Case No.: S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

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

RESPONDENTS' CONSOLIDATED ANSWER BRIEF REGARDING JUSTICIABILITY

STEPHEN V. BOMSE (BAR NO. 40686)
CHRISTOPHER F. STOLL (BAR NO. 179046)
DAVID J. SIMON (BAR NO. 241501)
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104-2878
T: (415) 772-6000 / F: (415) 772-6268

SHANNON MINTER (BAR NO. 168907)
VANESSA H. EISEMANN (BAR NO. 210478)
MELANIE ROWEN (BAR NO. 233041)
CATHERINE SAKIMURA (BAR NO. 246463)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
T: (415) 392-6257 / F: (415) 392-8442

Additional Counsel Listed on Next Page:
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
ACLU FOUNDATION OF NORTHERN CALIFORNIA
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
LAW OFFICE OF DAVID C. CODELL

Attorneys for Respondents Joshua Rymer and Tim Frazer, et al. in No. A110451; Respondent Equality California in No. A110450; Del Martin and Phyllis Lyon, et al. in Nos. A110652 and A110651

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HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104-2878
T: (415) 772-6000 / F: (415) 772-6268

SHANNON MINTER (BAR NO. 168907)
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MELANIE ROWEN (BAR NO. 233041)
CATHERINE SAKIMURA (BAR NO. 246463)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
T: (415) 392-6257 / F: (415) 392-8442

Additional Counsel Listed on Next Page:
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
ACLU FOUNDATION OF NORTHERN CALIFORNIA
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
LAW OFFICE OF DAVID C. CODELL

Attorneys for Respondents Joshua Rymer and Tim Frazer, et al. in No. A110451; Respondent Equality California in No. A110450; Del Martin and Phyllis Lyon, et al. in Nos. A110652 and A110651

Additional Attorneys for

Respondents Joshua Rymer and Tim Frazer, Jewelle Gomez and Diane Sabin, Myra Beals and Ida Matson,
Arthur Frederick Adams and Devin Wayne Baker,
Jeanne Rizzo and Pali Cooper, Karen Shain and Jody Sokolower,
Janet Wallace and Deborah Hart, Corey Davis and Andre LeJeune,
Rachel Lederman and Alexsis Beach, Stuart Gaffney and John Lewis, and
Phyllis Lyon and Del Martin, Our Family Coalition, and
Equality California in No. A110451;

Respondent Equality California in No. A110450; and

Respondents Del Martin and Phyllis Lyon, Sarah Conner and Gillian Smith, Margot McShane and Alexandra D'Amario, David Scott Chandler and Jeffery Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, and Equality California in Nos. A110651 and A110652

JON W. DAVIDSON (BAR NO. 89301)
JENNIFER C. PIZER (BAR NO. 152327)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
T: (213) 382-7600 / F: (213) 351-6050

PETER J. ELIASBERG (BAR NO. 189110)
CLARE PASTORE (BAR NO. 135933)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
T: (213) 977-9500 / F: (213) 250-3919

ALAN L. SCHLOSSER (BAR NO. 49957)
ALEX M. CLEGHORN (BAR NO. 231983)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
T: (415) 621-2493 / F: (415) 255-8437

DAVID C. CODELL (BAR NO. 200965)
LAW OFFICE OF DAVID C. CODELL
9200 Sunset Boulevard, Penthouse Two
Los Angeles, CA 90069
T: (310) 273-0306 / F: (310) 273-0307

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Whether the Court of Appeal correctly concluded that Petitioners Proposition 22 Legal Defense and Education Fund (the "Fund") and Campaign for California Families (the "Campaign") lack standing to maintain their actions against the City and County of San Francisco (the "City") and that those Petitioners' claims are nonjusticiable.[1]

[1] On January 12, 2007, this Court entered an order clarifying that Petitioners Proposition 22 Legal Defense and Education Fund and Campaign for California Families (jointly referred to herein as "Petitioners") were permitted to file opening briefs limited to the "issue of justiciability or standing addressed by the Court of Appeal." This Answer Brief Regarding Justiciability addresses that issue. The Fund's Opening Brief includes discussion of the proper construction of Section 308.5 of the Family Code (Proposition 22). Respondents' understanding of this Court's order is that Respondents should address substantive issues concerning the constitutionality or construction of the marriage statutes and the proper construction of California Family Code Section 308.5 in Respondents' Opening Brief on the Merits, filed in these coordinated cases on April 2, 2007, and in Respondents' forthcoming Reply Brief on the Merits, rather than in this Answer Brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[2]

The Court of Appeal's holding that the Fund and the Campaign lack standing to seek relief against the City and County of San Francisco regarding the constitutionality of California's marriage statutes is consistent with settled law and should be affirmed. Petitioners' lawsuits (Nos. A110652 and A110651) asserted taxpayer claims pursuant to section 526a of the Code of Civil Procedure seeking to stop the issuance of marriage licenses to same-sex couples by the City and County of San Francisco. In a separate pair of consolidated cases brought by taxpayers and by the Attorney General, this Court issued a final judgment against the City ordering it "to comply with the requirements and limitations of the current marriage statutes" and to cease issuing marriage licenses to same-sex couples. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1120 (hereafter *Lockyer*).) This Court's ruling in *Lockyer* rendered

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[2] The Respondents submitting this Answer Brief are:

- Respondents Joshua Rymer and Tim Frazer, Jewelle Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Karen Shain and Jody Sokolower, Janet Wallace and Deborah Hart, Corey Davis and Andre LeJeune, Rachel Lederman and Alexsis Beach, Stuart Gaffney and John Lewis, Phyllis Lyon and Del Martin, Our Family Coalition, and Equality California in *Woo v. Lockyer*, No. A110451;
- Respondent Equality California in *Tyler v. State of California*, No. A110450; and
- Respondents Del Martin and Phyllis Lyon, Sarah Conner and Gillian Smith, Margot McShane and Alexandra D'Amario, David Scott Chandler and Jeffery Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, and Equality California in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, No. A110651 and in *Campaign for California Families v. Newsom*, No. A110652.

moot the lawsuits of both the Fund and the Campaign. Petitioners' standing as taxpayers ended when this Court issued a final judgment ordering that the City cease the improper expenditure of public funds to issue marriage licenses to same-sex couples and the City complied.

Moreover, because the consolidated cases that were before this Court in *Lockyer* included an action by taxpayers and residents seeking to require the City to comply with the marriage statutes, the final judgment in *Lockyer* precludes other taxpayer or citizen suits challenging the same actions by the City. For purposes of res judicata and collateral estoppel, all taxpayers and residents are deemed to be in privity with the taxpayers in the previously concluded litigation. Following this Court's ruling in *Lockyer*, absent some further actual or threatened unlawful expenditure of public funds by the City or actual or threatened failure to enforce the marriage statutes by the City — of which there is none — neither the Fund nor the Campaign has taxpayer standing to sue or continue to sue the City for declaratory or injunctive relief regarding the invalidity of the City's issuance of marriage licenses to same-sex couples. Without any live challenge to a public expenditure of funds, Petitioners may not seek as taxpayers a judicial opinion regarding the validity of the marriage statutes because such an opinion would be merely advisory in the context of their cases.

In addition, Petitioners lack standing to seek a declaration that the exclusion of same-sex couples from marriage is constitutional under Code of Civil Procedure section 1060 because Petitioners have no cognizable legal interest at stake in their respective cases. Regardless of the outcome of this case, Petitioners and their supporters will continue to be able to marry the person of their choice, and those who are married will continue to enjoy

all of the legal, social, and personal benefits that marriage uniquely provides. As the Court of Appeal held in a related action in which the Fund unsuccessfully appealed the denial of its application to intervene in two of the cases seeking the freedom to marry for same-sex couples, the Fund cannot identify "any diminution in legal rights, property rights or freedoms that an unfavorable judgment might impose" on its contributors or supporters. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1038-1039.) The same is true of the Campaign, whose supporters likewise have only a political or philosophical interest in the outcome of this case, not a legally cognizable one.

Finally, Petitioners lack standing as alleged "proponents" of Proposition 22 because they neither meet the legal definition of official initiative proponents nor have any interest in the meaning and constitutionality of Proposition 22 that is different from the interests of other voters who supported and voted for the measure. Such a generalized interest is not sufficiently concrete or distinct to provide them with standing in this case.

