Case No. S 147999

IN THE SUPREME COURT OF CALIFORNIA

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365

After a Decision of the Court of Appeal
First Appellate District, Division Three
Of Consolidated Cases A110449, A110450, A110451,
A110463, A110651 and A110652
San Francisco Superior Court Case Nos. 504038, JCCP 4365
Honorable Richard A. Kramer, Judge

COMBINED REPLY BRIEF OF CAMPAIGN FOR CALIFORNIA FAMILIES ON JUSTICIABILITY

MARY E. MCALISTER (SBN 148570)
Liberty Counsel
PO Box 11108
100 Mountain View Rd Suite 2775
Lynchburg, VA 24506
court@lc.org
(434) 592-7000 - Telephone
(434) 592-7700- Facsimile

MATHEW D. STAVER
FL Bar No. 0701092*
Liberty Counsel
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
court@lc.org
(800) 671-1776 - Telephone
(407) 875-0770 - Facsimile
*Appearing Pro Hac Vice

Attorneys for Campaign for California Families, Plaintiff- Petitioner in Case No. A110652

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INTRODUCTION

As this Court said in *Van Atta v. Scott* (1980) 27 Cal.3d 424, 450 [166 Cal.Rptr. 149, 613 P.2d 210], claims based upon Code of Civil Procedure §526a must be liberally construed to afford a broad base of relief. "Otherwise, the perpetration of public wrongs would continue almost unhampered." *Id.* That is precisely the result of adopting the Court of Appeal's justiciability standard, which would permit governmental officials to evade challenges by simply stopping expenditures before a lawsuit can be resolved. Eager to adopt that standard and do away with the Campaign for California Families' ("the Campaign") zealous defense of the marriage statutes, Petitioners City and County of San Francisco ("CCSF") and the Woo[1] Plaintiffs (collectively "Petitioners") attempt to justify the Court of Appeal's conclusion by ignoring more than 80 years of precedent from this Court. Both the Court of Appeal and Petitioners ignored this Court's directive that "[i]n this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials. . ." *Crowe v. Boyle* (1920) 184 Cal. 117, 152 [193 P. 111]. Instead, the Court of Appeal and Petitioners adopted an

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[1] According to the Petition for Review filed in Case No. A110451, Plaintiffs Lancy Woo and Cristy Chung are not continuing as parties and did not join the Petition. However, for ease of reference and consistency with the underlying case names, the Campaign will refer to the Plaintiffs in Case No. A110451 as the "Woo Plaintiffs."

overly restrictive construction of only part of the Campaign's Section 526a claims in order to justify their conclusion that the claims are not justiciable.

Again misconstruing this Court's precedent, Petitioners claim that the decision in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1069 [17 Cal.Rptr.3d 225, 95 P.3d 459] somehow rendered the Campaign's constitutional claims moot even though this Court specifically said it was not ruling on the constitutional issues. Moreover, Petitioners claim that *Lockyer* rendered the Campaign's claims moot but did not affect Petitioners' constitutional claims. Petitioners do not explain their illogical conclusion, nor their assertion that their cross-complaints raising constitutional issues are moot but their complaints raising the same claims are not.

Petitioners continue their crusade to deny the Campaign a voice in this action by claiming, for the first time, that the Campaign's claims are barred by res judicata and collateral estoppel. That procedural strategy fails, however, because res judicata and collateral estoppel are waived if they are not raised in the trial court.

Reaching the wrong conclusion about justiciability under Section 526a put Petitioners' and the Court of Appeal 's analysis of justiciability under Section 1060 on shaky ground, since a finding of justiciability under Section 526a is also a finding of an actual justiciable controversy under Section 1060.

Van Atta, 27 Cal.3d at 450 n.28. The appellate court's and Petitioners' analyses completely disintegrate when exposed to this Court's declaratory judgment precedents and the California Constitution.

The Court of Appeal and Petitioners claim that the Campaign has, at most, an "abstract or academic dispute"with Petitioners. *In re Marriage Cases* (2006) 143 Cal.App.4th 873, 894. However, under this Court's holdings in *Van Atta* and *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269 [96 Cal.Rptr. 42; 486 P.2d 1242], Petitioners' allegations that the marriage statutes are unconstitutional and the Campaign's allegations built upon the premise that the statutes are constitutional are the kind of opposing positions that satisfy the actual controversy standard. In addition, the Campaign's zealous defense of the marriage statutes, including the furthering of claims abandoned by the State, establishes the adversity of interest necessary for an actual controversy. *See Van Atta*, 27 Cal.3d at 450.

In addition, CCSF's attempt to unilaterally overturn Family Code §308.5 created an actual controversy under Art.4, §1 of the California Constitution. CCSF claims it can disregard the people's right of initiative and referendum reserved under Art.4 §1, while the Campaign asserts that CCSF cannot disregard the Art.4 §1 rights. That is more than an "academic" disagreement, but is the very type of substantial controversy which Code of

Civil Procedure § 1060 is designed to remedy.

What is a more academic dispute is the question of whether the Court of Appeal should have utilized a de novo or abuse of discretion standard of review. The parties disagree about which standard is appropriate, but whatever standard is applied the result is the same: the Court of Appeal erred when it determined that the Campaign's claims are not justiciable.

