Case No. S147999

IN THE SUPREME COURT 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

ANSWER TO PETITIONS FOR REVIEW

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

SHANNON MINTER (BAR NO. 168907)
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 Plaintiffs-Petitioners and Respondents
Joshua Rymer and Tim Frazer, et al. in No. A110451,
Intervener and Respondent Equality California in No. A110450, and
Interveners and Respondents Del Martin and Phyllis Lyon, et al.
in Nos. A110651 and A110652

Additional Attorneys for

Plaintiffs-Petitioners and 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;

Intervener and Respondent Equality California in No. A110450; and

Interveners and Respondents Del Martin and Phyllis Lyon,
Sarah Connor 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

CHRISTINE P. SUN (BAR NO. 218701)
PETER J. ELIASBERG (BAR NO. 189110)
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)
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

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INTRODUCTION: WHY REVIEW SHOULD BE LIMITED TO THE SUBSTANTIVE CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S MARRIAGE STATUTES[1]

In five petitions for review, numerous parties challenging the constitutionality of California's marriage statutes forcefully have argued

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[1] This Answer is filed on behalf of parties in four of the Marriage Cases:

- in *Woo v. Lockyer*, No. A110451, 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, who were plaintiffs-petitioners in the San Francisco Superior Court and respondents in the Court of Appeal;
- in *Tyler v. State of California,* No. A110450, Equality California, which was an intervener plaintiff-petitioner in the Los Angeles Superior Court, and thereafter the San Francisco Superior Court, and a respondent in the Court of Appeal; and
- 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, Del Martin and Phyllis Lyon, Sarah Connor 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, who were intervener respondents in the San Francisco Superior Court and respondents in the Court of Appeal.

These parties are referred to in this Answer as the "Rymer/Martin Parties." This Answer responds to four petitions for review in the Marriage Cases: (i) by Proposition 22 Legal Defense and Education Fund in No. A110651 ("Fund's Petn."); (ii) by the City and County of San Francisco in No. A110449; (iii) by Robin Tyler, et al. in No. A110450; and (iv) by Gregory Clinton, et al. in No. A110463. Two of the plaintiffs-petitioners and respondents in No. A110451, Lancy Woo and Cristy Chung, are not continuing as parties in this litigation for personal reasons unrelated to the merits of these constitutional challenges. They therefore have not joined in this Answer.

that this Court should review the Court of Appeal's opinion in the Marriage Cases to decide whether California's statutory exclusion of same-sex couples from marriage violates the California Constitution by denying equal protection of the laws, including on the bases of sexual orientation and sex, and by denying rights to due process, privacy, and freedom of expression. This Court should grant those five petitions for review, which raise some of the most important substantive constitutional issues of our day.

In contrast, Proposition 22 Legal Defense and Education Fund (the "Fund") has filed a petition in No. A110651 seeking review of purely procedural and jurisdictional issues. None of those issues warrants this Court's attention. First, the Court of Appeal correctly held that, following this Court's issuance of a writ of mandate in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, the Fund lacks standing to seek a declaration that the marriage statutes are constitutional, and there is no need for this Court to review that jurisdictional ruling or to entertain litigation duplicative of *Lockyer*. Second, contrary to the Fund's suggestion, the Fund's case does not actually present the issue of whether the proponents of an initiative have a unique interest in defending the constitutionality of the initiative, because the Fund was not the proponent of Proposition 22, and indeed, did not even exist until a year after Proposition 22's enactment. Third, there is no need for this Court to review whether a trial court's decision that an "actual controversy" exists within the meaning of Code of Civil Procedure section 1060[2] is subject to *de novo* review, or whether such a decision may be reversed only upon a showing of abuse of discretion, because the Court of Appeal's decision that the Fund's action presents no justiciable controversy was correct under either standard of review.

