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11 SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO  
12 STATE OF CALIFORNIA

13 Coordination Proceeding Special )  
Title (Rule 1550(b)) )  
14 **MARRIAGE CASES** )

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4365

Case No.: CGC 04-428794

15 RANDY THOMASSON and )  
CAMPAIGN FOR CALIFORNIA )  
16 FAMILIES )

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN FURTHER  
SUPPORT OF CCF'S MOTION FOR  
SUMMARY JUDGMENT**

17 )  
18 )  
19 Plaintiffs, )

20 vs. )

21 GAVIN NEWSOM, individually and )  
in his official capacity as Mayor of the )  
City and County of San Francisco, CA and )  
22 NANCY ALFARO, in her official capacity )  
as the San Francisco County Clerk, )

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

23 )  
24 Defendants. )  
25 )  
26 )  
27 )  
28 )

1 Campaign for California Families (“CCF”) submits this Memorandum of Points and  
2 Authorities in further support of its Motion for Summary Judgment on all causes of action, or  
3 alternatively, summary adjudication on each cause of action.

4 **I. INTRODUCTION**

5 It bears emphasis at the outset that “[a]s a general rule, the state may place persons in  
6 different classes and treat those classes differently so long as the classification and treatment are not  
7 arbitrary and rest on some ground of difference having a rational relationship to the object of the  
8 legislation.” *Holguin v. Flores*, 122 Cal. App.4th 428, 439 (2004). Where the law does not classify  
9 based on a suspect category, which it does not here, the question for this Court is whether there is  
10 “any reasonable basis in fact to support the legislative determination of the regulation’s wisdom and  
11 necessity?” *Terminal Plaza Corp. v. San Francisco*, 177 Cal. App.3d 892, 907 (Cal. Ct. App.  
12 1986). “As a general rule, such legislative classifications are presumptively valid.” *Id.* Recognizing  
13 the difficult (if not impossible) task before them, Defendants resort to the use of inflammatory and  
14 derogatory characterizations of those who maintain that marriage should remain as the union of one  
15 man and one woman.

16 An old maxim heard at least once in every lawyer’s career aptly describes the purpose behind  
17 these ad hominem attacks.

18 When you have the facts on your side, argue the facts. When you have the law on  
19 your side, argue the law. When neither is on your side, change the subject and  
question the motives of the opposition.

20 That is precisely what Defendants, particularly the City and County of San Francisco (the “City”)  
21 do in their papers. The City levels one attack after the other against the *motives* behind those who  
22 believe that there are legitimate reasons for continuing to define marriage as the union of one man  
23 and one woman. In an obvious effort to detract this Court’s attention from the fact that Defendants’  
24 arguments lack merit, Defendants fill their papers with pejorative descriptions of CCF and the  
25 millions in California who voted to pass § 308.5. For example, the City explains that those who  
26 believe in marriage as the union of a man and a woman adhere to “heterosexual supremacy” (City  
27

1 at 14, lines 12-14; City at 17, lines 6-7 & lines 12-14), display “animus or bigotry” (City at 17, lines  
2 16-17) and hold “deeply entrenched . . . prejudices”(City at 17 n.8, lines 26-27) that are based on  
3 “fear and animosity” (City at 34, line 15).

4         Probably the most telling reflection of the weakness of Defendants’ arguments is the City’s  
5 attack against individuals like Alan Chambers and Randy Thomas, who submitted declarations  
6 describing their choice to leave the homosexual lifestyle. (City at 31). Characterizing them as  
7 “converts”, and entirely misconstruing their declarations,<sup>1</sup> Defendants tell this Court, in essence, that  
8 Mr. Chambers and Mr. Thomas are living a lie. In particular, Defendants maintain that the thousands  
9 of individuals who have chosen to leave the homosexual lifestyle are actually “gay persons trying  
10 to conform to the ‘heterosexual lifestyle.’” (City at 31, lines 19-22). The City goes so far as to  
11 suggest that an individual who is trying to “conform to the ‘heterosexual lifestyle’” should not parent  
12 children. (City at 31, lines 19-22) (raises “serious questions about . . . the healthiness for children  
13 of being raised in a family composed of current or former gay persons trying to conform to the  
14 ‘heterosexual lifestyle.’”).

15         The fact is, individuals like Mr. Chambers and Mr. Thomas, are an insurmountable barrier  
16 to the goal of those seeking the “right” to same-sex marriage. These individuals, and the thousands  
17 others throughout the country that have left a homosexual lifestyle, demonstrate that homosexuality  
18 is *not* immutable. If, as the scientific evidence points, homosexuality is not genetic, but includes a  
19 real aspect of choice, then there is nothing unconstitutional about marriage laws that permit every  
20 man to marry a woman and every woman to marry a man.<sup>2</sup>

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22         <sup>1</sup> Contrary to the City’s characterizations of those declarations, Mr. Thomas and Mr.  
23 Chambers do not describe how “difficult and unhappy the conversion process is”; but rather, they  
24 detail how unhappy and destructive it was for them to live the homosexual lifestyle.

25         <sup>2</sup> To conclude that sexual orientation discrimination is subject to rational basis review, this  
26 Court does not need to determine whether homosexuality is immutable. Rather, the law as it  
27 currently stands is clear that an equal protection claim based on sexual orientation discrimination is  
28 subject to rational basis review. The declarations were submitted to offset Defendants’ statements  
and position that there is no dispute concerning the immutability of sexual orientation.