LEGAL ARGUMENT

I. THE APPROPRIATE STANDARD OF REVIEW FOR THE QUESTION OF WHETHER THE CAMPAIGN'S CLAIMS ARE JUSTICIABLE IS ABUSE OF DISCRETION, BUT REGARDLESS OF THE STANDARD OF REVIEW THAT IS APPLIED, THE COURT OF APPEAL'S DECISION THAT THE CAMPAIGN'S CLAIMS ARE NOT JUSTICIABLE IS ERRONEOUS.

A. The Court Of Appeal Addressed The Question Of Whether The Campaign's Claims Are Justiciable, Not Merely Whether The Campaign Had Standing.

Petitioners wrongly insist that the Court of Appeal properly applied a de novo standard of review to the question of whether the Campaign's claims are justiciable, and that the Court properly concluded that the claims were not justiciable. Petitioners' erroneous conclusions are based upon a mischaracterization of the issue addressed by the Court of Appeal. As the court made clear in its analysis, it was not determining merely whether the Campaign had standing, but whether its claims were justiciable. *In re*

Marriage Cases (2006) 143 Cal. App.4th 873, 893. "As a preliminary matter, we must address arguments that two of the cases before us should have been dismissed because they are not **justiciable controversies**." *Id.* (emphasis added). Standing was not the primary question before the Court of Appeal, but only part of the question of whether the Campaign's claims were justiciable.

Certainly, as Petitioners state, standing is a threshold question of law that is generally reviewed de novo. *People v. Superior Court (Plascencia)* (2002) 103 Cal.App. 4th 409, 424. Therefore, if standing were the only issue being addressed by the Court of Appeal, then the de novo standard discussed in *IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299, *Olson v. Hopkins* (1969) 269 Cal.App. 2d 638, 645 and *Plascencia* would be appropriate. However, standing was not the only issue, or even the primary issue under consideration. "The propriety of a private person's judicial challenge to legislative or executive acts depends upon the fitness of the person to raise an issue ("standing") and the amenability of the issue raised to judicial redress ("justiciability")."*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159 [101 Cal.Rptr. 880, 496 P.2d 1248] (citing *Flast v. Cohen* (1968) 392 U.S. 83, 91-103, 120 L.Ed. 2d 947, 956-964, 88 S.Ct. 1942). More particularly, in the context of declaratory relief actions, justiciability is expressed as whether there is an actual or

probable future controversy between the parties. *Sherwyn & Handel v. California Dep't. of Social Servs.* (1985) 173 Cal.App.3d 52, 58. That is how the Court of Appeal framed the question in this case – not merely as whether the Campaign had standing as a plaintiff, but whether its claims were justiciable. *In re Marriage Cases*, 143 Cal.App. 4th at 894-895. In answering that question, the Court of Appeal should have determined whether the trial court abused its discretion, not engaged in de novo review. *See Sherwyn & Handel*, 173 Cal.App.3d at 59 (using an abuse of discretion standard to overturn the trial court decision finding a justiciable controversy.).

Dolan-King v. Rancho Santa Fe Association (2000) 81 Cal.App. 4th 965 and *Cebular v. Cooper Arms Homeowners Association* (2006) 142 Cal.App.4th 106 do not change the conclusion that the Court of Appeal applied the wrong standard of review when it examined whether the Campaign's claims were justiciable. The courts in *Dolan-King* and *Cebular* held that when the trial court's grant or denial of declaratory relief is based upon stipulated and undisputed evidence, then the trial court's decision is reviewed de novo. *Dolan-King*, 81 Cal.App.4th at 974, *Cebular*, 142 Cal.App. 4th at 119. Neither *Dolan-King* nor *Cebular* dealt with the question at issue here, whether the plaintiffs' claims are justiciable, but instead addressed the question of the proper standard of review of a court's final determination of a declaratory

relief claim. Therefore, they are wholly inapplicable to the question of which standard of review the Court of Appeal should have applied to the trial court's threshold determination of justiciability.

When the question presented is whether an action is justiciable for purposes of Code of Civil Procedure § 1060, rather than whether the plaintiff has standing or whether the trial court properly granted declaratory relief, it is "a matter entrusted to the sound discretion of the trial court." *The Application Group, Inc. v. The Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 893 [72 Cal.Rptr.2d 73]; *California Physicians' Service v. Garrison* (1946) 28 Cal. 2d 790, 801 [172 P.2d 4]. Therefore, the Court of Appeal should have deferred to the trial court's ruling instead of engaging in its own de novo review.

B. The Court of Appeal's Ruling That The Claims Are Not Justiciable Is In Error Regardless of Which Standard Of Review Is Applied.

The discussion of whether an abuse of discretion or de novo standard of review should apply is little more than an academic exercise, because the Court of Appeal's conclusion that the Campaign's claims are not justiciable is incorrect no matter what standard of review is applied. In *McKee v. Orange Unified School District* (2003) 110 Cal.App.4th 1310, 1316, the Court of Appeal utilized a de novo standard of review to reverse the trial court and find that non-district taxpayers had standing to assert a challenge for violation of

the Brown Act against the school district. *Id.* The *McKee* court noted that the Brown Act is to be "construed liberally so as to accomplish its [remedial] purpose." *Id.* at 1318. The *McKee* court found that the trial court failed to abide by that directive and defined the permissible plaintiff class too narrowly. *Id.*

This Court has similarly established that Code of Civil Procedure §526a is to be "construed liberally to achieve this remedial purpose." *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268. The trial court in this case followed that directive and construed the Campaign's case broadly to conclude that the claims are justiciable. Furthermore, the trial court applied the *Blair* directive to all of the Campaign's claims.

