

Case No. A110652

**IN COURT OF APPEAL FOR THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION 3**

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**IN RE MARRIAGE CASES**

Judicial Council Coordination Proceeding No. 4365

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

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**CAMPAIGN FOR CALIFORNIA FAMILIES'  
MOTION FOR STAY OR OTHER EXTRAORDINARY RELIEF FOLLOWING  
REMAND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

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The Campaign for California Families (the “Campaign”) hereby moves this Court for an order staying the issuance of marriage licenses to same-sex couples, or other extraordinary relief following remand from the California Supreme Court. This Motion is based upon the attached Memorandum of Points and Authorities and on the pleadings and files in this action.

### **INTRODUCTION**

When this Court regains jurisdiction over this matter upon remand, it will have the opportunity to ensure that the rule of law continues to govern in California. The Campaign respectfully asks that this Court take advantage of that opportunity by staying the issuance of any marriage licenses to same-sex couples to enable the people and the Legislature to meaningfully exercise the rights reserved and granted to them, respectively, under the California Constitution.

In its May 15, 2008 Decision and Order the Supreme Court held that certain language in Family Code §300 and the entirety of Family Code §308.5 must be stricken as unconstitutional under the California Constitution and remanded the case back to this Court for “further action consistent with this opinion.” *In re Marriage Cases*, 2008 WL 2051892 at \*58. The Supreme Court did not and cannot actually remove the language from the statutes, which must be done by the Legislature. *See Kopp v. Fair Pol. Practices*

*Comm.* (1995) 11 Cal.4th 607, 675 (Werdegar, J., concurring)(Stating that the power to write laws belongs to the people and political branches of government, not the judiciary).

In addition, the Supreme Court did not address other Family Code sections which specifically state that marriage can only occur between an unmarried man and an unmarried woman, nor provisions in the Health and Safety Code and other codes. *See, inter alia*, Family Code §§301, 302 and 500.<sup>1</sup> As the Supreme Court held in an earlier ruling in a related case, local officials cannot refuse to enforce those provisions based upon a belief that they are also unconstitutional, but can only refuse to abide by those statutes after a judicial determination that **they** violate the California Constitution. *Lockyer v. City and County of San Francisco*, (2004) 33 Cal.4th 1055, 1074. Since neither the Supreme Court nor this Court has declared those statutes unconstitutional, local government officials do not have the power to issue marriage licenses to anyone other than an unmarried man and an unmarried

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<sup>1</sup> For example, Family Code §420 provides that in a marriage ceremony the parties are to take each other as “husband and wife.” Family Code §700 provides that “Husband and wife contract toward each other obligations of mutual fidelity, respect and support.” A Westlaw search of the terms “husband and wife” resulted in over 150 hits in various code sections, including the Health and Safety Code, Government Code, Penal Code, Probate Code, Revenue and Taxation Code, Water Code and the Welfare and Institutions Code .

woman. Therefore, this Court should order that no marriage licenses be issued to same-sex couples until the language cited by the Supreme Court is stricken by the Legislature and until there is a judicial determination that the other statutes are unconstitutional.

Furthermore, this Court should stay the issuance of marriage licenses to same-sex couples until after the November 2008 general election in order to preserve the people's right to amend the Constitution via initiative. The Marriage Protection Act has been certified for the general election ballot. If enacted by the voters, the Act would amend the California Constitution to include the definition of marriage as the union of one man and one woman, effectively overturning the Supreme Court's decision. Permitting same-sex couples to obtain marriage licenses between June 16 and November with the amendment pending would not only undermine the electorate's constitutional rights, but would also create questions regarding the validity of such marriages.