1 CCF is entitled to an order declaring the marriage laws constitutional based on the fact that  
2 *as a matter of law*, there is no fundamental right to same-sex marriage, the marriage laws do not  
3 invade the constitutional right to privacy of same-sex couples, the marriage laws do not discriminate  
4 on the basis of gender, and sexual orientation discrimination is subject to rational basis review.

5 **II. THIS COURT CAN AND SHOULD CONSIDER CCF'S MOTION FOR SUMMARY**  
6 **JUDGMENT.**

7 Defendants' argue that this Court cannot consider CCF's motion for summary judgment  
8 because it was not made 75 days prior to the December 22 hearing date. Defendants' maintain that  
9 this Court should either deny CCF's relief in its entirety, or treat the motion as one for judgment on  
10 the pleadings, thereby disregarding all evidence submitted by CCF in support of its motion. Contrary  
11 to Defendants' arguments, the motion is properly before the Court. What Defendants overlook is that  
12 this Court set the date for the hearing, and established the dates for CCF to file its opening papers,  
13 Defendants' to file their opposition, and CCF to file its reply. In light of the nature of the relief  
14 sought by CCF – namely, declaratory relief – it could only put the constitutionality of the marriage  
15 laws before the Court by way of a motion for summary judgment. The issue raised in CCF's  
16 summary judgment papers are identical to those raised in the papers submitted by the Woo parties  
17 and the City in their separate writ action. Both suits – the CCF suit and the Woo/CCSF suit – seek  
18 a ruling on the constitutionality of the marriage laws.

19 Indeed, because they put precisely the same issues before the Court, there is no merit to  
20 Defendants' arguments that CCF's motion must be denied because the City would like to take  
21 extensive discovery on matters raised in CCF's papers. As this Court explained in setting the  
22 December 22 hearing date, to the extent the Court can decide this matter without the need to make  
23 factual determinations, it will do so as a result of the December 22 hearing. If the Court determines  
24 that a decision cannot be made without the need for factual determinations, evidentiary matters will  
25 be decided at a subsequent hearing. CCF maintains that this Court *can* resolve this matter without  
26 the need for evidentiary determinations. Significantly, this Court can and should determinate as a



1 In particular, since 1999 CCF has been leading the battle for Californians who support traditional  
2 family values. (See March 9, 2004 Declaration of Randy Thomasson submitted in this case, at 1).  
3 CCF serves the public interest by advocating support of, among other things, California laws that  
4 define marriage as a relationship between one man and one woman. Plaintiff CCF actively  
5 campaigned for the passage of Proposition 22 (Family Code § 308.5) on behalf of constituents  
6 located throughout the State of California. CCF represents the interests of individuals across the  
7 state, including individuals who have paid real property taxes and/or other taxes to the City and  
8 County of San Francisco during the past year. CCF therefore has associational standing to maintain  
9 this suit on behalf of its constituents.

10 In fact, in recent litigation in the Superior Court of Sacramento over the constitutionality of  
11 AB 205, the court specifically found that CCF has representational capacity to maintain suit on  
12 behalf of those who voted for and supported Proposition 22, which was codified as Fam. Code §  
13 308.5. See *Thomasson v. Schwarzenegger*, case no. 03AS07035 (Sacramento Superior Court), RJN,  
14 Ex. 1. The central issue in the Sacramento litigation is whether AB 205, which was passed by the  
15 Legislature, unconstitutionally amends or takes away from the effect of Family Code § 308.5, which  
16 was a voter initiative. The Superior Court overruled defendants’ demurrers and specifically held that  
17 CCF had capacity to maintain a suit for declaratory and injunctive relief.

18 CCF plainly has associational standing to maintain this suit on behalf of its  
19 constituents. “Even in the absence of injury to itself, an association may have standing solely as the  
20 representative of its members.” *Warth v. Seldin*, 422 U.S. 490, 511 (1975).<sup>4</sup> “An association has  
21 standing to bring suit on behalf of its members when: (a) its members would otherwise have standing  
22 to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s  
23 purpose; and (c) neither the claim asserted nor the relief requested requires the participation of  
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26 <sup>4</sup> All cases have been previously cited by CCF or Defendants, and therefore already  
27 previously included in the Appendices of Non-California Authority. For that reason, CCF does not  
28 enclose another Appendix of Non-California Authority.

1 individual members of the lawsuit.” *Hunt v. Washington Apple Advertising Comm’n*, 432 U.S. 333,  
2 343 (1977). Associational standing is particularly appropriate in cases in which an association seeks  
3 declaratory or other prospective relief. *Warth*, 422 U.S. at 515. The organization must allege that  
4 its members, or any one of them, are suffering immediate or threatened injury as a result of the  
5 challenged action of the sort that would make out a justiciable case had the members themselves  
6 brought suit. *Warth*, 422 U.S. at 511.

7 The interests CCF seeks to protect in this litigation are “germane to the organizations’s  
8 purpose” and the claims asserted do not require individualized proof of the association’s  
9 constituents. Through all of its efforts, including the pending litigation in the *Thomasson v.*  
10 *Schwarzenegger* litigation concerning the scope and effect of § 308.5, CCF represents, and advocates  
11 on behalf of, those who seek to preserve traditional family values. In particular, CCF represents those  
12 individuals who passed Proposition 22 into law. CCF has a sufficient interest in the subject matter  
13 of this litigation to vigorously represent those in San Francisco and throughout the State who seek  
14 to stop Defendants’ efforts to overturn the marriage laws.