As more fully explained below, Respondents respectfully request that this Court affirm the Court of Appeal's determination that the Campaign and the Fund lack standing to maintain their actions against the City and County of San Francisco and that those Petitioners' claims are nonjusticiable.

PROCEDURAL BACKGROUND

On February 12, 2004, the Clerk of the City and County of San Francisco began issuing marriage licenses to same-sex couples in San Francisco. (Appellant's Appendix in *Thomasson v. City and County of San Francisco,* A110652, at pp. 12-13.) On February 13, 2004, the Fund and the Campaign initiated actions in San Francisco County Superior Court, seeking an immediate stay and writ relief to halt the issuance of marriage licenses to same-sex couples by the City.[3] (*Thomasson v. Newsom,* San Francisco Super. Ct. Case No. 428794; *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, San Francisco Super. Ct. Case No. 503943.) The trial court permitted intervention in the *Thomasson (Campaign)* and the *Fund* actions by several Respondents, including four same-sex couples to whom San Francisco had issued marriage licenses, a same-sex couple who intended to marry in San Francisco, and Equality California, many of whose members had married their same-sex partners in San Francisco or intended to do so. (Exhibits In Support Of Respondents' Unopposed Motion to Augment the Record On Appeal, A110651, Vol. I, at pp. 1012-1014, 1037-1039.)

Then-Attorney General Bill Lockyer and a group of taxpayers and residents of San Francisco also filed original writ proceedings in this Court seeking an immediate stay and a peremptory writ of mandate against the

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[3] The Campaign also sought a declaration that Mayor Newson and the County Clerk "failed to comply with the statutes governing the issuance of marriage licenses . . . and that all marriage licenses issues and marriages of same-sex couples] solemnized under circumstances not provided by law are invalid"; and an injunction enjoining City and County officials from issuing marriage licenses to same-sex couples. (Appellant's Appendix in *Campaign for California Families v. Newsom*, A110652, at pp. 5-10.)

Clerk and the City. (*Lockyer v. City and County of San Francisco*, Supreme Ct. Case No. S122923; *Lewis v. Alfaro*, Supreme Ct. Case No. S122864).[4] The *Lockyer* and *Lewis* cases were consolidated, and on March 11, 2004, the Court stayed the proceedings in the Campaign and Fund actions while original writ proceedings were pending in the Court challenging the City's issuance of marriage licenses to same-sex couples. (*Lockyer, supra*, 33 Cal.4th at pp. 1073-1074). In addition, the City and numerous same-sex couples (including some of the Respondents), and two organizations (Respondents Our Family Coalition and Equality California), filed four actions challenging the constitutionality of the State's statutes excluding same-sex couples from marriage: *City and County of San Francisco v. State of California*, San Francisco Super. Ct. Case No. 429539; *Woo v. State of California*, San Francisco Super. Ct. Case No. 429548 (hereinafter *Woo*); *Clinton v. State of California*, San Francisco Super. Ct. Case No. 429548; and *Tyler v. County of Los Angeles*, Los Angeles Super. Ct. Case No. 088506. These four cases and the Fund's and the Campaign's lawsuits were coordinated in Judicial Council Coordination Proceeding No. 4365 before San Francisco Superior Court Judge Richard Kramer.

When this Court issued its writ of mandate against the City on August 12, 2004 (*Lockyer, supra,* 33 Cal.4th at p. 1120), its decision dissolved the stay of the *Fund* and *Campaign* (*Thomasson*) cases.

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[4] Petitioners Barbara Lewis et al. in *Lewis v. Alfaro*, Supreme Ct. Case No. S122864, were represented by some of the same counsel who represent the Fund in this case, namely Alliance Defense Fund and the Law Offices of Terry L. Thompson. (*Lockyer, supra,* 33 Cal.4th at p. 1065.) The Campaign participated in that case as amicus curiae. (*Ibid.*)

(Supreme Ct. Minute Order of September 15, 2004 (*Lockyer*, Supreme Ct. Case No. S122923).) At that time, both the City and Respondents dismissed their cross-complaint and complaints in intervention, respectively, in recognition that this Court's decision in *Lockyer* had rendered them moot. (Clerk's Transcript, Case No. A110651 ("CT"), at pp. 1157-1165.) Both Petitioners attempted to file a Second Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief in its Superior Court cases in front of Judge Kramer. (CT:155-164; Exhibits in Support of Respondents' Unopposed Motion to Augment the Record on Appeal in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, A110651, at 1372-1381; Appellant's Appendix in *Thomasson v. City and County of San Francisco*, A110652, at pp. 131-165.) The trial court denied Petitioners' motions to amend because it construed their complaints to include a request for declaratory judgment on the constitutionality of the marriage laws. (Reporter's Transcript ("RT"):125; CT:344.)

On September 22, 2004, the City and Respondents moved to dismiss Petitioners' cases for mootness and lack of standing. (Exhibits in Support of Respondents' Unopposed Motion to Augment the Record on Appeal in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, A110651, at 1358-1371; Appellant's Appendix in *Thomasson v. City and County of San Francisco*, A110652, at pp. 117-130; RT:107, 399.) The court denied the motions to dismiss because it found that a controversy remained. (RT:125; CT:344.) During the hearing on summary judgment, the City renewed its motion to dismiss for lack of standing, which the trial court denied for being untimely (RT:398) and because of a supposed "remaining question regarding the permanency of an

order against Mayor Newsom." (RT:399.)

After a two-day hearing on Respondents' writ petitions and Petitioners' motion for summary judgment in December 2004, Judge Kramer issued his final opinion and order in this and the other coordinated marriage cases on April 13, 2005, in favor of Respondent couples, Equality California, and the City and County of San Francisco, Gavin Newsom, and Nancy Alfaro. Petitioners and the State appealed.

On October 5, 2006, the Court of Appeal, First Appellate District, Division Three issued an opinion in all six appeals, which reversed, in part, the Superior Court's judgment. (Opn., at p. 64.)[5] The Court of Appeal held that sections 300 and 308.5 of the Family Code do not violate the equal protection, due process, privacy, free association or free expression guarantees of the California Constitution. (Opn., at pp. 21-50.) Presiding Justice J. Anthony Kline dissented, explaining why the statutory ban on marriage by same-sex couples violates the California Constitution's equal protection, privacy, due process, and free expression provisions. (*Id.* at pp. 72-122 (dis. opn. of Kline, J.).)

The Court of Appeal unanimously affirmed the trial court's judgment against the Fund and the Campaign on the ground that the Fund's and the Campaign's cases should have been dismissed because Petitioners lacked standing to pursue their claims. (Opn., at p. 8.)

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[5] The Court of Appeal's opinion is cited throughout this brief as "Opn."

ARGUMENT

I. PETITIONERS DO NOT HAVE TAXPAYER STANDING BECAUSE THEIR CLAIMS UNDER CCP SECTION 526A ARE MOOT AND BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL AS A RESULT OF THIS COURT'S RULING IN *LOCKYER*.

"For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-233.) In order to have taxpayer standing, a plaintiff must allege "'an *actual* or *threatened* expenditure of public funds.'" (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 749 (hereafter *Connerly*) [citing *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240 (hereafter *Waste Management*)].) The Court of Appeal correctly concluded that the Fund "do[es] not have standing under Code of Civil Procedure section 526a . . . because [its] claims do not identify or challenge any allegedly illegal expenditure of public funds." (Opn., at pp. 10.)

Petitioners' interest in this action as taxpayers expired when this Court issued its decision in *Lockyer*, *supra*, 33 Cal.4th at p. 1055. The Court's ruling in *Lockyer* ordered all of the substantive relief that Petitioners were entitled to seek in a taxpayer claim for declaratory and injunctive relief – cessation of an improper expenditure and a declaration that public funds were spent improperly. The City has complied with the *Lockyer* decision and stopped issuing marriage licenses to same-sex couples. Therefore, there are no longer "'facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur.'" (*Connerly*, 146 Cal.App.4th at p. 749 [citing *Waste Management*,

79 Cal.App.4th at p. 1240].) Without the threat of any future improper expenditure, there is no longer any basis for Petitioners to seek a writ of mandate or injunctive or declaratory relief against the City.

