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May 30, 2008

To: The Honorable Ronald George, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

From: The Attorneys General of Ten States
(as listed on Appendix 1)

Re: *In re Marriage Cases*, Case No. S147999
Letter Brief Suggesting Modification of the Opinion on the Court's Own
Motion

Dear Chief Justice George:

In *Brown v. Superior Court*, (1982) 33 Cal.3d 242, 655 P.2d 1260 (1982),
the California Supreme Court said:

On that date we received a letter from amici curiae urging that finality of the decision not be accelerated. Amici curiae - not being parties to the action - have no standing to petition for rehearing (rule 27(a) and (b)) and are bound by the general rule that they must "accept the case as [they] find it and may not 'launch out upon a juridical expedition of [their] own unrelated to the actual appellate record.' " [citations omitted] *Nevertheless, this court routinely considers amici curiae briefs suggesting rehearing or modification of the opinion on the court's own motion.* (Emphasis added.)

On the basis of the quoted language, we respectfully submit to the Court this
"Letter Brief Suggesting Modification of the Opinion on the Court's Own

Motion.” Specifically, for the reasons given below, we respectfully suggest that this Court modify the remedy stated in its opinion by deferring the effective date of that remedy until certification of the election results relative to the proposed California ballot measure on marriage.

Before setting forth the reasons why this Court should so act, we emphasize that our Letter Brief does *not* address the merits of, or advocate for, any legal definition of marriage in California. Each State makes and unmakes its own marriage and other domestic relations laws as it sees fit, a prerogative the *amici* support. Further, we emphasize that our Letter Brief, consistently, does *not* address the merits of, or advocate for or against, the proposed California ballot measure on marriage. What our proposed Brief does, and all it does, is bring to this Court’s attention some genuine concerns regarding the administration of justice in California’s sister States, concerns that may well be ameliorated by this Court modifying its opinion’s remedy’s effective date, as suggested.

Each of the *amici* is, as his or her State’s Attorney General, the chief law enforcement officer in that State and the attorney charged with representing the State in litigation addressing the validity and application of the State’s statutes and other laws. As such, the *amici* are well-informed regarding litigation of what is generally referred to as the “recognition” issue. The recognition issue arises in cases where the *amicus*’s own State courts must decide whether to recognize a marriage entered into by a same-sex couple in Massachusetts or a foreign country such as Canada. Such recognition may be for some or all of that State’s purposes, and the need for resolution of the recognition issue may arise in any one of several dozen possible litigation contexts. For reasons explained in detail below (having to do with a Massachusetts statute with no equivalent in California), the number of such cases in our courts has been relatively small to date. But absent a stay of the mandate in this case, that number will certainly become very large indeed – and unnecessarily so if a majority of California’s voters favor in November the proposed ballot measure on marriage. That prospect of “unnecessarily so” provides the basis of our concerns regarding premature, unnecessary, unnecessarily difficult, and therefore unduly burdensome litigation in our courts.

We believe that what we set out below will aid this Court in assessing those particular concerns and the weight to be fairly accorded them. We send you this Letter Brief out of a conviction that this Court will accord due and serious respect to the concerns of California’s sister States, in the best traditions of our Union.

I.
**THE NATURE AND SCOPE OF LITIGATION OVER THE RECOGNITION OF
FOREIGN MARRIAGES BETWEEN SAME-SEX COUPLES**

A. Resolution of the Recognition Issue Implicates Two Sources of Law and Is Litigation-Intensive.

Generally speaking, a court required to resolve the recognition issue will first apply its State's own law to the question. Absent a state statutory or constitutional provision addressing the issue,¹ that law is usually common law and does vary somewhat State to State. The Restatement (Second), Conflict of Laws § 283(2) gives a general idea of the burden faced by courts in resolving the recognition issue under common law: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."

