Case No. S147999

IN THE

Supreme Court of the State of California

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365
Court of Appeal No. A110651

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND,
Plaintiff and Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants and Respondents,

DEL MARTIN, et al.,
Intervenors/Defendants/Respondents.

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Consolidated on Appeal with Case Nos.
A110449, A110450, A110451 A110463, A110652
San Francisco Superior Court Case Nos. 503943, 428794
Honorable Richard A. Kramer, Judge

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND REPLY BRIEF

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INTRODUCTION

Proposition 22 Legal Defense and Education Fund (the "Fund") hereby replies to the Answer briefs of the City and County of San Francisco (the "City") and Joshua Rymer, et al. ("Rymer") (collectively, "Respondents").[1]

From the time Respondents saw an opportunity to try to litigate their constitutional claims without the involvement of parties who would challenge their assumptions and evidence, they have worked diligently to either separate their cases from this one, or to eliminate the Fund as an opponent. Despite their repeated assertions about the Attorney General's vigorous defense of the marriage laws, and California Family Code section 308.5 ("Proposition 22") in particular, the Attorney General has not challenged Respondents' assumptions or evidence. Nor has he raised any defense at all to Respondents' position that Proposition 22 does not apply to marriages licensed in California. Accordingly, it is no surprise that Respondents would prefer to litigate against the State only.

Respondents' pretense that the Fund is still seeking the same relief in this case that was granted in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225] (*Lockyer*) is disingenuous. There is no basis in the record for that claim. The Fund is seeking a declaration as to the scope and constitutionality of Proposition 22, and the constitutionality of the marriage laws in general. It is not seeking a writ of mandate or a permanent injunction. As Judge Kramer recognized, the Fund's description

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[1]The Fund is the Petitioner on this appeal, but a Respondent on the merits appealed by the City, Rymer, Gregory Clinton, et al., and Robin Tyler, et al. The City and Rymer are Respondents on this appeal, but Petitioners on the appeal of the substantive issues decided by the Court of Appeal. The Intervenors are represented in the Rymer brief.

of the *Lockyer* mandate as having the effect of interim relief in this case has nothing to do with the type of relief sought herein, but is a valid analogy. He refused to discharge the alternative writ, with costs, on the ground that it was premature. It was his view that even though the goal of the alternative writ has been accomplished, the Fund will not be a prevailing party unless the marriage laws are ultimately declared constitutional.

I. THE FUND'S CLAIMS ARE NOT MOOT.

If *Lockyer* had determined the scope and constitutionality of Proposition 22 and ruled that the City violated it, the City and Rymer's mootness arguments would be on point. They are not. This Court expressly chose "not [to] address the scope or effect of section[] . . . 308.5 in this case." (*Lockyer, supra*, at p. 1076.) It also declined to address "the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman . . . ." (*Id*. at p. 1068.) Thus, the only issues originally in this case that *Lockyer* decided was whether the City could continue issuing marriage licenses to same-sex couples, and whether the licenses issued were valid. The Fund did not ask the trial court to reiterate the *Lockyer* ruling on those issues, or to make a ruling that was in any way redundant of *Lockyer*.

Therefore, the City's reliance upon cases like *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739 [53 Cal.Rptr.3d 203] (*Connerly*) is unavailing. (See City Answer Br. p. 19.) In *Connerly* a prior decision had invalidated the statue at issue, and therefore, there was nothing left for the trial court to decide. "It was an idle and superfluous act for the trial court to issue a declaratory judgment that merely restates the holding [of the prior case]." (*Id*. at p. 747.) Here, the issues before the Court have not previously been decided.

A. There Is a Live Controversy over the Scope and Constitutionality of Proposition 22.

It is beyond dispute that there is a current controversy over the scope of Proposition 22. The City's Complaint against the State requested a declaration that Proposition 22 "does not apply to in-state marriages" (City Answer Br. p. 34 [quoting Complaint]), and it continues to argue that position. (*Id*. pp. 33-38.) Rymer likewise argued in its opening brief that Proposition 22 applies only to out-of-state marriages. (Rymer Open Br. pp. 79-84.) In contrast, the Clinton and Tyler parties assume that Proposition 22 applies to marriages contracted within the state, but argue that it is unconstitutional. (Clinton Open Br. p. 3; Tyler Open Br. pp. 1, 5, 12, 14.) The Fund has explained why Proposition 22 applies to marriages contracted within and outside of California. (Fund Open Br. pp. 29-32; Fund Answer Br. pp. 73-84.)

It is also beyond dispute that there is a current controversy over the constitutionality of Proposition 22. The City and Rymer claim that if Proposition 22 applies to marriages contracted within California, it is unconstitutional. (City Answer Br. pp. 33-34; Rymer Open Br. p. 79 n.51.) Clinton and Tyler include Proposition 22 with the other marriage laws in arguing that all of them are unconstitutional, while Campaign for California Families ("CCF") includes Proposition 22 with the other marriage laws in arguing that all of them pass constitutional muster. The Fund argues not only that Proposition 22 is constitutional, but that it limits the public policy arguments that can be used to attack the other marriage laws. (Fund Open Br. pp. 28-29.) It is plain that the issues of the scope and constitutionality of Proposition 22 are "one[s] which admit[] of definite and conclusive relief by judgment within the field of judicial administration . . . ." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117 [109 Cal.Rptr. 799].)

Interestingly, the Fund is the only party with sufficient interest in the scope of Proposition 22 to vigorously defend its application to marriages licensed in California. (See Fund Open Br. pp. 29-32; Fund Answer Br. pp. 73-84.)[2] The Attorney General has not thought it necessary to defend the scope of Proposition 22 in this litigation. (State Answer Br. p. 6, n.7 ["there is no need to decide this issue"].)[3] The Governor's position on the scope of Proposition 22 is not clear. And Campaign for California Families assumes that Proposition 22 applies to marriages contracted in California, but has not yet argued about its scope. Thus, as to defending the scope of Proposition 22, the Fund is the only party that has shown that it satisfies "[t]he purpose of a standing requirement[, which] is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." (*Common Cause v. Board of Supervisors* (1998) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574] (*Common Cause*).)

