SUPREME COURT COPY

Case No. S189476

SUPREME COURT OF THE STATE OF CALIFORNIA

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs/Respondents,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervener/Respondent,

vs.

EDMUND G. BROWN JR *ET AL.*,

Defendants,

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendants-Interveners/Petitioners,

HAK-SHING WILLIAM TAM,

Defendant-Intervener.

CITY AND COUNTY OF SAN FRANCISCO'S REQUEST FOR JUDICIAL NOTICE

On Request from the United States Court of Appeals for the Ninth Circuit, Case No. 10-16696

DENNIS J. HERRERA, SB #139669
City Attorney
THERESE M. STEWART, SB #104930
Chief Deputy City Attorney
VINCE CHHABRIA, SB #208557
MOLLIE M. LEE, SB #251404
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-5408
Telephone: (415) 554-4708

DANNY CHOU, SB #180240
Chief of Complex and Special Litigation
CHRISTINE VAN AKEN, SB #241755
ERIN BERNSTEIN, SB #231539
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, CA 94102
Telephone: (415) 554-3800

Attorneys for Plaintiff-Intervener/Respondent CITY AND COUNTY OF SAN FRANCISCO

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiff-Intervener/Respondent the City and County of San Francisco hereby requests, pursuant to California Rules of Court 8.252(a) and 8.520(g) and Evidence Code sections 452 and 459, of the following documents, true and correct copies of which are attached hereto. These documents are not presently part of the federal court record in this case.

Exhibit A. Docket (Register of Actions), *Beckley v. Schwarzenegger et al.*, Case Number C065920, California Court of Appeal, Third Appellate District.

The Court may take judicial notice of Exhibit A, a record of a court of California, pursuant to Evidence Code sections 452(d) and 459. Exhibit A is relevant to this proceeding because it demonstrates the disposition of a petition for writ of mandamus to compel the Governor and Attorney General of California to notice an appeal from the district court's decision in *Perry v. Schwarzenegger*, N.D. Cal. No. 09-2292.

Exhibit B. Docket (Register of Actions), *Beckley v. Schwarzenegger (Perry)*, Case Number S186072, Supreme Court of California.

The Court may take judicial notice of Exhibit B, a record of this Court, pursuant to Evidence Code sections 452(d) and 459. Exhibit B is relevant to this proceeding because it demonstrates the disposition of the petition seeking this Court's review of the Court of Appeal's decision in *Beckley v. Schwarzenegger*, Case Number C065920.

Exhibit C. Letter Brief from Respondent, Attorney General Edmund G. Brown Jr., Sept. 8, 2010, *Beckley v. Schwarzenegger (Perry)*, Case Number S186072, Supreme Court of California.

The Court may take judicial notice of Exhibit C, a letter brief filed in this Court by the Attorney General of California, pursuant to Evidence Code sections 452(c), 452(d) and 459. Exhibit C is relevant to this proceeding because it indicates the reason that then-Attorney General Edmund G. Brown Jr. provided to this Court for his decision not to appeal the federal district court's judgment.

Exhibit D. Brief of the State of California as *Amicus Curiae*, *Reitman v. Mulkey* (1966) U.S. Sup. Ct. No. 483.

The Court may take judicial notice of Exhibit D, a record of a United States federal court and of an official act of the Attorney General of California, pursuant to Evidence Code sections 452(c), 452(d) and 459. Exhibit D is relevant to this proceeding because it illustrates that the California Attorney General has previously taken the position that an initiative constitutional amendment violates the United States Constitution.

Exhibit E. Excerpt from Ballot Pamphlet, Proposition 14, 1964 General Election.

The Court may take judicial notice of Exhibit E, a record of a United States federal court and an official publication of the State of California, pursuant to Evidence Code sections 452(c) and 459. Exhibit E is relevant to this proceeding because it illustrates that the California Attorney General has previously taken the position that an initiative constitutional amendment violates the United States Constitution.

Exhibit F. Letter from United States Attorney General Eric H. Holder to the Honorable John A. Boehner, Speaker of the United States House of Representatives, Feb. 23, 2011.

The Court may take judicial notice of Exhibit F, an official act of the United States Department of Justice, pursuant to Evidence Code sections

452(c) and 459. Exhibit F is relevant to this proceeding because it indicates that the Attorney General of the United States has determined that the Section 3 of the Defense of Marriage Act violates the Federal Constitution.

Exhibit G. California Senate Bill No. 5, 2011-2012 Legislative Session.

The Court may take judicial notice of Exhibit G, a bill introduced into the California Senate, pursuant to Evidence Code sections 452(c) and 459. Exhibit G is relevant to this proceeding as a pending bill that would be superfluous if California law presently required the California Attorney General to appeal adverse trial court decisions concerning initiative constitutional amendments or allowed the proponents of an initiative constitutional amendment to take an appeal from an adverse trial court decision concerning the amendment if the Attorney General could not do so.

Exhibit H. Petition for Review, Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, Supreme Court Case No. S147999.

The Court may take judicial notice of Exhibit H, concerning previous proceedings in this Court, pursuant to Evidence Code sections 452(d) and 459. Exhibit H is relevant to this proceeding because it demonstrates that Proponents knew or should have known that the Attorney General of California would not defend an enactment banning the marriage of same-sex couples in the manner that proponents of the ban would prefer, and that California law did not guarantee initiative proponents the right to participate in proceedings concerning the validity of initiative constitutional amendments.

No party has previously presented these documents to the federal district court or the Court of Appeals for the Ninth Circuit. With the exception of Exhibit F, these documents do not relate to proceedings that occurred after the district court's judgment or the Ninth Circuit's order certifying a question to this Court were entered.

Dated: April 4, 2011

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
DANNY CHOU
Chief of Complex and Special Litigation
CHRISTINE VAN AKEN
VINCE CHHABRIA
ERIN BERNSTEIN
MOLLIE M. LEE
Deputy City Attorneys

By: _____
CHRISTINE VAN AKEN

Attorneys for Plaintiff-Intervener/Respondent
CITY AND COUNTY OF SAN FRANCISCO

INDEX OF EXHIBITS

Exhibit	Document
A	Docket (Register of Actions), *Beckley v. Schwarzenegger et al.*, Case Number C065920, California Court of Appeal, Third Appellate District
B	Docket (Register of Actions), *Beckley v. Schwarzenegger (Perry)*, Case Number S186072, Supreme Court of California
C	Letter Brief from Respondent, Attorney General Edmund G. Brown Jr., Sept. 8, 2010, *Beckley v. Schwarzenegger (Perry)*, Case Number S186072, Supreme Court of California
D	Brief of the State of California as *Amicus Curiae*, *Reitman v. Mulkey* (1966) U.S. Sup. Ct. No. 483
E	Excerpt from Ballot Pamphlet, Proposition 14, 1964 General Election
F	Letter from United States Attorney General Eric H. Holder to the Honorable John A. Boehner, Speaker of the United States House of Representatives, Feb. 23, 2011
G	California Senate Bill No. 5, 2011-2012 Legislative Session
H	Petition for Review, Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, Supreme Court Case No. S147999

CALIFORNIA APPELLATE COURTS

Case Information

3rd Appellate District

Change court

Court data last updated: 04/03/2011 11:05 PM

Case Summary Docket Briefs
Disposition Parties and Attorneys Trial Court

Docket (Register of Actions)

Beckley v. Schwarzenegger et al.
Case Number C065920

Date	Description	Notes
08/30/2010	Filed petition for writ of:	mandamus. (ms). Requesting expedited ruling by 9/11/2010.
08/31/2010	Received:	amended proof of service, adding service of Andrew Pugno attorney for RPI ProtectMarraige.com et al.
09/01/2010	Order denying petition filed.	The petition for writ of mandamus is denied. Scotland, P.J. (BRo)
09/07/2010	Petition for review filed in Supreme Court.	By petitioner in S.F. (S186072)
09/07/2010	Service copy of petition for review received.	From Petitioner.
09/07/2010	Received copy of	Motion for calendar preference for filing in Supreme Court by petitioner.
09/07/2010	Record transmitted to Supreme Court.	1 vol.
09/08/2010	Answer to petition for review received	
09/08/2010	Petition for review denied in Supreme Court.	The motion for calendar preference is denied. The petition for review is denied. George, C.J.
09/08/2010	Received copy of Supreme Court filing.	Letter from respondent Attorney General dated 09/08/10, in response to the Court's order and asks the Court to deny the petition for review.
09/08/2010	Case complete.	
10/29/2010	Record returned from Supreme Court.	1 vol.

Click here to request automatic e-mail notifications about this case.

Exhibit A

CALIFORNIA APPELLATE COURTS

Case Information

Supreme Court

Change court

Court data last updated: 04/03/2011 11:05 PM

Case Summary Docket Briefs
Disposition Parties and Attorneys

Docket (Register of Actions)

BECKLEY v. SCHWARZENEGGER (PERRY)
Case Number S186072

Date	Description	Notes
09/07/2010	Petition for review filed	Petitioner: Beckley, Joshua Attorney: Kevin T. Snider
09/07/2010	Motion filed	for petitioner, for Calendar Preference/Expediated Review & Decision based upon Immidiate Expiration Date; by Kevin T. Snider, counsel
09/07/2010	Order filed	Respondents are directed to serve and file, by letter brief, any answer to the petition for review in the above-captioned matter on or before 9:00 a.m. on Wednesday, September 8, 2010. Any reply to the answer is to be served and filed, by letter brief, on or before 12:00 noon on Wednesday, September 8, 2010. No request for extension of time will be granted.
09/08/2010	Answer to petition for review filed	Respondent: Schwarzenegger, Arnold Alois Attorney: Andrew Walter Stroud
09/08/2010	Answer to petition for review filed	Respondent: Brown, Edmund Gerald Attorney: Tamar Pachter
09/07/2010	Record requested	
09/08/2010	Received Court of Appeal record	1-file jacket containing petition for alternative writ of mandamus and CA order
09/08/2010	Reply to answer to petition filed	Petitioner: Beckley, Joshua Attorney: Kevin T. Snider
09/08/2010	Petition for review denied	The motion for calendar preference is denied.
10/28/2010	Returned record	1 manila jacket

Click here to request automatic e-mail notifications about this case.

Exhibit B

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5970
Facsimile: (415) 703-1234
E-Mail: Tamar.Pachter@doj.ca.gov

September 8, 2010

Honorable Frederick K. Ohlrich, Clerk
Supreme Court of California
350 McAllister Street, First Floor
San Francisco, California 94102-4797

RE: *Joshua Beckley v. Arnold Schwarzenegger, et al. (Perry)*
Supreme Court Case No. S186072

Dear Mr. Ohlrich:

Respondent Attorney General Edmund G. Brown Jr. submits this letter brief in response to the Court's order and asks the Court to deny the petition for review. Petitioner has established none of the four possible grounds for review (see Cal. Rules of Court, rule 8.500(b)), and therefore the decision of the Court of Appeal dismissing the petition for writ of mandate should stand.

In short, the petition for writ of mandate is too little, too late. In the nearly two years since Proposition 8 passed in 2008, the Attorney General has consistently recognized its constitutional deficiency because, as this Court concluded in *In re Marriage Cases* (2008) 43 Cal.4th 757, denying same-sex couples the right to marry violates foundational principles of equal protection and due processof law. The United States District Court reached the same result applying the lens of the federal Constitution. Yet, until just days before the expiration of a deadline to appeal, no one, including petitioner here, went to court with the suggestion that the Attorney General was failing to perform his duty. Petitioner's last-minute invocation of a constitutional crisis notwithstanding, the Attorney General's decision not to appeal in *Perry v. Schwarzenegger* from a judgment he agrees with is an ordinary and sound exercise of the discretion secured by law to his office. Indeed, it is petitioner's demand that the judicial branch act to control the exercise of discretion by the executive branch that might invite such a crisis.