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[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Because the decision of the Court of Appeal regarding the Fund's lack of standing was correct and unexceptional, this Court should deny the Fund's petition for review, in full. Additional considerations also warrant denial of the Fund's petition. In two of the Marriage Cases *challenging* the constitutionality of the marriage statutes — in which petitions for review currently are pending before this Court (Nos. A110449 and A110451) — the Fund's attempts to intervene were rejected by the trial court and the Court of Appeal. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030.) The Court of Appeal concluded that the Fund and its members did not have "a sufficiently direct and immediate interest" to entitle them to become parties in those cases. (*Id.* at pp. 1038, 1044.) This Court thereafter denied review as well as a request for depublication of that decision. (*City and County of San Francisco v. State of California* (July 25, 2005, S134515) [2005 D.A.R. 8791].) Even though California's courts already have determined conclusively that the Fund is not entitled to be a party to the affirmative challenges to California's marriage statutes, the Fund continues to attempt to hang onto its party status in the Marriage Cases by seeking an affirmative declaration, *against the City and County of San Francisco* (the "City"), that the State's marriage statutes are constitutional. This Court, however, decided in the *Lockyer* litigation that issues related to the City's compliance with the marriage statutes should be kept separate from constitutional challenges to those statutes. (See *Lockyer v. City and County of San Francisco, supra*, 33 Cal.4th at p. 1069.) The Fund's continuing attempt to maintain a case against the City as part of the Marriage Cases threatens to thwart this Court's previous determination regarding how to address the serious constitutional questions raised by California's marriage statutes.

The Marriage Cases already involve numerous parties and raise a number of critically important and complex constitutional questions. There

is no need to further complicate the Marriage Cases by adding the procedural and jurisdictional issues raised by the Fund's petition, which do not warrant the Court's attention. This Court should not require extended briefing and argument and the consumption of valuable court time to address these additional issues. Doing so would only detract from the substantive issues raised by the five other pending petitions for review.

Should this Court deny review of the Fund's petition, while granting review of the substantive constitutional issues raised in the five petitions filed by parties challenging the constitutionality of the marriage statutes, then the Court of Appeal's decision of the issues raised in the Fund's petition will remain determinative. (See *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709, fn. 12.) Because those determinations go to the *standing* of the Fund, the Fund will not be entitled to participate as a *party* in this Court's review of the other Marriage Cases.[3] Instead, the Court may allow the Fund to participate as an amicus curiae, which will enable the Court to consider any of the Fund's arguments that properly bear on the substantive constitutional issues relating to California's marriage statutes. (Cf. *Lockyer v. City and County of San Francisco, supra*, 33 Cal.4th at p. 1116.)

Accordingly, and as more fully explained below, although this Court should grant review of the substantive issues raised in the five petitions challenging the constitutionality of the marriage statutes, the Court should deny review of the issues in the Fund's petition for review.

Pursuant to California Rules of Court, rule 28.1, however, the Rymer/Martin Parties request that, if this Court grants review of any of the

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[3] The same will be true with respect to the Campaign for California Families, which did not file a petition for review in the remaining lawsuit that was part of the Marriage Cases, No. A110652, *Campaign for California Families v. Newsom.*

petitions filed in the Marriage Cases, the Court also grant review of the following two issues:

> 1. Does California's statutory ban on marriage between two persons of the same sex violate the California Constitution by denying equal protection of the laws, including on the bases of sexual orientation and sex, and by denying the right to due process, privacy, and freedom of expression?
>
> 2. Should courts apply strict scrutiny under the California Constitution to laws that discriminate based on sexual orientation?

These two issues are identical to those presented in the petitions for review filed by by Joshua Rymer *et al.* in No. A110451 and by Equality California in No. A110450, and are fairly included in the issues presented in the petitions filed by the City and County of San Francisco in No. A110449, by Robin Tyler *et al.* in No. A110450, and by Gregory Clinton *et al.* in No. A110463.

The remainder of this Answer focuses on why the Court should deny review of the issues in the Fund's petition for review.

LEGAL DISCUSSION

I. The Court of Appeal Analyzed The Fund's Lack Of Standing Under Well-Settled Law, And Its Ruling On This Issue Does Not Warrant This Court's Review.

The Court of Appeal held that the Fund lacked standing to seek declaratory relief regarding the constitutionality of the marriage statutes because the Fund and its members have no actual interest in that question and because none of the exceptions to the requirement that a party show

injury in order to establish standing apply in this case. The Court of Appeal's ruling on this issue is consistent with well-settled law. That aspect of the Court of Appeal's ruling does not present any novel or important issues, nor is this Court's review of that aspect of the ruling necessary to resolve any conflict. Accordingly, the Fund's petition for review should be denied.

A. The Court of Appeal's Holding That The Fund Lacked Standing Under Section 526a Is Consistent With Established Law And Raises No Novel Or Important Issues Requiring Resolution By This Court.