15 Contrary to Defendants’ arguments, CCF’s claims for injunctive and declaratory relief do  
16 present a live, justiciable controversy concerning the marriage laws. Defendants are continuing their  
17 efforts to have the marriage laws declared unconstitutional. CCF represents the interests of those  
18 California citizens who passed section 308.5. Just as the state has an interest in defending the  
19 constitutionality of the laws passed by the legislature, the citizenry has an interest in defending the  
20 laws passed by them. In February 2004, the City and County of San Francisco, through the Mayor  
21 and other public officials, violated the plain language of California law, and began marrying same-  
22 sex couples. CCF and the Fund commenced suit on behalf of citizens to require the City and all of  
23 its officials to comply with the marriage laws. The City still continues to press toward its goal of  
24 overturning California’s marriage laws. Those laws include § 308.5, which was passed by the  
25 electorate. CCF, representing those who voted to preserve marriage as the union of one man and one  
26 woman, seeks an order declaring the marriage laws constitutional – thereby putting an end to the

1 City's actions.<sup>5</sup>

2 **IV. THE MARRIAGE LAWS ARE SUBJECT TO RATIONAL BASIS REVIEW.**

3 **A. There Is No Fundamental Right to Marriage.**

4 Defendants refuse to acknowledge that the California Supreme Court has specifically adopted  
5 the methodology of the U.S. Supreme Court in identifying the liberty interest at stake in a  
6 constitutional challenge. That analysis requires the court to

7 make a “careful description of the asserted fundamental liberty interest.” This  
8 “careful description” is concrete and particularized, rather than abstract and general;  
9 thus in *Washington v. Glucksberg*, a case addressing a state statute forbidding  
10 assisted suicide, the high court rejected the view the interest in question was  
“whether there is a liberty interest in determining the time and manner of one’s  
death” or a “liberty to choose how to die.”

11 *Dawn D. v. Superior Court of Riverside*, 17 Cal.4th 932, 940 (1998). In this case, the careful  
12 description of the asserted liberty interest must be defined as the right to same-sex marriage. To  
13 define it as Defendants suggest – as the right to marriage, or the right to choose one’s spouse –  
14 would violate the clear mandate of the California Supreme Court. As explained in our moving  
15 papers, once the interest is properly framed as the asserted right to same-sex marriage, the Court  
16 must conclude that the right to same-sex marriage is *not* “one of our fundamental rights and  
17 liberties.” *Id.* at 940. Indeed, Defendants do not even attempt to argue that the “right” to choose to  
18 marry a same-sex partner is deeply rooted in the history, traditions and conscience of our people.  
19 Rather, their argument rests upon a conclusion by this Court to ignore the dictates of *Dawn D* by  
20 broadly defining the asserted liberty interest<sup>6</sup>

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22 <sup>5</sup> The Woo/Martin parties also argue that CCF’s motion should be denied because the relief  
23 sought by CCF has been rendered moot as a result of the decision in *Lockyer v. City and County of*  
24 *San Francisco*. Inasmuch as this Court has already decided that issue in favor of CCF, and the  
Woo/Martin parties did not seek rehearing on that motion, the issue is not properly presently before  
the Court. Therefore, CCF will not address the argument here.

25 <sup>6</sup> The Martin/Woo parties suggest that CCF is incorrect in its assertion that marriage has  
26 always been the union of a man and a woman by pointing to instances in the “Hebrew Bible” where  
27 men took more than one wife. (Woo at 4, lines 6-8 & n.3, lines 15-19). To the extent the Martin/Woo  
parties have invited a theological discussion, CCF offers this response. Those situations in the Old

1 The City also makes the remarkable argument that “the values against which this civil law  
2 institution [of marriage] can be tested in this Court are solely those of the Constitution, which may  
3 not and need not reflect so-called ‘natural law,’ religious doctrine, or any other competing value  
4 system.” The City Opp. at 14, lines 13-23. Without reference to the “natural law” and “common  
5 law”, the California Constitution has no meaning. As explained by Sir William Blackstone, “civil  
6 law is given, not to create rights, but to protect already pre-existing natural rights: The ‘primary  
7 object of law is to maintain and regulate these absolute rights of individuals.’” Blackstone  
8 Commentaries, Vol. 1 at 89. The California Constitution cannot possibly be viewed in a vacuum as  
9 Defendants’ suggest: to do so would gut the Constitution of any significance, leaving only a  
10 compilation of meaningless words. For example, the Constitution’s reference to a right of privacy  
11 means nothing if not considered in conjunction with the common law, natural law and understanding  
12 of those who put it into the Constitution. Although The City argues that this Court cannot consider  
13 any “competing value system” when deciding the scope of the privacy guarantee, what The City  
14 really means (as demonstrated by The City’s derogatory and inflammatory statements directed at  
15 those who support the continued vitality of marriage as the union of a man and a woman) is that this  
16 Court should only consider the value system of those who seek to overturn the marriage laws. *See,*  
17 *e.g.*, “This Court’s task is not to sniff out (or bow to) some transcendent, untouchable ‘definition’  
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19  
20 Testament where men took more than one wife exemplify the sinful nature of man, *not* the ideal plan  
21 for marriage created by God, and certainly not, as the Martin/Woo parties content, “the legitimacy  
22 of polygamy.” (Woo at 4, line 9). Genesis 1:27 records that “God created man in his own image, in  
23 the image of God he created him; male and female he created them.” In verse 31, it is recorded that  
24 “God saw all that he had made, and it was very good.” God did not create two men and a woman,  
25 He created one man and one woman, with the admonition to “Be fruitful and increase in number.”  
26 Gen. 1: 28. The ideal of marriage consisting of one man and one woman is reinforced in the New  
27 Testament where Paul writes in a letter to the Church in Corinth that “It is good for a man not to  
28 marry. But since there is so much immorality, each man should have his own wife, and each woman  
her own husband.” 1 Corinthians 7:1-2. The Martin/Woo parties misconstrue the significance of  
what they have quoted from the Bible. That men took more than one wife does not demonstrate the  
legitimacy of polygamy; to the contrary, those situations epitomize the sinful nature of man – the  
tendency to do things that are in defiance of God’s ideal in order to satisfy our desires. Indeed, it is  
because of the sinfulness of mankind and our inability to live a life wholly pleasing to a perfect God,  
that Christ offered himself as a living sacrifice for our sins.