Preventing these additional legal complications provides more than sufficient cause to stay the issuance of marriage licenses to same-sex couples until the statutory provisions have been appropriately addressed and the results of the November 2008 election have been certified by the Secretary of

State.<sup>2</sup>

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION FOR STAY OR OTHER EXTRAORDINARY RELIEF**

The Campaign submits the following Memorandum of Points and Authorities in Support of its Motion for a Stay or Other Extraordinary Relief Upon Remand:

**FACTUAL BACKGROUND**

On May 15, 2008, the Supreme Court issued its Decision and Order reversing this Court’s ruling upholding Family Code §§ 300 and 308.5 against constitutional challenges brought by the City and County of San Francisco and various same-sex couples. The Supreme Court determined that

The language of section 300 limiting the designation of marriage

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<sup>2</sup> Plaintiff City and County of San Francisco (“CCSF”) objected to motions brought by the Proposition 22 Legal Defense and Education Fund (the “Fund”) and the Campaign in the Supreme Court on the grounds that the parties lack standing. Campaign for California Families anticipates CCSF raising a similar objection to this motion, but urges this Court to reject the challenge. The trial court, this Court and the Supreme Court have treated the Fund and the Campaign as parties, allowing them to raise new arguments, to participate in oral argument, and in essence to do all that parties can do. Continuing such considerations would be consistent with this Court’s actions throughout this case. In addition, the Campaign filed the first case in these consolidated matters, has been intimately involved since the very beginning of the litigation, and has continuously raised issues not raised by Defendants. The same is true with this Motion, as both the Governor and Attorney General have indicated that they will not be seeking similar relief. The exigency and seriousness of the issues presented in this Motion should be addressed by this Court, so the Campaign should be permitted to raise them.

to a union “between a man and a woman” is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.

*In re Marriage Cases*, 2008 WL 2051892 at \*58. The full text of Family Code

§300 presently reads:

(a) Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).(b) For purposes of this part, the document issued by the county clerk is a marriage license until it is registered with the county recorder, at which time the license becomes a marriage certificate.

Once fully implemented by the Legislature, the Supreme Court’s direction that the “between a man and a woman” language be stricken, Family Code §300 would read:

(a) Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).(b) For purposes of this part, the document issued by the county clerk is a marriage license until it is registered with the county recorder, at which time the license becomes a marriage certificate.

The Supreme Court further held:“In addition, because the limitation of

marriage to opposite-sex couples imposed by section 308.5 can have no constitutionally permissible effect in light of the constitutional conclusions set forth in this opinion, that provision cannot stand.” *Id.* As a result, the language added to the Family Code by a vote of 61.4 percent of California voters, “Only marriage between a man and a woman is valid or recognized in California,” would be removed by the Legislature.

However, the Supreme Court did not address other statutory provisions which incorporate the definition of marriage as the union of one man and one woman. These statutes include Family Code §301, which provides: “An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage;” Family Code §302(a), which provides: “(a) An unmarried male or female under the age of 18 years is capable of consenting to and consummating marriage upon obtaining a court order granting permission to the underage person or persons to marry;” and Family Code §500, which provides:

When an unmarried man and an unmarried woman, not minors, have been living together as husband and wife, they may be married pursuant to this chapter by a person authorized to solemnize a marriage under Chapter 1 (commencing with Section 400) of Part 3, without the necessity of first obtaining health certificates.

Neither these, nor the numerous other statutes that use the language “the union

of one man and one woman” were declared unconstitutional by the Supreme Court’s ruling. Therefore, those statutes remain in effect and must be carried out by local officials until an appellate court determines that they are unconstitutional. *Lockyer v. City and County of San Francisco*, (2004) 33 Cal.4th 1055, 1094-95; Cal. Const. art. 3 §3.5.

Furthermore, on June 2, 2008, subsequent to the Supreme Court’s ruling, the Marriage Protection Act (the “Act”) qualified for the November general election. The Act would add to the California Constitution the very language that the Supreme Court said was unconstitutional. If enacted by the voters, the Act would add “Only marriage between a man and a woman is valid or recognized in California” to the California Constitution. If marriage licenses are issued to same-sex couples between June and November 2008 and the Act is approved by voters, then the validity of those licenses and the rights granted to couples pursuant to those licenses would be in question.

