Case No. S147999

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.**	

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Case No. A110651

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND REPLY IN SUPPORT OF PETITION FOR REVIEW ON JUSTICIABILITY

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TABLE OF CONTENTS

INTRODUCTION. 1

I. JURISDICTION OVER AN ACTION FOR A WRIT OF MANDATE PROPERLY ENCOMPASSES A DECLARATORY JUDGMENT REGARDING THE CONSTITUTIONALITY OF THE UNDERLYING LAW.. 3

II. THE FUND'S ASSOCIATIONAL STANDING GIVES IT A LEGALLY PROTECTED INTEREST IN THE CONSTITUTIONALITY OF PROPOSITION 22. 6

III. THE COURT OF APPEAL'S USE OF DE NOVO REVIEW OF A FINDING OF JUSTICIABILITY UNDER SECTION 1060 CREATES CONFUSION... 11

CONCLUSION.. 13

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14. 14

TABLE OF AUTHORITIES

California Cases

Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles
(2006) 136 Cal.App.4th 119 [38 Cal.Rptr.3d 575]. 7

Application Group, Inc., v. Hunter Group, Inc.
(1998) 61 Cal. App.4th 881 [72 Cal.Rptr.2d 73]. 12

Bustop v. Superior Court for Los Angeles County
(1977) 69 Cal.App.3d 66 [137 Cal.Rptr. 793]. 9, 10

California Water and Tel. Co. v. Los Angeles County
(1967) 253 Cal.App.2d 16 [61 Cal.Rptr. 618]. 11, 12

City and County of San Francisco v. State
(2005) 128 Cal.App.4th 1030 [27 Cal.Rptr.3d 722]. 8

Connerly v. State Personnel Bd.
(2001) 92 Cal.App.4th 16 [112 Cal.Rptr.2d 5]. 10

Denham v. Superior Court of Los Angeles County
(1970) 2 Cal.3d 557 [468 P.2d 193]. 13

Harman v. City and County of San Francisco
(1972) 7 Cal.3d 150 [101 Cal.Rptr. 880]. 11

In re Marriage Cases
(2006) 143 Cal.App.4th 873 [49 Cal.Rptr.3d 675]. 10

Lockyer v. City and County of San Francisco
(2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225]. 1, 3, 4, 5

National Paint & Coatings Assn. v. State of California
(1997) 58 Cal.App.4th 753 [68 Cal.Rptr.2d 360]. 10

Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.
(2005) 132 Cal.App.4th 666 [33 Cal.Rptr.3d 845]. 6, 7

Tehachapi-Cummings County Water District v. Armstrong
(1975) 49 Cal.App.3d 992 [122 Cal.Rptr. 918]. 12

Federal Cases

Yniguez v. State of Arizona,
(9th Cir. 1991) 939 F.2d 727. 6

Statutes

CCP § 526a 2
CCP § 1060. . . . . 2, 11, 12
CCP § 387a. 10

California Family Code § 308.5.. 2

INTRODUCTION

When a local government challenges the constitutionality of a law by choosing to violate it, the controversy over the validity of the conduct automatically includes the issue of whether the law is constitutional. That does not mean that the local government can *compel* a court to rule on the constitutionality of the law or laws at issue prior to determining the validity of the conduct. But it does mean that the constitutionality of the law or laws is placed in controversy by the conduct. A court certainly has discretion to address the constitutionality of the underlying laws in a lawsuit challenging the validity of the governmental action.

The City and County of San Francisco ("City") created two controversies when it began issuing marriage licenses to same-sex couples: a controversy over whether it had the authority to act upon its belief that the marriage laws are unconstitutional, and a controversy over whether the laws are, in fact, unconstitutional. This Court resolved the first controversy in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225], but it deliberately chose not to address the second one. (*Id.* at p. 1112.) The trial court exercised its discretion in choosing to resolve the second controversy in this case. It properly recognized that the resolution of the first controversy did not moot Proposition 22 Legal Defense and Education Fund's (the "Fund") right to have the second controversy resolved. It properly recognized that governmental conduct challenging the constitutionality of a law involves more than the bare question of whether the government may continue violating the law. Thus, it treated the writ of mandate issued in *Lockyer* as interim relief in this case.