The issue for purposes of standing under § 1060 is not whether the Fund is a "person interested" (which it is, as discussed in Section II, *infra*), but whether there is an actual controversy between the City and the Fund relating to the scope and constitutionality of Proposition 22. Section 1060 provides standing to bring an action to five categories of plaintiffs:

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[2]Presumably CCF, the Attorney General and the Governor will address the scope of Proposition 22 in their supplemental briefing per this Court's June 20, 2007 order.

[3]For this reason, Respondents' assertions about the Attorney General's vigorous defense are without merit. (See City Answer Br. p. 32-33; Rymer Answer Br. pp. 13, 30.) Indeed, the Attorney General's failure to defend Proposition 22 is a refusal to participate in litigation, which the City acknowledges has an impact on third party standing. (City Answer Br. p. 33.)

1. "Any person interested under a written instrument, excluding a will or trust";
2. "Any person interested . . . under a contract";
3. "Any person . . . who desires a declaration of his or her rights or duties with respect to another";
4. "Any person . . . who desires a declaration of his or her rights or duties . . . in respect to, in, over or upon property";
5. "Any person . . . who desires a declaration of his or her rights or duties . . . with respect to the location of the natural channel of a watercourse . . . ."

Under any of these circumstances, the trial court's decision on whether there is an "actual controversy relating to the legal rights and duties of the respective parties" is entitled to deference on appeal. (See *Hannula v. Hacienda Homes, Inc.* (1949) 34 Cal.2d 442, 448 [211 P.2d 302] ["Whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion"]; *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 801 [172 P.2d 4] ["Whether a [declaratory judgment] determination is necessary and proper is a matter within the discretion of the trial court"].) Deference is particularly important in the context of this coordinated litigation because "[t]he trial court has broad discretion . . . to fashion suitable methods of practice in order to manage complex litigation." (*Fire Insurance Exchange v. Superior Court,* (2004) 116 Cal.App.4th 446, 452 [10 Cal.Rptr.3d 617] (*Fire Insurance Exchange*).)

Neither the City nor Rymer have suggested how the trial court's finding of an actual controversy could be an abuse of discretion. At most, the cases upon which Rymer relies support the proposition that when there is an unmistakable absence of a justiciable controversy, the trial court should

dismiss nonjusticiable claims. (See *Zetterberg v. State Dept. of Pub. Health* (1974) 43 CAl.App.3d 657, 665 [118 Cal.Rptr. 100] [trial court should have dismissed claim that was beyond its power to address] (*Zetterberg*).)[4] The decision in *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 894 [72 Cal.Rptr.2d 73] held nothing more. It simply held that the trial court should not have ruled on moot issues. (*Ibid*.) The cases Respondents cite for *de novo* review of standing where the facts are undisputed have no bearing here, where Respondents failed to take the opportunity to challenge the factual basis for the Fund's standing, and even admitted the existence of a live controversy. (See Sections II.C. and D., *infra*.)

Given the context of the coordinated proceedings, and the existence of an actual controversy over the scope and constitutionality of Proposition 22, the trial court could not possibly have effected an injustice by its finding of justiciability. (See *Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 566 [468 P.2d 193] [no abuse of discretion without having effected an injustice].) Rymer asserts that "[t]he State is vigorously defending the validity of its statutes in these cases." (Rymer Answer Br. p. 13.) But as shown above, the State has not defended Proposition 22. If the State were defending the lawsuits against it as vigorously as the Fund is prosecuting its case, Respondents would have no reason to work so diligently to eliminate the Fund as an opponent.

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[4] *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 434-35 [121 Cal.Rptr.2d 844], which the City cites, goes no further. (See City Answer Br. p. 14.) In that case, there was clearly no justiciable controversy. The sole means of determining the right at issue, set by statute, did not provide for a declaratory judgment action.

B. A Taxpayer Claim for Declaratory Judgment Does Not Become Moot Simply because a Claim for an Injunction Is Moot.

This Court has held that even though a plaintiff's "cause of action seeking injunctive relief [may be] moot, a live controversy may remain regarding its request for declaratory relief." (*Pacific Gas and Electric Company v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1147 n.4 [69 Cal.Rptr.2d 329] [citing cases] (*Pacific Gas and Electric*).) In *Pacific Gas and Electric* the plaintiff's claim for injunctive relief became moot while on appeal, but this Court recognized that the controversy over the right to a declaratory judgment remained live. (*Ibid*.)[5]

In the same way, this Court's decision in *Lockyer* has no impact on the Fund's claims for declaratory relief. Before *Lockyer*, the Fund had standing under CCP § 526a to seek an injunction stopping the City's illegal conduct.[6] It also had standing to seek a declaratory judgment that (1) the City's expenditure of taxpayer funds at issue were in violation of Proposition 22 (the scope of Proposition 22) and (2) that the marriage laws being challenged by the City were constitutional. The trial court properly recognized that a live controversy over the scope and constitutionality of Proposition 22 remained after this Court's *Lockyer* decision. (See *Pacific Gas and Electric, supra*, 16

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[5]The Court also observed that it could reach the merits of the case even if it were entirely moot because of the substantial public interest in the issue, but that does not undermine the finding of a live controversy.

[6]Rymer's arguments about "interim relief" ignores the fact that it would have been impossible to obtain a permanent injunction in this case without first proving the validity of the marriage laws. (See Rymer Answer p. 13.) The *Lockyer* writ of mandate had the effect of interim relief in this case because it did not resolve the entire controversy. (See Fund Open Br. pp. 13-15.) Moreover, the Fund is no longer seeking an injunction.

Cal.4th at p. 1147 n.4; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 449-50 [166 Cal.Rptr. 149] (*Van Atta*); *Stanson v. Mott* (1976) 17 Cal.3d 206, 223 [130 Cal.Rptr. 697] (*Stanson*).)