The Supreme Court also did not address the interaction between its determination that same-sex couples should be permitted to “marry” and the existing AB 205 domestic partnership system. AB 205 grants to domestic partners “the same rights, protections, and benefits,” and subjects them to the “same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies,

common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.” Family Code §297.5(a). Domestic partnerships are available to same-sex couples over the age of 18 and to opposite sex couples if at least one person is age 62 or older. Family Code §297(b). In its May 15, 2008 ruling, the Supreme Court held that same-sex couples should be permitted to marry, but did not address how marriage would affect same-sex couples who are already in AB205 domestic partnerships. The simultaneous existence of AB205 domestic partnerships and marriage for same-sex couples would open a Pandora’s box of complications and questions about property, financial, health and relationship issues. These questions should be addressed and resolved by the Legislature before marriage licenses are issued to same-sex couples.

Since California does not have a residency requirement for marriage licenses, these issues reach far beyond this state, but could affect same-sex couples, judges and legislatures throughout the nation.<sup>3</sup> Because of the magnitude of the issues raised, it is vitally important that this Court stay the issuance of marriage licenses to same-sex couples until the issues left unanswered by the Supreme Court are answered and until the voters have been

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<sup>3</sup> These inter-jurisdictional concerns were raised by the Attorneys General of 13 states in letter briefs filed with the Supreme Court.

permitted to exercise their right to amend the Constitution.

## LEGAL ARGUMENT

### **I. THE SUPREME COURT’S ORDER DOES NOT MANDATE THE IMMEDIATE ISSUANCE OF MARRIAGE LICENSES TO SAME-SEX COUPLES, AND THIS COURT SHOULD ACT TO PREVENT THE CONSTITUTIONAL AND LEGAL CONFUSION THAT WOULD RESULT FROM SUCH ACTION.**

When its May 15, 2008 ruling becomes final on June 16, 2008, the Supreme Court will remand this case to this Court “for further action consistent with this opinion.” *In re Marriage Cases*, 2008 WL 2051892 at \*58. Those directions are not a mandate to this Court to direct the issuance of marriage licenses to same-sex couples, nor can they be. The doctrine of separation of powers and the Supreme Court’s ruling in *Lockyer* require that this Court institute a measured and reasoned approach to implementing the Supreme Court’s directives. In order to ensure that this Court is able to carry out its duties upon remand, it is critical that the Court issue an order staying the issuance of marriage licenses to same-sex couples pending the resolution of outstanding issues and the results of the November 2008 general election.

As the Supreme Court said in *Lockyer*, “It is well settled in California that the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated.” *Lockyer*, 33 Cal.4th at 1074. “The regulation of marriage and divorce is solely

within the province of the Legislature, except as the same may be restricted by the Constitution.” *Id.* In its May 15th ruling, the Supreme Court determined that the language “between one man and one woman” in Family Code §300 and the language “Only marriage between a man and a woman is valid or recognized in California” in Family Code §308.5 were unconstitutional and should be stricken from the statutes. *In re Marriage Cases*, 2008 WL 2051892 at \*58. The Legislature, not the courts, must amend the statutes to conform to the Supreme Court’s ruling. *See California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 (The role of the judiciary is to interpret laws, not write them). Until the language is stricken and/or amended by the Legislature, Family Code §§300 and 308.5 continue to provide that marriage is defined as the union of one man and one woman.

Furthermore, the Supreme Court did not declare similar language in Family Code §§301, 302, 500, other sections of the Family Code, provisions in the Health and Safety Code and sections of other statutes to be unconstitutional. While state officials might assume that similar language is unconstitutional and should be stricken, the Supreme Court made it clear in *Lockyer* that administrative officials cannot make such assumptions to justify refusal to enforce the statutes. *Lockyer*, 33 Cal.4th at 1082. Instead, administrative officials must continue to carry out their ministerial duties and

enforce statutes until there has been a judicial determination that the statute is unconstitutional. *Id.* More particularly,

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional **unless an appellate court** has made a determination that such statute is unconstitutional.