The Fund argues that, under section 526a of the Code of Civil Procedure, the Fund is entitled to seek a declaration that the marriage statutes are constitutional despite this Court's holding in *Lockyer v. City and County of San Francisco*, *supra*, 33 Cal.4th 1055 that the Court need not reach that issue to enjoin the City's issuance of marriage licenses to same-sex couples. As the Court of Appeal explained, however, the Fund's argument disregards the essential requirement of a taxpayer action, which "must involve an actual or threatened expenditure of public funds. [Citation.]" (Opn. at pp. 10-11 [citing *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240].) Here, the City stopped issuing marriage licenses to same-sex couples when ordered to do so by this Court, and there accordingly is no "continuing public expenditure" for the Fund to challenge. (*Id.* at p. 10.) As a result, the Court of Appeal correctly concluded that the Fund "do[es] not have standing under Code of Civil Procedure section 526a to seek declaratory

relief because [its] claims do not identify or challenge any allegedly illegal expenditure of public funds." (*Ibid.*)[4]

The Fund's argument disregards the requirement that any relief sought in a taxpayer suit ultimately must involve an allegedly illegal or wasteful expenditure of public funds. Thus, while it is true that 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 the illegal expenditure of funds. (*Waste Management of Alameda County, Inc.v. County of Alameda*, *supra*, 79 Cal.App.4th at p. 1240.) In this case, the Fund could have sought declaratory relief only in conjunction with its request for injunctive relief to prevent the City's expenditure of public funds to issue marriage licenses to same-sex couples. In *Lockyer*, however, this Court ruled that it need not reach the issue of whether the marriage statutes are constitutional to hold that the City must comply with them and that the marriages of same-sex couples granted by the City were invalid. (*Lockyer v. City and County of San Francisco*, *supra*, 33 Cal.4th at pp. 1081, 1112 [holding that the Court need not address the constitutionality of the marriage statutes "in deciding whether a writ of mandate should issue"].) Accordingly, this Court's ruling in *Lockyer* rendered the Fund's request for declaratory relief moot because this Court granted all of the

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[4] The Fund has not argued that the City's current involvement in the City's lawsuit seeking the right to marry for same-sex couples is "wasteful" within the meaning of section 526a, nor could it. The term "wasteful" in section 526a refers to conduct that provides "no public benefit" and is a "useless expenditure of public funds." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1137-39.) Determining whether the statutory exclusion of same-sex couples from the right to marry is not "wasteful" under this test; if the statute is unconstitutional, the City will have conferred a public benefit by helping to ensure that the guarantees of the California Constitution are enforced.

substantive relief requested by the Fund on an alternative legal basis.[5] In effect, the Fund asks this Court to grant review to revisit its prior decision that this Court could restrain the City's "conduct" of issuing marriage licenses to same-sex couples without resolving "the merits of claims relating to a controversy over the constitutionality of the underlying statute." (Fund's Petn. at p.12.) Because this Court already has resolved this issue, the Fund's petition for review should be denied.

B. The Court of Appeal's Holding That The Fund Lacks An Actual Interest In The Outcome Of This Litigation As Required To Have Standing Under Section 1060 Is Consistent With Established Law And Raises No Novel Or Important Issues Requiring Resolution By This Court.

The Court of Appeal's holding that the Fund lacks an actual interest in the outcome of this litigation is consistent with the plain language of Code of Civil Procedure section 1060 and with prior case law construing this provision. By the express terms of section 1060, a court is "only empowered to declare and determine the rights and duties of the parties 'in cases of actual controversy relating to the legal rights and duties of the respective parties.'" (*Pittenger v. Home Sav. & Loan Ass'n of Los Angeles* (1958) 166 Cal.App.2d 32, 34 [quoting Code Civ. Proc., § 1060] [holding that an action for declaratory relief must be dismissed where the controversy has become moot].) Consistent with settled law, the Court of Appeal held that the requirement of "an actual controversy" means that a

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[5] For the same reason, the fact that the City and interveners filed cross-complaints against the Fund prior to this Court's decision in *Lockyer* is irrelevant and does not support the Fund's argument. The City and the interveners filed cross-complaints against the Fund prior to this Court's ruling that it need not, and would not, reach the merits of the constitutional issues. After this Court ruled, both the City and the interveners dismissed their cross-complaints in recognition that this Court's decision had rendered them moot. (Clerk's Transcript, Case No. A110651, pp. 1157-1165.)

party "must have an actual interest in the subject matter that is subject to injury depending on the outcome of the suit." (Opn. at p. 9 [citing *Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662-663 ["The plaintiff must establish facts which give rise as a matter of law to an existing or imminent invasion of his rights by the defendant which would result in injury to him"]].)