1 of marriage” (City at 14, lines 12-14); “[P]laintiffs’ arguments against equal marriage rights are  
2 grounded in heterosexual supremacy . . . .” (City at 17, lines 6-7); “Indeed, to the extent that there  
3 is any meaningful distinction between white supremacy and plaintiffs’ adherence to ‘heterosexual  
4 supremacy,’ it lies in the fact that the latter retains a certain degree of social acceptability, whereas  
5 the former does not.” (City at 17, lines 12-14); “Like plaintiffs here, many proponents and defenders  
6 of antiscegenation laws similarly resisted charges that those laws displayed animus or bigotry.”  
7 (City at 17, lines 16-17); “In both cases, deeply entrenched popular prejudices have been codified  
8 as law to needlessly impede otherwise eligible couples from expressing their love and commitment  
9 through marriage.” (City at 17 n.8, lines 26-27); “Hopefully one day soon, these same supremacist  
10 rationalizations, now used to defend the restriction of marriage to heterosexual couples, will appear  
11 just as transparently discriminatory to the majority as they already do to the excluded minority.”  
12 (City at 18, lines 16-19); “[W]hen Anita Bryant and Phyllis Schlafly were on the rampage . . . .”  
13 (City at 29 n.16, lines 24-25); States that it raises “serious questions about . . . the healthiness for  
14 children of being raised in a family composed of current or former gay persons trying to conform to  
15 the ‘heterosexual lifestyle.’” (City at 31, lines 19-22) (“so called ‘converted’ homosexuals (line 16)).

16 The fact is that every law is based on someone’s value system. For Defendants to suggest that  
17 this Court should ignore all “competing value systems” and the natural law in deciding what the  
18 California Constitution requires only demonstrates the radical nature of the relief sought.<sup>7</sup> The case  
19 law is clear that the asserted liberty interest must be defined as the “right to same-sex marriage” and  
20 that the inescapable conclusion is that there is no right to same-sex marriage.

21 **B. The Marriage Laws Do Not Violate Any Right to Privacy Same-sex Couples**  
22 **May Have.**

23 Defendants’ privacy argument appears to be that preventing same-sex couples from marrying  
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25 <sup>7</sup> Ironically, Defendants do not hesitate in asking this Court to look to the “competing value  
26 systems” represented by the Canadian and South African courts. The Woo/Martin parties in  
27 particular rely heavily on the recent South African and Canadian same-sex marriage decisions.

1 affects their right to make intimate personal decisions or their right to conduct personal activities  
2 without intrusion by the state. A party alleging a violation of the state guarantee of privacy, found  
3 in Article I, section I of the California Constitution, “must establish each of the following: (1) a  
4 legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances;  
5 and (3) conduct by defendant constituting a serious invasion of privacy.” *Hill v. National Collegiate*  
6 *Athletic Assn.*, 7 Cal.4th 1, 39-40 (1994). Defendants cannot establish a violation of the  
7 constitutional right of privacy.

8         The privacy provision of the California Constitution “was not intended ‘to create any  
9 unbridled right of personal freedom of action that may be vindicated in a lawsuit against either  
10 government agencies or private persons or entities.’” *Liebert v. Transworld Systems*, 32 Cal. App.4th  
11 1693, 1701 (1995) (affirming order sustaining demurrer to privacy claim based on alleged  
12 termination due to sexual orientation). The framers of the constitutional privacy provision intended  
13 to protect those rights that were recognized in the common law and protected by the federal  
14 Constitution. *Hill*, 7 Cal.4th at 16 (“at the time of the Privacy Initiative there were two distinct and  
15 well-established legal sources of privacy rights – the federal Constitution . . . and common law and  
16 statutory provision . . .”). The constitutional right to privacy “is to be interpreted and applied in a  
17 manner consistent with the probable intent of the body enacting it: the voters of the State of  
18 California.” *Id.* Thus, the voters’ intent determines the scope of the privacy provision. Defendants  
19 cannot possibly demonstrate that the right to same-sex marriage was recognized as falling within the  
20 ambit of privacy rights that should be constitutionally protected at the time the privacy provision was  
21 added to the state Constitution in 1972. *See also Hill*, 7 Cal.4th at 37 (“[n]ot every action which has  
22 some impact on personal privacy invokes the protections of our Constitution”); J. Clark Kelso,  
23 *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 440 (1992) (“There is no  
24 indication that all aspects of home life, all aspects of family, and all rights of association are  
25 protected by the privacy clause”).