Aside from the Court of Appeal's decision below, Respondents are unable to cite any authority for the notion that a taxpayer claim for declaratory judgment must be moot if the illegal expenditure at issue has ceased. Indeed, there is none. All of the cases citing the requirement of an "actual or threatened expenditure of public funds" merely recognize that in order to support taxpayer standing, there must be an allegedly illegal expenditure of funds *at some time*.

None of Respondent's cases other than *Pacific Gas and Electric* and *Stanson* involved an expenditure that was entirely in the past.[7] In *Stanson*, this Court reversed the trial court's dismissal on the defendant's demurrer, and remanded for a determination of whether there had been an illegal expenditure. (*Stanson, supra*, 17 Cal.3d at pp. 210, 222-23.) The Court held that if the plaintiff proved the allegations of the complaint, he would be entitled to a declaratory judgment that the past expenditure of public funds was improper.

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[7]Thus, the City's citation of *Zetterberg* for the proposition that "no taxpayer action may be maintained if the actual or threatened injury to the public fisc has been eliminated" (City Answer Br. p. 18) is inappropriate. *Zetterberg* turned on the fact that control of executive functions is beyond the authority of the judiciary, not on the elimination of an illegal expenditure. (See *Zetterberg, supra*, 43 Cal.App.3d at p. 662 [no allegation of illegal expenditure].) The City's citation of *Pittenger v. Home Savings and Loan Association of Los Angeles* (1958) 166 Cal.App.2d 32, 37 [332 P.2d 399] for the alleged mootness of the Fund's taxpayer standing is likewise inapposite. There, the *section 1060* action (no taxpayer action was involved) had become moot because the defendant no longer had an interest in the contract at issue. (*Id*. at pp. 36-37.) The City clearly continues to have an interest in the constitutionality of the marriage laws.

(*Ibid*.) The Court further held that if the plaintiff "establishes that similar expenses are threatened in the future, he will also be entitled to injunctive relief." (*Id*. at 223.) The controlling point is that standing for a declaratory judgment did not turn on whether there was an ongoing or threatened expenditure. A past expenditure was sufficient. (*Ibid*.)

C. The Fund's Beneficial Interest in the Writ of Mandate Is Sufficient for a Declaratory Judgment Regarding the Constitutionality of Proposition 22.

The Fund's opening brief explained that jurisdiction over an action for writ of mandate properly encompasses a declaratory judgment regarding the constitutionality of the underlying law. (Fund Open Br. at pp. 13-15.) Respondents' Answers did not challenge the Fund's beneficial interest in seeking a writ of mandate under CCP § 1085 or the fact that the mandate action encompasses a declaratory judgment regarding the underlying statute.

Indeed, Respondents are estopped from challenging the Fund's beneficial interest by virtue of the trial court's entry of judgment on the pleadings. "A motion for judgment on the pleadings . . . admits the truth of all material facts pleaded." (*Consolidated Fire Protection District of Los Angeles, County v. Howard Jarvis Taxpayers' Association* (1998) 63 Cal.App.4th 211, 219 [73 Cal.Rptr.2d 586] (*Consolidated Fire Protection*).) Thus, for purposes of the trial court decision, Respondents admitted the Fund's beneficial interest in the CCP § 1085 claim, as alleged in the operative complaint. (Augmented Clerk's Transcript ("CT") p. 1026, ¶ 12 ["Petitioners are beneficially interested in the subject matter of this action and have no plain, speedy or adequate remedy at law"].)

II. THE FUND HAS A UNIQUE INTEREST IN THE SCOPE AND CONSTITUTIONALITY OF PROPOSITION 22.

During the oral argument on Respondents' motions to dismiss the Fund's claims for mootness, Judge Kramer pointed out that Respondents had not moved to dismiss for lack of standing. (Reporters' Transcript ("RT") pp. 95, 115, 118.) Nevertheless, he was "allowing it to be argued" (RT:115), and suggested that Respondents were welcome to file a motion on standing, which would resolve "the nature of these plaintiffs and the nature of their interest." (RT:118; see also RT:106 ["If you want to get into whether these parties have standing to raise that claim, any party to that lawsuit would be free, of course, to files such a motion as to standing . . . and I would guess that such a motion might raise factual questions"].) Respondents purposely chose *not* to file a motion to resolve the nature of the Fund's interest. Had they done so, the record would plainly reflect the unique nature of the Fund's interest in defending Proposition 22.

Respondents have set up a strawman by characterizing the Fund and its constituents as "supporters" of Proposition 22, like any of the millions of California citizens who voted for the initiative. Contrary to the Court of Appeal and the Respondents, the Fund's interest is not a mere "political" interest like that of any other voter. The Fund was formed by the official proponent and campaign organizers, in substantial part, to represent their interests in defending the initiative they successfully enacted: "The Fund's Articles of Incorporation state that the 'specific purpose of this corporation is to defend the right of the California electors to enforce Proposition 22 and to approve or reject attempts by the Legislature to amend or repeal its provision . . . .'" (Declaration of Senator William J. ("Pete") Knight ("Knight Decl.") submitted in record of *City and County of San Francisco v. State* appeal

("*CCSF* Appeal"), ¶ 3, City June 13, 2007 Request for Judicial Notice ("6/13/2007 CRJN") App. 108.)

Senator Knight was the President of the Fund when this lawsuit was filed. (*Id*. ¶ 1, App. 108.) He was the drafter of Proposition 22 and its official proponent. (*Id*. ¶ 9, App. 110.) He, along with numerous Fund constituents, created the "Defense of Marriage Campaign," "a registered ballot measure committee that oversaw the gathering of signatures from registered voters in order to satisfy the legal requirements necessary for Proposition 22 to be submitted to California voters." (*Ibid*.) Many of the Fund's constituents "were involved in organizing voter support . . . ." (*Ibid*.) Senator Knight affirmed that the Fund's "interest in defending California's marriage laws will be forever harmed if the present marriage laws are not properly defended and/or if said laws are held unconstitutional or otherwise held invalid." (*Id*. ¶ 8, App. 109.)