In holding that the Fund lacked standing under section 1060, the Court of Appeal merely applied this long settled law to the undisputed facts of this case. As the Court of Appeal correctly found, the Fund "[does not] satisf[y] these requirements for injury-based standing" because neither the Fund nor its members have any actual or concrete interest in the litigation that is subject to injury depending on the outcome of the case. (*Ibid.*) Rather, apart from their deep political and philosophical interest in the issues involved, which is not sufficient to establish standing, the Fund's members have not alleged or demonstrated "that a judgment in the action would in any way benefit or harm the Fund's members." (*Ibid* [citing *City and County of San Francisco v. State of California, supra,* 128 Cal.App.4th at p. 1038].) Because the Fund did not satisfy the injury-based requirements for standing under section 1060, the Court of Appeal properly held that the Fund lacked standing under this provision. This ruling does not create a conflict with other decisions or present an important issue that merits further review by this Court.

Contrary to the Fund's argument, the decision in *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 does not hold that these injury-based requirements for standing may be disregarded or relaxed in cases seeking declaratory relief about the validity or construction of a statute. (See Fund's Petn. at pp. 10-12 [citing *City of Cotati, supra,* 29 Cal.4th 69].) Rather, in *City of Cotati*, this Court merely held that, where an actual controversy exists, "the constitutionality of an ordinance can be a proper

subject for declaratory relief" under section 1060. (*City of Cotati, supra,* 29 Cal.4th at 79.) In *Cotati*, the mobilehome park owners had an actual, concrete interest in challenging the constitutionality of an ordinance that stabilized mobilehome park rents and thus directly affected the owners' business. (*Id.* at pp. 71-72.) Likewise, the City of Cotati had an actual, concrete interest in establishing whether it could enforce the ordinance. In contrast, the Fund did not demonstrate or even allege any actual, concrete interest in determining the constitutionality of the statutes excluding same-sex couples from marriage. (Opn. at p. 9 [citing *City and County of San Francisco v. State of California, supra,* 128 Cal.App.4th at p. 1038] ["Specifically, the Fund [did] not claim a ruling about the constitutionality of denying marriage licenses to same-sex couples [would] 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."[bracketed modifications in original]].) Accordingly, *City of Cotati* does not support the Fund's position or raise any issues requiring this Court's review.

The Fund also is mistaken when it argues that the City "cannot eliminate a live controversy that it created simply by filing a separate lawsuit against the State." (Fund's Petn. at p. 11, fn. 4; see also Fund's Petn. at p. 12 [arguing that the City "transform[ed] . . . its affirmative defense into a separate lawsuit"].) It was this Court, not the City or any other party, that determined that actions challenging the City's issuance of marriage licenses to same-sex couples did not present the issue of whether barring same-sex couples from marriage violates the California Constitution and that any challenge to the constitutionality of the marriage statutes should be heard in a separate lawsuit. (*Lockyer v. City and County of San Francisco*, *supra*, 33 Cal.4th at p. 1099.) Accordingly, the Court of Appeal correctly held that, in order to establish standing to seek a declaration regarding the constitutionality of the marriage statutes under

section 1060, the Fund would have to demonstrate "an actual interest in the subject matter that is subject to injury depending on the outcome of the suit," which the Fund cannot do. (Opn. at p. 9 [citing *Zetterberg v. State Dept. of Public Health*, *supra*, 43 Cal.App.3d at pp. 662-663].)

II. This Case Does Not Present The Question Of Whether The Proponents Of An Initiative Have A Unique Interest In Defending The Constitutionality Of That Initiative.

Contrary to repeated suggestions in the Fund's petition for review, the Fund was not the proponent of Proposition 22, and there is no need for this Court to review the question of whether the proponent of an initiative has a unique interest in defending the measure.[6] 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

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[6] 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 . . . ."

