deny the Fund's petition for rehearing without even reaching its merits because the Court has concluded (and the Fund's Petition does not dispute) that the Fund is not a proper party to this litigation and that its lawsuit (one of the six Marriage Cases consolidated on appeal) is moot. As such, the Fund is not situated differently from any other political organization. As this Court explained in its decision:

> [W]e agree with the Court of Appeal that, absent a showing by the Fund that it possesses a direct legal interest that will be injured or adversely affected (which the Fund acknowledges has not been established here), the Fund's strong ideological disagreement with the City's views regarding the scope or constitutionality of Proposition 22 is not sufficient to afford standing to the Fund to maintain a lawsuit to obtain a declaratory judgment regarding these legal issues. (See, e.g., *Newland v. Kizer* (1989) 209 Cal.App.3d 647, 657, 257 Cal.Rptr. 450; *Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662-663, 118 Cal.Rptr. 100.) In this respect, the Fund is in a position no different from that of any other member of the public having a strong ideological or philosophical disagreement with a legal position advanced by a public entity that, through judicial compulsion or otherwise, continues to comply with a contested measure.

(*In re Marriage Cases*, May 15, 2008, No. S147999, Slip Opinion [hereinafter Opn.]) The Court went on to hold, unanimously, that the Fund's lawsuit became moot "once this court's decision in *Lockyer* [*v. City*

and County of San Francisco (2004) 33 Cal.4th 1055] granted the mandamus relief sought by the Fund ... in [its] previously filed lawsuit[] against the City and its officials." (Opn. at p. 21; accord Concurring and Dissenting Opn. of Baxter, J. at p. 3 [Chin, J. concurring]; Concurring and Dissenting Opn. of Corrigan, J., at p. 1, fn. 1].)

While the Fund's views (considered as those of an amicus curiae) may have "broaden[ed] [the Court's] perspective on the issues raised by the parties," (Opn. at 22, fn. 10 (citing *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14)), the Fund has no basis for challenging any further determination of this Court on the merits. The Fund is no more entitled to petition for rehearing with regard to the Court's remedy than any other political organization or amicus curiae. Even if the Fund had sought rehearing of the Court's determinations on standing and mootness, however, the Court's rulings on those issues were demonstrably correct. The Court therefore should not consider any argument in the Fund's petition for rehearing. Rather, the only parties who are in a position to seek rehearing are the Attorney General and the Governor, neither of whom has sought such relief.[1]

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[1] The Fund cannot rely on any interest in the impending ballot initiative to claim standing. The Fund is not the sponsor of the proposed initiative, and therefore is not situated differently from any other group of California residents for purposes of complaining about supposed effects of permitting the Court's ruling to go into effect. (Cf. *City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1038 [upholding denial of intervention by the Fund in two of these six consolidated marriage cases and noting that "the Fund itself played no role in sponsoring Proposition 22"].) Further, to the extent the Fund seeks to petition the Court on behalf of government officials or the public or same-sex couples who might marry, the Fund has no right to petition for rehearing on their behalf. It is well settled that concern for the public interest without more does not confer standing or revive a moot case. (See *Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 38 [rejecting plaintiff's attempt to

II. THE FUND'S PETITION FOR REHEARING IMPROPERLY DISREGARDS RULE 8.532(B)(1).

The Fund's Petition for Rehearing asks the Court to stay its judgment for nearly six months, "pending the outcome of the November 4, 2008 election." (Petn. for Rehg., p. 1.) That request is improper under California Rule of Court 8.532(b)(1) which permits the Court to extend the date that a decision becomes final for up to 60 days, or a maximum total of 90 days from the date of decision. Rule 8.532(b)(1) provides that "a Supreme Court decision is final 30 days after filing unless: (A) The court orders a shorter period; or (B) Before the 30-day period or any extension expires the court orders one or more extensions, not to exceed a total of 60 additional days." Even in cases where a reviewing court has made a substantive mistake, the finality period prescribed by the rules is inflexible. (*See Sparrow's Real Estate Service, Inc. v. Appellate Dept. of Super. Ct. of Kern County* (Cal.App.1965) 236 Cal.App.2d 739, 743 ["There must obviously be a limitation on the right to ask for further action on the part of a court. If it were not for this principle, there might well be no end to litigation and 'the law's delay would be even more apparent.'"] Given the limits imposed by this Court's rules, there is no basis for the Court to grant a stay that would extend through the November 2008 election.