Summary of Relevant Facts and Proceedings

This petition arises from a federal court challenge to Proposition 8. Proposition 8 was an initiative measure approved at the November 4, 2008 election that added section 7.5 to article I of the California Constitution, providing: "Only marriage between a man and a woman is valid or recognized in California." The measure overrode this Court's decision holding that the California Constitution protects the right of same-sex couples to marry in California. (*See In re Marriage Cases, supra,* 43 Cal.4th 757.) In *Strauss v. Horton* (2009) 46 Cal.4th 364, this Court

Exhibit C

upheld Proposition 8 against a state constitutional challenge. In that case, the proponents of Proposition 8 defended the measure. The Attorney General argued that, while the measure was an amendment of the Constitution and not a revision, it was nevertheless an *ultra vires* amendment because the initiative power was never intended to empower voters to strip fundamental rights from their fellow citizens. (*Id.* at p. 390.)

After this Court issued its decision in *Strauss v. Horton*, a different set of plaintiffs filed a suit in the United States District Court for the Northern District of California styled *Perry v. Schwarzenegger*, Case Number 09-CV-2292 (VRW), in which they alleged that Proposition 8 violated the Due Process and Equal Protection Clauses of the U.S. Constitution. The *Perry* plaintiffs sued the Governor and the Attorney General, among others; the State of California is not named as a defendant. The Attorney General admitted the material allegations of the complaint and took no active part in the trial. Both the Governor and the Attorney General, however, told the district court that they were bound by and would enforce Proposition 8 unless the court ordered otherwise. The proponents of Proposition 8 sought and obtained leave to intervene and defended the measure through a three-week trial.

On August 4, 2010 the Honorable Vaughn R. Walker ruled in *Perry* that Proposition 8 violated both federal Due Process and Equal Protection, and ordered that a permanent injunction issue preventing any enforcement of Proposition 8. The proponents filed a notice of appeal the same day. On August 12, the district court entered a permanent injunction, the effect of which was subsequently stayed by a motions panel of the Ninth Circuit Court of Appeals. In opposing the proponents' request for a stay pending appeal, the Attorney General stated that he did not plan to appeal the judgment. The Governor has not indicated if he will appeal. The deadline to file a notice of appeal is September 13.[1]

In denying the proponents' motion for a stay pending appeal, Judge Walker expressed doubt that the proponents would have federal appellate standing absent an appeal by the Governor or the Attorney General because the injunction does not operate against the proponents. The Ninth Circuit motions panel declined to address the appellate standing issue in its order granting the stay, but ordered the parties to address appellate standing in their briefs on the merits.

Summary of Argument

Petitioner waited until the eleventh hour to seek mandamus, even though the Attorney General has been involved in challenges to Proposition 8 since 2008, and has never defended the substance of the measure in state or federal court. Petitioner does not complain of this; the relief

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[1] Assuming that the 30-day period to file a notice of appeal began on the date of entry of the injunction (rather than August 4, 2010, when the district court entered its findings and conclusions in the docket), the time to file a notice of appeal in *Perry v. Schwarzenegger* would expire on September 11, 2010, which is a Saturday. Therefore, the deadline to file is September 13, which is the next court day. (See Fed. Rules App.Proc., rules 4(a) and 26(a).)

he seeks is much narrower. Petitioner fears that the federal courts will rule that the proponents of Proposition 8 lack standing to pursue *their* appeal of the judgment in *Perry v. Schwarzenegger*. It is therefore to ensure *proponents'* participation in the federal appeal that petitioner seeks to compel the Attorney General to file a notice of appeal. But the Attorney General has no duty to appeal at all, let alone to file an appeal he has determined is legally unjustified, solely to manufacture federal appellate standing in private parties.

There are many faulty assumptions underlying the petition, but for purposes of this response two issues stand out: No law requires the Attorney General to file a notice of appeal, and his decision not to appeal from a judgment with which he agrees and did not resist at trial cannot be an abuse of discretion. As this Court well knows, such an appeal would be frivolous. There is no basis for mandamus.

There is No Mandatory Duty Enforceable by Mandamus

Petitioner insists that Government Code sections 12511 and 12512 require the Attorney General to file a notice of appeal in *Perry*. (Petition at pp. 8-10.) His reasoning is that these statutes require the Attorney General to defend state law. He leaps from that premise, which is not really in issue here, to the conclusion that the Attorney General must file a notice of appeal to allow private parties to pursue a federal appeal. But petitioner cites no authority for this interpretation of the statutes, and their plain language does not support it.[2]

Petitioner also misunderstands the nature of ministerial duties that mandamus may be used to direct. This Court has ruled that a ministerial duty that can be enforced by mandamus is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) Government Code sections 12511 and 12512 do not qualify under this standard, certainly not to compel the relief sought here.

In any event, at this late date petitioner does not seek an order directing the Attorney General to defend Proposition 8 on appeal. Instead, petitioner asks the Court to compel the Attorney General file a notice of appeal in the unsubstantiated hope that the mere filing of a

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[2] Petitioner also quotes California Constitution Article III, section 3.5, but does not explain how it pertains to this proceeding. (Petition at p. 10.) That provision has no relevance here. The Attorney General has never refused to enforce Proposition 8. To the contrary, the Attorney General stated in papers filed in the District Court that he was bound by Proposition 8 and this Court's decision in *Strauss v. Horton*, and stated that he would continue to enforce Proposition 8 as required unless and until a court ordered otherwise. In any event, this argument was not before the Court of Appeal and so is not properly before this Court on a petition for review. (Cal. Rules of Court, rule 8.500(c)(1).)

notice of appeal will suffice to create appellate standing in the *proponents* of Proposition 8.[3] But Petitioner identifies no law that requires the Attorney General to file a notice of appeal to manufacture federal appellate jurisdiction for a private party. To state the nature of the relief requested is to understand just how farfetched it is. There is no basis here for the exercise of mandamus.

The Judiciary Cannot Control the Exercise of Discretion Entrusted to the Attorney General Where There Has Been No Abuse of Discretion

A court may not control the discretion conferred upon a public official to determine whether to seek relief. (*People v. Karriker* (2007) 149 Cal.App.4th 763, 786-787.) The mischief that would ensue if courts could instruct the Attorney General to investigate or not, to prosecute or not, to defend or not, to appeal or not, is apparent. Without even bothering to address the constitutional implications, petitioner asks this Court to ignore the law governing separation of powers and override the Attorney General's exercise of discretion.

Moreover, the discretion not to appeal successful challenges to laws, whether enacted by the Legislature or by initiative, is both ordinary and regularly exercised by state and federal attorneys general alike. (See, e.g., *Diamond v. Charles* (1986) 476 U.S. 54, 61 [state did not appeal order invalidating statute regulating abortion]; *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 55 [state did not appeal order invalidating English-only initiative]; *Providence Baptist Church v. Hillandale Committee, Ltd.* (6th Cir. 2005) 425 F.3d 309, 312 [city entered consent judgment admitting that zoning ordinance was unconstitutional as applied]; *Kendall-Jackson Winery, Ltd. v. Branson* (7th Cir. 2000) 212 F.3d 995, 996 [state did not appeal order invalidating state legislation]; *Fouke Co. v. Brown & Younger* (D.C. Cal. 1979) 463 F.Supp. 1142 [no appeal taken from order striking down California endangered species statute]; *Kaiser v. Montgomery* (D.C. Cal. 1969) 319 F.Supp. 329 [no appeal taken from order striking down state welfare statute]; *California Democratic Party v. Lungren* (N.D. Cal. 1996) 919 F.Supp. 1397 [no appeal taken from judgment striking down Cal. Const., art. II, § 6(b)].) Attorneys general are not potted plants in the litigation process. In another case, then Acting Solicitor General John Roberts declined to defend a statute passed by Congress and signed by the President and instead filed a brief in the U.S. Supreme Court urging the court to invalidate the law as unconstitutional. (See www.justice.gov/osg/briefs/1989/sg890279.txt.) And, of course, California Attorney General Thomas Lynch filed an amicus brief in the United States Supreme Court arguing for the invalidation of Proposition 14 as an unconstitutional denial of equal protection. (See *Reitman v. Mulke* (1966) 387 U.S. 369, Br. State of California, 1967 WL 113956.)

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[3] It is not at all clear that the bare filing of a notice of appeal by a government defendant will suffice to invoke federal appellate jurisdiction in the *Perry* case. As discussed below, given the Attorney General's position in the District Court, the federal appellate courts might well view such an appeal as frivolous and dismiss it.

Although it is not every day that the Attorney General declines to defend a state law, the state Constitution, or an initiative, he may do so because his oath requires him support the United States Constitution as the supreme law of the land, and the law requires him to exercise discretion to enforce both state and federal law.[4] Petitioner cannot demonstrate that the Attorney General abused that discretion by declining to appeal the judgment in *Perry*.[5] In the District Court the Attorney General filed an answer admitting the material allegations of the complaint, did not defend Proposition 8 at trial, and opposed a stay of the judgment pending appeal. In view of his public and consistent position both in this Court in *In re Marriage Cases* and in the district court in *Perry*, it would have been inconsistent and legally suspect (if not sanctionable) for the Attorney General to abruptly change course and file a notice of appeal.

It is within the Attorney General's discretion to determine that it is *or that it is not* appropriate to pursue an appeal. In *Perry*, given the Attorney General's position at trial, there are no grounds for an appeal, and the filing of an appeal under such circumstances would be frivolous. The petitioner's contention to the contrary is manifestly without merit.

For the forgoing reasons, the Attorney General requests that the Court deny the petition for review.

Sincerely,

TAMAR PACHTER
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

TP:

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[4] California's Attorneys General have long been recognized as having independent discretion in respect to litigation. California's first Attorney General, for example, brought suit to invalidate a *state* license fee as preempted by federal law and treaties. (See *Ex parte People ex rel. Atty. Gen.* (1850) 1 Cal. 85, 86.)

[5] In the Court of Appeal, petitioner did not allege any abuse of discretion. Therefore, that issue is not properly before this Court on a petition for review. (Cal. Rules of Court, rule 8.500(c)(1).)

DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: **Joshua Beckley v. Arnold Schwarzenegger, et al.**

No.: **S186072**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-1234.

On September 8, 2010 at 8:53 AM., I served the attached **LETTER BRIEF** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(g)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

Kevin Trent Snider, Esq.
Pacific Justice Institute
P.O. Box 276600
Sacramento, CA 95827
Fax #: (916) 857-6902

Kenneth C. Mennemeier, Esq.
Mennemeier, Glassman & Stroud, LLP
US Bank Plaza
980 9th Street, Suite 1700
Sacramento, CA 95814-2736
Fax #: (916) 553-4011

Theodore Hideyuki Uno
Attorney at Law
Boies Schiller & Flexner LLP
333 Main St.
Armonk, NY 10504
Fax #: (914) 749-8300

Amir Cameron Tayrani
Attorney at Law
Gibson Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Suite 900
Washington, DC 20036
Fax #: (202) 530-9645

Dennis J. Herrera
Attorney for City and County of San Francisco
City and County of San Francisco
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Fax #: (415) 557-4747

Richard E. Winnie
County Counsel
Alameda County Counsel's Office
1221 Oak Street, Suite 450
Oakland, CA 94612
Fax #: (510) 272-5020

Elizabeth M. Cortez
Office of the Los Angeles County Counsel
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713
Fax #: (213) 680-2165

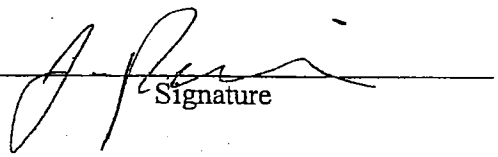
Robert H. Tyler, Esq.
Advocates for Faith and Freedom
24910 Las Brisas Road, Suite 110
Murrieta, CA 92562
Fax #: (951) 894-6430

Andrew P. Pugno
Attorney at Law
Law Offices of Andrew P. Pugno
101 Parkshore Drive, Suite 100
Folsom, CA 95630-4726
Fax #: (916) 608-3066

Court of Appeal of the State of California
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 8, 2010, at San Francisco, California.