26         Nor have Defendants shown that a fundamental right to same-sex marriage exists today that  
27

1 would be protected by the right of privacy. As discussed above, there is no fundamental right to  
2 same-sex marriage under the California Constitution. Applying this same analysis, several courts,  
3 including the Hawaii Supreme Court, Arizona Court of Appeals, a New Jersey trial court, and a New  
4 York trial court, have denied claims that restrictions against same-sex marriage violate a right to  
5 privacy. *See, e.g., Baher v. Lewin*, 852 P.2d at 57; *Standhardt v. Superior Court*, 77 P.3d at 460;  
6 *Lewis v. Harris*, 2003 WL 23191114, \*13.

7 Defendants suggest that *Ortiz v. Los Angeles Police Relief Ass'n, Inc.*, 98 Cal. App.4th 1288  
8 (2002) requires that a right to same-sex marriage be recognized as protected by the right to privacy.  
9 Defendants' reliance on *Ortiz* is misplaced. In that case, a female employee of a non-profit  
10 organization that managed benefits for retired officers of the Los Angeles Police Department was  
11 terminated after she informed her employer that she intended to marry a male prison inmate. *Id.* at  
12 1297. The employer was concerned that the female employee's involvement with the male inmate  
13 could result in disclosure of confidential information regarding police officers to the inmate. *Id.* In  
14 affirming the trial court's judgment sustaining the employer's demurrer, the *Ortiz* court stated that  
15 the right to marry was a legally protected privacy interest. *Id.* at 1304. The court held that this right  
16 was not violated by the employer's policy because the policy was rationally related to the employer's  
17 legitimate interest. *Id.* at 1312.

18 *Ortiz* is distinguishable from this action because the case involved an opposite-sex couple,  
19 and the court's decision was grounded on the traditional understanding of marriage as involving one  
20 man and one woman. *Id.* at 1303. *Ortiz* does not suggest that a right to marriage is absolute or always  
21 required under the constitutional right to privacy because the employer's policy was supported by  
22 a rational basis. *Id.* at 1312. Thus, *Ortiz* does not support Defendants' contention that their privacy  
23 claims are subject to strict scrutiny.

24 In addition, California's marriage laws do not constitute an invasion of privacy. Actionable  
25 violations of privacy "must be sufficiently serious in their nature, scope, and actual or potential  
26 impact to constitute an egregious breach of the social norms underlying the privacy right." *Hill*, 7  
27

1 Cal.4th at 37. There is no social norm recognizing same-sex marriage. Nor do the marriage laws  
2 invade the private decisions of same-sex couples. Rather, it is only when same-sex couples seek full  
3 marital, public, recognition of their relationship from the state, that the laws prevent them from doing  
4 entirely as they desire.

5 For these reasons, California’s marriage laws do not violate the California Constitution’s  
6 right to privacy.

7 **C. The Marriage Laws Do Not Discriminate on the Basis of Sex.**

8 As discussed in CCF’s moving papers, the great weight of authority in the same-sex marriage  
9 case law finds no gender discrimination in the limitation of marriage to opposite-sex couples. *See,*  
10 *e.g., Standhardt*, 77 P.3d at 58; *Lewis v. Harris*, 2003 WL 23191114 at \*20-21 (N.J. Super. Ct. Nov.  
11 5, 2003); *Morrison v. Sadler*, 2003 WL 23119998 at \*4-5 (Ind. Super. Ct. May 7, 2003); *Singer v.*  
12 *Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky  
13 Ct. App. 1973); *Shields v. Madigan*, no. 1458/04 at 7 (N.Y. Sup. Ct. Rockland Co. Oct. 18, 2004);  
14 *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995). Just last week, another trial court  
15 in New York upheld the constitutionality of the marriage laws, specifically rejecting the argument  
16 that the laws discriminated on the basis of gender. *Samuels v. New York*, no. 1967-04, at 3 (“Initially,  
17 the Court finds that the Domestic Relations Law does not contain a gender-based classification; both  
18 men and women may obtain a license to marry someone of the other gender, and neither a man nor  
19 a woman may obtain a license to marry a person of the same gender.”) (RJN, Ex. 2). Even the  
20 majority opinion in *Goodridge* did not find gender discrimination, even though the concurring judge  
21 wrote an opinion urging that the case be decided on those grounds. *Goodridge*, 798 N.E.2d at 971.

22 Similarly, the Vermont Supreme Court rejected the argument that the marriage laws  
23 constituted sex discrimination. The court observed that “[a]ll of the seminal sex-discrimination  
24 decisions . . . have invalidated statutes that single out men or women as a discrete class for unequal  
25 treatment.” *Baker v. State of Vermont*, 744 A.2d 864, 880 n.13 (Vt. 1999) (citing U.S. Supreme  
26 Court sex-discrimination cases). Defendants’ claim that the marriage statutes constitute gender  
27

1 discrimination should be rejected for this same reason. California’s marriage statutes do *not* favor  
2 one gender over another, and such disparate treatment is needed to show that a statute discriminates  
3 on the basis of gender. *See Reece v. Alcoholic Beverage Control Appeals Board*, 64 Cal. App.3d 675  
4 (1977) (holding that a regulation barring “spouses” of employees of law enforcement agencies from  
5 holding alcoholic beverage licenses did not violate equal protection because the class of spouses  
6 affected by the regulation included both men and women). Defendants do not cite any California  
7 cases establishing that gender discrimination occurs where a statutory scheme like the marriage laws  
8 treats men and women in the same fashion.