The Court of Appeal decision below implies that if a court grants a Petition for writ of mandate to restrain unlawful governmental conduct, the

issuance of the writ ends the entire controversy; it eliminates the standing of the plaintiff that filed the lawsuit to obtain a declaratory judgment on the controversy over the constitutionality of the laws at issue. Whether standing to resolve the entire controversy raised by illegal governmental activity exists under California Civil Procedure section 526a (taxpayer standing) or section 1060 (declaratory judgment) is an important legal question that should be resolved by this Court.

The Fund is before the Court representing the interests of its many members who were sponsors, organizers, financial supporters, and volunteers in the effort to place Family Code section 308.5 ("Proposition 22") on the ballot and obtain its passage.[1] As such, the Fund stands in the shoes of its members. Their interest – the interest of the Fund – is not merely ideological, political, or philosophical, but is the same as the interest of any initiative sponsors or proponents in defending the validity of the initiative they successfully sponsored. That interest has always been presumed to be sufficient for standing, regardless of other bases for standing, such as sections 526a and 1060.

The City's argument that whether the Fund is a party in this case "does not even matter" is not well grounded. If it doesn't matter, why have the City and Intervenors gone to such efforts to exclude the Fund from the coordinated litigation? Absent the Fund, the five petitioners seeking review of the merits face one opponent – who does not even oppose review. The reality is that the

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[1]The Fund was established by the official proponent, Senator William J. Knight, and the campaign sponsors, organizers, leaders, and major supporters to represent their interests in litigation affecting Proposition 22. Although Senator Knight is deceased, the remaining organizers, leaders, and major supporters are current members of the Fund. As explained below, that gives the Fund associational standing.

Attorney General will not defend the marriage laws with the same vigor as the Fund, and has made no defense at all of Proposition 22. With the Attorney General actually *supporting* the five petitions for review on the merits, it is now more clear than ever that it matters greatly whether the Fund is a party in this litigation. The Attorney General has made it plain that he wishes to put the victory for the State below at risk in further litigation.[2] If this Court were to grant review on the merits, it would be crucial for the Fund to be a party in order to have the marriage laws, particularly Proposition 22, vigorously defended. Reversal of the Court of Appeal's decision on justiciability is also important because of the potential impact of the decision on future litigation by the Fund and other initiative sponsors.

Finally, it is not disputed that the standard for a reversal based on abuse of discretion is that there has been a miscarriage of justice. The Court of Appeal did not rule that the trial judge's finding of justiciability, and therefore standing, resulted in a miscarriage of justice. Instead, it engaged in de novo review to find that the Fund's claims were not justiciable.

I. JURISDICTION OVER AN ACTION FOR A WRIT OF MANDATE PROPERLY ENCOMPASSES A DECLARATORY JUDGMENT REGARDING THE CONSTITUTIONALITY OF THE UNDERLYING LAW.

This Court held in *Lockyer* that it need not decide the constitutionality of the marriage laws in order to determine that the City had exceeded its authority in issuing marriage licenses to same-sex couples. (*Lockyer, supra*, 33 Cal.4th at p. 1112.) However, it did not rule that a claim for writ of mandate relief could *not* include a claim for a declaratory judgment regarding the constitutionality of the underlying statute. It merely ruled that an official

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[2]A private attorney following a similar course of action would likely be sued for malpractice – unless the client did not want to win the lawsuit.