J. Palomino
Declarant



Signature

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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Brief of the State of California as Amicus Curiae.

THOMAS C. LYNCH,
Attorney General,
CHARLES A. O'BRIEN,
Chief Deputy Attorney General,
MILES T. RUBIN,
Senior Assistant Attorney General,
LOREN MILLER, JR.,
Deputy Attorney General,
HOWARD J. BECHEFSKY,
PHILIP M. ROSTEN,
HAROLD J. SMOTKIN,
Deputy Attorneys General,
600 State Building,
Los Angeles, Calif. 90012,
As Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous Page

Statutes

Textbook

IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

Brief of the State of California as Amicus Curiae.

Interest of Amicus.

In 1963, a fair housing bill known as "The Rumford Act" passed the California Legislature by margins of 63-9 in the House and 22-13 in the Senate. It followed two anti-discrimination bills—the Unruh and Hawkins Acts—which were passed in 1959.

The Rumford Act sought a partial end to economic housing decisions based solely on race or religion and afforded a means to the eventual eradication of the product of such housing discrimination—the ghettos of poverty and apathy which so readily spawn crime.[1]

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[1] *Jackson v. Pasadena City School District*, 59 Cal. 2d 876 (1963) at 881; 31 Cal. Rptr. 606.

". . . Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. . . ."

The Attorney General is "the chief law officer of California."[2] His primary duties are to seek the means by which California's nineteen million residents may live free from crime and unlawful inequities. Toward this end, he can, and does, enforce old laws and encourage the promulgation of new ones. But enforcement and promulgation of individual laws are only effective when people respect and support the general law, and such respect and support is uncontrovertedly weakest in the ghetto. Thus, if we are to minimize crime, we must eliminate the ghetto.[3]

The Rumford Act may well accelerate the ghetto's demise. With the passage of the act, however, a campaign was initiated for its immediate suppression through the device of a constitutional amendment intended not only to nullify the Rumford Act and its predecessors, but also to make the future passage of similar legislation impossible by the state and any of its political subdivisions.

The initiative offered no alternative to the Rumford Act, and destroyed the power of all governmental bodies to legislate against housing discrimination.

The California Supreme Court identified the purpose behind this initiative. Since unconstitutional discrimination now finds sanctuary in our State's Constitution, we are filing this *amicus curiae* brief.

If Article I, Section 26, is upheld; if this Court says that a state court must ignore the unconstitutional reality which spurns seemingly innocuous legislation, then a new avenue of repression will be opened to those in all other states who seek to perpetuate unconstitutional discrimination.

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[2]Cal. Const., Art. V, Section 13.

[3]"A Challenge of Crime in a Free Society" a report by the President's Commission on Law Enforcement and Administration of Justice (United States Government Printing Office, Wash. D.C.) 1967.

ARGUMENT.

I.

The Effect of Article I, Section 26, of the California Constitution Is to Perpetuate Racial Discrimination in Housing in Violation of the Fourteenth Amendment.

Article I, Section 26, of the California Constitution provides:

> ". . . Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease, or rent such property to such person or persons as he, in his absolute discretion, choses."

This carefully drawn language is as innocuous as the language in Alabama Local Law No. 140, which revised the city boundaries of Tuskegee, Alabama. See *Gomillion v. Lightfoot,* 364 U.S. 339 (1960). It is as devoid of expressing overt racial purposes as the literacy test in Alabama's Boswell Amendment, *Davis v. Schnell,* 81 F. Supp. 872, aff'd without opinion, 336 U.S. 933 (1949), or the abolition of primaries in *Terry v. Adams,* 345 U.S. 461 (1953).

But like the public enactments struck down or criticized in the above cases, the neutrality of Article I, Section 26, is confined to its surface. The California Supreme Court found that behind its bland language lies the same purpose which rendered these earlier pronouncements suspect or unconstitutional: the perpetuation of racial and ethnic discrimination in violation of the Fourteenth Amendment.

Petitioners now insist the decision to sponsor Proposition 14 was born of reasons not confined to race and ethnic groups.

> "The measure establishes non-regulation by the State over conduct in the rental or sale of residential property by its owners not only when based on racial or religious discrimination but when done for any reason or for no reason at all. Thus, the Section forbids governmental restrictions upon the privilege of residential property owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance, or whatever. . . ." (Br. for Petners. pp. 17-18.)

The campaign for Proposition 14's passage was not consistent with this disclaimer.

The purpose was so clear to the majority of the California Supreme Court that they dismissed any allegations to the contrary in two sentences:

> "Proposition 14 was enacted against the foregoing historical background [of housing legislation] with the clear intent to overturn state laws that bear on the right of private sellers and lessors to discriminate, to forestall future state action that might circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." *Mulkey v. Reitman*, 64 Cal. 2d 529, 534-35 (1966); 50 Cal. Rptr. 881.

The Justices of the California Supreme Court lived through the heated campaign over Proposition 14, and recognized the reality which lay behind the proposition's

language. This reality was also apparent from the official arguments on Proposition 14 submitted to the voters, which petitioners attach in the appendix to their brief. (Appen. pp. 3-4.) After stating that:

> "Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish without interference by state or local government,"

the proponents immediately launched an attack upon the Rumford Act:

> "Most owners lost this right through the Rumford Act in 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry."

Their conclusion is of particular import:

> "Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.
>
> "Your 'Yes' vote will end such interference. It will be a vote for freedom."

The argument concentrates on the Rumford Act and the need to prevent similar legislation. It also makes specific reference to minority groups, although none of these subjects appear in the body of the initiative or its official legislative analysis.[4]

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[4]See XLIV California Real Estate Magazine No. 11, Sept. 1964.

The only "right" taken away by the Rumford Act was the "right" to discriminate on the basis of race, color, religion, national origin and ancestry.[5] The Rumford Act was referred to as the Rumford *Forced* Housing Act. The proponents did not seek a simple repeal of the Rumford Act. Nor did they merely seek to abolish existing fair-housing enactments. They sought further and most importantly to preclude any future considerations of this issue by the duly elected representatives of the State, county and city governments.

These purposes are not apparent from a simple perusal of the language used in the initiative. However, this court has had no difficulty in discerning the true objectives of sophisticated legislation. *Lane v. Wilson,* 307 U.S. 268, 275 (1939).

In *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), the mode was a sophisticated revision of the city boundaries of Tuskegee, Alabama. On its face, Alabama's Local Law 140 displayed no discriminatory purpose. But the petitioners averred that the newly created boundaries would eliminate all but a few of the city's Negro voters, while retaining all its white voters. This Court held that,

> "if these allegations remained uncontradicted or unqualified, the conclusion would be irresistible. . . . that the legislation is solely concerned with segregating white and colored voters by forcing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* at 341.

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[5]Art. I, § 1, Cal. Const.

In *Davis v. Schnell,* 81 F. Supp. 872, aff'd without opinion, 336 U.S. 933 (1949), the means was a literacy test adopted as the "Boswell Amendment" by the people of Alabama. Again, the words revealed no discriminatory purpose. But, the district court noted:

> ". . . while it is true that there is no mention of race or color in the Boswell Amemdnent, this does not save it [since] . . . it clearly appears that amendment was intended to be and is being used for the purpose of discrimination against applicants for the franchise on the basis of race or color." *Id.* at 880.

In *Anderson v. Martin,* 375 U.S. 399 (1964) this court in reviewing a statute which provided for the race of all candidates for public office be placed on the ballot declared that:

> "[In] the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which a racial prejudice may be so aroused as to operate against one group because of race . . ." *Id.* at 402, 403.

This case presents an analogous situation. The enactment purported to be a lawful exercise of legislative power, and was not discriminatory on its face; but in reality it is a state supported vehicle for the exercise of private discrimination.

Petitioners question the California Supreme Court's finding of the discriminatory purpose of Article I, Sec-

tion 26, and ask this Court to overrule that finding. The long history of California has been replete with examples of discrimination in housing; many of the neighborhoods of its largest cities have become non-white by custom and legal sanction.[9]

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[9]In Los Angeles County in 1960, 334,916 Negroes out of a total Negro population of 461,546, lived within the central district of the City of Los Angeles. Another 36,291 Negroes lived in a highly segregated unincorporated area contiguous to the City's central district. About 62,720 Negroes lived in 67 other incorporated cities within the county but of that number 59,022 Negroes lived in segregated areas of Long Beach, Pasadena, Compton, Santa Monica, and Monrovia. The remaining 3,-718 Negoes lived in 62 cities within the county having a combined population of 1,829,907. (Report of the Los Angeles Human Relations Commission, March 1963.)

In 1965, the McCone Commission Report found that 88.6% or 575,900 of the countys' 650,000 Negroes lived within the 46 square mile curfew area of the Watts Riots. The total area of Los Angeles County is 452 square miles (p. 75 [1966]). *"Violence in the City—An End or a Beginning"* Report of California's Governor's Commission on the Los Angeles Riots, December 1965; see *Social Profiles: Los Angeles County*, by Ed Freudenberg and Lloyd Street (Los Angeles Welfare Planning Council Report No. 21, 1965) pp-scd-sc 15: *Background for Planning* by Marchia Meeker with Joan Harris (Los Angeles Welfare Planning Council Report No. 17, 1964), pp. 54-62 and Tables VII, VIII, IX, X and XI.

In San Francisco, while the total population has shown a slight decrease from 740,300 in 1960 to 740,200 in 1965, the non-white population has increased from 18.4% in 1960 to 22.8% in 1965. And 21.1% of the Negro population lives in three census tracts where the percentage of Negroes approaches 70%. (Fair Employment Practice Commission of California Memo. No. 33, 1966.)

In Oakland, California, 77% of the Negroes living within that community live in four target areas of the Anti-poverty Program that have a high concentration of housing, health and job problems.

During the period from 1960 to 1965, Alameda County, where the City of Oakland is located, had a population increase of 148,000 people and 115,000 of that number were located in the white suburbs in the southern part of the county. Oakland's population remained constant: 381,350 in 1960, 386,186 in 1965. However, 30,000 whites have moved out of the city and were replaced by 30,000 Negroes. The percentage of Negroes liv-

In their brief, petitioners emphasize that this is a suit between individuals, who are merely exercising their constitutional right to discriminate. Any theoretical argument that the petitioners possess such a right was removed by the passage of the Rumford and Unruh Acts. If petitioners possess such a right to discriminate on the basis of race or religion, it arises *only* because of Article I, Section 26. Clearly, the State is substantially involved in the present acts of discrimination, because without Article I, Section 26, petitioners would possess no right to discriminate on the basis of race or religion.

Article I, Section 26 does more than make the State neutral in matters of discrimination in housing. It purports to give legality to every act of racial discrimination committed by a property owner in the sale or rental of real property.

Far from acting as "neutral" in this instance, the State is actually declaring that henceforth no fair-housing acts can be passed by the state Legislature or any cities, counties, or political subdivisions. This constitutional barrier to such legislation or enactment of ordinances by local entities in the fair-housing field constitutes an affirmative stand by the state electorate against fair-housing enactments contrary to the Fourteenth Amendment of the United States Constitution.

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ing in Alameda County is 14% while the percentage in Oakland is 30% and in Berkeley 20.6%. In the southern part of the county the percentage of Negroes is only 0.1%. (Report of Fair Employment Practice Division, Memo. No. 33, 1966.)