Indeed, given that the Fund has not challenged this Court's ruling that the Fund lacks standing, and in light of the continuing harm that any delay in implementation of this Court's ruling would impose on thousands of same-sex couples who wish to marry (see Section IV below), this Court should deny the Fund's Petition without issuing any extension of the date on which this Court's decision will become final under Rule 8.532(b)(1).

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revive moot case by invoking the "public interest," where plaintiff claimed that thousands of Californians could be affected].)

This conclusion is buttressed by the facts that the California Office of Vital Records has accepted this Court's constitutional determinations regarding the language that is stricken from Family Code section 300 and regarding section 308.5's invalidity and that the State Registrar has informed all county clerks that new California marriage forms will be ready for use in all counties by June 17, 2008. (See OVR Letter, at p. 1.)[2]

III. THE FUND HAS NOT DEMONSTRATED ANY BASIS FOR REHEARING OR A STAY.

Rehearing is an extraordinary and rarely granted remedy. It is particularly implausible in the present case, which was one of the most elaborately briefed cases in the Court's history, and produced slip opinions in excess of 170 pages. Thus, it should not be surprising that the Fund's Petition fails to articulate a single error in the Court's substantive analysis, let alone any error that was based on a failure to consider or correctly apply any pertinent points of law. Instead, the Petition's purported justification for preventing the decision from becoming effective in the ordinary course is limited to claims that the remedy ordered by the Court is somehow unclear and that this Court should issue a stay of the decision because of the possibility of a future amendment to the state Constitution that might lead to potential problems, not for the Fund or its members, but for same-sex couples, such as Petitioners. Even ignoring the standing and jurisdictional

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[2] The authorities cited by the Fund in support of its argument for modification of this Court's remedy merely stand for the obvious proposition that a court can modify a remedy in light of the public interest. (Petn. for Rehg., pp. 9-10 [citing *Market St. Ry. Co. v. Railroad Commission* (1946) 28 Cal.2d 363; *Perine v. Lewis* (1900) 128 Cal. 236; *United States v. Morgan* (1939) 307 U.S. 183].) The public interest here is best served by enforcement of the constitutional rights of tens of thousands of same-sex couples living in the State of California.

issues noted above, the Petition is meritless for a variety of reasons, as explained below.

A. The Possibility Of A Ballot Initiative Does Not Provide A Valid Basis For A Stay Of The Court's Decision.

This Court should not stay its decision that barring lesbian and gay couples from marriage violates the California Constitution based upon speculation that a proposed voter initiative that purports to authorize such a bar may appear on the ballot or may be enacted. First, as the Fund acknowledges, the Secretary of State has not yet verified enough signatures to certify that this proposed initiative will even appear on the November 2008 ballot. (Petn. for Rehg., pp. 4-6.) Second, even if were the measure to qualify, the mere pendency of such a measure would not support the Fund's argument that the Court should stay its judgment based on deference to "the people's voice." (Petn. for Rehg., p. 14.) A proposed initiative requires support from only eight percent of voters from the last gubernatorial election in order to qualify for the ballot. (Cal. Const. art. II, sec. 8, subd. (b).) Such a small percentage of the state's population does not represent "the people's voice," nor can the mere qualification of an initiative override the current provisions of the California Constitution or justify freezing the law for six months in its current unconstitutional state.

Third, even if the initiative were to qualify for the ballot, there is no reason to assume that it will be approved. Indeed, the most recent Field poll, released today, shows that a majority of California voters *oppose* amending the state Constitution to bar marriage between gay and lesbian couples and specifically would oppose an initiative to do so were such a measure to qualify for the November 2008 ballot.[3] Such rejection would be

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[3] See DiCamillo and Field, Growing Trend in Support of Allowing Same-Sex Marriage in California (The Field Poll Release No. 2268) (May

in line with recent actions in other states. One of the most recent proposed state constitutional amendments seeking to ban marriage (as well as other forms of relationship recognition) for same-sex couples was rejected by the voters in Arizona on November 7, 2006. (Ariz. Sect. of State 2006, General Election for Prop. 107, "Protect Marriage Arizona" (Unofficial Results, Nov. 28, 2006) <www.azsos.gov/results/2006/general/BM107.htm> [as of May 28, 2008].) A similar attempt to amend the Massachusetts Constitution to reverse the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003), failed in the Massachusetts legislature in 2007 (Frank Phillips, "Legislators vote to defeat same-sex marriage ban", Boston Globe, June 14, 2007 (June 14, 2007) <http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_1.html> [as of May 28, 2008].).