violating the law "cannot *compel* a court to rule on the constitutional issue by refusing to apply the statute . . . ." (*Id*. at p. 1081 [emphasis by Court].) Indeed, as Justice Moreno explained in concurring, a court entertaining an action for a writ of mandate may properly entertain a claim for a declaratory judgment. (*Id*. at pp. 1121 [Moreno, J., concurring] ["when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality . . . a court at least has the discretion to refuse to issue the writ until the underlying constitutional question has been decided"].) If it had not been for the extent of the City's unlawful activity (i.e., if the City had only issued one marriage license as a test case), the Court may well "have delayed the issuance of a writ of mandate against it until the underlying constitutional question had been adjudicated . . . ." (*Id*. at p. 1124.)[3]

Justice Moreno explained that "if a court determines that interim relief to compel a government agency to obey a statute is appropriate, it may grant such relief before the constitutional question is ultimately adjudicated." (*Id*. at p. 1123.) That, in effect, is what happened in the Fund's case against the City.[4] The trial court refused to grant interim relief until it made a

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[3]In fact, if the City had issued only one license as a test case instead of thousands of licenses, there would have been no reason to file petitions for a writ of mandate in this Court. The extraordinary relief granted in *Lockyer* was necessary only because of the City's flagrant violation of the law.

[4]The City suggests that, contrary to the finding of the trial court, the Fund's claims did not encompass a claim for declaratory relief on the constitutionality of the marriage laws. (City Answer at p. 5 n.2.) However, even in *Lockyer* counsel for the Fund argued (on behalf of the *Lewis* petitioners) that "'[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts.'" (*Lockyer, supra*, 33 Cal.4th at p. 1073 n.7.) The Fund certainly intended to litigate the constitutionality of the laws in its lawsuit against the City, but did not need to make that an overt claim while the City was defending on the basis of the unconstitutionality of

determination of the constitutionality of the marriage laws, which was what precipitated the filings in this Court in *Lockyer*. (*See id*. at p. 1071 n.16.) However, this Court thereafter issued a writ of mandate in *Lockyer* "unless and until [the marriage laws] are judicially determined to be unconstitutional . . . ." (*Id*. at p. 1069.) That mandate, issued while the Fund's case was pending, but before the constitutionality of the marriage laws was determined, had no more effect on the Fund's case than an order granting interim relief until the constitutional question is ultimately adjudicated. The constitutionality of the marriage laws, already before the trial court when the petitions for extraordinary relief were filed in *Lockyer*, had not yet been addressed. Thus, one of the controversies created by the City issuing marriage licenses to same-sex couples was still alive. The trial court had the discretion to resolve that live controversy by deciding the constitutionality of the marriage laws in this case. (*Id*. at p. 1121, 1123 [Moreno, J., concurring] [court may address constitutionality after interim relief].)

This case involves illegal governmental conduct undertaken to challenge the constitutionality of laws. The Court of Appeal's decision revealed confusion over the impact of a writ of mandate in that context. This Court should grant review to decide the important question of whether a plaintiff who has standing to restrain illegal governmental conduct also has standing to litigate the constitutionality of the laws challenged by the conduct. If not, a court has no discretion to decide the constitutionality of a law before deciding whether it should issue a writ of mandate. If so, a plaintiff's standing

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the laws. The only reason the complaint was not amended to expressly state a claim for declaratory relief on the constitutionality of the marriage laws after the City transformed its affirmative defense into a separate claim is that the trial court found the existing complaint to encompass the issue.

to obtain declaratory relief should not be affected when the government's conduct is so egregious that the Supreme Court must intervene to stop it.

II. THE FUND'S ASSOCIATIONAL STANDING GIVES IT A LEGALLY PROTECTED INTEREST IN THE CONSTITUTIONALITY OF PROPOSITION 22.

The City and Intervenors' standing arguments raise a crucial question: if the Fund does not have standing to participate in litigation defending Proposition 22, who does? There is no group of citizens more closely connected with the drafting, authorship, and passage of Proposition 22 than the organization founded by its proponent, sponsors, and organizers.[5] Denying standing to the Fund leads to the absurd result that opponents of the initiative can challenge it, but no zealous sponsors can defend it. In public policy litigation involving deeply held views about controversial social issues, advocates on both sides must be permitted to participate as parties. Anything less impugns the integrity of the judicial system.