9 Defendants rely heavily on *Holguin v. Flores*, 122 Cal. App.4th 428 (Cal. Ct. App. 2004) for  
10 the argument that the marriage laws discriminate on the basis of sex. (Woo/Martin at 26). Even  
11 Defendants’ acknowledge, however, that the court’s discussion in that case of gender discrimination  
12 was dicta. The court, in discussing a prior version of the wrongful death statute, observed that the  
13 “gender or age” prevented same-sex couples from marrying. *Holguin*, 122 Cal. App.4th at 439. That  
14 is the extent of the court’s gender discrimination analysis in that case. The court was *not* presented  
15 with the constitutional question of whether the marriage laws constituted gender discrimination.<sup>8</sup>  
16 As discussed in CCF’s moving papers, the great weight of authority demonstrates that the marriage  
17 laws do not constitute sex based discrimination. *See Baker*, 744 A.2d at 880, n.13 (“we are not  
18 persuaded that sex discrimination offers a useful analytic framework for determining plaintiffs’  
19 rights under the Common Benefits Clause”).

20 **D. To the Extent the Marriage Laws Discriminate on the Basis of Sexual**  
21 **Orientation, they are Subject to Rational Basis Review.**

22 Contrary to Defendants’ arguments, this Court can and should find that sexual orientation  
23

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24 <sup>8</sup> In addition, as the State argued in the *Woo/CCSF* case, “[i]f petitioners’ view of what  
25 constitutes gender discrimination were the law, the Court of Appeal [in *Holguin*] would have  
26 concluded that the domestic partner law discriminates on the basis of gender because, if the plaintiff  
27 had been a woman, he could have formed a domestic partnership with the decedent and thereby  
28 obtained a wrongful death award.” (State Opp. in *Woo* at 20 n.21).

1 discrimination is subject to rational basis review. No California case has applied strict scrutiny to  
2 a classification based on sexual orientation. In fact, the *Woo/Martin* parties concede this point.  
3 (*Woo/Martin Opp.* at 33, lines 22-23). Defendants rely heavily on *Gay Law Students Assn. v. Pacific*  
4 *Telephone and Telegraph Co.*, 24 Cal.3d 458 (1978), *Children’s Hospital and Medical Center v.*  
5 *Bonta*, 97 Cal. App.4th 740 (2002) and *Holmes v. California National Guard*, 90 Cal. App.4th 297  
6 (2001) to support their claim that this Court should be the first California court to apply strict  
7 scrutiny to sexual orientation discrimination in an equal protection context. None of those cases  
8 support Defendants’ argument.

9         In *Gay Law Students*, the California Supreme Court held that a cause of action is stated when  
10 it is alleged that a public utility had an employment policy of discriminating against homosexuals.  
11 That decision, however, “did not establish homosexuality as a suspect class . . . .” *Hinman v. Dep’t*  
12 *of Personnel Administration*, 167 Cal. App.3d 516, 526, n. 8 (1985). The decision in *Children’s*  
13 *Hospital and Medical Center v. Bonta*, 97 Cal. App.4th 740 (2002), involved an equal protection  
14 challenge by out-of-state hospitals to Department of Health Services regulations governing  
15 reimbursement rates for treatment of Medi-Cal patients. *Id.* at 747. In its discussion, the Court of  
16 Appeal stated that because “the differential treatment of in-state and out-of-state enterprises does not  
17 relate to any fundamental interests, such as the right to vote, or suspect classifications, such as race  
18 or sexual orientation, the question is whether there is a rational basis for the different treatment.” *Id.*  
19 at 769. The reference to sexual orientation as a suspect classification was plainly dicta and was not  
20 before the court.

21         Finally, the Court of Appeal’s decision in *Holmes* contains no discussion whatsoever of  
22 whether strict scrutiny or rational basis review should apply. Significantly, the Ninth Circuit held in  
23 a related case by the same plaintiff that “[h]omosexuals do not constitute a suspect or quasi-suspect  
24 class,” thus requiring the application of rational basis review to a challenge to the military’s “don’t  
25 ask/don’t tell” policy. *Holmes v. California Army National Guard*, 124 F.3d 1126, 1132 (9<sup>th</sup> Cir.  
26 1997). Indeed, the U.S. Supreme Court has squarely held that rational basis review applies to equal  
27

1 protection challenges based on sexual orientation discrimination. *See, e.g., Romer v. Evans*, 517 U.S.  
2 620, 632 (1996) (Amendment 2 “lacks a rational relationship to legitimate state interests”). Last year,  
3 in *Lawrence v. Texas*, the Court cited with favor that portion of the *Romer* decision. *Lawrence v.*  
4 *Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2482 (2003).<sup>9</sup>

5 **E. The Marriage Laws Are Supported by Rational, if Not Compelling Reasons.**

6 Defendants have raised several arguments in an effort to distract this Court’s attention from  
7 the fact that under a rational basis review, each of the proffered justifications for the law do not need  
8 to be proven before they are relied upon by this Court in upholding the laws. Rather, this Court need  
9 only conclude that the justifications are reasonable and bear the appropriate relationship to the  
10 marriage restrictions. For all of the reasons set forth in CCF’s moving papers, the State and the  
11 electorate (in passing 308.5) have a rational basis for defining marriage as the union of one man.<sup>10</sup>

12 **V. PROPOSITION 22 CONCERNS IN STATE AND OUT OF STATE MARRIAGES.**

13 Defendants argue that § 308.5 applies only to out of state marriages, placing no limits on the  
14 state legislature’s ability to pass legislation creating same-sex marriage. (Woo/Martin at 36-42).