Finally, in San Diego County 82% of the Negroes residing there live in 10 of the 123 census tracts, while 84 tracts have fewer than nine Negroes and 32 tracts have no Negroes. (Governor's Advisory Committee on Housing Problems, Report on Housing in California, 38, 1963.)

If the measure had merely repealed the Unruh and Rumford Acts, the state Legislature and other political subdivisions of the state would have been free to enact or refuse to enact such legislation. Then a state of neutrality would have existed. However, this enactment not only cancels the effectiveness of the existing state legislation but also precludes cities, counties and other political sub-divisions which have legislative power within their own jurisdictional boundaries[7] from passing fair-housing legislation even though such localities might desire to legislate to meet local problems. Article I, Section 26, "stagnates" or "freezes" their power to enact fair-housing ordinances.

II.

The Enactment of Section 26 Was Itself Prohibited State Action in Violation of the Fourteenth Amendment Because It Was an Abdication of a Traditional Governmental Function for a Racially Discriminatory Purpose.

The California Supreme Court determined that the State was significantly involved in, and responsible for, the acts of racial discrimination in this case. Amicus curiae further submits that the enactment of section 26

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[7]Article XI, Section 11, of the California Constitution reads as follows:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In 40 Ops. Cal. Att'y. Gen. 114 (September 1962) prior to the enactment of the Rumford Fair-Housing Act, it was concluded that as of that date the State of California had not preempted the field with respect to discrimination in housing and, thus, local entities could enact fair-housing ordinances. Thus, a mere repeal of the Rumford Act would have created the situation where local entities could have enacted fair-housing ordinances.

was itself prohibited state action in violation of the Fourteenth Amendment because it was an abdication of a traditional governmental function for an impermissible purpose.

The electorate's enactment of a state constitutional amendment is "state action" in its most fundamental form; the product of such enactment is subject to the limitations imposed by the Constitution of the United States, *Lucas v. Forty-fourth General Assembly*, 377 U.S. 715, 736-737 (1964).

The ability to determine whether to legislate in a given area is undeniably a fundamental governmental function. By virtue of the enactment of Article I, Section 26, all levels of California government were forced to abdicate this basic function for the purpose of permitting private racial and religious discrimination in the transfer of real property. Minority groups are therefore precluded from presenting their grievances about, and seeking redress for, such racial or religious discrimination to the governmental bodies of the State of California. This denial of access to the Legislature violated the Fourteenth Amendment.

Furthermore, the disability superimposed by section 26 was limited to one aspect of property rights, the right to sell, lease, or rent real property. It was enacted at the expense of an equally important aspect of property rights, the right to acquire and possess real property.[8]

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[8]*Cf. Barbier v. Connolly*, 113 U.S. 27, 32 (1885); *Shelley v. Kraemer*, 334 U.S. 1 (1948); Article I, Section 1, California Constitution which reads as follows:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defendang life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Section 26 constituted a grant of virtual immunity to persons who would vent racial and religious discrimination against those seeking to exercise their right to acquire property on an equal basis in an open market. As this Court noted in *Truax v. Corrigan*, 257 U.S. 312, 333 (1921):

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal right or a property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted to work against, a larger class."

This Court is familiar with previous attempts by states to effectuate private racial discrimination while purportedly becoming neutral in an area of traditional governmental concern. The series of cases culminating with *Terry v. Adams*, 345 U.S. 461 (1953)[9] involved an increasingly sophisticated pattern of disenfranchising Negro voters in Texas. The court ultimately found that the racial discrimination in the selection of primary candidates by the Jaybird Association, a voluntary political club uncontrolled by state statute, was violative of the Fifteenth Amendment because it was the basic step in accomplishing exactly what the Fifteenth Amendment sought to prevent. *Terry v. Adams, supra*, at 469-470. The court noted that racial discrimination in county-operated primaries would be unconstitutional and viewed the state's withdrawal from that part of the electoral process as

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[9]*Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944).

> ". . . circumvention, to permit within its borders the use of . . . [a] device that produces an equivalent of the prohibited election." *Id.* at 469.

Similarly, in *Rice v. Elmore,* 165 F. 2d 387 (4th Cir.), *cert. den.* 333 U.S. 875 (1947) and *Baskin v. Brown,* 174 F. 2d 391 (4th Cir. 1949), approved in *Terry v. Adams, supra,* the Fourth Circuit found that South Carolina's abandonment of its traditional role in the primary election for the purpose of permitting racial discrimination by private political clubs was an administration of the state's election laws:

> "[i]n such way as to result in persons being denied any real voice in government because of race and color, [and] it is idle to say that the power of the state is not being used in violation of the Constitution." *Rice v. Elmore, supra,* at 391.

When South Carolina further sought to avoid the burden of complying with the equal protection guarantee of the Constitution by shifting even greater control of the primary election to private political clubs, the court again invalidated the scheme, stating:

> "The devices adopted showed plainly the unconstitutional purpose for which they were designed; but, even if they had appeared to be innocent, they should be enjoined if their purpose or effect is to discriminate against voters on account of race." *Baskin v. Brown, supra,* at 393.

Manipulations by states to effectuate racial discrimination are not limited to elections. In *Griffin v. School Board,* 377 U.S. 218 (1964), Prince Edward County, Virginia, sought to avoid the result of this Court's holding in *Brown v. Board of Education,* 347

U.S. 473 (1954), by abandoning its traditional role in the educational process. This court, however, readily recognized the purpose for which the county had closed its public schools and found such action violative of the Equal Protection Clause:

> ". . . But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional" *id.* at 231.

Minority groups have no less right to the equal protection of state laws regulating the legislative processes than to those regulating voting or education. Housing discrimination infinitely complicates the school segregation problem which this Court has been trying to solve for over a decade. In addition to causing the victims to live in crowded, expensive, unhealthy, and unsafe conditions, racial discrimination in housing, inflicts a "continuing subjection to public indignity and humiliation" magnified by significant state participation and involvement in the activities of the discriminator.[10]

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[10]"[H]ousing segregation remains as the most serious and least soluble aspect of the race problem, at least in the Northern States.' 'Myrdal, *An American Dilemma* XL-XLI (McGraw-Hill, Paperback ed. 1964).

"Fourteenth Amendment Aspects of Racial Discrimination in 'Private Housing,'" 52 Calif. L. Rev. 1, 28-30 (1964). We are dealing neither with a luxury nor a frill but "a basic aspect of a decent life." *Ibid.*

This Court should not hesitate to strike at the heart of the evil embodied in Article I Section 26: the total disabling of California government from carrying on their legislative functions for the purpose of effectuating racial discrimination. The determination that the enactment of section 26 denied the equal protection of the laws to those groups who have been subjected to racial or religious discrimination, does not constitute a mandate that a state must take affirmative steps to eliminate such discrimination; rather, it is a recognition that the governmental units vested with the power and duty to legislate must remain free to determine whether it is in the public interest to act or to refrain from acting in this particular area.

The language of Circuit Judge Parker in *Rice v. Elmore, supra,* at p. 392, is apropos to the present case:

> "The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time. Their primary purpose must not be lost sight of, however; and no election machinery can be upheld if its purpose or effect is to deny to the Negro,

on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives."

Section 26 would have effectively accomplished the purposes for which it was enacted: to preclude those persons racially discriminated against in transfer of property from presenting their grievances to the Legislature; to insure that private discrimination would prevail, and to maintain the strict pattern of segregation of the communities in California. Its enactment was an affront to the dignity of the constitutional standards of the Fourteenth Amendment.

Conclusion.

The California Supreme Court was correct in its resolution of this issue and its decision should be affirmed.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

CHARLES A. O'BRIEN,
Chief Deputy Attorney General,

MILES T. RUBIN,
Senior Assistant Attorney General,

LOREN MILLER, JR.,
Deputy Attorney General,

HOWARD J. BECHEFSKY,
PHILIP M. ROSTEN,
HAROLD J. SMOTKIN,
Deputy Attorneys General,
As Amicus Curiae.

I voted against ACA 12 in the Assembly not because I think it is a bad bill, but because I don't think it should necessarily be a part of the Constitution. This reverses a trend we started only a few years ago. As recently as 1962, we passed Proposition 7 which removed 15,000 surplus words from the Constitution. I don't know whether we should begin adding them again so soon.

In 1948 an initiative was circulated and gathered enough signatures to qualify for the November ballot. It specified a particular individual to be the Director of a reorganized Department of Social Welfare. The measure was approved by the voters at the general election, and this woman became Director of the State Department of Social Welfare. The Department budget went up—benefits went up—costs to the taxpayer went up—she leased buildings throughout the State—she purchased new automobiles—she bought truckloads of furniture which we are still putting to use. It took a full year before a special election could be called to remove her from office. Because of this fiasco, the Constitution was amended to say that no individual could be named in the Constitution to hold any o or to perform any duty of State governme...

Obviously the people expressed their opinions by adding the amendment which excluded individuals from the Constitution. If they had wanted to exclude private corporations from the Constitution, they would have done so at that time.

I believe that the voters of the State of California will not be duped by private corporations sponsoring initiative measures and getting themselves named in the Constitution to carry out quasi-state functions. While I favor keeping the Constitution free of extraneous matters, in the present situation, I believe that it would be entirely unthinkable and unworkable to have a private corporation named in the Constitution.

The answer to the dilemma then is to make certain that every voter in the State of California votes against any proposed amendment or initiative which would name a private corporation as part of the Constitution.

GORDON H. WINTON, Jr.
Assemblyman, 31st District
Merced, Madera and
San Benito Counties

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14 **SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY.** Initiative Constitutional Amendment. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places.

YES	
NO	

(For Full Text of Measure, See Page 13, Part II)

Analysis by the Legislative Counsel

This measure would add Section 26 to Article I of the California Constitution. It would prohibit the State and its subdivisions and agencies from directly or indirectly denying, limiting, or abridging the right of any "person" to decline to sell, lease, or rent residential "real property" to such person or persons as he, in his absolute discretion, chooses.

By definitions contained in the measure, "person" would include individuals, partnerships, corporations and other legal entities, and their agents or representatives, but would not include the State or any of its subdivisions with respect to the sale, lease, or rental of property owned by it. "Real property" would mean any residential realty, regardless of how obtained or financed and regardless of whether such realty consists of a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

The measure would not apply to the obtaining of property by eminent domain, nor to the renting or providing of any transient lodging accommodations by a hotel, motel, or other similar public place engaged in furnishing lodging to transient guests.

Argument in Favor of Proposition No. 14

Your "Yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.

Most owners of such property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.

The Rumford Act establishes a new principle in our law—that State appointed bureaucrats may force you, over your objections, to deal concerning your own property with the person they choose. This amounts to seizure of private property.

Your "Yes" vote will require the State remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another.

Exhibit E

Under the Rumford Act, any person refused by a property owner may charge discrimination. The owner must defend himself, not because he refused, but for his reason for refusing. He must defend himself for alleged unlawful thoughts.

A politically appointed commission (Fair Employment Practices Commission) becomes investigator, prosecutor, jury and judge. It may "obtain . . . and utilize the services of all governmental departments and agencies" against you. It allows hearsay and opinion evidence.

If you cannot prove yourself innocent, you can be forced to accept your accuser as buyer or tenant or pay him up to $500 "damages."

You may appeal to a court, but the judge only reviews the FEPC record. If you don't abide by the decision, you may be jailed for contempt. You are never allowed a jury trial.

If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?

Your "Yes" vote will prevent such tyranny. It will restore to the home or apartment owner, whatever his skin color, religion, origin, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private parties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation.

Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.

Your "Yes" vote will end such interference. It will be a vote for freedom.