California courts have repeatedly recognized that under both California and United States Supreme Court precedent, an association has standing to assert claims of its members:

> [A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. However, even in the absence of injury to itself, an association may have standing solely as the representative of its members. An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's

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[5]It bears repeating that citizens resort to the initiative process precisely when elected officials are indifferent or hostile to the citizens' preferred policy. That is the sole point for which the Fund cited *Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727 in its Petition for Review.

> purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

(*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 672-673 [33 Cal.Rptr.3d 845] [internal citations and quotations omitted]; *accord, Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 129 [38 Cal.Rptr.3d 575].)

In fact, "an association has standing to sue when 'its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'" (*Whispering Palms,* 132 Cal.App.4th at p. 673 [emphasis original].) In *Whispering Palms*, the Court specifically recognized the standing of an association to bring claims for which a significant portion of its members did *not* have standing, since others did. (*Id*. ["Pursuant to these authorities, the fact that the Association's membership includes residents of Greens No. 1 does not prevent the Association's standing to bring this action on behalf of residents of Greens Nos. 2 and 3"].)

The Intervenors admit that an organization sponsoring an initiative has an interest in litigation concerning the constitutionality or scope of the initiative. (Intervenors' Answer at p. 13.) Yet they summarily dismiss the Fund's place in this litigation by asserting that "the Fund cannot demonstrate that *it* has a unique interest" because it was "neither the proponent nor the sponsor of Proposition 22." (*Id.*, emphasis added.) This is irrelevant. It is well-established under California law that an association has standing to assert any claim for which even *one* of its members has standing.

Principals of the Fund actively participated in the campaign for Proposition 22's passage. Senator William J. Knight, the official proponent

of the initiative, and other campaign sponsors and organizers created the Fund to represent their interests in defending Proposition 22. Senator Knight served as president of the Fund until his untimely death on May 7, 2004.[6] Fund board member Natalie Williams "'regularly spoke to individuals and organizations urging support for Proposition 22' before it was enacted, and she participated in designing campaign strategies in support of the initiative." (*City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1035 [27 Cal.Rptr.3d 722] ("*CCSF*").) Similarly, Fund board member and secretary Dana Cody "participated in campaign meetings regarding the initiative . . . [and] also headed a separate public interest organization that supported passage of Proposition 22." (*Id*.) In addition, most of the Fund's financial supporters contributed directly to the campaign to enact Proposition 22.

The fact that the chief standard-bearers for the enactment of Proposition 22 formed the Fund post-ratification presents no barrier to the justiciability of the Fund's declaratory claims. The law allows Proposition 22's proponents

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[6]The Intervenors' pretense that the Fund cannot represent the interests of Proposition 22's sponsors is manifestly disingenuous. They state that "[t]he record . . . is clear: The Fund was not the proponent of Proposition 22." (Intervenors' Answer at p. 12 n. 7.) They suggest the record on this matter is closed with the conclusion that "the Fund's verified petition for writ of mandate pleads no facts otherwise suggesting that this case properly presents the second issue in the Fund's Petition," i.e., whether initiative proponents have a unique interest in defending the constitutionality of their enactments. (*Id.*) This is blatant sandbagging. The coordination judge invited a motion to dismiss the Fund's complaint on the basis of standing, if the City or Intervenors wished to bring it. (Reporter's Transcript at pp. 105-106). The court anticipated that such a motion would resolve factual issues about standing. (*Id*. at p. 106.) However, neither party filed such a motion. A litigant that declines an invitation to file a motion to resolve factual issues regarding standing cannot credibly insist that a plaintiff loses a standing challenge on appeal because of a lack of facts alleged in the complaint.

and campaign organizers to rely on the Fund as the vehicle for defending the direct interests of those (like Williams and Cody) who were actively involved in the campaign for the passage of Proposition 22.