Dana Cody is a board member of the Fund. (Declaration of Dana Cody submitted in *CCSF* Appeal, ¶ 2, 6/13/2007 CRJN, App. 111.) The Fund has more than 15,000 financial contributors, most of whom supported the Defense of Marriage Campaign financially. (*Id*. ¶ 4.) Ms. Cody worked with representatives of the Defense of Marriage Campaign during 1999 and 2000. She "participated in regular meetings and discussions with representatives of the campaign regarding strategy to be used for the promotion of Proposition 22." (*Id*. ¶ 5, App. 111-12.) At the same time Ms. Cody was the chairperson for another public interest organization that was working to pass Proposition 22. (*Id*. ¶ 5, App. 112.)

Natalie Williams is also a board member of the Fund. (Declaration of Natalie Williams submitted in *CCSF* Appeal, ¶ 2, 6/13/2007 CRJN, App. 106.) Ms. Williams lobbied individuals and organizations to support Proposition 22

prior to the vote on the initiative. (*Id*. ¶ 7, App. 107.) She participated regularly in Defense of Marriage Campaign meetings and activities, and "participated in developing campaign strategies that were used for the ultimate passage of Proposition 22." (*Ibid*.) In addition, she has donated time and money to the Fund. (*Id*. ¶ 6.)

Thus, if Respondents had accepted Judge Kramer's offer of an opportunity to challenge the factual basis of the Fund's standing, the Fund would have established a sufficient basis. It represents the interests of many financial sponsors of the initiative campaign, the interests of those who planned the strategy and campaigned for the passage of Proposition 22, and the interests of those who founded, and engaged in, the Defense of Marriage Campaign to oversee the gathering of sufficient signatures to place the initiative on the ballot.

A. A Loss in This Litigation Would Eliminate the Reason for the Fund's Existence.

The Court of Appeal's ruling that the Fund and its members would not suffer any harm if the marriage laws were struck down ignored the Fund's *raison d'etre* – to defend California's marriage laws, including Proposition 22. If the marriage laws were struck down, the Fund would no longer have a mission; its entire purpose would be defunct. That is why Senator Knight said that the Fund's interests would be forever harmed if the marriage laws were struck down. On the other hand, a ruling that Proposition 22 applies to marriages contracted in California and is constitutional would vindicate the Fund's existence. Thus, Respondents' argument that the Fund would not be harmed if its reason for existence were eliminated is sophistry. An organization whose very existence is at stake certainly has "a sufficient interest

in the subject matter of the dispute to press their case with vigor." (*Common Cause, supra*, 49 Cal.3d at p. 439.)

B. The Interests of Campaign Proponents, Organizers, and Sponsors Are Sufficient for Standing.

Given the importance of the right of initiative in California's constitutional scheme, this Court should rule that campaign proponents, organizers, and sponsors have a sufficient interest in their enactments to enforce or defend the validity of their enactments. (See Fund Open Br. pp. 15-20.) Citizens resort to the initiative process precisely because they do not believe their elected representatives are sufficiently sensitive to the popular will. Those who sponsor and work for the passage of an initiative are the persons likely to defend it most vigorously. (*Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727, 733 (*Yniguez*).)[8] As the Ninth Circuit recently held in an intervention case, an initiative proponent and a major supporter had a "significant protectable interest" in litigation over its validity. (*Prete v. Bradbury* (9th Cir. 2006) 438 F.3d 949, 956.)

The Court of Appeal's recent decision in *Paulson v. Abdelnour* (2006) 145 Cal.App.4th 400 [51 Cal.Rptr.3d 575] (*Paulson*) supports a finding of standing for initiative proponents, organizers, and sponsors. The referendum

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[8]Respondents chastize the Fund for citing this opinion without acknowledging that the Supreme Court vacated it. It did not. The decision the Supreme Court vacated was a later decision published at 93 F.3d 920 in 1995. (See *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43.) Indeed, the Ninth Circuit continues to cite *Yniguez* as good law. (See *Baranowicz v. Commissioner* (2005) 432 F.3d 972, 975-76; *State of California Department of Social Services v. Thompson* (2003) 321 F.3d 835, 845 ("*Thompson*".) Moreover, the Fund cited *Yniguez* only for the proposition that those who work to pass an initiative have a greater interest in defending it than the State. The Fund did not cite the *Yniguez* discussion of standing, which the Ninth Circuit continues to follow. (See *Thompson, supra*, 321 F.3d at p. 845.)

at issue in *Paulson*, Proposition A, involved a vote by San Diego residents to donate the Mt. Soledad veterans memorial to the federal government. In a challenge to Proposition A's constitutionality, Mike Shelby, an individual who signed a referendary petition and obtained signatures to put the referendum on the ballot, moved to intervene. (*Id*. at p. 414.) The court denied the motion to intervene, and ruled that Proposition A was unconstitutional. (*Ibid*.) Pursuant to CCP section 663, Shelby and an organization called San Diegans for the Mt. Soledad National War Memorial ("San Diegans")[9] brought a motion to vacate the order on unconstitutionality, which the court denied. (*Ibid*.) Shelby and San Diegans appealed, and the plaintiff challenged their standing to do so. The Court of Appeal ruled that they were "aggrieved" by the judgment, and thus had standing to move to vacate it under section 663, thereby becoming parties of record:

> One is considered an "aggrieved party" whose rights or interests are injuriously affected by the judgment. The interests so affected must be immediate, pecuniary and substantial and not nominal or a remote consequence of the judgment. [Citations.] Given their involvement in passage of Proposition A, the resources spent in that passage, and their interests as expressed at trial, we conclude both Shelby and San Diegans . . . are aggrieved parties for purposes of appeal.