Moreover, California voters regularly reject the *great majority* of *constitutional amendments proposed by initiative*. Indeed, during the last five years, California voters have rejected seventeen out of the eighteen proposed initiative constitutional amendments that have appeared on the

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28, 2008) at pp. 6-7, http://www.field.com/fieldpollonline/subscribers/Rls2268.pdf [as of May 28, 2008]. In the Field poll, one group of voters was asked: "Do you favor or oppose changing the California State Constitution to define marriage as between a man and a woman, thus barring marriage between gay and lesbian couples." Fifty-four percent (54%) opposed such a change, and only forty percent (40%) favored such a change. (*Id.* at p. 7.) Another group of voters was asked: "There may be a vote on this issue in the November election. Would you favor or oppose having the state constitution prohibit same-sex marriage, by defining marriage as only between a man and a woman?" Fifty-one percent (51%) opposed such a prohibition, and only forty-three percent (43%) favored such a prohibition. (*Ibid.*) In each group, six percent (6%) expressed no opinion. (*Ibid.*)

ballot and have adopted only one such initiative amendment, approving the funding of stem cell research.[4]

Furthermore, if the Fund's argument were correct, this Court would be barred from issuing final judgments in cases dealing with any of the topics of other initiatives that may qualify for the November 2008 ballot based on the mere possibility that the underlying law in a particular area might change.[5] The adoption of such a rule would constitute an unwarranted and untenable abdication of judicial responsibility. Indeed, under the Fund's reasoning, this Court's judgment in these *Marriage Cases*

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[4] See Secretary of State's official declarations of vote results on statewide ballot measures, available at the following website pages: http://www.sos.ca.gov/elections/sov/2008_primary/12_official_declaration.pdf (for February 5, 2008 election, reporting rejection of all three proposed initiative constitutional amendments on the ballot); http://www.sos.ca.gov/elections/sov/2006_general/sum_amended.pdf (for November 7, 2006 election, reporting rejection of all five proposed initiative constitutional amendments on the ballot); http://sos.ca.gov/elections/sov/2005_special/sov_pref_pgxii_official_result_props.pdf (for November 8, 2005 election, reporting rejection of all three proposed initiative constitutional amendments on the ballot); http://www.sos.ca.gov/elections/sov/2004_general/sov_pref20_official_results_props.pdf (for November 2, 2004 election, reporting rejection of five proposed initiative constitutional amendments and enactment of one initiative constitutional amendment); http://www.sos.ca.gov/elections/sov/2004_primary/vote_summaries.pdf (for March 2, 2004 election, reporting rejection of sole proposed initiative constitutional amendment on the ballot); http://www.sos.ca.gov/elections/sov/2003_special/sum.pdf (for October 7, 2003 election, reporting rejection of sole proposed initiative constitutional amendment on the ballot).

[5] Currently, for example, initiatives that have qualified for the November ballot or that currently are having their signatures counted or verified address topics such as the treatment of farm animals; prisoner rehabilitation and visitation programs; California's "three strikes" law; parental notification before termination of a minor's pregnancy; sentencing, parole and rehabilitation of non-violent offenders; and victims' rights. (See Ballot Measure Update as of May 12, 2008, available at http://www.sos.ca.gov/elections/elections_j.htm#2008SPrimary.)

could be stayed indefinitely because even if the current initiative were to fail in November, it is possible that a similar measure regarding marriage might qualify for the *next* ballot, and then future ballots.