> 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.) As noted above, this Court denied review of the Court of Appeal's intervention opinion on July 20, 2005. This Court's review is not warranted now regarding either the *fact* that the Fund was not the proponent of Proposition 22 or the legal consequences that follow from that fact.[7]

The Fund's petition for review erroneously describes the Court of Appeal's opinion in this case as "the only published decision denying standing *to an initiative proponent*" and erroneously describes the Court of Appeal's earlier intervention opinion as "the only published California opinion denying intervention *to an initiative proponent*." (Fund's Petn. at pp. 13-14, italics added.) Stripped of their mistaken characterizations of the Fund as an initiative proponent, those assertions in the Fund's petition for review concede that there is no conflict of any kind in any published state-court opinions regarding the participation of initiative proponents in litigation concerning ballot measures.[8] Indeed, as a string of citations in the

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[7] In a footnote, the Fund's petition for review states: "The facts relating to the specific interests of the Fund and its organizers are not in the record because the City chose not to file a motion challenging standing in the trial court." (Fund's Petn. at p. 13, fn. 6.) The record, however, is clear: The Fund was not the proponent of Proposition 22. (*City and County of San Francisco v. State of California, supra,* 128 Cal.App.4th at p. 1038.) The Fund's verified petition for writ of mandate pleads no facts otherwise suggesting that this case properly presents the second issue in the Fund's Petition.

[8] Article III standing in the federal courts is another matter. The Fund's petition for review quotes at length from an opinion of the United States Court of Appeals for the Ninth Circuit in connection with the Fund's

Fund's petition makes plain, there is no doubt under this Court's precedents that an organization sponsoring an initiative may be permitted to intervene in appropriate circumstances in litigation concerning the validity or the meaning of the initiative. (See Fund's Petn. at p. 13 [citing this Court's opinions in *Legislature of State of Cal. v. Eu* (1991) 54 Cal.3d 492, 499-500; *Calfarm Ins. Co. v. Deukmeijian* (1989) 48 Cal.3d 805, 812; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241].)

The Fund's petition for review argues that "[i]nitiative proponents and sponsors have a *unique* interest in the validity and scope of an enactment they have successfully promoted." (Fund's Petn. at p. 15, emphasis added.) But because the Fund was neither the proponent nor the sponsor of Proposition 22, the Fund cannot demonstrate that *it* has a unique interest justifying its lawsuit against a local government that is complying in full with the marriage statutes pursuant to a writ of mandate issued by this Court in another proceeding. Nor is there any merit to the protestations in the Fund's petition that it is better positioned than the Attorney General to defend the State's public policies regarding procreation and child rearing. (Fund's Petn. at p. 16.) As in the past, this Court will be able to consider

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argument that "initiative proponents are likely to be the most vigorous defenders of their enactments." (Fund's Petn. at p. 15 [citing *Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727, 733].) The United States Supreme Court, however, 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 [117 S.Ct. 1055, 1068] [citing *Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank & Trust Co. of Chicago* (1983) 460 U. S. 1077 [103 S.Ct. 1762]].)

and address, should it be appropriate to do so, arguments tendered by the Fund as an amicus curiae in this litigation, rather than as a party. (See *Sharon S. v. Superior Court* (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."].) The Fund's lawsuit does not properly present the second issue in the Fund's petition for review, and there is no need for this Court's review of that issue.[9]

III. Review Is Unnecessary Because The Court Of Appeal's Determination That This Case Presents No "Actual Controversy" Under Code of Civil Procedure Section 1060 Was Correct Regardless Of Which Standard Of Review Applies.

The Fund asserts that this Court should grant review to decide whether a trial court's decision that an "actual controversy" exists within the meaning of Code of Civil Procedure section 1060 is subject to *de novo* review or whether such a decision may be reversed only upon a showing of abuse of discretion. The Court need not grant review on this question, however, because the Court of Appeal's decision that the Fund's action presents no justiciable controversy was equally correct under either

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[9] The Fund's petition for review suggests that it wishes to contend in this litigation "that to the extent Family Code § 297.5 [the domestic partnership statute] counters the policy embodied in Proposition 22, section 297.5 violates Article 2, § 10(c) of the California Constitution because it was not submitted to the voters for approval." (Fund's Petn. at p. 16.) The Fund, however, was the sole petitioner in *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, review denied (Jun. 29, 2005), and is barred by the doctrine of *res judicata* from challenging section 297.5 on any such ground. (See *id.* at p. 18 [holding that "the Legislature's enactment of the domestic partners act did not constitute an amendment of [Proposition 22] and, thus, that the Legislature's action without separate voter approval did not violate article II, section 10, subdivision (c) of the California Constitution"].)

standard of review. (Cf. *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 58-59 [declining to resolve which standard of review applies to trial court's dismissal of declaratory relief action for lack of justiciable controversy, because trial court's decision to dismiss was correct under either standard].)