Submitted by:

L. H. WILSON
Fresno, California
Chairman, Committee
for Home Protection

JACK SCHRADE
State Senator
San Diego County

ROBERT L. SNELL
Oakland, California
President, California
Apartment Owners
Association

Argument Against Proposition No. 14

Leaders of every religious faith urge a "NO" vote on Proposition 14.

Leaders of both the Republican and Democratic parties urge a "NO" vote on Proposition 14.

Business, labor and civic leaders urge a "NO" vote on Proposition 14.

Why such overwhelming opposition? Because Proposition 14 would write hate and bigotry into the Constitution. It could take away your right to buy or rent the home of your choice.

The evidence is clear:

1. Proposition 14 is a deception. It does not give you a chance to vote for or against California's Fair Housing Law. Instead, it would radically change our Constitution by destroying all existing fair housing laws. But more than that, it would forever forbid your elected officials of the state, cities and counties from any future action in this field. It would also threaten all other laws protecting the value of our properties.

2. Proposition 14 says one thing but means another. Its real purpose—to deny millions of Californians the right to buy a home—is deliberately hidden in its tricky language. Its wording is so sweeping it could result in persons of any group being denied the right to own property which they could afford.

3. Proposition 14 is not legally sound. California's Supreme Court already has said there are "grave" doubts as to its constitutionality. It destroys basic rights of individuals and thus is in violation of the U.S. Constitution.

4. Proposition 14 is misleading. California already has a fair and moderate housing law similar to those in effect in 10 other states. In five years the Fair Employment Practice Commission, which administers this law, has dealt with over 3,500 cases in both employment and housing. All but four cases were either dismissed or settled in the calm give-and-take of conciliation.

5. Proposition 14 is a threat. It would strike a damaging blow to California's economy through loss of $276,000,000 in federal redevelopment and other construction funds. Thousands of Californians could be thrown out of work.

6 Proposition 14 is immoral. It would legalize and incite bigotry. At a time when our nation is moving ahead on civil rights, it proposes to convert California into another Mississippi or Alabama and to create an atmosphere for violence and hate.

For generations Californians have fought for a tolerant society and against the extremist forces of the ultra-right who actively are behind Proposition 14.

Now a selfish, mistaken group would restrict free trade in real estate in California —a powerful lobby seeking special immunity from the law for its own private purposes is asking you to vote hatred and bigotry into our State Constitution.

Do not be deceived. Join the leaders of our churches, our political parties and business and labor in voting "NO" on Proposition 14. Before you vote study! Learn why you should join us!

REVEREND
DR. MYRON C. COLE
President, Council of Churches in Southern California

MOST REVEREND
HUGH A. DONOHOE
Bishop, Catholic Diocese of Stockton

STANLEY MOSK
Attorney General of California

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15 **TELEVISION PROGRAMS.** **Initiative.** Declares it contrary to public policy to permit development of subscription television business. Provides no charge shall be made to public for television programs transmitted to home television sets. Contracts inconsistent with free transmission made after effective date of Act or still executory are void. Act does not apply to community, hotel, or apartment antenna systems, or non-profit educational television systems. Injured person may seek damages or injunction for violation of Act. Repeals Sections 35001-35003, Revenue and Taxation Code, relating to subscription television.

YES	
NO	

(For Full Text of Measure, See Page 14, Part II)

Analysis by the Legislative Council

This initiative measure, the "Free Television Act," states that the development of any subscription television business would be contrary to the public policy of the State.

The measure declares that the public shall have the right to view any television program on a home television set free of charge, regardless of how such program is transmitted, if the program is of a category, form, kind, nature or type which was transmitted on or before the effective date of the measure free of charge for reception on home television sets. It would prohibit any person from, directly or indirectly, making a charge inconsistent with such right.

Contracts, agreements, or understandings, where inconsistent with such free transmission, which are made or executed after the effective date of the measure, and those in existence on such effective date, to the extent that they are executory, would be void and unenforceable by the measure.

Any person injured by a violation of the measure would be permitted to recover three times the amount of any damages he suffers because of such violation and to enjoin such violation. He would also be entitled to his costs of suit and reasonable attorneys' fees.

The measure would not apply to community antenna systems and to hotel and apartment antenna systems, where no charge is made to the viewer based upon or related to program content, nor to nonprofit educational television systems.

The measure would repeal existing statutes which now authorize subscription television corporations to engage in the subscription television business.

The measure would provide that if any portion or portions of the measure, or the application thereof, are adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remainder of the measure or valid applications of the measure.

Argument in Favor of Proposition No. 15

Your YES vote on Proposition 15 will:

1. Repeal the unregulated subscription PAY-TV monopoly.

2. Protect you from having to pay a monthly bill for sports programs and popular shows you now see on FREE-TV.

PAY-TV claims they will offer only cultural and educational programs. But a $28,000,000.00 venture will not be able to pay dividends with "trips to the museum" and "visits to Tokyo's Kabuki Theatre."

Rather, they will buy up sports attractions and your favorite shows now on FREE-TV and force you to pay or do without.

A good example is major league baseball. In every Eastern City in the National League, a major portion of the schedule is on FREE-TV.

In California Dodger and Giant games are monopolized by PAY-TV charging $1.50 per game if you are in the PAY-TV area. You can't see the games at all (nine excepted this year) if you live in any low or most middle income neighborhoods, a suburban area, or any place outside Los Angeles and San Francisco.

And plans are underway to rob FREE-TV of football, basketball and other sports.

But this isn't all. The three networks—ABC, NBC, CBS—have made it clear that if PAY-TV is a financial success they will be forced into PAY-TV also in order to keep

Office of the Attorney General
Washington, D. C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications

[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Exhibit F

based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[2] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none

[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the

engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia* , 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or

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argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

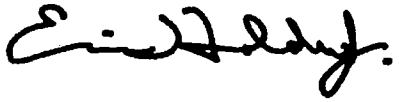
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General

SENATE BILL **No. 5**

Introduced by Senator Harman

December 6, 2010

An act to add Section 12512.5 to the Government Code, relating to the Attorney General.

LEGISLATIVE COUNSEL'S DIGEST

SB 5, as introduced, Harman. Attorney General: defense of initiative statutes.

The California Constitution provides that the Attorney General is the chief law officer of the state with the duty to see that the laws of the state are uniformly and adequately enforced. Existing law requires the Attorney General to prosecute and defend all causes to which the state or state officers in their official capacities are parties.

This bill would require the Attorney General to defend against constitutional challenge, at the trial court level or as a respondent or appellant at the court of appeal or the Supreme Court, a constitutional amendment or an initiative statute that has been approved by the voters, unless an appellate court has made a determination that the amendment or statute is unconstitutional or otherwise in conflict with, or in violation of, federal law or regulation. The bill would authorize the proponents of the constitutional amendment or initiative statute, if any, to defend the amendment or statute in the place of the Attorney General, if he or she is disqualified. The bill would authorize the Attorney General to appoint special counsel if the proponents do not defend the amendment or statute when the Attorney General is disqualified.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

Exhibit G

The people of the State of California do enact as follows:

SECTION 1. Section 12512.5 is added to the Government Code, to read:

12512.5. (a) The Attorney General shall defend against constitutional challenge, at the trial court level or as a respondent or appellant at the court of appeal or the Supreme Court, a constitutional amendment or an initiative statute that has been approved by the voters.

(b) The Attorney General shall not refuse to defend a constitutional amendment or an initiative statute on the basis of it being unconstitutional, or in conflict with, or in violation of, federal law or regulation, unless an appellate court has made a determination that the amendment or statute is unconstitutional or otherwise in conflict with, or in violation of, federal law or regulation.

(c) This section shall not apply if an appellate court determines that the underlying action is frivolous.

(d) If the Attorney General is disqualified from defending a constitutional amendment or initiative statute, the constitutional amendment or initiative statute may be defended by its proponents, if any, in place of the Attorney General. No other state officer or entity is required to be a party to the court action. If the proponents do not defend the constitutional amendment or initiative statute, the Attorney General may employ special counsel to conduct that defense.

(e) For purposes of subdivision (d), "proponent" means the person or persons who submit a draft of a petition proposing the constitutional amendment or initiative statute 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 constitutional amendment or initiative statute.

O

For Opinion See 183 P.3d 384 , 149 P.3d 737

Supreme Court of California.
Coordination Proceeding Special Title (Rule 1550(b)) Marriage Cases,
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.
No. S147999.
November 14, 2006.

Judicial Council Coordination Proceeding No. 4365
San Francisco County Superior Court Case No. 503-943 (Consolidated with Thomasson v. Newsom, Case No. 428-794)
After a Decision by the Court of Appeal, First Appellate District, Division Three, Case No. A110651

Petition for Review

Alliance Defense Fund, Benjamin W. Bull, Arizona State Bar No. 009940[FN*] , Glen Lavy, Arizona State Bar No. 022922[FN*], 15333 North Pima Road, Suite 165, Scottsdale, Arizona 85260, Telephone: (480) 444-0020, Facsimile: (480) 444-0028, bbull@telladf.org, glavy@telladf.org.Advocates for Faith and Freedom, Robert H. Tyler, State Bar No. 179572, 24910 Las Brisas Road, Suite 110, Murrieta, California 92562, Telephone: (951) 304-7583, Facsimile: (951) 894-6430, rtyler@faith-freedom.com.Law Offices of Terry L. Thompson, Terry L. Thompson, State Bar No. 199870, 1804 Piedras Circle, Alamo, California 94507, Telephone: (925) 855-1507, Facsimile: (925) 820-6034, tl_thompson@earthlink.net.Law Offices of Andrew P. Pugno, Andrew P. Pugno, State Bar No. 206587, 101 Parkshore Drive, Suite 100, Folsom, California 95630, Telephone: (916) 608-3065, Facsimile: (916) 608-3066, andrew@pugnolaw.com, Attorneys for the Plaintiff-Petitioner Proposition 22 Legal Defense and Education Fund.

FN* Motion to Appear Pro Hac Vice Submitted.

*i TABLE OF CONTENTS

Exhibit H

***ii** TABLE OF AUTHORITIES

California Cases

ISSUES PRESENTED

1. Whether claims under Code of Civil Procedure § 526a and § 1060 may be rendered moot by a writ of mandate that restrains conduct without reaching the merits of the claims for injunctive and declaratory relief.

2. Whether citizen initiative proponents and organizers have a unique interest in defending the constitutionality of an initiative in which they have invested time, money and reputation.

3. Whether a trial judge's finding of justiciability under CCP § 1060 in complex litigation is entitled to a deferential standard of review.

WHY REVIEW SHOULD BE GRANTED

There is no dispute that the Proposition 22 Legal Defense and Education Fund (the "Fund") had standing when it filed its claims under California Code of Civil Procedure ("CCP") §§ 526a, 1060, and 1085. Nevertheless, the

Court of Appeal ruled that the writ of mandate in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225], mooted the Fund's entire case. (*In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 691, Appendix ("App.") at 17.) But the *Lockyer* writ of mandate restraining conduct did not address the merits of the Fund's requested declaratory and permanent injunctive relief under CCP §§ 526a and 1060. Because the City and County of San Francisco, et al. (the "City") was continuing to challenge the constitutionality of the marriage laws in its case against the State, the *Lockyer* writ of mandate had no more affect on the Fund's claims for injunctive relief than a preliminary injunction or a stay, and no affect whatsoever on its claims for declaratory relief. That lack of resolution of the Fund's case was the basis for the trial court's conclusion that the City's standing arguments had no merit. This Court should grant review to settle the important question of law of whether claims under CCP §§ 526a ***2** and 1060 are rendered moot by a writ of mandate that restrains conduct without reaching the merits of claims for declaratory and injunctive relief.