There is no precedent to support the Fund's request for such a stay. The Fund's only purported authority does not support the Fund's position. (See Petn. for Rehg., p. 13 [citing *Lucas v. Forty-Fourth General Assembly of the State of Colo.* (1964) 377 U.S. 713 (hereafter *Lucas*)]). In *Lucas*, the U.S. Supreme Court struck down, under the Equal Protection Clause of the Fourteenth Amendment, an initiative amending the Colorado Constitution to reapportion seats in the Colorado General Assembly. (*Lucas*, 377 U.S. at pp. 736-39.) The *Lucas* plaintiffs filed suit challenging the constitutionality of Colorado's legislative districts, which had not been reapportioned for many years, in June, 1962. Confronted with the reality that two proposed amendments to the state constitution, each of which would change the state's apportionment rules in different ways, were slated to be voted on in November, 1962, the district court postponed any action on plaintiff's challenge to the existing apportionment rules until after the election.

The Fund cites *dicta* from the Supreme Court's opinion in *Lucas* for the non-controversial proposition that a federal court may "stay its hand temporarily . . . while proposed initiated measures *relating to legislative apportionment* are pending and will be submitted to the State's voters at the next election." (*Id.* at 737 (emphasis added).) That proposition, however, has no application in this case. First, the *Lucas* district court delayed deciding a constitutional issue because an impending election might fundamentally change *what the court was being asked to evaluate* under the federal Constitution. In contrast, here this Court has *already decided* the constitutional issues presented in this litigation. Furthermore, the change proposed by the initiative here would not alter the question posed to the Court regarding the current constitutionality of denying same-sex couples

equal access to marriage, but instead would change the terms of the Constitution itself. The *Lucas* dicta therefore does not support a stay here.

Second, federal cases dealing with apportionment of state legislatures, such as *Lucas,* not only raise sensitive questions regarding federal court involvement in state elections, but also raise unique practical and political concerns regarding the *conducting* of elections and the election of state officials that are absent here. The Fund's argument for rehearing or stay does not concern the *conducting* of an election, but rather the possible substantive result of the November 2008 election.

Contrary to the Fund's suggestion, implementation of this Court's ruling in the *Marriage Cases* does not raise practical complexities comparable in any way to the apportionment context. Rather, this Court in the *Marriage Cases* held that barring same-sex couples from marriage violates the due process, privacy, and equal protection guarantees of the California Constitution. By way of remedy, this Court struck the language in Family Code section 300 "limiting the designation of marriage to a union 'between a man and a woman;'" struck down Family Code section 308.5 in its entirety; and ordered "the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate our ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." (Opn. at pp. 120-121.) The State is already prepared to comply with the Court's order and has prepared new California marriage forms and ordered all county clerks to use only the new forms as of June 17, 2008, after this Court's decision becomes final. (OVR

Letter, at p. 1.)[6] Thus, in contrast to apportionment cases and other cases where implementation of a decree might require a state to take complex steps, compliance with the Court's decision in this case is straightforward.

The Fund further attempts to rely on decisions of other state courts recognizing the rights of same-sex couples. (See Petn. for Rehg., at pp. 13-14 [citing to *Goodridge v. Department of Public Health* (2003) 440 Mass. 309, 344 [hereineafter *Goodridge*], *Lewis v. Harris* (2006) 188 N.J. 415, 463 [hereafter *Lewis*], and *Baker v. State* (1999) 170 Vt. 194, 229 [hereafter *Baker*]].) But, again, its reliance is misplaced. *Goodridge*, *Lewis*, and *Baker* held that, under *other state's* laws (as opposed to under this Court's rules governing finality of its decisions), a court may temporarily stay its judgment in order permit a legislature to *implement* the court's decision where the changes required may be complex and possibly require legislative consideration. Those cases provide no support for the Fund's argument that this Court should delay enforcement of its ruling in this case, where no similar complexity is involved and where legislative action is not necessary.