By contrast, in its review of the question of justiciability, the Court of Appeal looked at only part of only one of the causes of action of the Campaign's Complaint. The Court of Appeal referred to the Campaign's case as a "purely declaratory relief claim," wholly ignoring the causes of action for preliminary and permanent injunction. In addition, when analyzing the declaratory relief claim, the Court of Appeal wholly ignored allegations related to deprivation of constitutional rights, which place the Campaign's claims squarely within the constitutional issue being considered by this Court. The Court of Appeal's incomplete analysis resulting in the conclusion that the

Campaign's claims are not justiciable is without merit, whether it is based upon abuse of discretion or de novo review.

II. THE CAMPAIGN'S CLAIMS FOR RELIEF UNDER CODE OF CIVIL PROCEDURE §526a REMAIN JUSTICIABLE.

Contravening this Court's directive that justiciability under Code of Civil Procedure §526a is to be interpreted broadly,[2] Petitioners assert that the Campaign lost the right to seek relief under Section 526a the minute that CCSF officials stopped spending tax dollars to issue marriage licenses to same-sex couples. Petitioners also claim that the Campaign is somehow prevented from litigating its claims for injunctive and declaratory relief because this Court granted a writ of mandate in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055. In *Lockyer,* this Court specifically stated that it was **not** addressing whether the marriage statutes are constitutional. *Id.* at 1069. Nevertheless, Petitioners claim that res judicata bars the Campaign from litigating its constitutionally based claims following the *Lockyer* decision. Petitioners' res judicata assertion defies logic. More importantly, Petitioners waived their res judicata claim when they failed to raise it in the trial court.

Under this Court's clearly established precedents the Campaign's claims for injunctive and declaratory relief under Code of Civil Procedure

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[2] *Crowe v. Boyle* (1920) 184 Cal. 117, 152 [193 P. 111].

§526, which are founded upon the constitutionality of the marriage laws, are justiciable controversies. This Court's grant of mandamus relief in *Lockyer* did not render those claims non-justiciable.

A. The Campaign's Taxpayers' Claims Were Not Rendered Moot By This Court's Decision in *Lockyer v. City and County of San Francisco*.

1. The Campaign's status as a taxpayer plaintiff did not evaporate when the City stopped issuing marriage licenses following this Court's ruling in Lockyer .

The Court of Appeal and Petitioners mistakenly wed justiciability under Code of Civil Procedure § 526a with the spending of taxpayer dollars to create an overly restrictive standard in which taxpayers lose the right to challenge governmental actions the minute that the government stops spending money. Both the Court of Appeal and Petitioners misread relevant precedent when they concluded that the Campaign no longer has valid claims under Section 526a because CCSF has stopped spending tax dollars to issue marriage licenses to same-sex couples.

On numerous occasions this Court has explained that a taxpayer action under Code of Civil Procedure §526a is not limited to a challenge of alleged illegal spending. "A taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." *Harman v.*

City and County of San Francisco (1972) 7 Cal.3d 150, 160 (citing *Gogerty v. Coachella Valley Junior College Dist.* (1962) 57 Cal.2d 727, 730 [21 Cal.Rptr. 806, 371 P.2d 582]). This Court explained that "this well-established rule ensures that the California courts, by entertaining only those taxpayers' suits that seek to measure governmental performance against a legal standard, do not trespass into the domain of legislative or executive discretion." *Id.* at 160-161. Therefore, Section 526a actions are not solely aimed at illegal expenditures, but at restricting governmental **conduct** that does not comply with the government's legal duty. *Id.* (emphasis added). Section 526a "provides a general citizen remedy for controlling illegal governmental activity." *White v. Davis* (1975) 13 Cal.3d 757, 763 [120 Cal.Rptr. 94, 533 P.2d 222] , *See also Crowe*, 184 Cal. at 152 ("In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal **conduct** of city officials, and no showing of special damage to the particular taxpayer has been held necessary**."**) (emphasis added).

None of the lower court cases relied upon by Petitioners support their proposition that Code of Civil Procedure §526a is to be interpreted restrictively to permit challenges only when there are ongoing or threatened illegal **expenditures**. With one exception, Petitioners do not cite this Court's precedents in *Crowe*, *Harman, Gogerty* or *White*, but argue that illegal

expenditures are a prerequisite to a Section 526a claim by relying upon lower court decisions which state only that taxpayers are permitted to challenge illegal expenditures under Section 526a. The only time that Petitioners cite the relevant Supreme Court authorities is in the Woo Plaintiffs' answer brief in which they correctly cite *White v. Davis* for the statement that the purpose of Section 526a is to permit a large body of the citizenry to challenge governmental **action**. (Woo Plaintiffs' Consolidated Answer at p. 19, emphasis added). The Woo Plaintiffs promptly sweep that statement aside and refocus on lower court cases that discussed governmental expenditures. None of the lower court cases go as far as Petitioners claim and create a jurisdictional prerequisite of illegal governmental expenditures.[3]

For example, Petitioners claim that *Connerly v. State Personnel Bd* (2001) 92 Cal.App.4th 16 holds that "the gravamen of any taxpayer action is an illegal expenditure,"implying that illegal expenditure is a necessary prerequisite to maintaining taxpayer standing so that once the government stops spending money the taxpayers' claims disappear. (CCSF Consolidated Answer Brief at p. 18). That is not what the *Connerly* court said. Instead the *Connerly* court merely stated that Section 526a "**permits** a taxpayer to bring an action to restrain or prevent an illegal expenditure of public funds." 92 Cal.