Code of Civil Procedure sections 1060 and 1061 set forth the standards applicable to a trial court's determination whether to entertain an action for declaratory relief. Section 1060 uses mandatory, restrictive language and establishes that such actions may be brought only "in cases of actual controversy relating to the legal rights and duties of the respective parties." Section 1061 uses permissive language and states that, even in such cases of actual controversy, "[t]he court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." The Court of Appeal's decision here was based solely on its conclusion that the Fund's action does not meet the mandatory jurisdictional requirements of section 1060. The court's decision was not based on a discretionary decision by the trial court whether to exercise its power under section 1061.

In this case, the Court of Appeal did not expressly state which standard of review it was applying. However, the court's ruling was based wholly on its conclusion that the Fund lacked standing to pursue its claims. (Opn. at pp. 8-9.) It is well established that "[s]tanding is a question of law which [courts] review de novo." (*IBM Personal Pension Plan v. City & County of San Francisco* (2005) 131 Cal.App.3d 1291, 1299; see also *McKee v. Orange Unified School Dist.* (2003) 110 Cal.App.4th 1310, 1316.) To the extent a *de novo* standard applies, the Court of Appeal correctly applied the law for the reasons stated above, and there is no need for this Court to grant review.

Moreover, even if abuse of discretion were the correct standard of review in the circumstances of this case, the Court of Appeal's conclusion that the trial court should have dismissed the Fund's claims was fully consistent with authorities applying that standard. Those authorities make clear that 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 *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 481 ["Declaratory relief is appropriate where there is a justiciable controversy, but not where the dispute is moot, or only hypothetical or academic."]; *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 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].)[10]

In holding that the Fund's abstract philosophical desire to see the marriage laws upheld against constitutional challenge is insufficient to give

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[10] Many of the cases cited by the Fund in support of its petition for review 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, they are inapposite.

rise to a justiciable controversy, the Court of Appeal relied heavily on *Zetterberg*, a case that applied the abuse of discretion standard. Although the Court of Appeal did not repeat *Zetterberg*'s statement of the standard of review, its analysis was fully consistent with *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 v. State Dept. of Public Health*, *supra,* 43 Cal.App.3d at p. 663].) In short, because the Court of Appeal's decision that the Fund lacked standing to bring its claims was both legally correct and consistent with prior cases applying the abuse of discretion standard to the issue of justiciability, the fact that the Court of Appeal did not expressly state which standard of review it was applying does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Rymer/Martin Parties respectfully request that the Court (1) *deny* the Fund's Petition for Review in No. A110651; (2) *grant* review of the issues related to the constitutional challenges to the marriage statutes raised in the five other petitions for review in Nos. A110449, A110450, A110451, and A110463; and (3) should the Court grant the Fund's Petition for Review in No. A110651, *grant* review of the issues listed on page 5 of this Answer.

Dated: December 4, 2006 Respectfully submitted,

STEPHEN V. BOMSE
CHRISTOPHER F. STOLL
HELLER EHRMAN LLP

SHANNON MINTER
NATIONAL CENTER FOR LESBIAN RIGHTS

JON W. DAVIDSON
JENNIFER C. PIZER
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

ALAN L. SCHLOSSER
ACLU FOUNDATION OF NO. CALIFORNIA

CHRISTINE P. SUN
PETER J. ELIASBERG
ACLU FOUNDATION OF SO. CALIFORNIA

DAVID C. CODELL
LAW OFFICE OF DAVID C. CODELL

By: Stephen V. Bomse / cfs
Stephen V. Bomse
Attorneys for Joshua Rymer, *et al.* in No. A110451; Equality California in No. A110450; and Del Martin, *et al.* in Nos. A110651 and A110652

CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Answer to Petitions for Review, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 5,529 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: December 4, 2006

Respectfully submitted,

By: Stephen V. Bomse/CFS
Stephen V. Bomse

PROOF OF SERVICE

I, Catherine Lubiszewski, declare that I am over the age of eighteen years and I am not a party to this action. My business address is Heller Ehrman LLP, 333 Bush Street, San Francisco, CA 94104.

