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17 SUPERIOR COURT OF CALIFORNIA

18 COUNTY OF SAN FRANCISCO

19 COORDINATION PROCEEDING
20 SPECIAL TITLE [RULE 1550(b)]:

21 MARRIAGE CASES

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4365

22 **WOO/MARTIN PARTIES' RESPONSES
TO PROCEDURAL QUESTIONS POSED
AT DECEMBER 22-23, 2004 HEARING**

23 The Honorable Richard A. Kramer
24 Coordination Trial Judge
25 Dept.: 304

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1 In response to questions posed by this Court at the hearing conducted on December 22 and
 2 December 23, 2004 in these *Coordinated Marriage Cases* (“the Hearing”), the Woo/Martin Parties
 3 submit the following:

4 A. Regarding whether an opinion directing issuance of the writ of mandate for which
 5 the Woo/Martin Parties have petitioned would obviate their claims for declaratory
 6 and injunctive relief, the Woo/Martin Parties confirm their position as stated on the
 7 record during the Hearing, namely that such an order would resolve all issues
 8 necessary for judgment to be entered on all of their claims.

9 B. Regarding the motions for summary judgment filed by the Campaign for California
 10 Families (“the Campaign”) and the Proposition 22 Legal Defense and Education
 11 Fund (“the Fund”), the Woo/Martin Parties, as Intervenor-Defendants in those
 12 actions, confirm their position as stated on the record during the Hearing, namely
 13 that there are no factual disputes that are material to the Court’s resolution of the
 14 legal question posed by these motions, that is, whether California’s exclusion of
 15 same-sex couples from civil marriage does or does not violate the California
 16 Constitution. Accordingly, the Court may address this question as a matter of law
 17 on these motions.¹ Having agreed at the Hearing to waive the statutory notice

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 19 ¹ At the Hearing, the Court posed a question to various parties regarding whether this case involves a
 20 “facial” or an “as applied” challenge. Although we believe that the record is clear, out of an abundance of
 21 caution, the *Woo/Martin* parties wish to reiterate that this is a facial challenge raising purely an issue of law.
 22 The much-debated distinction between facial and as-applied challenges, as we understand it, has to do with
 23 situations in which a challenged statute is unconstitutional in all instances, as opposed to situations in which
 24 the law may have both constitutional and unconstitutional applications. Family Code Section 300, by its
 25 terms, restricts marriage to a man and a woman. That classification, on its face, is unconstitutional because
 26 marriage may not be so restricted. There is nothing about the particular circumstances of the individual
 27 petitioners in the *Woo* case which affects the constitutional determination, nor is there any need for
 28 consideration of evidence in making that determination.

A related, though distinct, question is whether the law in issue, by its own terms – that is, on its face
 – discriminates on the basis of “sexual orientation.” The marriage statute does. The text of the marriage law
 itself expressly purports to make marriage heterosexual by defining it so – that is, by limiting it to persons in
 an intimate relationship with someone of a different sex. By contrast, the definition of “homosexuality” is
 an affinity to form such a relationship with someone of the same sex. The term “sexual orientation” thus is
 relational, and the fact that neither the term “homosexuality” nor the term “heterosexuality” appears in the
 statute does not mean that the law does not classify expressly on the basis of sexual orientation, as has been
 well-recognized by the courts with respect to laws adversely treating same-sex couples. *See, e.g., Lockyer v.*
City and County of San Francisco (2004) 33 Cal. 4th 1055, 1128 (conc. & dis. opn. of Kennard, J) (noting
 that “California law has expressly restricted matrimony to heterosexual couples”) (emphasis added); *Harris*

1 requirement for such motions set by CCP Section 437c(a), the Woo/Martin Parties
 2 are filing herewith, as authorized by this Court at the Hearing, their Separate
 3 Statement of Disputed and Undisputed Facts, as prescribed by CCP Section
 4 437c(b)(3). The Woo/Martin Parties also are filing herewith, as requested by the
 5 Court, a form for the Court's rulings on their objections to the evidence submitted by
 6 the Campaign and the Fund. The Woo/Martin Parties' Separate Statement and
 7 evidentiary objections show as to each of the moving parties' proposed material
 8 facts why each either is not a fact but rather a legal assertion, is not material to the
 9 pending legal question and/or is not supported by admissible evidence.²

10 C. It is the Woo/Martin Parties' position that this Court's ruling on the legal question
 11 presented by the Campaign's and the Fund's motions will leave no issues remaining
 12 for further disposition by this Court.