In *Goodridge*, the Massachusetts Supreme Judicial Court held that barring same-sex couples from marriage violated the Massachusetts Constitution. *Goodridge*, *supra*, 440 Mass 309. Prior to that decision, Massachusetts did not formally recognize same-sex couples or provide such couples, either in whole or in part, with the rights and benefits of marriage. Accordingly, the Court stayed its decision in order to give the legislature an opportunity to implement any changes it might deem necessary in order to comply with the Court's decision. (See *Goodridge*, 440 Mass. at pp. 319, 344 [staying judgment "for 180 days to permit the Legislature to take such

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[6] The State Registrar's actions are justified by and consistent with Article 3, section 3.5, of the California Constitution given that this Court has determined that sections 300 and 308.5 are unconstitutional.

action as it may deem appropriate in light of this opinion"]). In contrast, same-sex couples in California have had available nearly all of the state-law rights, duties, and benefits of spouses since 2005 under the state's domestic partnership laws.

In *Baker* and *Lewis*, the high courts of Vermont and New Jersey, respectively, ruled that the state could not deny same-sex couples and their families the benefits and responsibilities of marriage, but declined to decide whether the state must permit such couples to marry or, in the alternative, could create a separate legal status for same-sex partners. Each court stayed its judgment in order to give the legislature an opportunity to craft and implement such a new system if it so chose. (See *Lewis*, at pp. 459-60, 463; *Baker*, at pp. 224-225.) In contrast to those decisions, this Court's decision requires only that the state cease to enforce the invalidated statutory restrictions in Family Code sections 300 and 308.5. In *Perez v. Sharp*, the only action required to implement the Court's decision was for county clerks to cease denying marriage licenses to interracial couples. *Perez v. Sharp* (1948) 32 Cal.2d 711, 712, 732. Likewise here, the only action required to implement the Court's decision is for the state to provide county clerks with appropriate forms and instructions to comply with the constitutional determinations in this Court's decision, which the California Office of Vital Records has done. (OVR Letter, at p. 1.) There is neither legal basis nor practical need for a stay.

B. The Fund's Allegations Regarding Hypothetical Legal Questions And Supposed Administrative Hardships Are Not Credible And, In Any Event, Do Not Provide A Valid Legal Basis For Staying The Court's Decision.

The Fund argues that this Court should stay its decision based on speculation that, if the proposed initiative qualifies for the ballot and passes, questions might arise as to the validity of marriages entered into by

lesbian and gay couples in California prior to the enactment of the initiative. (Petn. for Rehg., pp. 15-19.) That speculative argument provides no basis for rehearing. First, the Secretary of State has not yet determined whether the proposed initiative has qualified for the ballot; moreover, even if it were to qualify, there is no way for this Court to predict whether it is likely to pass. Mere speculation is not a valid legal basis for delaying correction of a serious constitutional harm.

Second, the Fund has not demonstrated how it could be harmed by allowing the decision to become effective, even if there were a future constitutional amendment purporting to overrule this Court's decision. Here, the only injury even suggested would be in the form of uncertainty on the part of *same-sex couples* who, of course, do not want this Court to delay the effectiveness of its decision for so much as a moment.[7]

Third, even if the initiative were to qualify, to pass, and to survive legal challenge, there would not be the level of uncertainty the Fund suggests. In contrast to the marriages addressed in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, which this Court held to be invalid because of the unauthorized issuance of licenses, there will be no ambiguity as to the validity or legal status of licenses issued or marriages entered into pursuant to this Court's ruling in these Marriage Cases. (*See* Opn. at pp. 1-2 [contrasting the legal issue in *Lockyer* with that presented in

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[7] This Court's opinion was clear that "retention of the limitation of marriage to opposite-sex couples is not needed to preserve the rights and benefits of opposite-sex couples." (Opn. at p. 117. See also *id.* at p. 72 ["our recognition that the constitutional right to marry applies to same-sex couples does not diminish any other person's constitutional rights"] *id.* at p. 116 ["the limitation is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite sex couples. Extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any rights and benefits conferred by the marriage statutes, but simply will make the benefit of the marriage designation available to same-sex couples and their children."]).

this case].) Rather, the marriages of same-sex couples entered pursuant to this Court's decision in this case will have been entered with full legal and constitutional validity.

Fourth, as the Fund correctly notes, the proposed initiative does not purport to have retroactive application. (Petn. for Rehg., p. 17). Thus, the marriages of those same-sex couples who married prior to passage of the amendment would not be affected.[8] Fifth, even if the initiative were to pass and legal questions regarding the validity of the marriages of same-sex couples who had married in the interim were to arise, the California courts and, where applicable, courts in other states, are fully capable of answering them. The mere possibility that such questions may arise or may require judicial resolution is not a reason to delay remedying a serious constitutional violation that, as this Court has recognized, "works a real and appreciable harm upon same-sex couples and their children." (Opn. at p. 117.)