(*Id*. at pp. 417-418.) As described in the declarations cited above, the Fund represents more extensive interests than those of Shelby and San Diegans. Those interests are substantial enough for standing to defend the scope and constitutionality of Proposition 22.

The City's assertion that initiative proponents should be treated the same as individual legislators in federal court for standing purposes is not well

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[9]San Diegans "spent approximately $100,000, and substantial man hours promoting passage of Proposition A." (*Id*. at p. 417.)

grounded. First, California does not have the federal limitation on judicial power, which is at issue in the legislator standing cases. (See *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 29 [112 Cal.Rptr.2d 5] ["California's Constitution, unlike its federal counterpart, does not contain a 'case or controversy' limitation on the judicial power"].) Second, initiative proponents, sponsors, and organizers have made an uncompensated personal investment of time and money that is significantly different from that of legislators, who are paid by the citizenry for their service. More importantly, allowing initiative proponents, sponsors, and campaign organizers to enforce or defend the validity of their enactments serves to preserve the people's right of initiative, a right that the courts must jealously guard. (See *Associated Homebuilders of the Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41] (*Associated Homebuilders*).) Thus, California's lack of a federal Article III-type limitation on judicial power, and the countervailing policy in favor of the initiative power, militate against following the federal precedent on legislator standing.

C. Respondents' Challenge to the Factual Basis of the Fund's Interest Was Untimely.

The Fund's operative complaint adequately alleged standing. It alleged that the Fund had a beneficial interest sufficient for standing under CCP § 1085 (CT:1026, ¶ 12); it alleged that the Fund represented the interests of approximately 14,000 California taxpayers sufficient for standing under CCP § 526a (CT:1024, ¶ 1); and it alleged an actual controversy between the Fund and Respondents sufficient for standing under CCP § 1060. (CT:1027, ¶ 19.) Because Respondents knew that an evidentiary hearing on the Fund's interests could only hurt their standing argument, they chose not to risk it. Instead, the

City attempted to make an oral motion for judgment on the pleadings regarding standing during the hearing on the merits. (RT:391.)

Judge Kramer ruled that the motion was untimely for three reasons: (1) Respondents knew of the issue at least from the time of the lifting of the stay on the Fund's case, but failed to file a motion; (2) Respondents failed to file a motion related to standing in connection with their motion on mootness; and (3) Respondents' participation in scheduling the hearing on the merits in a coordinated fashion estopped them from attempting to bring a motion on standing that would have required additional proceedings. (RT:398-99; see also RT:392 [discussing further briefing].) Judge Kramer had sufficient familiarity with the coordinated litigation to know that Respondents had been straining to find a way to separate the Fund and CCF litigation from the other four cases – they wanted to obtain judgment and pursue appeals without the Fund and CCF's involvement. In contrast, Judge Kramer was striving to keep the cases coordinated. Therefore, in reliance upon his "authority under the rules for complex litigation . . . and under the inherent power of th[e] Court to efficiently resolve this case," he "den[ied] the motion as not being timely." (CT:399.) At a minimum, that decision to prevent the City from challenging the basis of the Fund's standing is entitled to deference. (*Fire Insurance Exchange, supra*, 116 Cal.App.4th at p. 452.)[10] Respondents' failure to file a timely motion, thereby allowing the trial court to determine the factual basis for the Fund's standing, could also be construed as a waiver. (See *Ludgate Ins. Co., Ltd. v. Lockheed Martin Corp*. (2000) 82 Cal.App.4th 592, 605 [98

[10]Respondents did not appeal that ruling, and have not claimed that they were prejudiced by it.

Cal.Rptr.2d 277] [party can waive right to challenge factual basis for finding of justiciability] ("*Ludgate*").)

D. Respondents have Waived the Right to Challenge the Factual Basis of the Fund's Interest.

While standing is an issue that generally can be raised at any time, a party can waive the right to dispute the factual basis of a finding of a justiciable controversy.[11] (*Ludgate, supra*, 82 Cal.App.4th at p. 605.) In this case the Respondents waived the right to dispute an adequate factual basis for a finding of a justiciable controversy by filing a cross-complaint against the Fund alleging the existence of an actual controversy, and by obtaining entry of a judgment on the pleadings in the trial court.

Both Respondents filed cross complaints against the Fund to seek a declaration that the marriage laws are unconstitutional and that Proposition 22 does not apply to in-state marriages. (City Cross-Complaint, CT:1059, ¶ 11; Rymer (Woo) Cross-Complaint, CT:1144, ¶ 20.c.) Both alleged that "this Cross-Complaint arises out of the same transaction, occurrence, or set of transactions or occurrences set forth in the complaints . . . ." (City, CT:1057, ¶ 6; Rymer, CT:1140, ¶ 14.) Both Respondents also asserted that "an active controversy has arisen and now exists between Cross-Complainant(s) and Cross-Defendants concerning their respective rights, duties and responsibilities. The controversy is definite and concrete, and touches on the legal relations(hips) of the parties . . . ." (City, CT:1058, ¶ 9; Rymer, CT: 1142-43, ¶ 18.) Both Respondents later dismissed their cross-complaints to

[11]This is true even though the determination of standing, based upon undisputed facts, is subject to *de novo* review and cannot be waived.

avoid litigating those issues against the Fund.[12] However, their filing was an admission that there is an actual controversy among the parties over the scope and constitutionality of Proposition 22. In addition, these filings are a waiver of the right to contest the factual basis for the existence of a live controversy. (*Ludgate, supra*, 82 Cal.App.4th at pp. 605-06.)

Respondents also waived their standing arguments by insisting that the trial court enter judgments on the pleadings on their behalf. (CT:2643.)[13] By doing so, they "admit[ed] the truth of all material facts pleaded." (*Consolidated Fire Protection, supra*, 63 Cal.App.4th at p. 219.) That includes an admission of the Fund's beneficial interest in the litigation as well as an admission that there is an actual controversy between the Fund and Respondents. (*Ibid*., see also *Ludgate, supra*, 82 Cal.App.4th at p. 605 [motion for judgment on the pleadings admitted allegation of actual controversy].)