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[3] Nor could they without contradicting this Court's precedents.

App.4th at 29. The *Connerly* court then went on to quote from this Court's holding in *White v. Davis* that "taxpayer suits provide a general citizen remedy for controlling illegal governmental **activity**." *Id.* (emphasis added) (citing *White v. Davis* 13 Cal.3d at 763).

Petitioners similarly misstate that *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240 stands for the proposition that expenditures are an indispensable prerequisite to taxpayer standing under Section 526a. In fact, the *Waste Management* court correctly stated that the purpose of Section 526a "is to permit a large body of persons to challenge wasteful government **action** that otherwise would go unchallenged because of the standing requirement." *Id.* (emphasis added). (citing *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268).The *Waste Management* court went on to discuss that illegal expenditures are generally part of the requirement for Section 526a claims, but did not go as far as the Petitioners go and say that once spending has been suspended then taxpayer claims vanish. *Id.* More importantly, the *Waste Management* court's discussion revolved around the fact that the purported plaintiff was not a taxpayer suing a governmental body for activity that adversely affected the public. Instead, the plaintiff was pursuing litigation to protect its competitive and commercial interests, which the court said were not appropriate for

taxpayer standing. *Id.* Contrary to Petitioners' – and the Court of Appeal's – representations, *Waste Management* did not establish that illegal expenditures of public funds are a necessary prerequisite to maintaining status as a taxpayer plaintiff. Consequently, *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 749, which relied upon *Waste Management,* does not support the proposition that taxpayer standing requires actual or threatened expenditures.

Finally, *Zetterberg v. State Department of Public Health* (1974) 43 Cal.App.3d 657, 662 does not support Petitioners' proposition that taxpayers' claims disappear when the threat of public expenditures is gone. Instead, *Zetterberg* holds that being a taxpayer does not, *per se,* bestow standing upon a person without an actual controversy for the court to resolve. *Id.*

This Court has long established that claims for relief under Code of Civil Procedure §526a are to be broadly construed so as to fulfill the purpose of the statute – providing a general citizen remedy for controlling illegal government activity. *White* 13 Cal.3d at 763. As this Court said in *Harman*, Section 526a claims are not limited to illegal government expenditures, but include "cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." *Harman,* 7Cal.3d at 160. The Campaign's claims include allegations of ultra vires actions on the part of CCSF and Mayor Newsom (AA6, ¶ 35, AA7, ¶ 45) as

well as allegations of failure to perform a legal duty (AA5-AA8). The fact that the City is not now spending taxpayer dollars on marriage licenses for same-sex couples does not suddenly render those claims non-justiciable.

The Court of Appeal ignored well-established precedent when it restrictively defined justiciability under Section 526a to include only illegal expenditures and held that the Campaign's claims for relief under Section 526a ceased to exist when CCSF stopped spending public funds to issue marriage licenses to same-sex couples. The Court of Appeal's dismissal of the Campaign's Complaint based upon that impermissible definition must be reversed.

2. This Court's ruling in Lockyer did not grant the Campaign all of the relief it sought under Code of Civil Procedure §526a.

Petitioners also mistakenly claim that the Campaign's claims are moot because this Court granted all of the relief sought by the Campaign when it issued a writ of mandate in *Lockyer*. Even a cursory glance at the allegations of the Campaign's Complaint reveal the fallacy of this argument and of the Court of Appeal's conclusion that the claims based upon Section 526a are not justiciable.

The *raisons d'etre* for the Campaign's suit were 1. Mayor Newsom's statement that he believed the marriage statutes are unconstitutional and 2. the

action he took upon that belief – countermanding his ministerial duty by ordering that marriage licenses be modified to be issued to same-sex couples. The latter action would not have occurred without the mayor's foundational belief that the marriage laws are unconstitutional. Therefore, challenges to the mayor's actions, including the Campaign's claims, were, by necessity, challenges to the reason for his action – a belief that the marriage statutes violate the California Constitution. CCSF acknowledged that the constitutionality of the marriage statutes is integral to the Campaign's claims when it filed a cross-complaint and alleged that "Cross Defendants," which included the Campaign, "contend that Family Code sections 300, 301 and 308.5 are constitutional," while CCSF contends that they are unconstitutional, thus establishing an actual controversy. (AA50). The Woo Plaintiffs filed a similar cross-complaint in intervention. (AA92-AA111). Consequently, at the time that this Court heard *Lockyer* it was undisputed that the constitutionality of the marriage laws was part of the Campaign's claims. Now, however, Petitioners call the cross-complaints "irrelevant" to the question of whether the Campaign's constitutional claims are justiciable, citing the fact that the cross-complaints were dismissed after the *Lockyer* decision. Petitioners allege that the cross-complaints were dismissed because Petitioners believed they were moot after *Lockyer*. (Woo Plaintiffs' Answer Brief, p. 14, n7.). In fact, the