Finally, as this Court noted in its decision, "the Domestic Partner Act generally affords registered domestic partners the same substantive benefits and privileges and imposes upon them the same responsibilities

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[8] In addition, the Fund's asserted concerns about the possibility of litigation in other jurisdictions regarding the validity of marriages entered in California are overstated. Same-sex couples from the United States have been able to marry anywhere in Canada, which has no residence requirement, since 2005. Likewise, same-sex couples from designated states have been able to marry in Massachusetts since 2005. Nonetheless, litigation concerning recognition of Canadian and Massachusetts marriages in other jurisdictions has been sparse. Indeed, the Fund cites to only one case, *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 50 A.D.3d 189 (2008) to support is proposition that "[t]his issue has been litigated by courts throughout the country." (Petn. for Rehg., p. 18.) In fact, New York is one of the few states in which appellate courts have addressed whether marriages of same-sex couples from other jurisdictions will be recognized for some or all purposes and an appellate court in New York decided that they should be recognized, based on comity grounds.

and duties that California law affords to and imposes upon married spouses." (Opn. at p. 44 (emphasis deleted).) Thus, even if marriages of same-sex couples were found to be invalid as a result of the initiative, the practical impact with regard to specific legal rights and duties would be significantly mitigated by the continued existence of domestic partnership protections.

The Fund also erroneously asserts that in order to marry, same-sex couples would be required to "revoke" their domestic partnerships. (Petn. for Rehg., pp. 17-18.) In fact, California's domestic partnership laws are not altered by this Court's decision, and the marriage statutes require only that a person be "unmarried" in order to marry (see Fam. Code, § 301), just as the domestic partnership statute permits persons *married to each other* (including heterosexual couples with at least one member over the age of 62) to enter into a domestic partnership with each other (see *id.*, § 297, subd. (b)(2) [stating as requirement of domestic partnership registration that "[n]either person is married to *someone else*"] [emphasis added]). The official website of the Secretary of State specifically advises that:

> The California Supreme Court decision issued on May 15, 2008 regarding same-sex marriages did not invalidate or change any of the Family Code statutes relating to registered domestic partners. Until a Notice of Termination is filed with our office, a registered domestic partnership will remain active on the California's Domestic Partnership Registry. This office will continue to process Declarations of Domestic Partnership, Notices of Termination of Domestic Partnership and other related filings as permitted by the domestic partnership law.

(Cal. Sect. of State, Domestic Partner Registry (undated) <http://www.sos.ca.gov/dpregistry> [as of May 28, 2008].) In addition, the Office of Vital Records has recognized that the domestic partnership laws do not require persons who are registered domestic partners to dissolve

their domestic partnership in order to marry one another. (See OVR Letter, at p. 1.)[9]

The Fund also asserts that, in the absence of a stay, the State may face unnecessary "administrative hardships" and "unnecessary administrative costs." (Petn. for Rehg., pp. 19-20.) Like the Fund's other arguments, this argument rests entirely on speculation and, as such, does not supply a valid legal basis for a stay. In addition, the Fund offers no specific examples or evidence of administrative "hardships" or "costs" other than the cost of creating and printing new marriage license forms. In fact, however, the State already has created new forms and directed all county clerks to use those new forms starting June 17, 2008. (OVR Letter, at p. 1.) Therefore, any cost to the state due to creating new forms, and instructing the clerks to use them, already has been incurred and will not be affected by a stay.