Moreover, this Court should grant review to secure uniformity of decision on the standing of citizen initiative proponents to defend the constitutionality of their enactments. The reserved right of citizen initiative has been described as " 'one of the most precious rights of our democratic process.' " (*Associated Home Builders etc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41] [citation omitted].) It is beyond dispute that passing a citizen initiative requires a great deal of time, money, and effort. In addition, campaign organizers and proponents place their reputations at stake when the initiative relates to a socially controversial issue. Because initiative campaigns are most likely to occur when citizens do not believe their representative form of government is properly responsive to the public will, the state may not be highly motivated to defend the initiative. That is likely why no appellate court in California had ever held that initiative proponents have an insufficient interest to intervene or to file a declaratory judgment action relating to an initiative before the litigation in the coordinated *Marriage Cases.* In view of the decision below, absent review citizen initiative proponents may routinely be denied the right to defend the laws they have worked vigorously to enact, thus leaving the litigation to groups opposed to the legislation and the Attorney General, who may or may not oppose it. Such a practice would undermine the value of the reserved right of initiative.

Finally, this Court should grant review to clarify the previously settled standard of review of a Superior Court determination that there is a live controversy under CCP § 1060, particularly in the context of complex litigation. In *Hannula v. Hacienda Homes, Inc.* (1949) 34 Cal.2d 442, 448 [211 P.2d 302], this Court held "[w]hether a determination is proper in an ***3** action for declaratory relief is a matter within the trial court's discretion ... and the court's decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown... that the discretion was abused." The trial court below exercised its broad discretion under the complex litigation rules and under CCP § 1060 in ruling that there is a live controversy between the Fund and the City. Yet the Court of Appeal, without referencing a standard of review, undertook a *de novo* review of whether there is a live controversy, i.e., whether the Fund has standing under CCP § 1060. (*Marriage Cases, supra,* 49 Cal.Rptr. at p. 688-690, App. 14-17.) Absent clarification by this Court, the Courts of Appeal may continue reviewing Superior Court discretionary rulings on justiciability under CCP § 1060 *de novo.*

BACKGROUND

This case did not arise out of an abstract desire of the Fund to determine whether Proposition 22, California Family Code § 308.5, is constitutional. Nor did it arise out of a desire by the Fund to participate in litigation between the City and the State. Instead, it arose as an effort to stop the City's illegal activities in issuing marriage licenses to same-sex couples beginning February 12, 2004. (*See Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1071 [17 Cal.Rptr.3d 225].) The City had chosen to challenge the constitutionality

of the marriage laws by publicly announcing its conclusion that the laws were invalid and acting as though the laws had no effect. Its actions and public statements defending those actions created a controversy over the constitutionality and scope of Proposition 22. That controversy is ongoing.

On February 13,2004, the Fund filed this suit seeking a writ of mandate under CCP § 1085, and declaratory and injunctive relief under CCP §§ 526a and 1060. (*See Lockyer, supra,* 33 Cal.4th at p. 1071; Clerk's Transcript ***4** ("CT"), 813, 1023.) The public right to have the laws executed and the public duty enforced supported standing under CCP § 1085; the illegal expenditures relating to the issuing of invalid marriage licenses supported standing under CCP § 526a; and the City's challenge to the constitutionality and scope of Proposition 22 supported standing under CCP § 1060. The City did not dispute that there was a live controversy when the case was filed. (Recorder's Transcript ("RT"), 110, 112.)

All of the parties initially agreed that the Fund could not obtain all of the relief it was seeking without a determination of the constitutionality of the marriage laws. (Clerk's Transcript ("CT"), 160.) The City defended the lawsuit by arguing that the marriage laws were unconstitutional, and that Proposition 22 does not apply to California marriages. (CT:159-160; CT: 1055-1061 .) On February 19,2004, the City turned its affirmative defense into a claim by filing a cross-complaint against the Fund and the State of California to seek a declaratory judgment that Proposition 22 does not apply to California marriages, and that the other marriage laws are unconstitutional. (CT:1055-1061.)

On February 17, 2004, the trial court ruled that an alternative writ of mandate would issue, but denied an immediate stay. (*See Lockyer, supra,* 33 Cal.4th at p. 1071, n.6; CT: 1107.) On February 25, 2004, Barbara Lewis, et al. filed an original action in this Court seeking an immediate stay and a peremptory writ against county clerk Nancy Alfaro. Two days later the Attorney General sought a similar writ against the City and County of San Francisco. The cases were consolidated, with *Lockyer* as the lead case. (*Id.* at p. 1072-1073.) On March 11, 2004, the Court issued an immediate stay of the issuing of marriage licenses to same-sex couples. (*Id.* at p. 1073.) In the same order it stayed the proceedings in this case and the case with which it was ***5** consolidated, *Thomasson v. Newsom,* San Francisco Superior Court case number CGC-04-428794, pending the outcome of the Supreme Court proceedings. (*Id.*) The Court expressly stated that the stay did not prohibit the filing of lawsuits challenging the constitutionality of the marriage statutes. (*Id.* at p. 1073-1074.)

Four additional lawsuits challenging the marriage laws were filed shortly after the March 11,2004 order. One of the lawsuits was a new lawsuit by the City against the State, which raised the same claims as the cross-complaint filed against the Fund and the State on February 19, 2004.[FN1] All of the lawsuits were subsequently coordinated in Judicial Council Coordination Proceeding No. 4365, with Judge Richard A. Kramer as the coordination judge.

FN1. The City dismissed the cross-complaint on June 4, 2004. (CT: 1162.)

This Court issued its decision in *Lockyer,* on August 12, 2004. It held that San Francisco officials exceeded their authority in issuing marriage licenses to same-sex couples, and ruled that the licenses were void *ab initio. (Lockyer, supra,* 33 Cal.4th at p. 1069, 1113.) The decision dissolved the stay of the *Fund* and *Thomasson* cases. (*See* Supreme Court Minute Order of September 15, 2004 (*Lockyer,* Supreme Court Case No. S 122923).) The writ of mandate restraining the City's illegal conduct did not address the merits of the controversy over the scope or constitutionality of Proposition 22. (*See Lockyer, supra,* 33 Cal.4th at p. 1102 ["we have no occasion in this case to determine the constitutionality of the current California marriage statutes"].)

Upon the lifting of the stay, the Fund filed a motion to discharge its alternative writ, with costs, on the ground that it had obtained the mandamus relief it sought as a result of the *Lockyer* ruling. (CT: 155, 159.) The Fund also ***6** sought permission to file a Second Amended Complaint to clarify that its claims for declaratory relief under CCP § § 526a and 1060 included a request for a judgment that the marriage laws, including Proposition 22, are constitutional. (CT: 159-162.) In that motion the Fund reiterated its arguments about its standing under CCP § 526a to challenge the City's illegal expenditures in regard to issuing marriage licenses to same-sex couples. (CT:162.) It also pointed out that its request for a permanent injunction, authorized under § 526a by the City's illegal expenditures, was not mooted by *Lockyer* - the writ of mandate in that case acted only as interim relief in the Fund's case because the City was challenging the constitutionality of the marriage laws in another case before the Fund's case was final. (CT: 163-164.)

At the hearing on the motions to discharge, for costs, and to amend, the court also considered the City's motion to dismiss for mootness, which encompassed a claim that the Fund no longer had standing. (*Cf.* RT:341 ["I believe ... that inexorably in ruling that there remained a cause of action or a claim for declaratory relief [on the motion to dismiss], that I considered [standing]"].) The trial court ruled that because the case was not yet finished - the Fund had not yet prevailed on all of its claims - the motion to discharge the alternative writ and for costs was premature. (RT: 126; CT:344.) It denied the motion to amend because it construed the existing complaint as broad enough to include a request for declaratory judgment on the constitutionality of the marriage laws. (RT: 121; CT:344.) And it denied the City's motion to dismiss because it found that a live controversy remained. (RT: 118; CT:344.)[FN2]

> FN2. The judge stated that he believed he had the discretion to reconsider the denial of intervention in the City's case against the State, but that there was no need to do so - apparently because the Fund had viable claims in this case against the City. (RT:117.)

***7** During the hearing on dispositive motions, the City made an oral motion to dismiss the Funds' claims for lack of standing, which the court denied for being untimely. (RT:398.) The court further noted, however, that the motion did not have merit "because of the remaining question regarding the permanency of an order against Mayor Newsom." (RT: 399.)

On April 13, 2005, the Superior Court entered a single Final Decision on Applications for Writ of Mandate, Motions for Summary Judgment, and Motions for Judgment on the Pleadings, for all of the coordinated cases. (CT:703-728.) The Final Decision found California's marriage laws unconstitutional on a number of grounds under the California Constitution's equal protection provision. (CT:705, 718, 725.) In the *Fund* case, the trial court denied the Fund's motion for summary judgment and granted the City's motion for judgment on the pleadings. (CT:726-727.)

The Court of Appeal reversed on October 5, 2006. Nevertheless, the Court affirmed the separate final judgment against the Fund on the ground that the Fund did not have standing to bring the lawsuit. (*Marriage Cases,* 49 Cal.Rptr.3d at p. 689, 727, App. 15-16, 48-49.) The Court construed the Fund's efforts to obtain permanent relief in regard to the City's violation of Proposition 22 as nothing more than "pure declaratory relief claims." (*Id.* at p. 689.)

LEGAL DISCUSSION

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER A CASE MAY BE MOOTED BY A WRIT OF MANDATE RESTRAINING CONDUCT WITHOUT ADDRESSING THE MERITS OF CLAIMS

FOR INJUNCTIVE AND DECLARATORY RELIEF.

If the trial court had granted an alternative writ and stay on February 17, 2004, no one would have questioned whether the Fund had standing to prosecute its suit until it had a determination of whether Proposition 22 applies ***8** to California marriages, and whether it is constitutional. Indeed, the City initially defended by arguing that a permanent stay or peremptory writ on its issuing of marriage licenses could not be granted without addressing the constitutional claims. As this Court noted in *Lockyer,* the issue of the City's authority to issue marriage licenses to same sex couples and the constitutionality of the marriage laws are two different issues. (*Lockyer, supra,* 33 Cal.4th at p. 1112.) Thus, the fact that this Court granted a peremptory writ addressing the issuing of marriage licenses did not affect the other controversies involving the constitutionality of the marriage laws and the scope of Proposition 22. However, in view of the Court of Appeal's published decision, courts may now believe that the granting of a writ restraining illegal conduct without resolving a controversy over the constitutionality of the underlying law necessarily obviates declaratory relief.

From the Fund's perspective, it makes no difference whether the City ceased issuing marriage licenses (and making illegal expenditures) voluntarily, as the result of a preliminary injunction or stay in the Fund's case, or as the result of a writ of mandate in another case. In all of those scenarios, the Fund's original standing to resolve the separate controversies over the scope and constitutionality of Proposition 22 is unaffected.

A. The *Lockyer* Writ of Mandate Did Not Affect Standing Under Section 526a.

A taxpayer action under CCP § 526a is available to restrain or prevent the illegal expenditure of public funds. This Court has "ma[d]e clear that under section 526a 'no showing of special damage to the particular taxpayer [is] necessary.' " (*White v. Davis* (1975) 13 Cal.3d 757, 764 [120 Cal.Rptr. 94].) The purpose of the taxpayer statute is to allow a large class of citizens ***9** to challenge the illegal use of public funds. (*Id.*) Section 526a provides standing for declaratory relief as well as injunctive relief:

While [the] language [of § 526a] clearly encompasses a suit for injunctive relief, taxpayer suits have not been limited to actions for injunctions. Rather, in furtherance of the policy of liberally construing section 526a to foster its remedial purpose, our courts have permitted taxpayer suits for declaratory relief, damages and mandamus. To achieve the "socially therapeutic purpose" of section 526a, "provision must be made for a broad basis of relief. Otherwise, the perpetration of public wrongs would continue almost unhampered."