A court declining to recognize the foreign marriage of a same-sex couple, pursuant to its State's law, will still be faced with resolving a federal-law question : whether the federal constitution's full-faith-and-credit clause requires recognition. Suffice it to say that (1) whole forests have been cut down to provide the paper on which to print the warring law journal articles addressing that question² and (2) no United States Supreme Court resolution of the question is at all imminent.

The important point is that judicial resolution of the recognition issue is burdensome and litigation-intensive. By "litigation-intensive" we mean that some of the legal questions that our courts must answer are not simple and in

¹ Most States have some form of provision addressing the recognition issue, usually referred to as a "DOMA" for "Defense of Marriage Act [or Amendment]." A list and the contents of DOMAs appearing in state constitutions is available at <http://marriagelawfoundation.org/mlf/laws.html>. A list and the contents of DOMAs appearing in state statutes is available at <http://marriagelaw.cua.edu/Law/states/doma.cfm>.

² A Westlaw search in the "JLR" database of "same-sex /p 'full faith and credit'" returned 691 law journal articles. Further, the "full faith and credit" issue is usually seen to implicate the constitutionality of a portion of the federal DOMA, 28 U.S.C. § 1783C, which reads in pertinent part: "No State ... shall be required to give effect to any public act ... of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State"

some instances can prove difficult indeed. That difficulty is born out by (as one example) the extensive briefing by a wide range of *amici*, including legal scholars, in Rhode Island's *Chambers v. Ormiston* case described below; views on the correct resolution of the recognition issue in that context (divorce) varied greatly.

B. The Recognition Issue Arises in a Large Number of Litigation Contexts.

It is probably not possible to anticipate and list every litigation context in which the recognition issue may arise. Those contexts extend from the domain of wrongful death statutes to tax-filing status to testimonial privileges to legal standing for certain causes of action and beyond.

Here is an example from one of the few American appellate court decisions addressing to date the recognition issue. In *Martinez v. County of Monroe*, (4th App. Div. 2008) 850 N.Y.S.2d 740, a community college employee prosecuted a civil action against her employer, seeking a declaration that the employer must recognize her Canadian marriage to another woman for purposes of spousal health care benefits that came as a part of the employment package.

Here is another example from the recent Rhode Island Supreme Court decision in *Chambers v. Ormiston*, (R.I. 2007) 935 A.2d 956. Two women who were residents of Rhode Island traveled to Massachusetts, wed, returned to Rhode Island, and then later sought a Rhode Island divorce. The Rhode Island Supreme Court held that the Massachusetts marriage did not qualify as a "marriage" that would satisfy the jurisdictional statute governing divorce proceedings in the Family Court.

Another example involves testimonial privileges of a kind that often arise in litigation. One is a spouse's privilege to bar the other spouse's testimony in certain circumstances (the spousal privilege). Another is a person's privilege to bar a present or former spouse from disclosing any confidential communication made during the marriage (the confidential communications privilege).

This list of examples could be greatly expanded. The important point is that the recognition issue can arise in a wide variety of litigation contexts, both civil and criminal, and, when it arises, must be litigated to resolution.

C. A Massachusetts Statute, With No Counterpart in California, Has Minimized Across the Nation the Level of Litigation of the Recognition Issue.

In November 2003, the Massachusetts Supreme Judicial Court (SJC) held that the legal definition of marriage as the union of a man and a woman was constitutionally infirm and mandated that, effective May 17, 2004, the legal meaning of marriage in that State would be the union of any two persons. *Goodridge v. Department of Public Health*, (Mass. 2003) 798 N.E.2d 941. The State's Senate then asked the SJC whether statutory provision of civil unions for same-sex couples would be an adequate remedy, but the SJC held no, the legal meaning of marriage must be the union of any two persons. *In re Opinions of the Justices to the Senate*, (Mass. 2004) 802 N.E.2d 565.