The Fund has provided no specific information regarding supposed hardships and costs to the state and the State has not objected regarding any such hardships or costs. This Court therefore has no basis on which to determine that such supposed hardships and costs could outweigh the serious harm worked on lesbian and gay couples and their children by the

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[9] In any event, dissolution of a domestic partnership takes a minimum of six months, whether a couple follows the same procedure as a couple seeking divorce or is able to, and chooses to, follow the summary dissolution procedure available to domestic partners in limited circumstances. (See Fam. Code § 299, subds. (b)(1), (d); Fam. Code § 2339 [stating that "no judgment of dissolution is final for the purpose of terminating the marriage relationship of the parties until six months have expired from the date of service of a copy of summons and petition or the date of appearance of the respondent, whichever occurs first"].) Therefore, even if couples were required to dissolve their domestic partnerships in order to marry, most would be unable to do so before the November election, and staying this Court's decision would serve no purpose. To be clear, however, there is no such requirement of dissolution of a domestic partnership in order to marry one's own domestic partner.

continued denial of the freedom to marry.[10] Further, it is well settled that "[a]voidance or recoupment of administrative costs, while a valid state concern cannot justify imposition of an otherwise improper classification, especially when, as here, it touches on 'matters close to the core of our constitutional system.'" (*Young v. Gnoss* (1972) 7 Cal.3d 18, 28 [citing *Castro* v. *State of California* (1970) 2 Cal. 3d 223, 242].) Therefore, even if the Fund had provided additional evidence or examples of alleged administrative hardships or costs, avoiding those costs would not justify the continued classification of Californians based on their sexual orientation in order to exclude lesbians and gay men from the fundamental right to marry.

IV. GRANTING A STAY WOULD CAUSE SERIOUS AND IRREPARABLE HARM.

In this case, as explained above, there is no cognizable harm to the Fund at all since the Court's decision has no effect upon the Fund or its members or the marriage rights of different-sex couples. By contrast, granting a stay would cause enormous harm to Respondents and to other same-sex couples who are eager to exercise the fundamental right to marry for which many of them have been yearning for literally decades.

This Court's opinion itself eloquently explains this point. This Court held that "the exclusion of same-sex couples from the designation of

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[10] See also Opn. at p. 82 (noting harm to same-sex couples in being denied "the equal dignity and respect that is a core element of the constitutional right to marry"); *id.* at pp. 101-106 (same); *id.* at pp. 103-105 noting multiple harms to same-sex couples and their children caused by continuing to deny those couples access to the term "marriage;" *id.* at p. 118 (discussing how continuing to withhold the nomenclature of "marriage" marks lesbians and gay men as "second class" citizens and sends the now-repudiated message that "it is permissible, under the law, to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.").

marriage works a real and appreciable harm upon same-sex couples and their children." (Opn. at p. 117.) The right to marry is something that same-sex couples yearn to embrace the moment it is possible for them to do so. Having waited nearly four years even since the *Lockyer* litigation, and now, at long last, having won the right to marry, same-sex couples in California should be permitted to exercise their constitutional right to marry at least as early as June 17, 2008. There is no justification for delay.

CONCLUSION

For the foregoing reasons, this Court should deny the Fund's Petition for Rehearing and permit this Court's decision to become final on June 14, 2008, with an order denying the Petition issuing no later than June 16, 2008.

Dated: May 28, 2008

Respectfully submitted,

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

Pursuant to California Rule of Court 8.520(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Answer to Petition for Rehearing, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 6,022 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: May 28, 2008

Respectfully submitted,

By: _____
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PROOF OF SERVICE

I, Norman S. Lee, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 Bush Street, San Francisco, CA 94104.

On May 28, 2008, I served the document listed below on the interested parties in this action in the manner indicated below:

RESPONDENTS' ANSWER TO PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND'S PETITION FOR REHEARING

[ ] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

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[ ] **BY FACSIMILE**: I transmitted such documents by facsimile

INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on May 28, 2008, at San Francisco, California.

Norman S. Lee

SERVICE LIST

City and County of San Francisco v. California, et al.
San Francisco Superior Court Case No. CGC-04-429539
Court of Appeal No. A110449

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Woo, et al. v. California, et al.
San Francisco Superior Court Case No. CPF-04-504038
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Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
Court of Appeal Case No. A110450

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Clinton, et al. v. California, et al.
San Francisco Superior Court Case No. 429548
Court of Appeal Case No. A110463

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No., CPF-04-503943
Court of Appeal Case No. A110651

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Campaign for California Families v. Newsom, et al.
San Francisco Superior Court Case No. CGC 04-428794
Court of Appeal Case No. A110652

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