A. Petitioners' Taxpayer Claims Are Moot.

When a final judgment in a related proceeding determines all the issues in another proceeding, that other proceeding is rendered moot. (*Connerly, supra*, 146 Cal.App.4th at pp. 747-748; *Estate of Jackson* (1935) 2 Cal.2d 283, 283-285.) In the actions filed by the Fund and the Campaign, Petitioners sought to stop the City and its agents from issuing marriage licenses to same-sex couples and to invalidate the licenses already granted to such couples. (Appellant's Appendix in *Thomasson v. City and County of San Francisco*, A110652, at pp. 7-9 [claims for relief in the Campaign's Verified Amended Complaint]; City's Appendix in *Proposition 22 v. City and County of San Francisco*, A110651, at pp. 1027-1028 [prayer for relief in the Fund's First Amended Verified Petition].) The Fund admits that this Court's decision in *Lockyer* "is a definitive ruling that the expenditures were invalid and that the City could not continue issuing marriage licenses to same-sex couples." (Fund Opening Br. at p. 9.) Accordingly, the decision in *Lockyer* has rendered Petitioners' claims moot. (See, e.g., *Cornblum v. San Diego County Bd. of Sup'rs* (1980) 110 Cal.App.3d 976 [where judgment entered in a class action compelled defendants to rectify the same issues complained of in a taxpayers' suit, the taxpayers' suit was moot and thus presented no justiciable issue].)

Nevertheless, the Fund argues that its taxpayer claim "has not been resolved because of the ongoing dispute with the City over the scope and

constitutionality of Proposition 22." (Fund Opening Br. at p. 9; see also *id.* at p. 10 [arguing that "[a]n ongoing or future expenditure is relevant only to an injunction"].) Likewise, the Campaign argues that it has taxpayer standing to seek declaratory relief regarding the constitutionality of the marriage statutes despite this Court's ruling in *Lockyer*. (Campaign Opening Br. at pp. 22-28.) These arguments disregard the essential requirement of a taxpayer action, which "must involve an actual or threatened expenditure of public funds." (Opn., at pp. 10-11 [citing *Waste Management, supra,* 79 Cal.App.4th at p. 1240].) Although taxpayers may seek declaratory as well as injunctive relief under section 526a, they may do so only insofar as the declaratory relief is tied to an actual or future threatened illegal expenditure of funds. (See, e.g., *Waste Management, supra*, 79 Cal.App.4th at p. 1240.)

The authorities cited by Petitioners do not support their argument that taxpayers may seek declaratory relief under section 526a even after a court in a related proceeding has determined that the challenged expenditures are unlawful and issued a final judgment enjoining those expenditures. Contrary to Petitioners' claims, *Van Atta v. Scott* (1980) 27 Cal.3d 424 and *Blair v. Pitchess* (1971) 5 Cal.3d 258 merely stand for the unremarkable proposition that plaintiffs who have alleged an illegal expenditure of public funds under section 526a cannot be required to make an *additional* showing of "a special, personal interest in the outcome." (*Blair, supra*, 5 Cal.3d at p. 269; see also *Arrieta v. Mahon* (1982) 31 Cal.3d 381, 387 [same].) In this case, however, the Court of Appeal correctly held that, once this Court issued its ruling in *Lockyer*, Petitioners no longer met the threshold requirement of section 526a because, at that point, they could not point to any actual or threatened expenditure of public

funds. (Opn., at pp. 10-11.)

Petitioners' reliance on *Stanson v. Mott* (1976) 17 Cal.3d 206 is also misplaced. In *Stanson*, the plaintiff taxpayer sued the Director of the State Department of Parks and Recreation for an allegedly illegal expenditure of public funds on an advertising campaign in support of a bond. (*Id.* at p. 209.) The trial court granted the State's demurrer *without determining whether the expenditures were unlawful.* This Court reversed and remanded the case to the trial court to determine whether the challenged expenditures were improper and, if so, to issue appropriate declaratory and injunctive relief. (*Id.* at pp. 210, 222.) In contrast, in this case, this Court has already issued a final judgment holding that the challenged expenditure of public funds was unlawful and enjoining any further expenditures unless the relevant statutes are judicially determined to be unconstitutional. (*Lockyer*, *supra*, 33 Cal.4th at p. 1112, 1118.)

In *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, as in *Stanson*, there was a possibility that the challenged public expenditures might resume because there had been no decision on the merits of whether the conduct was unlawful. (*Id.* at 1147 fn.4 [holding that the Court could reach the merits of the appeal, even though the challenged action had been completed, because the case involved "an issue of substantial public interest that is likely to recur"].) In contrast, Petitioners' cases do not present an issue that would evade review unless the Court hears Petitioners' actions. This Court has already determined that the City's issuance of marriage licenses to same-sex couples was unlawful under the current marriage statutes. There is no credible threat that the City will act in contempt of this Court's order. (See *Connerly, supra,* 146 Cal.App.4th at p. 750 ["[I]njunctions cannot be predicated on the

proponent's fear of something that may happen in the future."]; *Lee v. Gates* (1983) 141 Cal.App.3d 989, 993 [same]; *Giles v. Horn* (2002) 100 Cal.App.4th 206, 228 [rejecting on analogous facts argument that court should exercise discretion to reach an issue of continuing public concern].)

Further, the issue of the constitutionality of California's marriage statutes already will be decided through resolution of the four cases challenging the exclusion of same-sex couples from civil marriage – *Woo v. California*, A110451; *City and County of San Francisco v. California*, A110449; *Tyler v. California*, A110450; and *Clinton v. California*, A110463. The State is vigorously defending the validity of its statutes in these cases. Thus, there is no danger the issues presented by this case will go unaddressed if Petitioners are prevented from re-litigating issues that have been resolved by this Court in *Lockyer*. There is no basis to invoke the "public importance" exception to mootness in this case.

For similar reasons, Petitioners cannot evade mootness by mischaracterizing this Court's ruling in *Lockyer* as "interim relief." (Fund Opening Br. at pp. 14-15; Campaign Opening Br. at pp. 12-15 [alleging that the Court of Appeal failed to consider Petitioners' claim for an injunction].) The writ of mandate in *Lockyer* provided, in substance, the full and permanent relief Petitioners sought in these lawsuits by enjoining the City's challenged expenditures in the absence of a judicial determination that the current statutory exclusion of same-sex couples from marriage is unconstitutional. Petitioners fail to explain how an injunction would give them any more relief than that provided by the *Lockyer* writ of mandate. Only if the marriage statutes are held to be unconstitutional could the *Lockyer* writ fairly be characterized as "interim," and in such a circumstance, Petitioners would not be entitled to an injunction. Nor, as

discussed further in the next section of this brief, do Petitioners have any standing to seek an injunction duplicative of the order in *Lockyer* but based on an alternative ground (i.e., based on the purported validity of the marriage statutes rather than based on the City's having exceeded its authority). The practical effect of any such injunction would be no different from the effect of this Court's order in *Lockyer*.[6]

In sum, this Court has already granted all of the substantive relief available to Petitioners under section 526a. In the absence of any further alleged unlawful expenditure of public funds, Petitioners have no standing as taxpayers to seek any further relief.[7]

B. Petitioners' Taxpayer Claims Are Also Barred By Res Judicata And Collateral Estoppel.

The claims of both the Fund and the Campaign are barred by the doctrines of res judicata and collateral estoppel because of this Court's issuance of a final judgment in the *Lewis* case, which was brought as a representative action by taxpayers and was consolidated with *Lockyer*. (See

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[6] The Court of Appeal also held that, although Petitioners originally had standing to bring a citizen suit against the City to seek affirmative relief requiring the City to enforce the marriage statutes, Petitioners lack standing to continue to pursue that claim against the City following this Court's writ of mandamus in *Lockyer*. (Opn. at p. 11.) The mootness, standing, res judicata, and collateral estoppel analyses discussed in this Answer Brief in connection with Petitioner's taxpayer claims apply as well to any claim by Petitioners that might be deemed to be brought as part of a citizen suit.

[7] For the same reason, the fact that the City and Respondents filed cross-complaints and complaints in intervention against the Fund and the Campaign prior to this Court's decision in *Lockyer* is irrelevant and does not support the Fund's argument. After this Court ruled, both the City and the respondents dismissed their cross-complaint and complaints in intervention, respectively, in recognition that this Court's decision had rendered them moot. (CT:1157-1165.)

Lockyer, supra, 33 Cal.4th at p. 1070, fn. 2.) A final judgment in a taxpayer action or citizen suit decides issues for *all* taxpayers and citizens and precludes duplicative litigation (in addition to rendering such litigation moot).