(*Van Atta, Jr. v. Scott* (1980) 27 Cal.3d 424, 449-450 [166 Cal.Rptr. 149] [footnotes and citation omitted].)

The Fund's claim under section 526a is that the City's issuing of marriage licenses in violation of Proposition 22 involved an illegal expenditure of funds that should be permanently enjoined and declared invalid. This Court's decision in *Lockyer* is a definitive ruling that the expenditures were invalid and that the City could not continue issuing marriage licenses to same-sex couples. However, the Fund's section 526a claim has not been resolved because of the ongoing dispute with the City over the scope and constitutionality of Proposition 22.[FN3] The Fund has not obtained a ruling that the City violated Proposition 22, or that Proposition 22 is constitutional. Thus, the writ of mandate in *Lockyer* did not affect the Fund's claims under section 526a.

> FN3. The City's February 19, 2004, cross-complaint against the Fund is an admission that the City believed there was a live controversy between the City and the Fund over the constitutionality of the statutes. (CT:1058, ¶¶ 9-10.) The Intervenor-Defendants made a similar admission by filing a cross-complaint against the Fund on March 10, 2004. (CT: 1142.)

***10** The Court of Appeal ruled that the Fund did not have standing because it had not "identified any continuing public expenditure it challenges." (*Marriage Cases, supra,* 49 Cal.Rptr.3d at p. 690, App. 16.) However, the authorities the Court cited hold only that the action "must involve an actual or threatened expenditure of public funds." (*Id.* [citation omitted].) In this case, there was clearly an actual unlawful expenditure of public funds when the City issued marriage licenses to same-sex couples. However, there has been no adjudication of whether that expenditure violated Proposition 22. Moreover, neither section 526a nor the case law construing it supports a ruling that if, during the course of litigation an illegal expenditure of public funds ceases, a taxpayer's standing expires.

B. The *Lockyer* Writ of Mandate Did Not Affect Standing Under Section 1060.

" 'The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [124 Cal.Rptr.2d 519] [citation and emphasis omitted].) In *City of Cotati* this Court acknowledged that the validity or construction of legislation is an appropriate issue for declaratory relief: " 'An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law.' " (*Id.* [citation omitted].)

This case involves a fundamental disagreement between the City and the Fund over the construction of Proposition 22, as well as a disagreement over the constitutionality of the initiative. (CT:1058.) The City initially admitted that there is an active controversy between the City and the Fund over these issues. (CT:1058, 1142.) That is a separate controversy from the one ***11** over whether the City had the authority to issue marriage licenses to same-sex couples without having first challenged the constitutionality of the marriage laws. The latter controversy over conduct is all that was addressed in *Lockyer. (See Lockyer, supra,* 33 Cal.4th at p. 1102.) Accordingly, the *Lockyer* writ of mandate has no bearing on the controversy created by the City's public challenge to the scope and constitutionality of Proposition 22 by issuing marriage licenses to same-sex couples.[FN4]

> FN4. Likewise, the City's separate lawsuit against the State did not eliminate the controversy. Indeed, preventing the need for subsequent lawsuits like the City's against the State is the point of a declaratory judgment action. (*Hannula, supra,* 34 Cal.2d at p. 448.) The City cannot eliminate a live controversy that it created simply by filing a separate lawsuit against the State. Moreover, the City's lawsuit cannot resolve the controversy over the scope of Proposition 22 because it has not raised that issue in its claims against the State.

In *City of Cotati* this Court discussed the nature of an actual controversy in the context of an anti-SLAPP motion to strike a complaint. Mobile home park owners had filed a federal lawsuit against the City of Cotati to attack the constitutionality of a city ordinance. The City of Cotati, in turn, filed a state court action in an effort to obtain a more favorable forum. The trial court held that because the two suits arose from the same underlying controversy, the city's state-court suit violated the anti-SLAPP statute. (*City of Cotati, supra,* 29 Cal.4th at p. 80 n.5 .) This Court reversed, finding that the controversy existed separately from the mobile home park owners federal lawsuit. (*Id.* at p. 80.) As the City of Cotati explained, the federal lawsuit put it on notice of the controversy, but was not itself the controversy. (*Id.* at p. 79.)

As in *City of Cotati,* the Fund is not relying upon this lawsuit to establish the controversy. The Fund was put on notice of the controversy by ***12** the City's public act of declaring the marriage laws unconstitutional and issuing marriage licenses to same-sex couples. That controversy was unaffected by the writ of mandate in *Lockyer.*

Subsequent to the *Lockyer* writ of mandate, and the City's transformation of its affirmative defense into a separate lawsuit, the City acknowledged the existence of an actual controversy, but took the position that the actual controversy over the scope and constitutionality of Proposition 22 was with the State only rather than with the Fund. (RT:111-112, 119.) The City's argument was that after *Lockyer,* the trial court could not grant the Fund any relief. (*Id.*) The trial court properly rejected that argument. The granting of a declaratory judgment in the Fund's action would have the same effect with or without the writ of mandate in *Lockyer* - it would settle the controversy over the scope and constitutionality of Proposition 22 (as well as the constitutionality of the other marriage laws) that the City created by publicly challenging the marriage laws and issuing marriage licenses to same-sex couples.[FN5]

> FN5. The Fund does not believe that this Court should review the merits of the Court of Appeal decision. However, if it does, it must also determine the scope of Proposition 22. If Proposition 22 applies to California marriages, its status as a voter initiative must be considered in determining California's public policy regarding marriage. The public policy embodied in Proposition 22 cannot be changed by the Legislature without a vote by the people. (Cal. Const., Art. 2, Sec. 10(c).) Thus, the Legislature's findings about same-sex parenting in enacting the Domestic Partnership Act have no validity and cannot undermine the validity of the marriage laws if Proposition 22 applies to marriages contracted in California.

This Court should grant review to determine the impact of a writ of mandate restraining conduct on the merits of claims relating to a controversy over the constitutionality of the underlying statute.

***13** II. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER INITIATIVE PROPONENTS HAVE A UNIQUE INTEREST IN DEFENDING THE CONSTITUTIONALITY OF THEIR ENACTMENTS.

This Court has never addressed the issue of whether initiative proponents, or an organization they establish to represent their interests, have standing to defend attacks on the validity or scope of the initiative.[FN6] However, California courts, including this Court, have routinely permitted such persons to intervene to defend the constitutionality of the initiatives they have passed. (*See, e.g., Legislature of State of Cal. v. Eu* (1991) 54 Cal.3d 492, 499-500 [286 Cal.Rptr.283] [allowing "the organization that sponsored Proposition 140" to intervene in original writ proceeding in Supreme Court]; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812 [258 Cal.Rptr. 161] ["proponents" of Proposition 103 permitted to appear as real parties in interest defending original writ proceeding in Supreme Court]; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250 [48 Cal.Rptr.2d 12] [noting that "the organization that drafted Proposition 103 and campaigned for its passage" had been permitted to intervene]; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241 [32 Cal.Rptr.2d 807] [noting that "proponent of Proposition 103" had been permitted to intervene].) In fact, the only published California opinion denying intervention to an initiative proponent is the Court of ***14** Appeal's affirmance of the denial of the Fund's effortto intervene in the City's suit against the State, and that was an appeal of a denial of permissive intervention. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1044 [27 Cal.Rptr.3d 722] (*"CCSF").*)[FN7] The decision below is the only published decision denying standing to an initiative proponent.

> FN6. The Fund represents the proponents and organizers of the campaign to enact Proposition 22. (CT: 164.) 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. (*See* CT: 118 ["nobody has asked me to dismiss their complaint for lack of standing, although I'm giving you [a] pretty good

idea, if you want to go ahead and make that motion that's find, I don't think, unless you come up with something different I don't think that that's going to work, and I think it might involve some pretty substantial fact type questions as to the nature of these plaintiffs and the nature of their interest. I have obviated all of that"].)

FN7. While the Fund's case was stayed it filed a motion to intervene in the City's case against the State. That motion was denied by the trial court, and the denial was affirmed on appeal. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030 [27 Cal.Rptr.3d 722].)

The gravamen of the Court of Appeal decision on justiciability was that it did not believe the Fund had any interest different from the citizenry at large to pursue what the Court deemed "pure declaratory relief claims" after the writ of mandate in *Lockyer*. (*Marriage Cases*, 49 Cal.Rptr.3d at p. 689-690, App. 15-17.) The Court of Appeal relied heavily on its decision in *CCSF*, an intervention case, in its *de novo* review of standing in this case. (*Marriage Cases*, 49 Cal.Rptr.3d at p. 689-690, App. 15-17.) That reliance - and the *de novo* review - was improper because of the difference in the posture of the two appeals. The appeal in *CCSF* was from a discretionary ruling denying permissive intervention, to which the Court of Appeal owed deference. (*CCSF*, 128 Cal.App.4th at p. 1044.) Similarly, the City's standing argument in this case related to a discretionary ruling on the existence of a live controversy, which the trial court viewed as having determined standing. (RT:341; CT:118, 344.) That ruling was likewise entitled to deference. (*Hannula, supra*, 34 Cal.2d at p. 448.) Thus, the Court of Appeal's earlier *CCSF* ruling affirming discretionary findings was not relevant to the challenge to justiciability in this appeal.

***15** The reserved right of citizen initiative is a core value of the California Constitution. (*Associated Home Builders, supra*, 18 Cal.3d at p. 591.) Initiative proponents and sponsors have a unique interest in the validity and scope of an enactment they have successfully promoted. (*See City of Santa Monica v. Stewart* (2nd Dist. 2005) 126 Cal.App.4th 43, 89-90 [24 Cal.Rptr.3d 72] ["As the sponsor and proponent of the embattled Initiative, the intervenors ... had a " 'personal interest" in the litigation in the broad sense that they were emotionally and intellectually connected to the litigation in ways that the general public was not' "], quoting *Hammond v. Agran* (4th Dist. 2002) 99 Cal.App.4th 115, 125 [120 Cal.Rptr.2d 646].) Initiative proponents and sponsors invest time, money, and personal reputation in the effort to pass an initiative. Their interest goes far beyond a mere political interest. (*Id.*)[FN8] If the proposition for which they labored is struck down, all of their efforts and investments will have been in vain. Presumably, that is why California courts have routinely recognized that proponents have a right to defend their initiatives.

FN8. The Court of Appeal improperly limited its interest analysis to whether a ruling on the constitutionality of the marriage laws would impair or invalidate the marriages of the Fund's members, and to "any diminution in legal rights, property rights or freedoms." (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 689-690, App. 15-17.)

Indeed, initiative proponents are likely to be the most vigorous defenders of their enactments. As the Ninth Circuit has observed:
Moreover, as appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with ***16** respect to a particular subject. While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can

invariably depend on its sponsors to do so.

(*Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727, 733.) That observation is true in the *Marriage Cases* as well. The Attorney General has been unwilling to raise certain defenses in the coordinated proceedings because of his political views. For example, the Attorney General has "expressly disavowed" the responsible procreation rationale for marriage, and "take[n] the position that arguments suggesting families headed by opposite-sex parents are somehow better for children, or more deserving of state recognition, are contrary to California policy." (*Marriage Cases, supra,* 49 Cal.Rptr. 3d at p. 724 n.33, App. 46.) In contrast, the Fund has vigorously presented the overwhelming weight of authority holding that encouraging responsible procreation and child rearing by biological parents within marriage is the primary state interest justifying the marriage laws. (*See id.*) The Attorney General has taken no position whatsoever on the scope of Proposition 22, but has argued that the California Registered Domestic Partnership Act, Family Code § 297.5, and the case law construing it, is the basis for the public policy he is arguing. The Fund has argued that to the extent Family Code § 297.5 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. (CT:581 [" § 308.5 prevents the Legislature from amending California's statutes concerning the fundamental principles underlying the institution of marriage. (*See* Cal. Const., Art. II, Sec. 10(c)"].) The Fund's positions and vigorous defense of Proposition 22 is apparently why ***17** the City has worked so hard in its effort to litigate against the Attorney General only.[FN9]

> FN9. The City fought strenuously to prevent the Fund from intervening in its lawsuit against the State. (*See CCSF, supra,* 128 Cal.App.4th 1030.) It filed a motion to dismiss for mootness in this case (CT:1358-1371), and also made an oral motion to dismiss for lack of standing during the hearing on the merits. (RT:391.)