cross-complaints were dismissed only after CCSF and the Woo Plaintiffs filed their own actions challenging the marriage statutes in response to this Court's statement that its temporary stay of the issuance of marriage licenses did not prevent parties from filing new actions. *See In re Marriage Cases*, 143 Cal.App.4th at 891. The Petitioners' allegation that they dismissed the cross-complaints because they were moot is a self-defeating proposition. If the constitutionality of the marriage laws raised in the Campaign's complaint and Petitioners' cross-complaints became moot after this Court's decision in *Lockyer*, then those same allegations in Petitioners' complaints, which are the subject of this action, are also moot. Petitioners cannot use a double standard to stack the deck in their favor. They cannot ask this Court to resolve their claims that the marriage statutes are unconstitutional and demand that the Court deny the Campaign the opportunity to have its claim that the statutes are constitutional resolved. Petitioners established that the Campaign's claims are based upon the constitutionality of the marriage statutes when they filed their cross-complaints. Their voluntary dismissal of the cross-complaints after they filed their own actions did not mean, as Petitioners now contend, that their allegations became untrue. If that were the case, then Petitioners would be admitting that they made false allegations in their cross-complaints. Certainly, that is not what Petitioners intend.

When this Court issued its opinion in *Lockyer*, it resolved the challenge to the actions taken by Mayor Newsom and CCSF without resolving the challenge to Mayor Newsom's underlying belief that the statutes are unconstitutional. *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055,1069. This Court rejected the Attorney General's invitation to decide the substantive issue of the constitutionality of the marriage statutes. *Id.* at 1073. Instead, this Court issued the writ of mandate on the narrower ground that the city respondents could not refuse to carry out their ministerial duties of enforcing the marriage statutes based upon the officials' opinion of whether the statutes are constitutional. *Id.* at 1082. This Court acknowledged the continuing relevancy of the constitutional question to the parties' claims when it ordered city officials to enforce the marriage laws "unless and until they are judicially determined to be unconstitutional." *Id.* at 1069. Thus, this Court closed the door on the City's attempt to circumvent the law based upon beliefs that the statutes were unconstitutional, but left open the question of whether the statutes are constitutional. *Id.* As Petitioners acknowledged when they filed their cross-complaints, the question of the constitutionality of the marriage statutes is at the heart of the Campaign's Complaint, just as it is at the heart of Petitioners' Complaints. Therefore, the substantive constitutional question remains justiciable for the Campaign just as it does for Petitioners.

Nevertheless, Petitioners argue that *Lockyer* somehow rendered the Campaign's constitutional claims moot while leaving Petitioners' constitutional claims intact. "This Court has already granted all of the substantive relief available to Petitioners under section 526a." (Woo Plaintiffs' Answer Brief, p. 14). "The Fund and the Campaign lack taxpayer standing because *Lockyer* rendered moot any claims they had or could have asserted as taxpayers." (CCSF Answer Brief, pp. 16-17). Incredibly, CCSF claims that "*Lockyer* rendered moot all taxpayer claims asserted by the Fund and the Campaign. All of those claims – **including any declaratory relief claims addressing the constitutionality** of the marriage exclusion – should therefore be dismissed." (CCSF Answer Brief, p. 17 (emphasis added)). Petitioners do not explain how *Lockyer* could have rendered the Campaign's constitutional claims moot without affecting Petitioners' claims, but merely revert to the argument that standing is lost when spending has stopped.

Petitioners' continuing assertion that taxpayer standing disappears as soon as the government stops spending money is questionable at best in light of this Court's decisions *Stanson v. Mott* (1976) 17 Cal.3d 206 [130 Cal.Rptr. 697, 551 P.2d 1] and *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143 [69 Cal.Rptr.2d 329, 947 P.2d 291]. In *Stanson*, this Court overruled a demurrer and permitted the plaintiff to proceed with a

Section 526a claim despite the fact that the election for which the expenditures were made was over and there was no threat of any continuing expenditures for that bond election. *Stanson*, 17 Cal. 3d at 222-223. If, as Petitioners assert, taxpayers lose standing as soon as spending stops, then the *Stanson* plaintiff would have been prohibited from pursuing his action since there was no possibility of further spending for that election. Instead, this Court said that the plaintiff's allegations, if proven, would entitle him to at least declaratory relief and perhaps injunctive relief. *Id.* The Woo Plaintiffs attempt to distinguish *Stanson* on the grounds that the trial court had not yet determined that there had been illegal expenditures. Their argument misses the point. Regardless of the factual circumstances of the case, if Petitioners' argument that taxpayer standing dissolves when spending stops were true, then Section 526a cases which have not been fully adjudicated would be dismissed as soon as the government stopped the challenged spending. Under Petitioners' theory, the plaintiff in *Stanson* would have been foreclosed from challenging the prior expenditures once the election was over. The fact that he was permitted to continue with his declaratory and injunctive relief claims demonstrates that standing is not dependent upon ongoing or threatened improper expenditures. Similarly, this Court's ruling that PG&E could continue with its Section 526a claim against expenditures for a federal lawsuit even after the lawsuit was

dismissed illustrates that standing is not dependent upon ongoing improper expenditures.