On December 4, 2006, I served the document listed below on the interested parties in this action in the manner indicated below:

ANSWER TO PETITIONS FOR REVIEW

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INTERESTED PARTIES:

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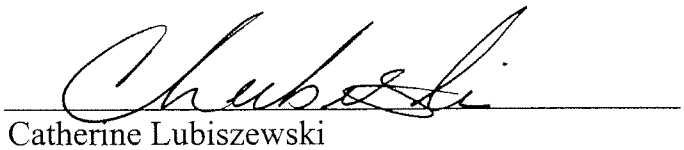
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on December 4, 2006, at San Francisco, California.



Catherine Lubiszewski

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

Dennis J. Herrera Therese M. Stewart Danny Chou CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Tel.: (415) 554-4700 Fax: (415) 554-4747 *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 Robert D. Wilson Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-5567 *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 Petitioners*	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 Petitioners*
Christine P. Sun Peter J. Eliasberg ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Petitioners*	Alan L. Schlosser Tamara Lange ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *Counsel for Petitioners*
Bill Lockyer Stacy Boulware Eurie Robert D. Wilson Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-5567 *Counsel for the State of California, et al.*	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 Petitioners*

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 Robert D. Wilson Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-5567 *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*	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*
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*	Christine P. Sun Peter J. Eliasberg 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*
Alan L. Schlosser Tamara Lange 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*	

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 Petitioners*	Bill Lockyer Stacy Boulware Eurie Robert D. Wilson Christopher E. Krueger STATE OF CALIFORNIA, DEPT. OF JUSTICE OFFICE OF THE ATTORNEY GENERAL 1300 I Street Post Office Box 944255 Sacramento, CA 94244 Tel: (916) 445-7385 Fax: (916) 324-5567 *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 32823 Highway 79 South Temecula, CA 92592 Tel.: (909) 461-7860 Fax: (909) 461-9056 *Counsel for Proposition 22 Legal Defense and Education Fund*	Benjamin W. Bull Glen Lavy Christopher R. Stovall Dale Schowengerdt ALLIANCE DEFENSE FUND 15333 North Pima Road, Suite 165 Scottsdale, AZ 85260 *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 *Counsel for Proposition 22 Legal Defense and Education Fund*	Terry L. Thompson LAW OFFICES OF TERRY L. THOMPSON Post Office Box 1346 Alamo, CA 94507 Tel.: (925) 855-1507 Fax: (925) 820-6034 *Counsel for Proposition 22 Legal Defense and Education Fund* **Via U.S. Mail**
Dennis J. Herrera Therese M. Stewart Danny Chou CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Tel.: (415) 554-4700 Fax: (415) 554-4747 *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*	

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*	Christine P. Sun Peter J. Eliasberg ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Martin Intervenors*
Alan L. Schlosser Tamara Lange ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *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 Rena Lindevaldsen Mary McAlister LIBERTY COUNSEL Second Floor 1055 Maitland Center Common Maitland, FL 32751 Tel.: (407) 875-2100 Fax: (407) 875-0770 *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*
Dennis J. Herrera Therese M. Stewart Danny Chou CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Tel.: (415) 554-4700 Fax: (415) 554-4747 *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*	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*
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*	Christine P. Sun Peter J. Eliasberg ACLU FOUNDATION OF SOUTHERN CALIFORNIA 1616 Beverly Boulevard Los Angeles, CA 90026 Tel: (213) 977-9500 Fax: (213) 250-3919 *Counsel for Martin Intervenors*

Alan L. Schlosser Tamara Lange ACLU FOUNDATION OF NORTHERN CALIFORNIA 39 Drumm Street San Francisco, CA 94111 Tel: (415) 621-2493 Fax: (415) 255-1478 *Counsel for Martin Intervenors*	
Courtesy Copy to: CLERK OF THE COURT Court of Appeal, First Appellate District 350 McAllister Street San Francisco, CA 94102 **Via Messenger Delivery**	Courtesy Copy to: HON. RICHARD A. KRAMER San Francisco Superior Court Department 304 400 McAllister Street San Francisco, CA 94012 **Via Messenger Delivery**