Cal. Const. art. 3 §3.5(a)(emphasis added).

The Supreme Court has stated only that one phrase in Family Code §300 and the language in Family Code §308.5 are unconstitutional. The provisions of Family Code §§ 301, 302 and 500, which state that an unmarried male and an unmarried female are capable of consenting to and consummating marriage, and similar provisions in other code sections were not addressed. Those statutes must continue to be enforced by administrative officials until an appellate court declares them unconstitutional and/or they are amended or repealed by the Legislature. Cal. Const. art. 3, §3.5(a).

If administrative officials were to attempt to issue marriage licenses to same-sex couples based solely upon the Supreme Court's May 15, 2008 order, they would be exceeding their authority. This is true both because the statutory provisions deemed unconstitutional by the Supreme Court have not been repealed or amended by the Legislature and because other statutes stating that an unmarried male and unmarried female are capable to consenting to and

consummating a marriage were not affected by the ruling. Until those statutes are changed, marriage licenses are still available only to an unmarried man and an unmarried woman.

The Supreme Court's order does not require a different result. The Court determined that "Plaintiffs are entitled to 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." *In re Marriage Cases*, 2008 WL 2051892 at \*58 . This Court is directed to take "further action consistent with this opinion." *Id.* That "further action" need not and should not be an order directing immediate issuance of marriage licenses to same-sex couples, because that will put this Court in the position of implementing rather than interpreting the law. The courts have no "power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." *California Teachers Assn.*, 14 Cal.4th at 633. Therefore, instead of effectively rewriting the statutes by ordering the issuance of marriage licenses to same-sex couples, this Court should clarify that marriage licenses cannot be issued to same-sex couples unless and until the Legislature acts to reform the statutes to conform

them to the Supreme Court's order.

The writ of mandate referenced by the Supreme Court should be directed to the Legislature to carry out the legislative changes necessary to implement the Supreme Court's order. Furthermore, as discussed more fully below, any proposed issuance of marriage licenses to same-sex couples should await the results of the November general election, when California voters will decide whether the language stricken by the Supreme Court as unconstitutional will become part of the Constitution.

**II. THIS COURT SHOULD STAY THE ISSUANCE OF MARRIAGE LICENSES TO SAME-SEX COUPLES TO PREVENT A VIOLATION OF FEDERAL AND STATE LAW BY OPENING THE DOOR TO DE FACTO POLYGAMY AND POLYAMORY.**

If the Supreme Court's decision is allowed to be implemented without further action by this Court and the legislative branch, then for the first time in California history polygamous and polyamorous relationships will be legitimized. The simultaneous existence of AB205 domestic partnerships, same-sex "marriage" and the absence of a residency requirement for marriage licenses, if permitted to stand, will mean that polygamous relationships will not only be theoretically possible but legally sanctioned.

Since California does not have a residency requirement for marriage licenses, same-sex couples from other states would be able to come to California to get married even if they do not intend to remain in California.

Unless the Legislature amends AB 205 domestic partnership laws, same-sex couples will be able to be part of both institutions with overlapping and potentially conflicting rights, obligations and benefits. So long as neither party is already married, then same-sex couples who are part of a domestic partnership or civil union in another state would be able to get married in California. This would mean that Parties A and B who are in a Vermont civil union (or New Jersey or Connecticut civil union) and Parties C and D who are also in a civil union and Parties E and F who are also in a civil union, then A and C could come to California to get married, and at the same time B and F could get married, and D and E could get married, *all at the same time*. In its present form, the Family Code says nothing about civil unions. Therefore, if marriage licenses are issued to same-sex couples without further statutory revisions, those who are in civil unions will be regarded as unmarried and will be able to marry each other or third parties, creating de facto polygamy and polyamory. *See* attached diagram marked as Exhibit 1.