Stanson and *PG&E* reflect this Court's longstanding recognition that Section 526a claims are to be interpreted liberally so as to fulfill the statute's purpose of providing "a general citizen remedy for controlling illegal governmental activity." *White v. Davis* (1975) 13 Cal.3d 757, 763. The Court of Appeal ignored this directive when it narrowly defined the Campaign's declaratory relief claim, failed to even acknowledge the injunctive relief claim and relied upon only selective factual allegations to arrive at its conclusion that the Campaign's claims under 526a are not justiciable. That conclusion must be reversed.

B. Petitioners Have Waived Any Claim That The Campaign's Action Is Barred By Res Judicata or Collateral Estoppel.

Petitioners further err when they attempt to defeat the Campaign's claims by asserting res judicata and collateral estoppel for the first time in this proceeding. Their assertion is too little too late. Res judicata is waived if it is not raised in the trial court. *Dillard v. McKnight* (1949) 34 Cal.2d 209, 219 [209 P.2d 387]. Similarly plaintiffs waive their right to assert collateral estoppel if they do not raise it in the trial court. *People v. Morales* (2003) 112 Cal.App.4th 1176, 1185. Since Petitioners did not raise either res judicata or

collateral estoppel before now, they have lost the right to use those doctrines to try to exclude the Campaign's claims from this Court's consideration.

III. THE CAMPAIGN'S CLAIMS FOR RELIEF UNDER CODE OF CIVIL PROCEDURE § 1060 REMAIN JUSTICIABLE.

This Court's directive that "provision must be made for a broad basis of relief" when taxpayers are challenging governmental actions, applies not only to justiciability under Code of Civil Procedure §526a, but also to justiciability under Section 1060. *Van Atta v. Scott* (1980) 27 Cal.3d 424, 450. As this Court said in *Van Atta*, an action which meets the criteria of Section 526a satisfies the actual controversy requirement of Section 1060. *Id.* at 450 n.28. As discussed more fully above, the Campaign's claims satisfy Section 526a despite the Court of Appeal's ruling to the contrary. Consequently, the Campaign's claims are also justiciable under Section 1060.

Furthermore, the opposing positions that the Campaign and Petitioners espouse on the constitutionality of the marriage laws easily satisfy the actual, justiciable controversy requirement under Section 1060. Finally, there is an actual and justiciable controversy between the Campaign and Petitioners related to the rights of initiative and referendum reserved to the people under Art. 4, §1 of the California Constitution.

A. There Is An Actual And Justiciable Controversy Between The Campaign And The Petitioners Regarding The Constitutionality Of The Marriage Statutes.

Petitioners correctly state that the "actual controversy" in Code of Civil Procedure §1060 "is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may or may not do." *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117 [109 Cal. Rptr. 799; 514 P.2d 111]. However, Petitioners incorrectly conclude that the Campaign's claims do not satisfy that definition. In *Selby*, this Court found that there was no actual controversy because the county had not taken any action regarding the plaintiff's property, but had merely adopted a general plan depicting streets that would cross plaintiff's land if they were constructed. *Id.* at 118.

> Whether eventually any part of plaintiff's land will be taken for a street depends upon unpredictable future events. If the plan is implemented by the county in the future in such manner as actually to affect plaintiff's free use of his property, the validity of the county's action may be challenged at that time.

Id. By contrast, in this case, the question of whether Petitioners will take action regarding taxpayers' constitutional rights does not depend upon unpredictable future events, but is a present reality. CCSF sparked the controversy when its

officials declared that they believed the marriage laws are unconstitutional and then acted upon that belief by issuing marriage licenses to same-sex couples. The Campaign's responsive lawsuit established the opposing viewpoint – that the marriage laws are constitutional and CCSF has no right to circumvent the law. In *Lockyer* this Court resolved the issue of CCSF's active circumvention of the law, but explicitly did not resolve the actual controversy between the Petitioners' position that the marriage laws are unconstitutional and the Campaign's position that the marriage laws are constitutional. That controversy has actually grown since then as additional parties have filed lawsuits taking the position that the laws are unconstitutional. Unlike the *Selby* case, this is not a request for an advisory opinion based upon hypothetical facts. Instead, it is an actual dispute which this Court can definitively resolve. This Court will decree, not merely suggest, that either Petitioners are right and the marriage laws are unconstitutional, or that the State, the Campaign and the Fund are right, and the marriage laws are constitutional.

Similarly, this case is unlike *Auberry Union School District v. Rafferty* (1964) 226 Cal.App.2d 599,603. In *Auberry*, the parties made only broad allegations that they "disagreed" about how a statute was to be interpreted and wanted the court to resolve the disagreement. *Id.* There were no allegations that the parties were actually on opposite sides of any particular issue. *Id.* For

that reason, the *Auberry* court found that there was not a controversy of "concrete actuality" to support a declaratory relief claim. *Id.* "Where it is apparent that the defendant does not actually oppose the position taken by the plaintiff, there obviously can be no controversy and there is nothing to be determined by the court." *Id.* In this case there is no doubt that the Campaign and Petitioners directly oppose the other's respective position regarding the constitutionality of the marriage statutes. Petitioners assert that the statutes are unconstitutional. The Campaign asserts that they are constitutional. In fact, the very reason that the Campaign initiated its action was to defend the marriage laws as constitutional against CCSF's claim that the statutes are unconstitutional and that therefore city officials can defy them. Unlike the "friendly disagreement" between the parties in *Auberry*, the respective positions in this case are wholly opposite and mutually exclusive.