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16 <sup>9</sup> As discussed in CCF’s moving papers, federal equal protection cases are relevant to the  
17 analysis of equal protection claims under the California Constitution. The California Supreme Court  
18 has observed that the equal protection provisions of the California Constitution “‘have been  
19 generally thought in California to be substantially the equivalent of the equal protection clause of  
20 the Fourteenth Amendment to the United States Constitution.’” *Manduley v. Superior Court*, 27  
21 Cal.4th 537, 572 (2002). Thus, although the California Constitution is construed independently from  
22 the United States Constitution, the California Supreme Court has followed federal equal protection  
23 analysis in analyzing California constitutional claims that are analogous to claims made under the  
24 U.S. Constitution. *Id.*

25 <sup>10</sup> Although *not relevant* to this Court’s decision, CCF responds to a statement made several  
26 times in Defendants’ papers. The City asserts that CCF does not dispute that same-sex couples are  
27 procreating and raising children. (City at 29, lines 7-9). CCF would indeed dispute that a same-sex  
28 couple can “procreate.” The basic dictionary definition demonstrates that the City is factually wrong  
in its assertion. To “procreate” means “to beget or produce offspring.” “Beget” in turn means to  
“father or sire.” “Produce” means to “bring about” “to make” or “to create.” The fact is that two men  
or two women cannot, *by themselves*, procreate. A woman in a same-sex relationship can give birth  
to a child, but not without the use of a sperm derived from outside the relationship. Similarly, no  
man can carry and give birth to a baby. Again, this point is not relevant to the decision before the  
court at this time; but since the City asserted that it was not disputed by CCF, a response was  
necessary.

1 First, regardless of whether this court accepts Defendants’ argument, this court still must decide the  
2 constitutionality of the marriage laws. Second, Defendants’ argument is simply wrong. Significantly,  
3 a Sacramento Superior Court Judge, faced squarely with this question, determined that section 308.5  
4 applies to both in state and out of state marriages. Thus, it prohibits the legislature from creating  
5 same-sex marriage without putting the legislation to a vote of the people. See *Thomasson v.*  
6 *Schwarzenegger*, case no. 03AS07035 (Sacramento Sup. Ct. Sept. 8, 2004) (RJN Ex. 2). Defendants’  
7 arguments are misplaced for two main reasons.

8 First, Defendants’ interpretation of section 308.5 means that California could treat in-state  
9 same-sex couples differently than out of state same-sex couples, based on nothing more than the fact  
10 they were married in another state. Thus, if California were to legalize same-sex marriages, residents  
11 of California could enter into same-sex marriages, while same-sex couples legally married in another  
12 state who moved to California would not have their marriage recognized as valid by the state. That  
13 alone would seem to raise constitutional concerns.

14 The second issue is that the language of Proposition 22 undermines Defendants’ argument.  
15 The language of Proposition 22 is straight-forward and simple. “Only marriage between a man and  
16 a woman is valid or recognized in California.” In order to give “effect to the intent of the voters  
17 adopting” an initiative, a court must “construe the words from the perspective of the voters,  
18 attributing the usual, ordinary, and commonsense meaning to them; [the court does] not interpret  
19 them in a technical sense or as terms of art.” *Howard Jarvis Taxpayers Assoc. v. County of Orange*,  
20 110 Cal. App.4th 1375, 1381 (Cal. Ct. App. 2003). The commonsense meaning of the fourteen  
21 words of section 308.5 are that same-sex marriage is not valid anywhere in the State of California.  
22 There is no distinction in section 308.5 between those who enter into their relationships out of state  
23 or in state. Rather, section 308.5 means that a same-sex marriage cannot validly be entered into  
24 within the state, nor will an out of state same-sex marriage be recognized as valid by the state.

25 In Defendants’ opposition papers, they argue that the “valid or recognized” language  
26 contained in section 308.5 both refer to the way in which the state will treat out of state marriages.

1 Thus, according to Defendants, “valid” in Proposition 22 refers to whether or not California will treat  
2 an out of state marriage as a “‘valid’ marriage for **all** purposes” and “recognize” refers to the state’s  
3 choice to “‘recognize’ the marriage for certain **limited** purposes.” (Woo/Marting Opp. at 38-39). The  
4 argument ignores the fact that the cases repeatedly use the phrase “recognize **as** valid”, whether for  
5 all or limited purposes, when deciding how to treat an out of state marriage; and simply use the word  
6 “valid” when determining the legality of a marriage within the state.

7 For example, the Woo/Martin parties cite *In re Bir’s Estate*, 83 Cal. App.2d 256 (Ca. Ct.  
8 App. 1948) in support of its arguments that valid and recognized both refer to a state’s treatment of  
9 out of state marriages. The facts in that case concerned a man, who while living in India, legally took  
10 two wives. He later moved to, and died in, California. The wives, who were residents of India,  
11 claimed they were both entitled to distribution of the estate. In holding that the two wives could  
12 receive the estate, the court explained that although the marriage would not have been recognized  
13 if the man had sought to legally live together with his two wives, for matters of succession, the  
14 “*validity* of the marriage should be *recognized*.” *Id.* at 258 (emphasis added). In other words, the case  
15 decided whether California would recognize, for any purpose, an out of state marriage that would  
16 not be valid if entered into in California. That case, therefore, belies their argument that “valid”  
17 refers to the State’s decision to grant all marital rights to an out of state marriage, and “recognize”  
18 refers to the State’s decision to grant only limited marital rights to an out of state marriage.