In a related context, the Court of Appeal held that a nonprofit corporation facially satisfies the "direct interest" requirement of the permissive intervention statute if "[i]ts members and the persons whom it purports to represent do have an interest in the litigation." (*Bustop v. Superior Court for Los Angeles County* (1977) 69 Cal.App.3d 66, 70 [137 Cal.Rptr. 793].) *Bustop* demonstrates that there is no legal requirement that the nonprofit organization itself hold a direct interest as long as the persons whom it purports to represent have a sufficient interest in the litigation. (*Id*. at p. 70.) There is no requirement that an organization even exist at the time that the persons whom it represents acquired their direct interests.

In *Bustop*, the nonprofit corporation (Bustop) purported to represent the interests of parents in preventing mandatory reassignment of all the school district's students to schools other than those which they chose to attend. (*Id*. at p. 69.) Bustop petitioned to intervene in litigation challenging a particular "bussing" plan of the school district. In response to the motion to intervene the objection was raised that the school district already sufficiently represented all the residents of the district, and that to permit Bustop to intervene would "open the way for a multitude of other individuals and groups to also intervene." (*Id*. at p. 70.)

The Court of Appeal held in *Bustop* that the organization facially satisfied the permissive intervention requirements because it purported to represent persons (parents of school children) who had a direct interest in the litigation (the right to choose their children's schools was at stake). (*Id*. at p. 71.) The appellate court accordingly ordered the trial court to grant Bustop's

petition to intervene. (*Id*. at p. 73.) *Bustop* supports the proposition that the Fund need not have participated at all in the enactment of Proposition 22, or even have existed when it was on the ballot, as long as the persons it represents have a sufficiently direct interest in the litigation.

The *Bustop* court reached this conclusion even under California's strict "interest" test for intervention, which is more stringent than the test for intervention under Fed. R. Civ. P. 24. (*CCSF*, 128 Cal.App.4th at p. 1043 [CCP § 387(a) imposes stricter "interest" standard for intervention that "the more lenient test" of Fed. R. Civ. P. 24].)[7]

Significantly, the Court of Appeal in *Bustop* found that the trial court had abused its discretion in denying permissive intervention to the association as the representative of its members' interests. (*Bustop*, 69 Cal.App.3d at 73.) That is particularly striking in view of the Court of Appeal's dealing with discretionary rulings in this case. Ironically, the Court of Appeal accorded deference to the trial court's denial of intervention in *CCSF*, and then relied upon *CCSF* in refusing to accord discretion to the coordination judge's finding of justiciability. (*In re Marriage Cases* (2006) 143 Cal.App.4th 873, 894-895 [49 Cal.Rptr.3d 675], Fund Appendix ("Fund App.") at p. 16.

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[7]In contrast to California's strict intervention standards, California's standing and justiciability rules are *less strict* than under federal law. (*See, e.g., Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29 [112 Cal.Rptr.2d 5] [standing in California is more lenient than in the federal courts because "California's Constitution, unlike its federal counterpart, does not contain a 'case or controversy' limitation on the judicial power"]; *see also National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 760-762 [68 Cal.Rptr.2d 360] [unlike U. S. Constitution's Article III, there is no barrier in the California state constitution to recognizing justiciability of suits by citizens in the undifferentiated public interest].

The Attorney General's support for review of the merits highlights the importance of the issue of the Fund's standing in this case. It shows his ambivalence about the marriage laws regardless of any statement to the contrary. He simply is not an ardent advocate for the people in regard to marriage. No zealous advocate for a client would recommend that a court grant discretionary review of a decision granting victory to his or her client.

III. THE COURT OF APPEAL'S USE OF DE NOVO REVIEW OF A FINDING OF JUSTICIABILITY UNDER SECTION 1060 CREATES CONFUSION.

The City and the Intervenors argue extensively about the "correctness" of the Court of Appeal's decision. The Fund believes those arguments addressing the merits of the Fund's position will be better addressed in the briefing following this Court's grant of review, in the event the Court chooses to do so. However, the decision below, as well as the briefing of both the City and the Intervenors, indicates substantial confusion about the relationship between standing and justiciability under section 1060.