"The purpose of a standing requirement 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* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574] [emphasis added].) There is no dispute over the vigor with which the Fund has litigated its case. Thus, the trial court's denials of the City's motion to dismiss for mootness and belated oral motion to dismiss for lack of standing during the hearing on the merits were consistent with the purpose of the standing requirement.

III. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER A SUPERIORCOURT FINDING OF JUSTICIABILITY UNDER CCP § 1060 IN COMPLEX LITIGATION IS ENTITLED TO DEFERENCE.

It has been well established that a trial court has broad discretion to determine whether a justiciable controversy exists to support declaratory relief. (*Hannula, supra,* 34 Cal.2d at p. 448 ["Whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion"]; *see also, Tehachapi-Cummings County Water District v. Armstrong* (1975) 49 Cal.App.3d 992, 998 [122 Cal.Rptr. 918] ["Whether justiciability exists in a jurisdictional sense in a declaratory relief action rests within the sound discretion of the trial court"]; *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 801[172 P.2d 4] ["Whether a [declaratory judgment] ***18** determination is necessary and proper is a matter within the discretion of the trial court"].) In addition, it is clear that a finding of justiciability under CCP 1060 supports standing for the plaintiff. (*Application Group, Inc., v. Hunter Group, Inc.* (1998) 61 Cal. App.4th 881, 892 [72 Cal.Rptr.2d 73] [" Code of Civil Procedure section 1060 confers standing ... to bring an action for declaratory relief in cases of actual controversy relating to the legal rights and duties of the respective parties"].)

Accordingly, this Court has held that a trial court's decision to issue a declaratory judgment should not be reversed absent a showing of abuse of discretion. (*Hannula, supra,* 34 Cal.2d at p. 448 ["the court's decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown ... that the discretion was abused"]; *Filarsky v. Superior Court of Los Angeles County* (2002) 28 Cal.4th 419, 433 [49 P.3d 194] ["The trial court's decision to entertain an action for declaratory relief is reviewable for abuse of discretion"]; *see also, Auberry Union School District v. Rafferty* (1964) 226 Cal.App.2d 599, 602 [38 Cal.Rptr. 223] ["The trial court's determination whether or not declaratory relief should be granted will not be disturbed on appeal in the absence of a clear showing of abuse of discretion"].)

Appellate review of discretionary decisions is extremely deferential. This Court has emphasized that:
[A] reviewing court, should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. Thus, in *Loomis v. Loomis,* 181 Cal.App.2d 345,348-349(4-6), 5 Cal.Rptr. 550, 552(2-4), it was said: "It is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless ***19** a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."

(*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 566 [468 P.2d 193].) The City failed to mention its burden on appeal much less meet it. More importantly, the Court of Appeal failed to apply or even mention the deferential abuse-of-discretion standard set out above. Instead, the Court erroneously considered the justiciability issue *de novo.*

In the Superior Court, the City moved to dismiss the Fund's complaint on the premise that its claims were rendered moot and nonjusticiable as a result of this Court's order in *Lockyer.* In its sound discretion, the trial court disagreed and denied the motion. (CT: 118; RT:341.) The Court of Appeal reviewed the justiciability issue but erroneously applied a *de novo* standard of review rather than the required "abuse of discretion" standard. (*Marriage Cases, supra,* 49 Cal.Rptr.3d at p. 689-690, App. 15-17.)

The Court of Appeal noted that the "City ... moved to dismiss [the Fund's complaint] as moot, arguing the Supreme Court's decision in *Lockyer* had granted all the relief sought in these cases and the plaintiffs lacked standing to pursue bare claims for declaratory relief." (*Id.* at p. 688, App. 15.) As demonstrated by the Court of Appeal's decision on this issue and the record below, the question of mootness and standing have been commingled into the broad question of justiciability.

During the motion to dismiss the trial court stated, "I don't think that there is a motion to dismiss based on lack of standing, but I'll consider the arguments now, because we get to the same place. But technically the motion to dismiss is for mootness ...." (RT:100.) The court further commented, "Would you like to get into the question of standing - what I've done is I've ***20** interpreted [the complaint] broad enough to state a claim for declaratory relief as to whether the marriage statute is constitutional." (RT: 105.)

It is of little import whether the trial court ruled on the issue of justiciability in the context of mootness or standing. What is significant is the trial court's discretionary finding that the Fund's complaint continued to state a justiciable controversy, at least in part because the claims had not been litigated to completion. (CT:126.) Nevertheless, the Court of Appeal ultimately concluded that the trial court "erred in denying the motion to dismiss be-

cause... the Fund lacked standing to pursue these pure declaratory relief claims." (*Marriage Cases, supra,* 49 Cal. Rptr.3d at p. 689, App. 15.)

The pertinent question for this Court is whether the Court of Appeal's published opinion applied the correct standard of review of the Superior Court's finding of justiciability; the law demonstrates it did not. The trial court's decision to preserve the Fund as a party to this litigation did not result in a "miscarriage of justice." (*See Denham, supra,* 2 Cal.3d at p. 566.) In fact, the City was not prejudiced in the least by the trial court's discretionary decision. Because of the complexity and multiplicity of the coordinated cases, there is no possibility that dismissing the Fund's case would have relieved the City of its burden to demonstrate the unconstitutionality of the marriage laws. Thus, the City has failed to meet its burden of demonstrating an abuse of discretion. (*See id.*)

It is imperative that this Court reinstate the appropriate standard of review in this typesof case. The Fund's case arises in the context of complex litigation addressing crucial issues of public concern. The trial court is in the best position to weigh all of the competing interests at stake and make justiciability decisions accordingly. (*See Fire Insurance Exchange v. Superior Court,* (2004) 116 Cal.App.4th 446,452 [10 Cal.Rptr.3d 617]["The trial court ***21** has broad discretion, however, to fashion suitable methods of practice in order to manage complex litigation"].) In this case, the trial court determined, in its discretion, that the Fund had a viable claim for declaratory relief and therefore allowed the Fund's case to proceed with the other consolidated cases. The Court of Appeal may not simply substitute its opinion for that of the trial court. (*Denham, supra,* 2 Cal.3d at 566.)

In addition to the general principle that needs to be clarified in view of the Court of Appeal's published opinion, the decision should be scrutinized because of its impact on the coordinated proceedings. The majority stated that "although we have determined that... the Fund lack[s] standing to pursue [its] declaratory relief claims, this conclusion has had little to no significance, as a practical matter, in our review of the substantive issues in these appeals." (*Marriage Cases, supra,* 49 Cal. Rptr.3d at p. 691, App. 17.) The assertion that denying the Fund's participation as a party was "insignificant" is belied by the decision on the merits. While the court claims it "considered all the arguments contained" in the Fund's briefs, it specifically did not consider one of the Fund's most compelling points; the state's interest in encouraging "responsible procreation." The court noted:
As ... the Fund and several amici curiae have stressed, only heterosexual unions have the potential of producing unintended offspring .... Although [the Fund argues 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.

(*Marriage Cases, supra,* 49 Cal. Rptr.3d at p. 724 n.33, App. 46 [citation omitted].)

As demonstrated above, the importance of the Fund's participation as a party in these cases should not be underestimated. In the event this Court ***22** grants review of the merits of the Court of Appeal's decision, the Fund should be permitted to participate in the briefing and argument because the Fund may have a significant impact on the final resolution of this litigation. The Attorney General's reluctance to assert state interests, which have been accepted almost universally by sister state courts, magnifies the relevance of the Fund's participation. Thus, it is imperative that this Court not only reinstate the proper standard of review in complex cases of great public importance, but that it permit the Fund to fully participate in any further proceedings on the merits.

CONCLUSION

For the foregoing reasons, this Court should grant review of the Court of Appeal's decision to decide whether: (1) claims under CCP § § 526a or 1060 may be rendered moot by a writ of mandate restraining conduct without

resolving the merits of the claims for injunctive and declaratory relief; (2) whether citizen initiative proponents and organizers have a unique interest in defending the constitutionality of their enactments; and (3) whether a trial judge's finding of justiciability under CCP § 1060 in complex litigation is entitled to deference on appeal.

Appendix not available.

Coordination Proceeding Special Title (Rule 1550(b)) Marriage Cases, 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.
2006 WL 3618498 (Cal.) (Appellate Petition, Motion and Filing)

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PROOF OF SERVICE

I, Catheryn M. Daly, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On April 4, 2011, I served the following document(s):

CITY AND COUNTY OF SAN FRANCISCO'S REQUEST FOR JUDICIAL NOTICE

on the following persons at the locations specified:

Jesse Panuccio
David Thompson
Charles J. Cooper
Nichole Jo Moss
Peter A. Patterson
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants, Intervenors, and Appellants Hollingsworth, Inight, Gutierrez, Jansson, and Protect Marriage.com

Brian William Raum, Senior Counsel
James Andrew Campbell
Litigation Staff Counsel
ALLIANCE DEFENSE FUND
15100 N 90th Street
Scottsdale, AZ 85260

Attorneys for Defendants, Intervenors, and Appellants Hollingsworth, Inight, Gutierrez, Jansson, and Protect Marriage.com

Andrew P. Pugno
Law Offices of Andrew P. Pugno
101 Parkshore Drive, Suite 100
Folsom, CA 95630

Attorneys for Defendants, Intervenors, and Appellants Hollingsworth, Inight, Gutierrez, Jansson, and Protect Marriage.com

Terry L. Thompson
Law Office of Terry L. Thompson
P.O. Box 1346
Alamo, CA 94507

David Boies
Rosanne C. Baxter
BOIES, SCHILLER & FLEXNER
333 Main Street
Armonk, NY 10504

Theodore Olson
Matthew McGill
Amir C. Tayrani
GIBSON DUNN & CRUTCHER, LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5306

Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Theane Evangelis Kapur
GIBSON DUNN & CRUTCHER, LLP
333 South Grand Avenue, Suite 5350
Los Angeles, CA 90071-3197

Ethan Douglas Dettmer
Enrique Antonio Monagas
Sarah E. Piepmeier
GIBSON DUNN & CRUTCHER, LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-2933

Jeremy Michael Goldman
BOIES, SCHILLER & FLEXNER, LLP
1999 Harrison Street
Oakland, CA 94612

Theodore H. Uno
BOIES, SCHILLER & FLEXNER, LLP
2435 Hollywood Blvd.
Hollywood, FL 33020

Joshua Irwin Schiller
Richard Jason Bettan
BOIES, SCHILLER & FLEXNER, LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022

Tamar Pachter, Deputy Attorney General
Daniel Powell, Deputy Attorney General
CALIFORNIA DEPT. OF JUSTICE
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Kenneth C. Mennemeier, Jr.
Andrew W. Stroud
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, CA 95814

Claude Franklin Kolm
OFFICE OF COUNTY COUNSEL
1221 Oak Street, Suite 450
Oakland, CA 94612-4296

Judy W. Whitehurst
Principal Deputy County Counsel
LOS ANGELES COUNTY COUNSEL
6th Floor
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
James Browning Courthouse
95 7th Street
San Francisco, CA 94103
[Served via ECF]

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY ELECTRONIC SERVICE**: Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed:

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed April 4, 2011, at San Francisco, California.

Catheryn M. Daly.

Catheryn M. Daly