Similarly, the Campaign is unlike the remotely interested parties who were denied standing in *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42 and *City of Santa Monica v. Stewart* (2005) 126 Cal.App. 4th 43. In *Fladeboe*, the plaintiffs were not parties to the contractual agreement that they were challenging. *Fladeboe*, 150 Cal.App.4th at 54-55. In *Stewart*, the City of Santa Monica was neither an obligor nor an obligee under a newly enacted campaign fund disclosure law, and therefore could not allege that its

rights would be affected. *Stewart*, 126 Cal.App. 4th at 60. In addition, the city's opposition to passage of the law, minimal support and tepid allegations for relief left the court of appeal with significant doubts that "Santa Monica is a 'party with a true incentive ... to present arguments supporting [the Initiative's] validity.'" *Id.* (citing *Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1247). Citing this Court's ruling in *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159, the *Stewart* court noted that standing is based upon not only the party's stake in the action, but also the force by which it presents its case. *Stewart*, 126 Cal.App.4th at 60. In that case, the City of Santa Monica failed on both counts.

By contrast, in this case, the Campaign has both a significant stake in the outcome of this action and has vigorously defended the constitutionality of the marriage laws. In fact, the Campaign has in some cases been a more zealous advocate for the marriage laws than has the State. One of the key arguments that the Campaign has raised throughout this action is the importance of marriage as a means of fostering responsible procreation, an issue that the United States Supreme Court has recognized is integral to the fundamental right of marriage. *See, e.g., Skinner v. Oklahoma* (1942) 316 U.S. 535 (Describing procreation as an important governmental interest central to our understanding of marriage). Despite that clear direction from the United

States Supreme Court, the Attorney General has rejected the responsible procreation issue as "irrelevant," leaving the Campaign to defend the marriage laws on that basis. In addition, the Campaign's members, acting through the Campaign, have a significant stake in the action, not only as taxpayers defending the constitutionality of a legislative act, but also as taxpayers defending the right of initiative and referendum reserved to the people in Art. 4 § 1 of the California Constitution.

B. There Is An Actual and Justiciable Controversy Between The Campaign And The Petitioners For Deprivation Of The Constitutional Rights Of Initiative And Referendum.

As this Court said nearly 60 years ago, "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 [196 P.2d 787]. The people's right of initiative has been part of the California Constitution since 1911 and is regarded as "one of the most precious rights of our democratic process." *Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473]. Consequently, "[t]he free exercise of the right of initiative reserved to the people may not be circumscribed except by the people of the state acting through the Legislature." *Goodenough v. Superior Court (Parker)* (1971) 18 Cal.App.3d 692, 696 [97 Cal.Rptr. 165].

Family Code §308.5, one of the statutes being challenged by Petitioners, is an example of the exercise of the people's initiative right under Art. 4 §1. More than 4.6 million Californians voted to add Section 308.5 to the Family Code when they approved Proposition 22 in 2000 with 61.4 percent of the vote.[4] Mayor Newsom tried to circumvent the people's right of initiative by unilaterally declaring Section 308.5 unconstitutional and directing city officials to violate it. CCSF's position is that it can annul an initiative statute as unconstitutional without consulting with the people who enacted it. The Campaign's position is that an initiative statute cannot be cavalierly disregarded and superceded without the consent of the people. These opposing positions create the actual controversy that this Court is being asked to resolve. As is true with the question of the constitutionality of the marriage statutes, the question of the violation of the right of initiative is a present, existing controversy which can be definitively resolved by this Court. This is not an advisory opinion on an academic dispute regarding hypothetical facts, but is a bona fide dispute over a critical constitutional right. Do the people of California have the right to enact legislation via initiative without being second

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[4] The final vote statistics were obtained from the Statement of the Vote, March 2000 Primary Election, issued by the California Secretary of State. http://www.ss.ca.gov/elections/sov/2000_primary/measures.pdf (last visited March 23, 2007).

guessed by municipal officials? The Campaign says yes. CCSF says no. This Court will decide.

Notably, CCSF failed to even address this issue in its Answer Brief. In fact CCSF did not even cite to Art. 4 §1 of the California Constitution. The Woo Plaintiffs relegated the issue to a footnote and then feigned puzzlement at how the constitutional provision gives rise to a justiciable controversy. As described in detail above, the right of initiative reserved to the people is not merely an aside to be thrown into a footnote, but is "one of the most precious rights of our democratic process," which is to be zealously guarded. *Associated Home Builders*, 18 Cal.3d at 591. The justiciable controversy lies in CCSF's utter disregard for the right and the Campaign's action to protect it. This Court's ruling on the constitutionality of the marriage statutes will determine whether the Campaign is right that CCSF violated the constitution through its actions or whether CCSF is right that the initiative statute is unconstitutional.

CONCLUSION

The Court of Appeal erred when it applied de novo review to overturn the trial court's decision that the Campaign's claims are justiciable. This Court's ruling in *Lockyer* did not render moot all of the Campaign's claims . Petitioners have waived the right to assert res judicata or collateral estoppel. There is a present and existing actual controversy between Petitioners and the

Campaign regarding the constitutionality of marriage statutes.

For these reasons, the Court of Appeal's determination that the Campaign's claims are not justiciable must be reversed.