The doctrine of res judicata (claim preclusion) applies "when 1) the issues decided in the prior adjudication are identical with those presented in the later action; 2) there was a final judgment on the merits in the prior action; 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1064-1065.) The related doctrine of collateral estoppel (issue preclusion) applies when "1) the issue to be precluded [is] identical to that decided in the prior proceeding; 2) the issue [was] actually litigated at that time; 3) the issue [was] necessarily decided; 4) the decision in the final proceeding [was] final and on the merits; and 5) the party against whom preclusion is sought [is] in privity with the party to the former proceeding." (*People v. Garcia* (2006) 39 Cal. 4th 1070, 1077.) [8] All of the elements of res judicata and collateral estoppel are easily satisfied here.

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[8] This Court has explained that while "[t]he doctrine of collateral estoppel is one aspect of the concept of res judicata," the "two terms have [acquired] distinct meanings" and generally refer to issue preclusion and claim preclusion, respectively. (*Lucido v. Superior Court of Mendocino County* (1990) 51 Cal.3d 335, 342 n.3; see also *People v. Barragan* (2004) 32 Cal. 4th 236, 252-253 [discussing close relationship between res judicata and collateral estoppel].) In this case, because the elements of both doctrines are satisfied, Respondents have provided the Court with an analysis of how both doctrines apply under the circumstances of this case. As a practical matter, regardless of which doctrine is applied, the result is the same: Petitioners' actions are precluded.

First, the issues decided in *Lockyer* are identical with those presented in Petitioners' actions – namely, whether the City's conduct violated the current marriage statutes and whether the City should be ordered to comply with the marriage statutes until such time as those statutes are ruled to be unconstitutional. (*Citizens for Open Access*, *supra*, 60 Cal.App. 4th at p.1064-1065 [identity of issues is a prerequisite for the application of res judicata]; *People v. G*arcia, 39 Cal.4th at p. 1077 [same for the application of collateral estoppel]; see also *Lucido v. Superior Court of Mendocino County* (1990) 51 Cal.3d 335, 342 [explaining that the identical issue requirement is met so long as "'identical factual allegations'" are at stake in the two proceedings"] [citing *People v. Sims* (1982) 32 Cal.3d 468, 485].)

Second, these issues were litigated vigorously in original writ proceedings not only by the City and the Attorney General in *Lockyer*, but also by the taxpayer-petitioners in *Lockyer*'s companion case, *Lewis*, as well as by numerous *amici*, including the Campaign.[9] (*People v. Garcia*, 30 Cal.4th at p. 1077 [actual litigation of issues is a prerequisite for the application of collateral estoppel].)

Third, this Court has determined that, in order to resolve the claims brought by the Attorney General in *Lockyer* and by the taxpayer-petitioners in *Lewis*, it was necessary to decide whether the City's challenged conduct violated the current marriage statutes and whether the City should be

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[9] As noted previously, Petitioners Barbara Lewis et al. in *Lewis v. Alfaro*, Supreme Ct. Case No. S122864, were represented by some of the same counsel who represent the Fund in this case, namely Alliance Defense Fund and the Law Offices of Terry L. Thompson. (*Lockyer, supra,* 33 Cal.4th at p. 1065.) The Campaign participated in that case as amicus curiae. (*Ibid.*)

required to comply with the current marriage statutes. This Court ruled that the City's conduct did violate the marriage statutes and that writ relief should issue requiring the City's compliance with those statutes. (*Lockyer*, *supra*, 33 Cal.4th at p. 1069.) Accordingly, it is plain that these issues were "necessarily decided." (*People v. Garcia*, *supra*, at p. 1077 [describing elements of collateral estoppel]; see also *Lucido*, *supra*, at p.342 [explaining that this requirement of collateral estoppel is met so long as resolution of an issue was not "entirely unnecessary" to the judgment in the initial proceeding].)

Fourth, this Court issued a final judgment on the merits of these issues, granting the application of the State and the taxpayer-petitioners for a writ of mandamus against the City's challenged conduct. (*Citizens for Open Access*, *supra*, 60 Cal.App. 4th at p.1064-1065 [issuance of final judgment on the merits is a prerequisite for the application of res judicata]; *People v. G*arcia, 39 Cal.4th at p. 1077 [same for the application of collateral estoppel].) Indeed, it has long been "settled that a final judgment rendered upon the merits of an application for a peremptory writ of mandamus comes within the principle of res judicata, and is a bar . . . to another action involving the same issues and in which the same relief is sought." (*Price v. Sixth Dist. Agricultural Ass'n* (1927) 201 Cal. 502, 515.)

Finally, the element of privity, which is required for the application of both res judicata and collateral estoppel, is also present. (*Citizens for Open Access*, *supra*, 60 Cal.App. 4th at p.1064-1065; *People v. G*arcia, 39 Cal.4th at p. 1077.) Under settled law, "judgments in representative taxpayer actions are binding on all other taxpayers even though the named taxpayer plaintiff in the second suit was not the same taxpayer who brought the original case." (*Gates v. Superior Court* (1986) 178 Cal.App.3d 301,

307; see also *Citizens for Open Access*, *supra*, 60 Cal.App. 4th at pp. 1069, 1073.) As representative taxpayers, Petitioners are in privity with the taxpayer-plaintiffs in *Lewis*.[10]

The application of res judicata and collateral estoppel is particularly appropriate under the circumstances of this case. First, as described above, all of the elements of res judicata and collateral estoppel are present. Because the taxpayer-petitioners in *Lewis* and the Attorney General in *Lockyer* obtained a writ of mandamus against the City's challenged conduct, Petitioners are precluded from proceeding with duplicative taxpayer claims challenging the same conduct and from re-litigating the issues of whether the City's issuance of marriage licenses to same-sex couples was unlawful or whether the City should be ordered to comply with the marriage statutes.

Second, application of res judicata and collateral estoppel under these circumstances promotes the public policies underlying these doctrines – "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious [litigation]." (*Lucido v. Superior Court of Mendocino County*, *supra*, 51

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[10] The res judicata and collateral estoppel analyses explained in the text apply with respect to the action brought by the *Lewis* taxpayers (*Lewis v. Alfaro*, S122865) even though their petition for writ of mandate did not refer to Code of Civil Procedure section 526a. The preclusion of duplicative taxpayer litigation against municipal governments serves important public policies regardless of how particular taxpayers style their claims. (See, e.g., *Citizens for Open Access*, *supra*, 60 Cal.App. 4th at pp. 1070-1074 [explaining that fairness and other important public policies generally support a finding of privity between litigants representing the public interest, even where the nature of the related actions differs procedurally].)

Cal.3d at p. 343.) In particular, application of these doctrines is necessary to preserve the integrity and purpose of taxpayer claims and to protect municipalities from the burden of defending (and the courts from the burden of deciding) multiple taxpayers lawsuits challenging the same conduct. The purpose of section 526a is "to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." (*White v. Davis* (1975) 13 Cal.3d 757, 764-765.) Once a taxpayer has succeeded in stopping an unlawful government expenditure, the government is not, and should not be, required to defend against other actions under 526a seeking the same relief. (*Gate*s, supra, 178 Cal.App.3d at pp. 307-308 ["Where the plaintiffs in the prior action commenced the action, as a resident and taxpayer on behalf of himself and others similarly situated, to determine a matter of general public interest, and where a different plaintiff in the succeeding action commenced that action as a citizen and taxpayer to determine the same matter of public interest, there is identity of parties within the requirement under the doctrine of res judicata."].) The public policies behind taxpayer actions are not served by permitting multiple lawsuits to proceed to judgment against municipal governments, as this Court recognized when it stayed the *Fund* and *Campaign* actions while the Court heard the *Lewis* and *Lockyer* actions.

Petitioners cannot avoid the res judicata and collateral estoppel effect of the decision in *Lockyer* merely because this Court in *Lockyer* had no need to reach, and did not reach, the issue of whether the marriage statutes are constitutional. (Fund Opening Br. at p. 10.) Res judicata and collateral estoppel apply when a judgment in one proceeding resolves the claims and issues, respectively, presented in another case, even if the

judgment does not address every legal argument that could have been raised (and that might be raised in the second case).

> [A]n issue may not be . . . split into pieces. If it has been determined in a former action, it is binding notwithstanding the [legal arguments urged by the parties] . . . . In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto.