13 D. Regarding whether it is necessary for final disposition of these cases that the Court
 14 resolve factual disputes and make corresponding factual findings, the Woo/Martin
 15 Parties confirm their position as stated on the record during the Hearing, namely,
 16 that there is no need for the Court to hold an evidentiary hearing and make any
 17 factual findings because the only material facts in this action are those that establish
 18 the Court's jurisdiction to consider and resolve the pending legal claims. The
 19 jurisdictional facts that establish this Court's authority to consider the Woo/Martin
 20 Parties' writ petition and render a final judgment in their case are set forth below,
 21 and each is undisputed:

22
 23 *v. Capital Grown Investors XIV* (1991) 52 Cal. 3d 1142, 1155, 1161 (describing the refusal of a business to
 24 treat a same-sex couple in the same manner as a different-sex couple as a form of discrimination based on
 25 "homosexuality"); *see also Lawrence v. Texas* (2003) 123 S.Ct. 2472, 2485 (O'Connor, J., conc.)
 26 (recognizing that adverse treatment of those with same-sex "partners" is discrimination based on "sexual
 27 orientation"). Most important, nothing about these matters suggests that this case involves anything other
 28 than a legal issue that can be resolved without factual determinations, let alone an evidentiary hearing.

² By taking this position for the purpose of opposing these motions for summary judgment, the
 Woo/Martin Parties do not intend to waive their right as Intervenor-Defendants to participate fully, including
 having the opportunity to submit evidence, should the Court determine, instead, that disputes of material fact
 preclude disposition of the claims presented in the Campaign/Fund cases as a matter of law, and that an
 evidentiary hearing is required as to such material facts.

1 1. The individual Petitioners in this case are Lancy Woo and Cristy Chung,
2 Joshua Rymer and Tim Frazer, Jewelle Gomez and Diane Sabin, Myra Beals
3 and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne
4 Rizzo and Pali Cooper, Karen Shain and Jody Sokolower, Janet Wallace and
5 Deborah Hart, Corey Davis and Andre Lejeune, Rachel Lederman and
6 Alexsis Beach, Stuart Gaffney and John Lewis, and Phyllis Lyon and Del
7 Martin.

8 2. Each of the individual Petitioners wishes to marry his or her same-sex
9 partner.

10 3. Apart from the statutory restriction that marriage must be between a male
11 and a female, each of the individual Petitioners is qualified to marry his or
12 her same-sex partner.

13 4. But for the statutory restriction that marriage must be between a male and a
14 female, each of the individual Petitioners would marry his or her same-sex
15 partner.

16 5. The organizational Petitioners in this case are Equality California and Our
17 Family Coalition.

18 6. Each of the organizational Petitioners in this case includes members who
19 wish to marry their same-sex partners, who are qualified to do so apart from
20 the statutory restriction that marriage must be between a male and a female,
21 and who would do so but for the statutory restriction.

22 The Defendant State of California, the Campaign and the Fund all confirmed
23 on the record during the Hearing that they do not dispute any of these jurisdictional
24 facts.³ Accordingly, because there is no dispute concerning the Court's jurisdiction
25 and because the legal question presented in the Woo/Martin Parties' Petition and the
26 Fund's and the Campaign's motions for summary judgment may be resolved as a

27 ³ These parties stipulated to similar jurisdictional facts regarding the plaintiffs' standing and
28 justiciability of their claims in litigation currently pending in federal court. *See Smelt v. County of Orange*,
 Case No. SA CV 04-1042-GLT (MLGx) (C.D. Cal.).

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matter of law, the Woo/Martin Parties submit that there are no disputes of material fact requiring an evidentiary hearing and corresponding factual "findings" by this Court.

Dated: January 14, 2005

Respectfully submitted,

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**THERESA MICHELLE PETRY and CRISTAL
RIVERA-MITCHEL, OUR FAMILY COALITION
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