Consequently, if the Court's ruling goes into effect without modification, then individuals could create legitimate polygamous and polyamorous relationships with multiple partners<sup>4</sup>. Such relationships have

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<sup>4</sup> This is not a hypothetical "parade of horrors," as illustrated in a recent news report which features a group of four adults in San Jose who practice polyamory and share a residence, child-rearing duties and intimate

been outlawed in California and the United States for centuries as an “offense against society.” *Reynolds v. United States*, (1878) 98 U.S. 145, 164-65. “Polygamy is a specific course of criminal conduct held to be highly detrimental to society at large.” *Otsuka v. Hite*, (1966) 64 Cal.2d 596, 606. In addition, such relationships would create a plethora of problems. Community property, parental rights, custody, visitation, alimony, child support, insurance proceeds, inheritance, intestacy, health care directives, employee benefits and a myriad of other rights and benefits would have to be allocated, distributed or applied to multiple parties under the laws of multiple states with possibly conflicting claims. Family law matters that are already complicated and contentious would become more so. If any of the parties moves out of state, then additional issues involving comity, full faith and credit and possibly conflicting public policy and legal standards would arise, creating even more chaos.

These potentialities are unprecedented because no other jurisdiction has had the combination of marriage and a marriage alternative simultaneously available to same-sex couples with the availability of licenses to nonresidents.

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relationships. See *Four better or four worse for marriage of four*, Telegraph News, June 6, 2008, available at <http://www.telegraph.co.uk/news/newstopics/howaboutthat/2083216/Four-better-or-four-worse-for-marriage-of-four.html> (Last viewed June 9, 2008).

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

In Vermont and New Jersey, the high courts did not redefine marriage to include same-sex couples but instructed the Legislatures to enact legislation that granted the rights, benefits and obligations of marriage to same-sex couples. *See Baker v. State*, (1999) 170 Vt. 194, 224-25 (“We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate.”); *Lewis v. Harris*, (2006) 188 N.J. 415 (No fundamental right to same-sex “marriage,” but the legislature must develop

scheme to grant rights to same-sex partners). In each instance, *the legislatures* enacted a civil union law. Consequently, in each instance, same-sex couples were granted **either** marriage or all the rights and benefits of marriage under another name, but **not both**.

By contrast, the Supreme Court's ruling if implemented immediately without statutory reform, would grant same-sex couples *both* the right to marry *and* the right to enter into a domestic partnership. This situation, when combined with the absence of a residency requirement, will lead to the kind of multiple-person relationships described above. This Court should exercise its jurisdiction upon remand to prevent such a scenario.

**III. THIS COURT SHOULD STAY THE ISSUANCE OF MARRIAGE LICENSES TO SAME-SEX COUPLES UPON REMAND SO AS TO PRESERVE SEPARATION OF POWERS BY PERMITTING THE LEGISLATURE AND THE PEOPLE TO EXERCISE THE ROLES GRANTED AND RESERVED TO THEM UNDER THE CALIFORNIA CONSTITUTION.**

The Supreme Court has repeatedly emphasized that the courts' role in constitutional challenges such as this case is limited to interpreting the law. "As this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them." *California Teachers Assn.*, 14 Cal.4th at 633.

The latter power belongs primarily to the people and the political branches of government .... (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 675, 47 Cal.Rptr.2d 108,

905 P.2d 1248 (conc. opn. by Werdegar, J.) It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.

*Id.* In California, the power to write and re-write laws is vested with the Legislature, but the people have reserved to themselves the right to enact legislation and amend the Constitution via initiative. Cal. Const. art. 4, §1, art. 2 §8. The reservation of those rights by the people set the California Constitution apart from its federal counterpart and creates free speech rights that are even more vigorous than those under the United States Constitution.