(*Price v. Sixth Dist. Agricultural Ass'n, supra,* 201 Cal. at p. 511.)

In *Lockyer,* this Court held that the City's actions were invalid based on its conclusion that the City did not have authority to issue marriage licenses in violation of Family Code section 300 absent a prior judicial determination that that provision of law was unconstitutional. (*Lockyer, supra,* 33 Cal.4th at p. 1112.) Given this conclusion, it was unnecessary for the Court to reach the further question of the scope of Proposition 22. The Petitioners are not entitled to seek what would be, in the context of Petitioners' lawsuits, advisory opinions regarding the validity of the marriage statutes. (See *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."]; *People v. McKay* (2002) 27 Cal.4th 601, 627-628 (Werdegar, J. concurring) ["The ban on advisory opinions has existed from almost the beginning of our Republic."].) Courts have discretion to limit their analysis to those issues whose resolution is necessary to the result, as this Court did in *Lockyer,* and parties may not compel courts to consider additional issues.

Accordingly, for purposes of determining whether Petitioners are barred by res judicata and collateral estoppel from bringing their taxpayer claims, it does not matter that this Court in *Lockyer could* have chosen to

refrain from deciding whether the City had exceeded its authority until the underlying constitutional questions were resolved. (Fund Opening Br., at pp. 8, 13-14.) That this Court elected to enjoin the City's challenged conduct without reaching the constitutionality and scope of the marriage statutes does not alter the fact that any justiciable dispute Petitioners had with City and County officials concerning the carrying out of their statutory duties has been resolved by this Court's decision in *Lockyer*. (*Connerly, supra,* 146 Cal.App.4th at p. 749 [holding that when government action "has been successfully challenged in other litigation and a final decision by an appellate court has rendered it null and void, the purpose of allowing taxpayer standing to challenge it is absent"].) As taxpayers, Petitioners are bound by this Court's determination in *Lockyer* (including the companion taxpayer action *Lewis*) of the same issues presented by Petitioners in their section 526a claims in this case.

II. PETITIONERS DO NOT HAVE STANDING UNDER CCP SECTION 1060 BECAUSE THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN PETITIONERS AND THE CITY.

A. Petitioners Lack Standing Under Section 1060 Because They Have No Cognizable Legal Stake In The Outcome Of This Case.

Under California Code of Civil Procedure section 1060, a court is "only empowered to declare and determine the rights and duties of the parties 'in case of actual controversy relating to the legal rights and duties of the respective parties.'" (*Pittenger v. Home Savings & Loan Assn. of Los Angeles* (1958) 166 Cal.App.2d 32, 34 [quoting section 1060].) "The 'actual controversy' referred to in this statute is one which admits of

definite and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117.) The requirement that there be a true controversy is a strict one and will not be excused even where the issue raised is of broad general interest. (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662.)

It is not enough that a litigant feel strongly about a statute or an issue. (*Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d at p. 117.) To demonstrate that they have a cognizable interest, parties must show some concrete and particularized way in which *they* personally would be affected by the granting or withholding of the requested remedy. (*Ibid.*) As the Court of Appeal held, "declaratory relief is only appropriate where there is an actual controversy, and not simply an abstract or academic dispute, between parties who are affected by the legislation." (Opn. at pp. 8-9 [citing *Newland v. Kizer* (1989) 209 Cal.App.3d 647, 657].)

Petitioners do not have standing under section 1060 because there is no justiciable controversy between Petitioners and the City. Contrary to the Fund's contention, the Fund does not have standing simply because it has a "fundamental disagreement" with the City about the constitutionality and scope of Proposition 22. Standing, and justiciability, require that parties have a personal stake in a case's outcome, not just a fundamental disagreement about the law.

The Fund's position is not supported by *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69. In that case, both the municipality and the mobile park home owners had a direct and concrete stake in the outcome of a decision regarding the constitutionality of the mobile home park rent

stabilization ordinance at issue. Depending on the outcome of the case, the respective rights and duties of the parties would be directly affected. (*Id.* at p. 79.) In contrast, while Appellants have strong political views on the issue of whether same-sex couples should have the freedom to marry, the outcome of the cases challenging the exclusion of same-sex couples from civil marriage will not result in any order "relating to the legal rights and duties of the respective parties" in Petitioners' actions.

Petitioners lack a sufficiently concrete or direct interest for two reasons. First, this Court has declared that the City has no independent authority or right to determine whether to issue marriage licenses to same-sex couples. Accordingly, the City owes no "duty" to Petitioners that could generate a legal controversy between those parties on the subject of the declaratory relief claims in Petitioners' actions. (*Lockyer, supra*, 33 Cal.4th at p. 1082 [concluding that "a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional."].)

Second, regardless of the outcome of this appeal, the supporters of the Campaign and the Fund will continue to enjoy the right to marry the person of their choice, with all of the tangible and intangible benefits that accompany that status.[11] As the Court of Appeal held in a related action in

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[11] The Fund concedes that it would neither suffer any injury nor obtain any benefit as the result of the judgment in these cases. (Fund Opening Br. at p. 17, fn. 9; Opn. at p. 9, fn. 8 ["At oral argument, counsel confirmed the Fund is not claiming injury-based standing in this appeal."]).

which the Fund unsuccessfully appealed the denial of its application to intervene in two of the cases seeking the freedom to marry for same-sex couples:

> the Fund does not claim a ruling about the constitutionality of denying marriage licenses to same-sex couples will impair or invalidate the existing marriages of its members, or affect the rights of its members to marry persons of their choice in the future. Nor has the Fund identified any diminution in legal rights, property rights or freedoms that an unfavorable judgment might impose on the 15,000 contributors to the Fund who oppose same-sex marriage or on the 4.6 million Californians who voted in favor of Proposition 22, whom the Fund also purports to represent.

(*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1038-39.)[12] The same analysis of Petitioners' interests applies in this case. Because Petitioners do not have a direct or concrete legal stake in the issues presented in these coordinated cases, they do not have standing to seek declaratory relief under section 1060.[13]

B. The Court Of Appeal's Determination That Petitioners Lack Standing Under CCP Section 1060 Was Proper Under Any Standard Of Review.

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[12] The Campaign was not a party to the intervention appeal, but the Court's conclusions apply equally to the Campaign.

[13] In other cases relating to the legal rights and status of same-sex couples, courts likewise have denied intervention to individuals and groups who oppose the extension of equal rights and protections to such couples on political, religious or philosophical grounds. (See, e.g., *Alons v. Iowa Dist. Court* (Iowa 2005) 698 N.W.2d 858, 869 [holding that plaintiffs who sought to intervene in case relating to the dissolution of a civil union between a same-sex couple in order to protect an asserted interest in "promoting traditional marriage" did not "have a specific, personal or legal interest in the underlying action"].)

Contrary to the Campaign's argument, the Court of Appeal correctly held that, as a matter of law, Petitioners lack standing under section 1060 for the reasons described above. As a general matter, "[s]tanding is a question of law which [courts] review de novo." (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299; *McKee v. Orange Unified School Dist.* (2003) 110 Cal.App.4th 1310, 1316 [same].) Accordingly, when a trial court's determination of whether a party meets the statutory criteria for standing under section 1060 is based on undisputed facts, it is subject to de novo review. (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974; *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 Cal.App.4th106, 119.)

In this case, the trial court's determination of whether there was an "actual controversy" between Petitioners and the City within the meaning of section 1060 did not turn on any disputed facts. The Court of Appeal's reversal of the trial court decision was likewise based solely on its conclusion that the Petitioners' actions do not meet the mandatory jurisdictional requirements of section 1060.[14] (Opn. at p. 9.) Accordingly, whether Petitioners have standing under section 1060 is a legal question, and the appellate courts are as well-situated as the trial court to determine whether an "actual controversy" exists under section 1060. Under a *de novo* standard, the Court of Appeal correctly applied the law for the reasons stated above.

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[14] Although a trial court "may refuse to [hear] . . . any case where its declaration or determination is not necessary or proper at the time under all the circumstances," even if there is an actual controversy (Code Civ. Proc. § 1061), the Court of Appeal's decision was not based on a review of a discretionary decision by the trial court regarding whether to exercise its power under section 1061.

In an effort to show that the trial court's determination is subject to an abuse of discretion standard of review, the Campaign cites inapplicable authorities.[15] In any event, however, even if abuse of discretion were the appropriate standard of review in this case, the Court of Appeal's conclusion that the trial court should have dismissed the Fund's claims for lack of standing still would be correct.