Dated: August 16, 2007

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MARY E. MCALISTER
(SBN 148570)
Liberty Counsel
PO Box 11108
100 Mountain View Rd Suite 2775
Lynchburg, VA 24506

MATHEW D. STAVER
FL Bar No. 0701092*
Liberty Counsel
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
*Admitted pro hac vice

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief has been prepared using proportionately double-spaced 13 point Times New Roman font. According to the "word count" feature of WordPerfect, which was used to prepare this document, the total number of words including footnotes but excluding the Table of Contents, Table of Authorities and this Certificate, is 6,900 words.

I declare under penalty of perjury under the laws of the State of California that this statement is true and correct.

Executed on August 16, 2007 at Lynchburg, Virginia.

_____
Mary E. McAlister

PROOF OF SERVICE

I, Mary E. McAlister, declare that I am over the age of eighteen and am not a party to this action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg, Virginia 24502.

On August 16, 2007, I served the above Reply Brief on Justiciability on the interested parties in this action in the manner indicated below:

X By Mail: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail in Lynchburg Virginia (as indicated on the Service List).

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct; that this declaration is executed on August 16, 2007, in Lynchburg, Virginia.

_____

Mary E. McAlister

SERVICE LIST

Clerk of Court Superior Court of California County of San Francisco Civic Center Courthouse 400 McAllister St San Francisco, CA 94102	Clerk of Court California Court of Appeals 1st Appellate District, Division 3 350 McAllister St. San Francisco, CA 94102
Christopher Edward Krueger State of California, Dept. of Justice Office of the Attorney General 1300 I Street #125 PO Box 944255 Sacramento, CA 94244-2550 christopher.krueger@doj.ca.gov Attorneys for State Defendants	Terry L. Thompson 199 East Mesa Linda - Suite 10 Danville, CA 94526 tl_thompson@earthlink.net Attorneys for Plaintiffs Proposition 22 Legal Defense and Education Fund
Benjamin Bull Glen Lavy Dale Schowengerdt Christopher R. Stovall Alliance Defense Fund 15333 N Pima Rd, Suite 165 Scottsdale, AZ 85260 Attorneys for Plaintiffs Proposition 22 Legal Defense and Education Fund	Robert H. Tyler Advocates for Faith and Freedom 24910 Las Brisa Rd, Suite 110 Murrieta, CA 92562 Attorney for Plaintiffs Proposition 22 Legal Defense and Education Fund
Andrew P. Pugno Law Offices of Andrew Pugno 101 Parkshore Dr, Suite 100 Folsom, CA 95630 Attorneys for Plaintiffs Proposition 22 Legal Defense and Education Fund	Gloria Allred Michael Maroko John West Allred, Maroko & Goldberg 6300 Wilshire Blvd. Suite 1500 Los Angeles, CA 90048 mmaroko@amglaw.com Attorneys for Plaintiffs Robin Tyler, et al.

Waukeen Q. McCoy Law Offices of Waukeen Q. McCoy 703 Market Street San Francisco, CA 94103 Attorneys for Plaintiffs Clinton, et al.	Lloyd Pellman Derrick Au 648 Kenneth Hahn Hall of Administration 500 W. Temple St. Los Angeles, CA 90012 Attorneys for Intervenor County of Los Angeles
Therese Stewart Chief Deputy City Attorney City and County of San Francisco Office of the City Attorney 1 Dr. Carlton B. Goodlett Place Room 234 San Francisco, CA 94102-4682 therese.stewart@sf.gov.org Attorneys for Plaintiffs City and County of San Francisco and Gavin Newsom, et al.	Amy Elizabeth Margolin Bobbie Jean Wilson Howard Rice Nemerovski Canady Falk & Rabkin Three Embarcadero Center, 7th Floor San Francisco, CA 94111 amargolin@howardrice.com Attorneys for Plaintiffs City and County of San Francisco and Gavin Newsom, et al.
Jason Hasley Paul, Hanley & Harley LLP 1608 4th St, Suite 300 Berkeley, CA 94710 Attorneys for Plaintiffs Clinton, et al	Stephen Victor Bomse Heller Ehrman White & McAuliffe 333 Bush Street San Francisco, CA 94101 sbomse@hewm.com Attorneys for Intervenors Martin et al. Attorneys for Plaintiffs Woo, et al. Attorneys for Intervenor Equality California

Shannon Minter National Center for Lesbian Rights 870 Market Street, Ste. 570 San Francisco, CA 94014 minter@nclrights.org Attorneys for Martin, et al. Attorneys for Woo, et al. Attorneys for Equality California	David C. Codell 9200 Sunset Blvd, Penthouse Two Los Angeles, CA 90069 Attorney for Martin, et all Attorney for Woo, et al Attorney for Equality California
Jon Davidson Jennifer Pizer Lambda Legal Defense & Education Fund 3325 Wilshire Blvd #1300 Los Angeles, CA 90010-1729 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California	Alan L. Schlosser ACLU Foundation of Northern California 39 Drumm St San Francisco, CA 94111 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California
Christine Sun ACLU Foundation of Southern California 1616 Beverly Blvd Los Angeles, CA 90026 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California	Clyde Wadsworth Steefel Levitt & Weiss 1 Embarcadero Center 30th Fl San Francisco, CA 94111-3719 Attorneys for Martin, et all Attorneys for Woo, et al Attorneys for Equality California