19 **Nor does Defendants’ argument address the fact that Division 3, Section 1 of the**  
20 **California Family Code (which includes §§ 300 - 310) is entitled “Validity of Marriage”.** That  
21 section of the Family Code, among other things, defines what is a marriage *in* California, establishes  
22 the licensing requirements for marriages performed *in* California, and explains who can consent to  
23 a marriage *in* California. The statutory and case law is clear that for out of state marriages, the  
24 question for California is whether it will recognize the marriage as valid (for limited or all rights).  
25 The question for marriages performed within the state is whether it is valid. *See, e.g., Etienne v.*  
26 *DKM Enterprises, Inc.*, 136 Cal. App.3d 487, 490, 186 Cal. Rptr. 321 (Ca. Ct. App. 1982)

1 (explaining that California law does “recognize common-law marriages” validly created in other  
2 states; once recognized, the common-law marriages are entitled to all marital benefits available to  
3 married couples in California); *Estate of DePasse*, 97 Cal. App.4th 92, 118 Cal. Rptr.2d 143 (Ca.  
4 Ct. App. 2002) (deciding whether marriage between California couple was valid, repeatedly  
5 describing the question as the “validity” of the in-state marriage).

6       What Defendants’ argument also fails to address is the fact that Proposition 22 states that  
7 “[o]nly marriage between a man and a woman is *valid or recognized* in California.” (Emphasis  
8 added). While the term “recognized” connotes the interpretation offered by Defendants – namely,  
9 whether an out of state relationship will be recognized by California – the term “valid” has much  
10 broader implications. This Court is obligated to give independent meaning and significance to the  
11 words “valid” and “recognize” and to avoid an interpretation of Proposition 22 that makes any part  
12 of it meaningless. *See San Diego Police Officers’ Association v. City of San Diego Civil Service*  
13 *Commission*, 104 Cal. App.4th 275 (2002) (“In construing a statute we are required to give  
14 independent meaning and significance to each word, phrase, and sentence in a statute and to avoid  
15 an interpretation that makes any part of a statute meaningless”) (citing *Dyna-Med, Inc. v. Fair*  
16 *Employment & Housing Com.*, 43 Cal.3d 1379, 1386-87 (1987)); *Lungren v. Superior Court of the*  
17 *City and County of San Francisco*, 14 Cal.4th 294, 58 Cal. Rptr.2d 855 (1996) (words used in the  
18 alternative are presumed to have independent meanings that are “commonly understood by the  
19 electorate”).

20       An interpretation that fails to give effect to the word “valid” in Proposition 22 also violates  
21 the rule of statutory interpretation concerning surplusage. The Supreme Court of California has  
22 explained that the rule

23       is not absolute; like all such rules, the rule against surplusage will be applied only if  
24       it results in a reasonable reading of the legislation. When uncertainty arises in a  
25       question of statutory interpretation, consideration must be given to the consequences  
26       that will flow from a particular interpretation. In this regard, it is presumed the  
27       Legislature intended reasonable results consistent with its expressed purpose, not  
28       absurd consequences.

1 *Santa Clara County Local Transp. Auth. v. Guardino*, 11 Cal.4th 220, 234-35, 45 Cal. Rptr.2d 207  
2 (1995); *see also People v. Rizo*, 22 Cal.4th 681, 687, 94 Cal. Rptr.2d 375, 380 (2000) (the rule  
3 against surplusage “is only a ‘guide and will not be used to defeat legislative intent’ or ‘provide an  
4 absurd result’”).

5 The decision in *Rizo* is instructive. In that case, section 114 to the Penal Code, which was  
6 passed by initiative, contained “much of the same language” as previously enacted section 113. The  
7 court refused to apply the surplusage rule. Instead, the court allowed the overlapping,  
8 “complementary penal scheme” to stand. So too, here, this court should construe Proposition 22 as  
9 prohibiting the State from treating as valid a same-sex “marriage” entered into within the state or  
10 recognizing as valid a same sex marriage entered into in another state. Although § 308.5 would in  
11 some respects overlap with § 300, any other interpretation would produce an absurd result. *A fortiori*,  
12 as a result of Proposition 22, the California Legislature cannot grant to same-sex couples, without  
13 voter approval, the benefits and obligations of marriage.

14 Another argument that has been advanced is that section 308.5 must be read as Defendants  
15 suggest because Fam. Code § 300 already limits marriage to the union of one man and one woman.  
16 What that argument overlooks, however, is that even if a voter initiative and legislative statute  
17 contained identical language – which Proposition 22 and Fam. Code § 300 do not – the voters would  
18 have legitimate reasons for passing an initiative statute. Significantly, Family Code § 300 can be  
19 amended by a simple majority vote of the California Legislature. On the other hand, Proposition 22  
20 can only be amended by another vote of the people. In passing Proposition 22, the people of  
21 California made very clear that they no longer wanted the Legislature to define and regulate who may  
22 marry and who is eligible for marital benefits.

23 //

1 **VI. CONCLUSION**

2 Wherefore, CCF requests that this Court grant its motion for summary judgment, or  
3 alternatively, for summary adjudication, declaring the marriage laws constitutional.

4 Dated: December 13, 2004

Respectfully submitted,

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