E. Recognizing the Fund's Unique Interest Is Consistent with This Court's Precedent.

The City's imagined parade of horribles from recognizing the Fund's interest in this litigation is just that – imagined. There simply will not be more than one organization formed to represent the interests of an initiative's proponent, ballot measure committee, and campaign organizers. While there

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[12]Rymer wrongly asserts that it and the City dismissed their cross-complaints after the ruling in *Lockyer* "in recognition that this Court's decision had rendered them moot." (Rymer Answer Br. p. 14, n.7.) That is incorrect. Rymer filed its dismissal on May 14, 2004, and the City filed on June 4, 2004. (CT:1157, 1162.) *Lockyer* was decided on August 12, 2004.

[13]The Fund had proposed that the judgment be a summary adjudication against it. (CT:697-98.)

could be multiple organizations working to pass an initiative,[14] California courts are not strangers to the use of mechanisms to limit the number of parties actively participating in litigation, including class actions. In any event, the courts can determine on a case-by-case basis whether each proposed party has a sufficient interest in the litigation to participate, as they do now.

The vacuity of the City's "floodgates" argument is highlighted by the open-ended nature of taxpayer standing. Any taxpayer may file an action under CCP section 526a to restrain an illegal expenditure. Yet, that has not placed an overwhelming burden on the courts. Moreover, the City's notoriously illegal conduct in issuing marriage licenses to same-sex couples resulted in the filing of just two lawsuits – this one and the lawsuit by CCF. There is no reason to suppose that recognizing the Fund's unique interest in defending Proposition 22 would increase that number.

It is nonsense to pretend that the interests of political lobbyists and legislators is the same as those of initiative proponents, sponsors, and organizers. (See City Answer Br. p. 31.) Political lobbyists, legislators, and even concerned citizens who lobby their legislators are working through the ordinary political process and relying upon the political process to protect their interests. Initiative campaigns, however, are generally the result of failed political processes. (See *supra*, Section II.B.) For that reason, elected representatives, such as the Attorney General, have less interest in defending legislation passed by initiative. (*Yniguez, supra*, 939 F.2d at p. 733.) Moreover, the initiative process requires unique protection under the

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[14]It is not clear how "the interests of supporters and opponents [of an initiative] are identical in nature." (City Answer Br. p. 31.) Successful supporters have something to defend; failed opponents do not.

California Constitution. (See *Associated Homebuilders, supra*, 18 Cal.3d at p. 591.)

It is specious to argue that recognizing the Fund's interest in defending Proposition 22 would spawn litigation against private citizens who voice opposition to a law. (See City Answer Br. p. 30.) This Court's decision in *City of Cotati v.Cashman* (2002) 29 Cal.4th 69 [124 Cal.Rptr.2d 519] does not create liability for those who dispute the validity or interpretation of a law. There, the city sued the owners of mobile home parks for a declaratory judgment that a city ordinance was valid when it learned that the owners believed that the ordinance constituted an unconstitutional taking of private property. (*Id*. at p. 72.) If the owners were right, and the city enforced the ordinance, it would incur financial liability. Thus, the owners' challenge to the validity of the ordinance created an actual controversy. There would not have been an actual controversy with the city if the challenger had simply been a citizen who disagreed with the ordinance because that challenge could not have had an impact on the city or the ordinance. Nor would the owners' disagreement with the ordinance have created a live controversy between the owners and other private persons or public interest groups, even if the ordinance had been enacted by initiative – the owners had no ability to affect the enforcement of the ordinance.[15] In contrast, the live controversy in this case arose from the City's blatantly illegal actions, not just its public statements about its beliefs. Even if the City's public statements alone could

[15]The lawsuits by the owners and the city might have given initiative proponents a reason to try to intervene, particularly if the city were not adequately defending the ordinance. (See *Building Industry Association of Southern California, Inc. v. City of Camarillo* (1986) 41 Cal.3d 810, 822 [226 Cal.Rptr. 81].) But permissive intervention is always available if the court, in its discretion, thinks it proper.

create an actual controversy, that controversy could exist only because of the City's ability to refuse to enforce the laws. A private person or entity would not have that ability.

Finally, it simply is not true that the Fund could adequately defend its interests as an *amicus* in this action. (See City Answer p. 33.) Respondents wish to pursue their litigation without having their assumptions and evidence challenged – which they could do without the Fund's or CCF's involvement. For example, the City noted that the Attorney General did not contest the thousands of pages of evidence it submitted to the trial court. (City Open Br. pp. 29-30.) In contrast, the Fund and CCF submitted eight declarations challenging the City's assumptions and evidence. (See RT:394 [referring to submission of eight expert declarations].) Moreover, the Court of Appeal refused to consider some of the Fund's and CCF's arguments on appeal because it decided that they had no standing. The Court stated that "[a]lthough some appellants and amici curiae argue this 'responsible procreation' incentive justifies the state's continued definition of marriage as opposite-sex, we do not analyze the legitimacy of this asserted state interest because the Attorney General has expressly disavowed it." (*In re Marriage Cases* 49 Cal.Rptr.3d 675, 724, n.33 (*Marriage Cases*).) The Attorney General's position on that issue has no bearing on whether the Court should consider the arguments of another party.

III. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE INAPPLICABLE.

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; and 3) the party against whom the plea is raised was a party or was in privity with a party to the

prior adjudication." (See *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1064-65 [71 Cal.Rptr.2d 77] (*Citizens for Open Access*).) Collateral estoppel (issue preclusion) "precludes relitigation of an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit." (*Producers Dairy Delivery Company v. Sentry Insurance Company* (1986) 41 Cal.3d 903, 910 [226 Cal.Rptr. 558] (*Producers Dairy Delivery Company*).) Neither res judicata nor collateral estoppel are applicable here because Respondents have waived them. If waiver does not apply, then Respondents are estopped by prior litigation from challenging the Fund's standing. In any event, the prior litigation Respondents are relying upon did not decide identical issues to this case.