*U.C. Nuclear Weapons Lab Conversion Project v. Lawrence Livermore Laboratory*, (1984) 154 Cal.App.3d 1157, 1163. As the Supreme Court has held:

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

*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591(emphasis added). “The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of

spirit as well as letter.” *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332.

The people exercised that “precious” right in 2000 when 61.4 percent of voters enacted Proposition 22, which was codified as Family Code §308.5. Voters will be exercising that right again in November 2008 by voting on whether the language in Family Code §308.5 struck down by the Supreme Court as unconstitutional should be added to the Constitution. In keeping with the judiciary’s duty to zealously uphold the right, this Court should stay the issuance of marriage licenses to same-sex couples until the results of the November election have been certified. To permit the issuance of marriage licenses to same-sex couples with the marriage amendment pending would effectively annul the people’s right to enact legislation.

Permitting same-sex couples to “marry” before the people have had an opportunity to determine whether such marriages are valid effectively makes the judiciary the author of the marriage laws. This directly contradicts the Supreme Court’s holding that the courts must preserve the initiative right to the fullest measure of the spirit and the letter. *McFadden*, 32 Cal. 2d at 332. The letter of the initiative right might be alive if the people vote on the marriage amendment after thousands of same-sex couples have gotten “married,” but the spirit of the law will be little more than a corpse. Directing that marriage licenses continue to be issued solely to opposite-sex couples until

the election would ensure that the people's right is zealously guarded.

Staying the issuance of marriage licenses to same-sex couples would also permit the Legislature to exercise its powers under art. 4, §1 to make the necessary statutory modifications to implement the Supreme Court's decision.

The rulings by the high courts in Massachusetts, Vermont and New Jersey are instructive on how a court's ruling declaring marriage laws unconstitutional can be carried out in a way that respects the separation of powers. After determining that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution," the Supreme Judicial Court of Massachusetts remanded the case back to the trial court for entry of judgment and stayed the judgment for 180 days to give the Legislature time to effectuate its ruling. *Goodridge v. Department of Public Health*, (2003) 440 Mass. 309, 344. The Vermont Supreme Court said:

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate.

*Baker v. State* (1999) 170 Vt. 194, 224-25. Similarly, the Supreme Court of New Jersey found that the state's equal protection clause required that same-sex couples be afforded the same rights and benefits enjoyed by married

opposite-sex couples, but left to the Legislature to determine how that would be carried out. *Lewis v. Harris*, (2006) 188 N.J. 415, 457. The New Jersey court also clarified the limited role of the judiciary in such cases:

To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate.

*Id.* at 460.

The Campaign urges this Court to take a similar stance when it regains jurisdiction of this case upon remand. This Court should make it clear that marriage licenses cannot be issued to same-sex couples until the Legislature has made necessary changes to all of the relevant statutes, not just those addressed by the Supreme Court, and until the people have exercised their legislative power by voting on the proposed constitutional amendment in November.

## **CONCLUSION**

For the foregoing reasons, the Campaign requests upon remand from the Supreme Court that this Court issue an order staying the issuance of marriage licenses to same-sex couples pending further legislative action on all statutes addressing marriage as the union of a man and a woman, and the certification of the results of the November 2008 election.

Dated: June 11 , 2008

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\*Admitted pro hac vice

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**RULE 8.204(c)(1) CERTIFICATE OF COMPLIANCE**