Massachusetts's then-governor, Mitt Romney, responded to these developments by directing that State officials comply with a Massachusetts statute prohibiting marriage in that State "by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction" (the 1913 statute).³

In June 2004, in a Massachusetts trial court, a number of out-of-state, same-sex couples challenged the 1913 statute, its constitutionality, and its application.⁴ In March 2006, at the SJC in *Cote-Whitacre v. Department of Public Health*, (Mass. 2006) 844 N.E.2d 623, one justice believed the 1913 statute unconstitutional,⁵ one did not take a clear position on that question,⁶ while five said the statute was constitutional.⁷ Regarding application, three (the Spina concurrence) believed that the 1913 statute applied to residents of all States where the public and legal meaning of marriage was the union of a man and a

³ General Laws c. 207, § 11. See Yvonne Abraham, *Romney: gay outsiders can't marry in Mass.*, THE BOSTON GLOBE, April 25, 2004, available at http://www.boston.com/news/local/articles/2004/04/25/romney_gay_outsiders_cant_marry_in_mass/.

⁴ *Cote-Whitacre v. Dep't of Pub. Health*, (Mass. 2006) 844 N.E.2d 623, 632-33 (Spina, J., concurring). Some Massachusetts clerks also initiated an action challenging the 1913 statute, *Johnstone v. Reilly*, Civil Action No. 04-2655-G; this action was consolidated with the action initiated by the out-of-state, same-sex couples.

⁵ *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 660-72 (Ireland, J., dissenting).

⁶ *Id.* at 659-60 (Greaney, J., concurring).

⁷ *Id.* at 645, 651-52 (Spina, J., concurring); *id.* at 652 (Marshall, C.J., concurring).

woman.⁸ The Spina concurrence based this conclusion on the idea that where a State's "law has interpreted the term 'marriage' as the legal union of one man and one woman as husband and wife ... then same-sex marriage would be 'prohibited' in that State"⁹ But three other justices (the Marshall concurrence) said that the 1913 statute did not apply to out-of-state couples from States that had no law saying in effect *both* "marriage is the union of a man and a woman" and "marriage is not the union of a man and a man or a woman and a woman."¹⁰

The case went back to the trial court to determine whether the plaintiffs not disqualified by even the Marshall concurrence – the one New York plaintiff-couple and the two Rhode Island plaintiff-couples – could marry in Massachusetts.¹¹ On September 29, 2006, the trial court found that under either the Spina concurrence or the Marshall concurrence the New York same-sex couple could not marry in Massachusetts.¹² The basis of the finding relative to New York was that State's Court of Appeals decision of July 6, 2006, holding that the man/woman meaning of marriage was constitutional.¹³ The trial court elected to follow the Marshall concurrence relative to the Rhode Island question.¹⁴ On that basis, the trial court found that no "constitutional amendment, statute, or controlling appellate decision from Rhode Island ... explicitly deems void or otherwise expressly forbids same-sex marriage."¹⁵ In this way, the trial court effectively blocked application of the 1913 statute to same-sex couples resident of Rhode Island, but only that State. The Massachusetts Attorney General took no appeal.¹⁶

⁸ *Id.* at 639 n. 12 (Spina, J., concurring).

⁹ *Id.*

¹⁰ *Id.* at 652-59.

¹¹ *Id.* at 658 (Marshall, C.J., concurring). Interestingly, one of the two Rhode Island couples had received a Massachusetts marriage license and had the marriage solemnized in Massachusetts, although government officials thereafter refused to register the completed marriage certificate. *Id.* at 659 n. 12.

¹² *Cote-Whitacre v. Dep't of Pub. Health*, (Mass. Super. 2006) 2006 WL 3208758 at *2.

¹³ *Id.*; see *Hernandez v. Robles*, (N.Y. 2006) 855 N.E.2d 1.

¹⁴ *Cote-Whitacre v. Dep't of Pub. Health*, (Mass. Super. 2006) 2006 WL 3208758 at *4 ("this Court will apply Chief Justice Marshall's construction of [the 1913 statute] to determine whether same-sex marriage is prohibited in Rhode Island.").