A trial court abuses its discretion when it permits a declaratory relief action to proceed even though the underlying claims present no actual controversy. (See *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 894 [vacating portions of underlying declaratory judgment that purported to decide claims which were moot and thus presented no "actual controversy"]; *Zetterberg v. State Dept. of Public Health, supra,* 43 Cal.App.3d 657 at p.665 [holding that trial court abused its discretion in refusing to dismiss complaint for declaratory relief where the action presented no justiciable controversy].)

Indeed, in holding that Petitioners' political and philosophical

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[15] The cases cited by Petitioners did not involve a dispute over the threshold legal issue of whether a justiciable controversy exists. These cases hold only that a deferential standard applies to the trial court's discretionary determination whether to permit an action for declaratory relief to proceed under section 1061 once it has been established that an actual controversy exists. (See *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433 [trial court abused its discretion in permitting declaratory relief action where permitting such action would thwart policies underlying separate statutory scheme]; *Hannula v. Hacienda Homes, Inc.* (1949) 34 Cal.2d 442, 447-448 [noting trial court's discretion under Code Civ. Proc. § 1061]; *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 801 [stating that parties' stipulation of facts showed an actual controversy but that an abuse of discretion standard applies to court's determination whether declaratory relief is necessary and proper under Code Civ. Proc., § 1061].) For this reason, these cases are inapposite.

desires to see the marriage laws upheld against a constitutional challenge are insufficient to give rise to a justiciable controversy, the Court of Appeal relied heavily on *Zetterberg*, a case that applied the abuse of discretion standard (*Zetterberg v. State Dept. of Public Health, supra*, 43 Cal.App.3d 657). Although the Court of Appeal did not specify that it was applying an abuse of discretion standard, its analysis followed *Zetterberg* in holding that "[a] difference of opinion as to the interpretation of a statute as between a citizen and a governmental agency does not give rise to a justiciable controversy." (Opn. at p. 10 [quoting *Zetterberg*, *Id.* at p. 663].) Therefore, even if the appropriate standard of review were abuse of discretion, this Court should uphold the Court of Appeal's decision that the Fund and Campaign lack standing.

III. NEITHER PETITIONERS NOR THEIR SUPPORTERS SATISFY THE STATUTORY DEFINITION OF A "PROPONENT" OF PROPOSITION 22 THAT WOULD GIVE THEM STANDING IN THIS CASE.

The Fund incorrectly asserts that it has standing because it claims to represent California citizens who were "proponents, sponsors or organizers of the campaign to enact Proposition 22." (Fund Opening Br. at p. 17, fn. 9.) The Campaign does not claim to have been involved in any way in the petition campaign to enact Proposition 22, but argues that it nevertheless has standing because its members "actively campaigned for and then voted for Proposition 22." (Campaign Opening Br. at p. 29.) In actuality, these organizations and their supporters' interest in this dispute is no different from the interest of any California citizen who contributed time or money to the campaign for (or against) Proposition 22, or who voted for (or against) that proposition.

Neither the Petitioners, nor any of the individuals they purport to represent was a "proponent" of Proposition 22 as that term is defined in the Election Code. Section 342 of the Election Code provides, in relevant part:

> "Proponent or proponents of an initiative or referendum measure" means, for statewide initiative and referendum measures, the person or persons who submit a draft of a petition proposing the measure to the Attorney General with a request that he or she prepare a title and summary of the chief purpose and points of the proposed measure . . . .

As the Court of Appeal explained in its earlier published opinion affirming the denial of the Fund's application to intervene in two of the consolidated lawsuits challenging the marriage statutes:

> [T]he Fund itself played no role in sponsoring Proposition 22 because the organization was not even created until one year *after* voters passed the initiative. In addition, despite the Fund's discussion of Senator [William J. (Pete)] Knight's activities and interests, this case does not present the question of whether an official proponent of an initiative (Elec. Code, § 342) has a sufficiently direct and immediate interest to permit intervention in litigation challenging the validity of the law enacted. Only the Fund — and not Senator Knight or any other individual member — sought to intervene in the consolidated cases. Moreover, to the extent the Fund seeks intervention as a representative of the interests of its members . . . it can no longer be said to represent Knight's interests in the litigation because Senator Knight is now deceased. Nor does evidence in the record suggest any other member of the Fund was an official proponent of Proposition 22.

(*City and County of San Francisco v. State of California, supra,* 128 Cal.App.4th at p. 1038.) This Court denied review of the Court of Appeal's intervention opinion on July 20, 2005. (*City and County of San Francisco v. State of California* (2005) 2005 Cal. LEXIS 8002, 2005 D.A.R. 8791.)

Petitioners contend that the court's ruling in *City and County of San Francisco v. State of California* is distinguishable because the Court of

Appeal reviewed a denial of the Fund's request for permissive intervention — a determination that is committed to the discretion of the trial court. The Court of Appeal's intervention decision, however, was premised on its conclusion that the Fund could not establish standing to bring a claim against the City for a declaration that the marriage laws are constitutional. The court's analysis of the Fund's lack of standing therefore applies with equal force here. (See Opn. at 9 ["For reasons we discussed in an earlier opinion concerning the Fund's attempt to intervene in the *CCSF* and *Woo* cases, neither the Fund nor CCF satisfies these requirements for injury-based standing."].)

This Court's precedents indicate that, in appropriate circumstances, an organization sponsoring an initiative *may* be permitted to intervene in litigation concerning the validity or the meaning of the initiative. Because neither the Fund nor the Campaign themselves were involved in any way in the passage of Proposition 22, however, these authorities are inapposite. Unlike Petitioners, the organizations that were permitted to intervene in the cases cited by the Fund had drafted or sponsored the initiatives they sought to defend. For instance, Voter Revolt, the proposed intervener in *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, drafted the initiative implicated by the actions in which it intervened. The intervener in *Legislature of the State of California v. Eu* (1991) 54 Cal.3d 492, 499 "sponsored Proposition 140," the initiative at issue in that litigation. While the Fund may be pleased that its namesake measure was approved, it cannot claim to have played a role in that process since it did not exist at the time. The same is true of the Campaign, which neither drafted nor sponsored the measure. Thus, even if being a ballot initiative "proponent," sponsor, or drafter may in some cases be sufficient to create standing, that

principle is of no benefit to Petitioners in this case.

Nor is there any merit to the Fund's assertions that it is better positioned than the Attorney General to defend the State's public policies regarding procreation and child rearing. (Fund's Opening Br. at pp. 18-20.) The Attorney General is fully capable of marshalling all relevant and appropriate arguments in defense of the marriage law, as he has done throughout this litigation. Moreover, this Court will be able to consider and address, should it be appropriate to do so, any arguments tendered by Petitioners by treating them as *amici curiae* in this litigation. (See, e.g., *Sharon S. v. Superior Ct.* (2003) 31 Cal.4th 417, 438 ["Amicus curiae Proposition 22 Legal Defense and Education Fund suggests that to affirm the statutory permissibility of second parent adoption 'would offend the State's strong public interest in promoting marriage.' We disagree."].) [16]

As the Fund concedes, an organization has associational standing only when its individual members would have standing to sue in their own

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[16] The Fund quotes at length from an opinion of the United States Court of Appeals for the Ninth Circuit in connection with the Fund's argument that initiative proponents "are likely to be the most vigorous defenders of their enactments." (Fund Opening Br. at p. 18 [citing *Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727, 733].) The Fund fails to disclose, however, that the United States Supreme Court dismissed that litigation as moot, expressed "grave doubts" regarding the Article III standing of the initiative proponents in that case to pursue their appeal, explained that the United States Supreme Court had never "identified initiative proponents as Article-III-qualified defenders of the measures they advocated," and described one of its previous decisions as "summarily dismissing, for lack of standing, [an] appeal by an initiative proponent from a decision holding the initiative unconstitutional." (*Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 65 [citing *Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago* (1983) 460 U. S. 1077].)

right. (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 672-673.) The Fund cannot assert associational standing in this case because there is no evidence that any living officer or member of the Fund was a "proponent" of Proposition 22 as that term is defined in the Election Code.[17] Thus, the Fund has no greater standing to bring this action on behalf of its members than it does to bring this action on its own behalf. (See *San Francisco, supra,* 128 Cal.App.4th at p. 1038.)