Depending upon the context, standing and justiciability may refer to entirely separate concepts. (*See Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159 [101 Cal.Rptr. 880] [standing refers to "the fitness of the person to raise an issue," and justiciability refers to "the amenability of the issue raised to judicial redress"].) However, when standing is created by statute, as in section 1060, the concepts merge. "When justiciability in a jurisdictional sense exists, the ripeness and standing concepts are metamorphosed in a declaratory relief action *into guides for the court's exercise of judicial discretion* in granting or withholding the remedy, and the trial court's exercise of discretion will not be disturbed on appeal unless its discretion has been abused." (*California Water and Tel. Co. v. Los Angeles*

County (1967) 253 Cal.App.2d 16, 23 [61 Cal.Rptr. 618] [footnote and citations omitted; emphasis added].)

Section 1060 creates standing for a declaratory judgment action when there is an actual controversy between the parties. (Fund App. at p. 15 ["section 1060 confers standing upon '[a]ny person interested under a written instrument' who brings an action for declaratory relief 'in cases of actual controversy relating to the legal rights and duties of the respective parties'"]; *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 892 [72 Cal.Rptr.2d 73] [same].) Thus, a finding of justiciability under section 1060 is also a finding of standing. (*See California Water and Tel. Co., supra*, 253 Cal.App.2d at p. 23.) Although standing in other contexts is a question of law reviewed de novo, a finding of justiciability under section 1060 is "a matter entrusted to the sound discretion of the trial court." (*Application Group, supra*, 61 Cal.App.4th at p. 893; *see also Tehachapi-Cummings County Water Dist. 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 Water and Tel. Co., supra*, 253 Cal.App.2d at p. 23 [determination of standing in a declaratory relief action is merely a guide for the court's discretion, subject to deferential review].)

In this case the coordination judge exercised his broad discretion under the rules of complex litigation to find a justiciable controversy between the Fund and the City. (Reporter's Transcript ("RT") at p. 118; Clerk's Transcript at p. 344.) The judge also indicated that he believed the Fund had an interest in the proceedings, and that granting intervention in one of the other coordinated proceedings would have been within his discretion as an alternative to a finding of justiciability. (RT:117.) Given the trial court's

broad discretion in complex litigation, the court was well within its authority in finding a justiciable controversy rather than entertaining a motion for intervention. Moreover, in view of the fact that the City and the Intervenors are litigating the constitutionality of the marriage laws regardless of whether the Fund maintains this lawsuit, allowing this case to go forward did not result in a miscarriage of justice. (*See Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 566 [86 Cal.Rptr. 65] [cannot reverse discretionary decision "unless there has been a miscarriage of justice"].)

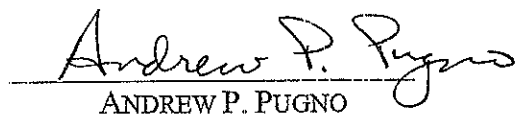
The Court of Appeal's undertaking of a de novo review of the trial court's decision on justiciability was in conflict with well-established California law. The decision, if left standing, would create confusion in the appellate courts on how to treat discretionary decisions regarding justiciability under section 1060.

CONCLUSION

For the foregoing reasons, this Court should grant review of the Court of Appeal's decision on justiciability.

Dated: December 12, 2006

Respectfully submitted,

By: 

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14

Pursuant to California Rule of Court 14(c)(1), counsel for Plaintiff-Petitioner hereby certifies that this brief was prepared in Times New Roman 13 font, and that the number of words contained in the foregoing Plaintiff-Petitioner's Reply in Support of Petition for Review on Justiciability, including footnotes, but excluding the Table of Contents, Table of Authorities, This Certificate, and any attachments, is 4,051, as calculated by using the word count feature of WordPerfect, the computer program used to prepare this brief.

Dated: December 12, 2006

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