¹⁵ *Id.* at *4.

¹⁶ We understand that Massachusetts clerks currently also allow same-sex couples from New Mexico to receive a Massachusetts marriage license.

What is important for our purposes is that the 1913 statute operates quite rigorously to limit the number of same-sex couples across our Nation who have been or will be married in Massachusetts, the only State to date to allow such marriages. Thus, that statute in turn limits the level of litigation across the Nation of the recognition issue.

II.

BUT FOR ISSUANCE OF THE REQUESTED STAY, THE CALIFORNIA SCENARIO MAY WELL RESULT IN EXTENSIVE AND BURDENSOME LITIGATION IN OUR COURTS OF THE RECOGNITION ISSUE, UNNECESSARILY.

California has no equivalent of the 1913 statute. Accordingly, it is not surprising that news media in each of our States report on not a few resident same-sex couples who intend to go or are seriously contemplating going to California to marry, if and when the remedy in this case becomes effective, and then returning home. We reasonably believe an inevitable result of such “marriage tourism” will be a steep increase in litigation of the recognition issue in our courts.

Out of our commitment to the principles of “our federalism,”¹⁷ we would simply shoulder that burden without comment – if it were not for the prospect that in a little more than five months, the legal meaning of marriage in California may return to “the union of a man and a woman.” We refer of course to the proposed ballot measure on marriage.

(With respect to the proposed ballot measure, we incorporate here, as though set forth in full, the portions – and only those portions – of “Proposition 22 Legal Defense and Education Fund’s Petition for Rehearing” and that party’s “Request for Judicial Notice” (both filed May 22, 2008) that identify that proposed ballot measure and its current status and ask for appropriate judicial notice thereof.)

That prospect of a possible return to the man/woman definition of California marriage¹⁸ has led us to certain inter-related and prudential

¹⁷ See *United States v. Lopez*, (1995) 514 U.S. 549, 581, 115 S.Ct. 1624, 1641 (“[C]onsiderable disagreement exists about how best to accomplish [a particular social policy] goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”)

¹⁸ Again, we advocate neither side of the proposed ballot measure on marriage. Nor do we express any view on the likelihood of the measure’s success or

considerations. One is the litigation burden we reasonably anticipate in the absence of the requested stay of this case's mandate. Another is that a return in November to the man/woman meaning for California marriage will not eliminate that burden but will probably add to it; a new and potentially difficult issue will be the marital status of a same-sex couple that married in California before the restoration of the man/woman meaning. The final prudential consideration is that the requested stay, if granted, will obviate these reasonably anticipated difficulties. That stay will effectively address our concerns regarding premature, unnecessary, unnecessarily difficult, and therefore unduly burdensome litigation in our courts.

Certainly if the new California definition of marriage continues past November, the resulting litigation in our courts of the recognition issue will have the virtue of being both necessary and unavoidable under the principles of "our federalism," principles to which we are all committed.


As to counter-arguments against any further delay in making California marriage available to same-sex couples, we simply note that this Court has proceeded to this point in a deliberate fashion and without undue haste. Thus, when various parties asked for immediate and direct review by this Court of the trial court's final judgment, this Court, no doubt out of prudential considerations, declined and instead directed review first by the Court of Appeal, a decision that delayed a final resolution quite a bit longer than the five or so months we are urging.

failure; we are not pollsters. But neither do we ignore the widely expressed views of knowledgeable people that the contest could go either way; to ignore those views, we believe, would not be prudent in these circumstances.

III.
CONCLUSION

For all the reasons set forth above, we respectfully suggest that this Court modify the remedy stated in its opinion by deferring the effective date of that remedy until certification of the election results relative to the proposed California ballot measure on marriage.

Respectfully submitted,


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*On his own behalf and on behalf of the
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