The Fund relies principally on the interests of the late Senator William J. "Pete" Knight to support its associational standing argument. As the Court of Appeal stated in the earlier appeal concerning intervention, however, "the Fund can no longer be said to represent Senator Knight's interests in the litigation because Senator Knight is now deceased. Nor does evidence in the record suggest any other member of the Fund was an official proponent of Proposition 22." (*San Francisco, supra,* 128 Cal.App.4th at p. 1038.) As the Court of Appeal observed, whatever interest Senator Knight had in this litigation by virtue of his sponsorship of Proposition 22 appears to have been a purely personal one, and the Fund did not allege that it was authorized to act as the personal representative or successor in interest of Senator Knight. (*Id.* at p. 1038 fn.7 [citing Code Civ. Proc., § 377.30 [surviving cause of action may be asserted by decedent's personal representative]].)

The Fund also argues that it has an interest in this litigation due to

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[17] The Campaign does not assert associational standing in this case except to the extent that its executive director and members are taxpayers. (Campaign Opening Br. at p. 17, fn.3.) There is no basis for taxpayer standing in this action, however, for the reasons stated above.

the activities of two of its board members, Natalie Williams and Dana Cody. However, the Fund has not demonstrated that either of these individuals held any official role in the campaign for Proposition 22's passage. Neither Williams nor Cody claims to have appeared in voter materials as an official sponsor. And neither claims to have been an author of the initiative or to have submitted it to the Attorney General. Accordingly, neither Williams nor Cody can claim to be an initiative "proponent," as defined in the Election Code.

With no official roles, Cody's and Williams' involvement was limited to tasks that are equally open to anyone who is interested in supporting a ballot initiative. Like many other residents of this state, Cody allegedly signed the initiative petition that placed Proposition 22 on the ballot in March 2000. (*San Francisco, supra,* 128 Cal.App.4th at p. 1035.) Like millions of other Californians, both individuals say that they cast their vote in favor of the initiative when it was on the ballot. (*Ibid.*) Beyond this, they claim only that they "spoke" to people about the initiative, were "involved" in meetings about the initiative, and "participated" in events related to it. (Fund Opening Br. at pp. 21-22.)

None of these activities is unique to them or any other interested supporter of an initiative; nor do these types of activities remotely elevate Williams or Cody to the status of official proponents of Proposition 22. They are simply citizens, voters, and taxpayers who have personal political beliefs that led them to support Proposition 22. They have no direct legal interest in Proposition 22 that differs from the interest of any other

California resident.[18]

Nor can the Fund use the purported interests of its other contributors to justify intervention. Even if the Fund had shown that it was a membership organization, neither the Fund nor any of the individuals who support it financially has been shown to have a direct and immediate interest in this litigation sufficient to establish an "actual controversy" between those individuals and the City

As the Court of Appeal aptly stated in the earlier appeal concerning the Fund's motion to intervene:

> while the members' campaign involvement and the Fund's charter may bear upon the strength of the asserted interest, they do nothing to change the fundamental *nature* of this interest, which is philosophical or political. There is no doubt the Fund's members strongly believe marriage in California should be permitted only between opposite-sex couples, and they believed in this principle strongly enough that they expended energy and resources to have it passed into law. However, because there is no evidence its members will be directly harmed by an unfavorable judgment, the Fund's interest in defending this principle is likewise indirect.

(*San Francisco, supra,* 128 Cal.App.4th at p. 1039.) Just as the Fund's interest was too indirect to support its intervention in actions brought by

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[18] The Campaign argues that the Court of Appeal's decision infringes the rights of initiative and referendum that the people have reserved to themselves under Article 4, section 1 of the California Constitution. (Campaign Opening Br. at pp. 28-31.) The Campaign does not explain how this constitutional provision gives rise to a justiciable controversy between it and CCSF. To the extent the Campaign is asserting that all individuals who supported or voted in favor of Proposition 22 have standing under Art. 4, § 1 to seek a declaration concerning its scope and constitutionality, the Campaign "has failed to cite a single state or federal case that either establishes or recognizes 'voter standing.'" (See *Connerly v. Schwarzenegger, supra,* 146 Cal.App.4th at p. 751.)

other parties challenging the constitutionality of the marriage law's exclusion of same-sex couples, it is too indirect to permit Petitioners to bring their own actions against the City in any capacity other than as taxpayers, and any such claims, as explained above, are now moot. The Campaign and the Fund actions accordingly present no justiciable controversy and should have been dismissed.

CONCLUSION

For the reasons set forth in this brief, Respondents respectfully request that this Court affirm the judgment of the Court of Appeal that the Fund and the Campaign lack standing and that their cases are not justiciable.

Dated: June 14, 2007

Respectfully submitted,

SHANNON MINTER
VANESSA EISEMANN
MELANIE ROWEN
CATHY SAKIMURA
National Center for Lesbian Rights

STEPHEN V. BOMSE
CHRISTOPHER STOLL
DAVID J. SIMON
Heller Ehrman LLP

JON W. DAVIDSON
JENNIFER C. PIZER
Lambda Legal Defense and
Education Fund, Inc.

ALAN L. SCHLOSSER
ALEX M. CLEGHORN
ACLU Foundation of Northern California

PETER J. ELIASBERG
CLARE PASTORE
ACLU Foundation of Southern California

DAVID C. CODELL
Law Office of David C. Codell

By: 
Shannon Minter

Attorneys for Respondents Joshua Rymer and Tim Frazer, et al. in No. A110451; Respondent Equality California in No. A110450; Del Martin and Phyllis Lyon, et al. in Nos. A110652 and A110651

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

Pursuant to California Rule of Court 8.520(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Response Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 8,355 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: June 14, 2007

Respectfully submitted,

By: _____

Vanessa Eisemann

PROOF OF SERVICE

I, Vanessa Eisemann, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 870 Market Street, Suite 370, San Francisco, California 94103.

On June 14, 2007, I served the document listed below on the interested parties in this action in the manner indicated below:

RESPONDENTS' CONSOLIDATED ANSWER BRIEF REGARDING JUSTICIABILITY

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

[ ] **BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand.

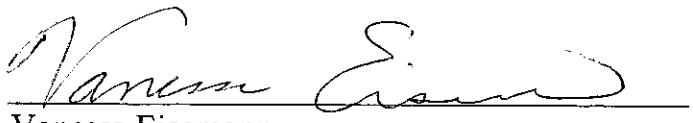
[X] **BY MAIL:** I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

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

INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on June 14, 2007, at San Francisco, California.



Vanessa Eisemann

SERVICE LIST

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

Therese M. Stewart Chief Deputy City Attorney OFFICE OF THE CITY ATTORNEY #1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102-4682 Tel.: (415) 554-4708 Fax: (415) 554-4745 *Counsel for the City and County of San Francisco, et al.*	Bobbie J. Wilson Amy E. Margolin HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN Three Embarcadero Center, 7th Floor San Francisco, CA 94111 Tel.: (415) 434-1600 Fax: (415) 217-5910 *Counsel for the City and County of San Francisco, et al.*
Bill Lockyer Stacy Boulware Eurie Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-8835 *Counsel for the State of California, et al.*	

Woo, et al. v. California, et al.
San Francisco Superior Court Case No. CPF-04-504038
Court of Appeal Case No. A110451

Shannon Minter NATIONAL CENTER FOR LESBIAN RIGHTS 870 Market Street Suite 370 San Francisco, CA 94102 Tel: (415) 392-6257 Fax: (415) 392-8442 *Counsel for Respondents*	Jon W. Davidson Jennifer C. Pizer LAMBDA LEGAL DEFENSE AND EDUCATION FUND 3325 Wilshire Boulevard, Suite 1300 Los Angeles, CA 90010 Tel: (213) 382-7600 Fax: (213) 351-6050 *Counsel for Respondents*
Peter J. Eliasberg Clare Pastore ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Respondents*	Alan L. Schlosser Alex M. Cleghorn ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *Counsel for Respondents*
David C. Codell LAW OFFICE OF DAVID C. CODELL 9200 Sunset Boulevard, Penthouse Two Los Angeles, CA 90069 Tel: (310) 273-0306 Fax: (310) 273-0307 *Counsel for Respondents*	Stephen V. Bomse Christopher F. Stoll HELLER EHRMAN LLP 333 Bush Street San Francisco, CA 94104-2878 Tel.: (415) 772-6000 Fax: (415) 772-6268 *Counsel for Respondents*
Bill Lockyer Stacy Boulware Eurie Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-8835 *Counsel for the State of California, et al*	

