Case No. S 147999

IN THE

SUPREME COURT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) **MARRIAGE CASES,**	Judicial Council Coordination Proceeding No. 4365
PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND, **Plaintiff and Petitioner,** **v.** **CITY AND COUNTY OF SAN FRANCISCO, ET AL.,** **Defendants and Respondents,**	San Francisco County Superior Court Case No. 503-943 (Consolidated with *Thomasson v. Newsom*, Case No. 428-794)
DEL MARTIN, ET AL., **Intervenors/Defendants/Respondents.**	

SUPREME COURT
FILED
NOV 14 2006
Frederick K. Ohlrich Clerk
DEPUTY

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*
GLEN LAVY, Arizona State Bar No. 022922*
15333 North Pima Road, Suite 165
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
bbull@telladf.org
glavy@telladf.org

Additional Counsel on Following Page

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

*Motion to Appear *Pro Hac Vice* Submitted

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

Constitutional Provisions

Statutes

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

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

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

("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

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.[1] All of the lawsuits were subsequently coordinated in Judicial Council Coordination Proceeding No. 4365, with Judge Richard A. Kramer as the coordination judge.

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. S122923).) 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

---

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

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.)[2]

---

[2]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.)

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

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

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.[3] 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.

---

[3]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.)

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

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.[4]

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

---

[4]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.

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.[5]

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.

---

[5]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.

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.[6] 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

---

[6]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"].)

Appeal's affirmance of the denial of the Fund's effort to 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*").)[7] The decision below is the only published decision denying standing to an initiative proponent.

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.

---

[7]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 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.*)[8] 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.

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

---

[8]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.)

> 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

the City has worked so hard in its effort to litigate against the Attorney General only.[9]

"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 SUPERIOR COURT 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]

---

[9]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.)

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

> 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

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 because . . . 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

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

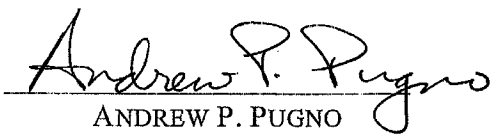
grants review of the merits of the Court of Appeal's decision, the Fund should be permitted to participate in the briefing and argument because the Fund may have a significant impact on the final resolution of this litigation. The Attorney General's reluctance to assert state interests, which have been 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.

Dated: November 13, 2006

Respectfully submitted,

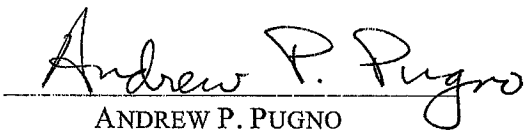
By: 

ANDREW P. PUGNO
Attorney for the Plaintiff-Petitioner
Proposition 22 Legal Defense and
Education Fund

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE OF COURT 14

Pursuant to California Rule of Court 14(c)(1), counsel for Plaintiff-Petitioner hereby certifies that this brief was prepared in Times New Roman 13 font, and that the number of words contained in the foregoing Plaintiff-Petitioner's Petition for Review, including footnotes, but excluding the Table of Contents, Table of Authorities, This Certificate, and any attachments, is 6,759, as calculated by using the word count feature of WordPerfect, the computer program used to prepare this brief.

Dated: November 13, 2006



ANDREW P. PUGNO
Attorney for the Plaintiff-Petitioner
Proposition 22 Legal Defense and
Education Fund