A. Respondents Have Waived Res Judicata and Collateral Estoppel.

Respondents arguments relating to collateral estoppel and res judicata may not be raised for the first time on appeal, much less for the first time in this court. The defense of res judicata is waived if not pleaded as an affirmative defense in the trial court. (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 88-89 [38 Cal.Rptr.3d 528] [citing cases]; see also CCP § 1908.5 ["When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there be an opportunity to do so"].) Collateral estoppel, which is a subset of res judicata, need not be pleaded, but "'is waived if not *raised* in the trial court.' [Citation.]" (*Rodgers, supra*, 136 Cal.App.4th at p. 89.) Because these issues have been raised for the first time in this Court, they are waived.

B. If Res Judicata and Collateral Estoppel Have Not Been Waived, Respondents Are Barred from Challenging the Fund's Standing.

On December 17, 2003, the trial court in *Knight v. Schwarzenegger* (Super. Ct. Sac. County, 2003, No. 03-AS05284), rejected a demurrer challenging the Fund's standing to defend Proposition 22. (Fund July 23, 2007 Request for Judicial Notice ("7/23/07 FRJN"), App. 66.) The court ruled that "the corporate entity has standing to assert the cause." (*Ibid.*) The court later ruled that the Registered Domestic Partnership Act did not amend or repeal Proposition 22. The Fund challenged the latter ruling by filing a petition for writ of mandate in the Court of Appeal. (See *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 18 [26 Cal.Rptr.3d 687] (*Knight*).) Parties in privity with Rymer challenged the Fund's standing in the writ proceedings. (7/23/07 FRJN, App. 1-65.) The Court of Appeal rejected the challenge to the Fund's standing by deeming the arguments unworthy of mention. (See *Knight, supra*, 128 Cal.App.4th 14.)

The issue on this appeal is identical to that in *Knight* because the Fund's standing to defend Proposition 22, as it is doing in this litigation, was necessarily litigated in the trial court proceedings and in the petition for a writ of mandate. *Knight* was a final judgment on the merits in that suit. Respondents Equality California, Phyllis Lyon, and Del Martin were parties in that litigation. (7/23/07 FRJN, App.1.) Thus, they are collaterally estopped from relitigating the Fund's standing to defend Proposition 22. (*Producers Dairy Delivery Company, supra*, 41 Cal.3d at p. 910.) The rest of the Respondents are in privity with the parties to the *Knight* litigation. They have such an identity of interest with each other "as to represent the same legal rights." (*Citizens for Open Access, supra*, 60 Cal.App.4th at p.1069.) This is

evidenced by the fact that most of them (the Rymer parties) have joint legal representation, and they are joined with the City in this litigation. Finally, those who were not parties to *Knight* undoubtedly had adequate representation by the "'party in the first action.'" (See *Id*. at p. 1070.) Counsel for Rymer were counsel for Equality California, Phyllis Lyon, Del Martin, et al. in *Knight*. (7/23/07 FRJN, App. 2-3.) Thus, if collateral estoppel has not been waived, Respondents are collaterally estopped from challenging the Fund's standing.[16]

C. The Issues Addressed in *Lockyer* and *CCSF* Are Not the Same as the Issues Here.

Rymer's argument that "the issues decided in *Lockyer* are identical with those presented in Petitioners' actions" is frivolous. (Rymer Answer Br. at 16.) As discussed in the Fund's opening brief and throughout this one, the issues for which the Fund is seeking a resolution are the scope and constitutionality of Proposition 22. In addition, if this Court rules that Proposition 22 governs marriages contracted in California, the Fund will have shown that the City's illegal conduct constituted an illegal expenditure in violation of Proposition 22. This Court did not address any of those issues in *Lockyer*. (See Section I, *supra*.) Thus, neither res judicata nor collateral estoppel apply. (See *Citizens for Open Access, supra*, 60 Cal.App.4th at p. 1064-65; *Producers Dairy Delivery Company, supra*, 41 Cal.3d at p. 910.)

The City's reliance upon *City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030 [27 Cal.Rptr.3d 722] (*CCSF*) is inapposite

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[16]Respondents would likewise be collaterally estopped from arguing that Proposition 22 applies only to out-of-state marriages, since *Knight* decided that question against them as well. (*Knight, supra*, 128 Cal.App.4th at pp. 23-24.)

because that case did not involve the issue of standing. The only issue before the Court was whether the trial court had abused its discretion in denying the motion for permissive intervention. The Court held that "the trial court did not abuse its discretion in denying the Fund's motions for permissive intervention because the Fund has identified no direct or immediate effect that a judgment in the consolidated cases may have on it or its individual members." (*Id*. at p. 1033.) Because the issue of whether the trial court abused its discretion in denying permissive intervention does not require a decision on whether the Fund has standing to file its own lawsuit, collateral estoppel does not apply. (See *Producers Dairy Delivery Company, supra*, 41 Cal.3d at p. 910 [issue must have been "necessarily decided"].)

Perhaps the City could argue that waiver should not apply to its collateral estoppel argument because it was unable to cite *CCSF* in the trial court, as it was not decided until April 27, 2005. But that makes the point. The trial court decision on intervention was made long before the City filed its motion to dismiss for mootness. If the intervention decision in the trial court had decided the issue of the Fund's standing, the City could have argued collateral estoppel. But the trial court decision was nothing more than a discretionary rejection of a motion to intervene. The Court of Appeal's decision can stand for nothing more than an affirmation of the trial court's decision, which did not decide standing.