Tyler, et al. v. California, et al.
Los Angeles Superior Court Case No. BS088506
Court of Appeal Case No. A110450

Gloria Allred Michael Maroko John S. West ALLRED, MAROKO & GOLDBERG 6300 Wilshire Blvd. Suite 1500 Los Angeles, CA 90048 Tel.: (323) 653-6530 Fax: (323) 653-1660 *Counsel for Robin Tyler, et al.*	Bill Lockyer Stacy Boulware Eurie Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-8835 *Counsel for the State of California, et al.*
Shannon Minter NATIONAL CENTER FOR LESBIAN RIGHTS 870 Market Street Suite 370 San Francisco, CA 94102 Tel: (415) 392-6257 Fax: (415) 392-8442 *Counsel for Intervenor Equality California*	Stephen V. Bomse Christopher F. Stoll HELLER EHRMAN LLP 333 Bush Street San Francisco, CA 94104-2878 Tel.: (415) 772-6000 Fax: (415) 772-6268 *Counsel for Intervenor Equality California*
Jon W. Davidson Jennifer C. Pizer LAMBDA LEGAL DEFENSE AND EDUCATION FUND 3325 Wilshire Boulevard, Suite 1300 Los Angeles, CA 90010 Tel: (213) 382-7600 Fax: (213) 351-6050 *Counsel for Intervenor Equality California*	Alan L. Schlosser Alex M. Cleghorn ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *Counsel for Intervenor Equality California*
Peter J. Eliasberg Clare Pastore ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Intervenor Equality California*	David C. Codell LAW OFFICE OF DAVID C. CODELL 9200 Sunset Boulevard, Penthouse Two Los Angeles, CA 90069 Tel: (310) 273-0306 Fax: (310) 273-0307 *Counsel for Intervenor Equality California*

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

Waukeen Q. McCoy LAW OFFICES OF WAUKEEN Q. MCCOY 703 Market Street, Suite 1407 San Francisco, CA 94103 Tel: (415) 675-7705 Fax: (415) 675-2530 *Counsel for Clinton Respondents*	Jason E. Hasley PAUL, HANLEY & HARLEY, LLP 1608 Fourth St. Suite 300 Berkeley, CA 94710 Tel.: (510) 559-9980 Fax: (510) 559-9970 *Counsel for Clinton Respondents*
Bill Lockyer Stacy Boulware Eurie Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-8835 *Counsel for the State of California, et al.*	

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

Robert H. Tyler ADVOCATES FOR FAITH AND FREEDOM 24910 Loas Brisas Road, Suite 110 Murietta, CA 92562 Tel.: (951) 304-7583 Fax: (951) 894-6430 *Counsel for Proposition 22 Legal Defense and Education Fund*	Benjamin W. Bull Glen Lavy ALLIANCE DEFENSE FUND 15333 North Pima Road, Suite 165 Scottsdale, AZ 85260 Tel.: (480) 444-0020 Fax: (480) 444-0028 *Counsel for Proposition 22 Legal Defense and Education Fund*
Timothy Donald Chandler ALLIANCE DEFENSE FUND 101 Parkshore Dr. #100 Folsom, CA 95630 Tel.: (916) 932-2850 Fax: (916) 932-2851 *Counsel for Proposition 22 Legal Defense and Education Fund*	Andrew P. Pugno LAW OFFICES OF ANDREW P. PUGNO 101 Parkshore Drive, Suite 100 Folsom, CA 95630 Tel.: (916) 608-3065 Fax: (916) 608-3066 *Counsel for Proposition 22 Legal Defense and Education Fund*
Terry L. Thompson LAW OFFICES OF TERRY L. THOMPSON 1804 Piedras Circle Alamo, CA 94507 Tel.: (925) 855-1507 Fax: (925) 820-6034 *Counsel for Proposition 22 Legal Defense and Education Fund*	Therese M. Stewart Chief Deputy City Attorney OFFICE OF THE CITY ATTORNEY #1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102-4682 Tel.: (415) 554-4708 Fax: (415) 554-4745 *Counsel for the City and County of San Francisco, et al.*
Bobbie J. Wilson Amy E. Margolin HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN Three Embarcadero Center, 7th Floor San Francisco, CA 94111 Tel.: (415) 434-1600 Fax: (415) 217-5910 *Counsel for the City and County of San Francisco, et al.*	Shannon Minter NATIONAL CENTER FOR LESBIAN RIGHTS 870 Market Street Suite 370 San Francisco, CA 94102 Tel: (415) 392-6257 Fax: (415) 392-8442 *Counsel for Martin Intervenors*

Stephen V. Bomse Christopher F. Stoll HELLER EHRMAN LLP 333 Bush Street San Francisco, CA 94104-2878 Tel.: (415) 772-6000 Fax: (415) 772-6268 *Counsel for Martin Intervenors*	Jon W. Davidson Jennifer C. Pizer LAMBDA LEGAL DEFENSE AND EDUCATION FUND 3325 Wilshire Boulevard, Suite 1300 Los Angeles, CA 90010 Tel: (213) 382-7600 Fax: (213) 351-6050 *Counsel for Martin Intervenors*
Alan L. Schlosser Alex M. Cleghorn ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *Counsel for Martin Intervenors*	Peter J. Eliasberg Clare Pastore ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Martin Intervenors*
David C. Codell LAW OFFICE OF DAVID C. CODELL 9200 Sunset Boulevard, Penthouse Two Los Angeles, CA 90069 Tel: (310) 273-0306 Fax: (310) 273-0307 *Counsel for Martin Intervenors*	

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

Mathew D. Staver LIBERTY COUNSEL Second Floor 1055 Maitland Center Common Maitland, FL 32751 Tel.: (800) 671-1776 Fax: (407) 875-0770 *Counsel for Randy Thomasson and Campaign for California Families*	Mary McAlister LIBERTY COUNSEL 100 Mountain View Road Suite 2775 Lynchburg, VA 24506 Tel.: (434) 592-7000 Fax: (434) 592-7700 *Counsel for Randy Thomasson and Campaign for California Families*
Ross S. Heckmann ATTORNEY AT LAW 1214 Valencia Way Arcadia, CA 91006 Tel.: (626) 256-4664 Fax: (626) 256-4774 *Counsel for Campaign for California Families*	Therese M. Stewart Chief Deputy City Attorney OFFICE OF THE CITY ATTORNEY #1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102-4682 Tel.: (415) 554-4708 Fax: (415) 554-4745 *Counsel for the City and County of San Francisco, et al*
Bobbie J. Wilson Amy E. Margolin HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN Three Embarcadero Center, 7th Floor San Francisco, CA 94111 Tel.: (415) 434-1600 Fax: (415) 217-5910 *Counsel for the City and County of San Francisco, et al.*	Shannon Minter NATIONAL CENTER FOR LESBIAN RIGHTS 870 Market Street Suite 370 San Francisco, CA 94102 Tel: (415) 392-6257 Fax: (415) 392-8442 *Counsel for Martin Intervenors*
Stephen V. Bomse Christopher F. Stoll HELLER EHRMAN LLP 333 Bush Street San Francisco, CA 94104-2878 Tel.: (415) 772-6000 Fax: (415) 772-6268 *Counsel for Martin Intervenors*	Jon W. Davidson Jennifer C. Pizer LAMBDA LEGAL DEFENSE AND EDUCATION FUND 3325 Wilshire Boulevard, Suite 1300 Los Angeles, CA 90010 Tel: (213) 382-7600 Fax: (213) 351-6050 *Counsel for Martin Intervenors*

Alan L. Schlosser Alex M. Cleghorn ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *Counsel for Martin Intervenors*	Peter J. Eliasberg Clare Pastore ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Martin Intervenors*
David C. Codell LAW OFFICE OF DAVID C. CODELL 9200 Sunset Boulevard, Penthouse Two Los Angeles, CA 90069 Tel: (310) 273-0306 Fax: (310) 273-0307 *Counsel for Martin Intervenors*	

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CLERK OF THE COURT Court of Appeal, First Appellate District 350 McAllister Street San Francisco, CA 94102	HON. RICHARD A. KRAMER San Francisco Superior Court Department 304 400 McAllister Street San Francisco, CA 94012