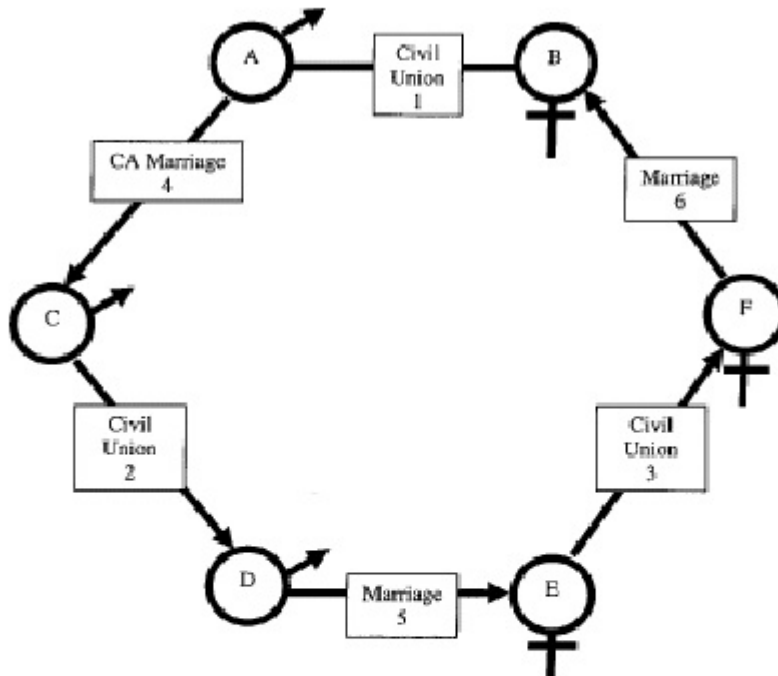
Pursuant to California Rule of Court 8.204(c)(1), I, Mary E. McAlister, hereby certify that this Motion to Stay is proportionately spaced, has a typeface of 13 points or more, and the number of words contained in the foregoing Motion, including footnotes but excluding the Table of Contents, Table of Authorities and this Certificate is 5,982 as calculated using the word count feature of the computer program used to prepare the motion.

Dated: June 11,, 2008

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Mary E. McAlister

EXHIBIT 1



The diagram above illustrates how a group of six people could legally form a polyamorous and polygamous relationship if the Supreme Court's ruling is implemented without legislative action. Couples A and B, C and D and E and F could each enter into civil unions in either Vermont or New Jersey (civil unions 1-3). One member of each civil union could then "marry" a member of one of the other civil unions in California.

**PROOF OF SERVICE**

I am over eighteen (18) years of age. I am not a party to this action. I am employed in the City of Lynchburg and my office address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 24502.

On June 11, 2008, I served the foregoing document, described as Motion to Stay of Campaign for California Families on the parties of record in this case by placing true and correct copies thereof enclosed in sealed envelopes, with first class postage thereon prepaid, addressed as stated in the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on June 11, 2008 at Lynchburg, Virginia.

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Mary E. McAlister

**SERVICE LIST**

<p>Christopher Edward Krueger          State of California, Dept. of Justice          Office of the Attorney General          1300 I Street #125          PO Box 944255          Sacramento, CA 94244-2550  <a href="mailto:christopher.krueger@doj.ca.gov">christopher.krueger@doj.ca.gov</a></p> <p>Attorneys for State Defendants</p>	<p>Terry L. Thompson          199 East Mesa Linda - Suite 10          Danville, CA 94526  <a href="mailto:tl_thompson@earthlink.net">tl_thompson@earthlink.net</a></p> <p>Attorneys for Plaintiffs Proposition          22 Legal Defense and Education          Fund</p>
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<p>Andrew P. Pugno          Law Offices of Andrew Pugno          101 Parkshore Dr, Suite 100          Folsom, CA 95630</p> <p>Attorneys for Plaintiffs Proposition          22 Legal Defense and Education          Fund</p>	<p>Gloria Allred          Michael Maroko          John West          Allred, Maroko &amp; Goldberg          6300 Wilshire Blvd. Suite 1500          Los Angeles, CA 90048  <a href="mailto:mmaroko@amglaw.com">mmaroko@amglaw.com</a></p> <p>Attorneys for Plaintiffs Robin          Tyler, et al.</p>

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