IV. PROPOSITION 22 APPLIES TO MARRIAGES CONTRACTED WITHIN CALIFORNIA.[17]

There is nothing on the face of Proposition 22 to suggest that its reference to "valid" marriages might refer only to out-of-state marriages, and the City cites no authority to support its speculation that it might.[18] (See City Answer Br. p. 35.) Nor does Family Code section 300, which also limits marriage to a man and a woman, create such an ambiguity by becoming superfluous. (See City Answer p. 36.) The cannons of construction do not preclude a *voter initiative* from rendering a *legislative act* superfluous. Otherwise, the initiative power could not trump legislative action, which it

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[17]The City's assertion that "the scope of section 308.5 is irrelevant if this Court agrees with the City and holds that the marriage exclusion is unconstitutional" has it backwards. (See City Answer Br. pp. 33-34.) This Court could possibly find the marriage laws to be constitutional without reaching the issue of the scope of Proposition 22 (which would result in additional litigation over the issue). However, given Proposition 22's limitation on what state marriage policy can be, the extent of that limitation needs to be addressed before the Court can find that public policy has rendered the marriage laws invalid. Neither the City nor Rymer have responded to the Fund's argument that Proposition 22 places limits on California's marriage policy. (See Fund Open Br. p. 28.)

[18]Rymer did not address the scope of Proposition 22 in its Answer because it believes that the Fund's Opening Brief was to be "limited to the 'issue of justiciability or standing addressed by the Court of Appeal,'" and that "Respondents should address substantive issues concerning the constitutionality or construction of the marriage statutes and the proper construction of . . . Section 308.5" in opening briefs. (Rymer Answer Br. p. 1, n.1 [quoting this Court's January 12, 2007 order].) However, the Fund raised the issue in the context of showing that the scope of Proposition 22 is a controversy at issue in this case (Fund Open Br. p. 27), a point with which Rymer apparently agrees. Regardless of who should have addressed the issue first, the City did not address that issue until its Answer to the Fund's opening brief. This section responds to the City's arguments.

clearly does. (Cal. Const., Art. 2, Sec. 10(c).) The "intent" at issue in construing Proposition 22 is that of "the enacting legislative body," the voters. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal.Rptr.3d 623].) It is *Proposition 22* that may not be construed in a way to make part of it "'meaningless or inoperative'[citation]" because it is the statute at issue, enacted by voter initiative after section 300. (*Id*. at p. 716). Moreover, construing Proposition 22 to preclude redefining marriage in California does not render it superfluous. Defining marriage as the union of a man and a woman gives Proposition 22 independent significance because it prevents the Legislature from changing California's public policy on marriage.

The City's selective use of legislative history does not change the result. (See City Answer pp. 36-38.) At worst, the ballot analyses and arguments are themselves ambiguous, and thus unpersuasive. (See *Medical Board of California v. Superior Court* (2003) 111 Cal.App.4th 163, 179 [4 Cal.Rptr.3d 403] [legislative history is dispositive only when it is unambiguous].) However, the relevant legislative history, viewed as a whole, makes it clear that there was no intent to limit Proposition 22 to marriages contracted out of state. (See Fund Answer Br. pp. 73-84.)

The issue for privilege and immunities analysis, again, is voter intent: did the voters intend to preclude recognition of same-sex "marriages" from other jurisdictions, while allowing same-sex "marriages" in California? The question is not a mere hypothetical. (See City Answer Br. p. 38.) The legislature has already passed a same-sex "marriage" bill once, which the Governor vetoed because he believed it violated Proposition 22. (See *Marriage Cases, supra*, 49 Cal.Rptr.3d at 726 n.35.) The Assembly passed a similar bill again on June 5, 2007, which is expected to receive approval in the Senate. In addition, marriage in California would be redefined if Respondents

were to persuade this Court that public policy has changed to the point that the marriage laws are no longer constitutional. Thus, the privileges and immunities issue is not idle speculation. It would clearly violate the privileges and immunities clause of the United States Constitution to allow same-sex "marriage" for California citizens, but refuse to recognize same-sex "marriages" from Massachusetts. (See Fund Open Br. p. 32.)

It would be absurd to conclude that the voters intended to put recognition of out-of-state same-sex "marriages" beyond the purview of the Legislature, but leave the Legislature the power to render the law unconstitutional by redefining marriage in California. Proposition 22 must be construed in a manner that will avoid that absurd result. (See *In re David H.* (1995) 33 Cal.App.4th 368, 387 [39 Cal.Rptr.2d 313].) In addition, it must be construed so as to be constitutional under all circumstances, not just in the unlikely event that the Legislature refrains from pursuing its stated goal of redefining marriage. It must be construed in a manner that "will render it valid in its entirety, or free from doubt as to its constitutionality, even though [an]other construction is equally reasonable." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509 [53 Cal.Rptr.2d 789].)

Finally, the City's assertion that *Knight* ignored the ballot materials and "considered the language of section 308.5 in isolation – and not in context" is flatly contradicted by the decision itself. (See City Answer p. 38.) The Court of Appeal specifically addressed Family Code sections 297, 300, and 308 in construing the language of Proposition 22. (*Knight, supra*, 128 Cal.App.4th at pp. 23-24.) There was no need for the court to consider the ballot materials because it ruled that the language was unambiguous. (*Id.* at p. 23.)

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal's decision on justiciability, and rule that Proposition 22 applies to marriages contracted in California.

Dated: August 17, 2007

Respectfully submitted,

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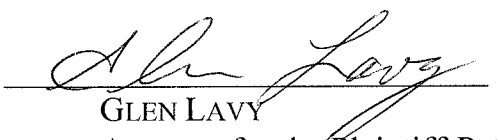
CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14

Pursuant to California Rule of Court 14(c)(1), counsel for Plaintiff-Petitioner hereby certifies that this brief was prepared in Times New Roman 13 font, and that the number of words contained in the foregoing Plaintiff-Petitioner's Reply Brief, including footnotes, but excluding the Table of Contents, Table of Authorities, This Certificate, and any attachments, is 8,533, as calculated by using the word count feature of WordPerfect, the computer program used to prepare this brief.

Dated: August 16, 2007



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