

Case No. S147999

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
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

REPLY TO ANSWERS TO PETITIONS FOR REVIEW

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in Nos. A110651 and A110652*

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DISCUSSION¹

The Answers of the Proposition 22 Legal Defense and Education Fund (“the Fund”) and the Campaign for California Families (“the Campaign”) do not detract from the case for why this Court should grant review of the important constitutional questions raised by the five petitions challenging the validity of California’s statutory exclusion of same-sex

¹ The Reply is filed on behalf of the following parties (referred to herein as the “Rymer-Martin parties”) in the following cases:

- in *Woo v. Lockyer*, Court of Appeal Case No. A110451, on behalf of Joshua Rymer and Tim Frazer, Jewelle Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Karen Shain and Jody Sokolower, Janet Wallace and Deborah Hart, Corey Davis and Andre LeJeune, Rachel Lederman and Alexsis Beach, Stuart Gaffney and John Lewis, Phyllis Lyon and Del Martin, our Family Coalition, and Equality California, who were plaintiffs-petitioners in the San Francisco Superior Court and respondents in the Court of Appeal;
- in *Tyler v. State of California*, Court of Appeal Case No. A110450, on behalf of Equality California, which was an intervener plaintiff/petitioner in the Los Angeles Superior Court (and thereafter the San Francisco Superior Court) and a respondent in the Court of Appeal; and;
- in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, Court of Appeal Case No. A110651, and in *Campaign for California Families v. Newsom*, Court of Appeal Case No. A110652, on behalf of Equality California, Del Martin and Phyllis Lyon, Sarah Connor and Gillian Smith, Margot McShane and Alexandra D’Amario, David Scott Chandler and Jeffery Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, who were intervener plaintiffs/petitioners in the San Francisco Superior Court in these two actions and respondents in the Court of Appeal.

Two of the plaintiffs/petitioners and respondents in No. A110451, Lancy Woo and Cristy Chung, are not continuing as parties in this litigation for personal reasons unrelated to the merits of these constitutional challenges. They therefore have not joined this Reply.

couples from marriage.² To the contrary, the Fund and the Campaign concede the great importance of those constitutional questions.³ Moreover, the State of California supports this Court's review. Accordingly, the Rymer-Martin parties restrict this Reply to correcting two errors in the Answers of the Fund and the Campaign.

First, the Fund's argument that petitioner Equality California and petitioners Del Martin and Phyllis Lyon are judicially estopped from relying upon the legislative findings in A.B. 205 in making arguments against the exclusion of same-sex couples from marriage is meritless and provides no basis to deny review of the petitions in *Woo v. Lockyer* or *Tyler v. State of California*.⁴ The Fund's argument appears to be that, because Equality California, Del Martin, and Phyllis Lyon argued in an earlier case that A.B. 205 did not amend Proposition 22 by allegedly providing for marriages of same-sex couples (see *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22), they cannot now cite to the Legislature's findings in enacting A.B. 205 in support of their argument that California's marriage

² Those five petitions are by the City and County of San Francisco in No. A110449; by Equality California in No. A110450; by Robin Tyler, et al. in No. A110450; by Joshua Rymer, et al. in No. A110451; and by Gregory Clinton, et al. in No. A110463.

³ With respect to the substantive constitutional questions concerning the marriage statutes, the Campaign and the Fund do not contend that the questions are not important enough for this Court's review; rather, the Campaign and the Fund contend that, in their view, the Court of Appeal resolved the questions correctly. (See Campaign's Answer to Petitions for Review, at pp. 1-3, 5-6, 8-9, 12-25, and 34 [urging this Court to deny review because the Court of Appeal, in the Campaign's view, ruled "properly" or "correctly"]; Fund's Answer Opposing Petitions for Review on Merits, at pp. 4-6 [defending the Court of Appeal's conclusion that the constitutional challenges posed here can be disposed of by relying on a historical "definition" of marriage as being between a man and a woman]).

⁴ The Fund does not argue that judicial estoppel has any application to the remaining petitioners.

laws are unconstitutional. The Fund's argument fails because the positions taken by Equality California and by Del Martin and Phyllis Lyon have been fully consistent throughout both sets of litigation, and therefore certainly could not meet the "total[] inconsisten[cy]" required for judicial estoppel to apply. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.)

In *Knight*, a group of interveners that included Equality California, Del Martin, and Phyllis Lyon argued that domestic partnerships are not the same as marriage and that, by enacting A.B. 205, the Legislature did not amend section 308.5 of the Family Code to permit marriage by same-sex couples. (See *Knight v. Superior Court, supra*, 128 Cal.App.4th at pp. 30-31.) In the present cases, the position taken by Equality California, Del Martin, and Phyllis Lyon is the same: domestic partnerships under A.B. 205 are not the same as marriage. In this Court, as well as the trial court and the Court of Appeal, Equality California, Del Martin, and Phyllis Lyon have relied on A.B. 205 not to argue that the Legislature has amended Proposition 22 to permit marriage of same-sex couples, but to show that: (1) the Legislature's findings recognize that domestic partnership is not a complete remedy for the inequalities faced by same-sex couples; (2) the Legislature's findings expressly disavow many of the public policy rationales on which the Fund relies to defend the constitutionality of the marriage laws, such as the idea that households headed by same-sex couples provide an inferior or harmful environment for raising children; and (3) the Legislature's findings recognize that the marriage laws discriminate against same-sex couples on the bases of sex and sexual orientation. Those findings express California's public policy, and Equality California, Del Martin, and Phyllis Lyon are entitled to quote from and to rely on the findings in A.B. 205, just as this Court did in *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 846, 849. Simply stated, there is no inconsistency between the positions that Equality

California, Del Martin, and Phyllis Lyon have taken, and judicial estoppel does not apply. (See *Aguilar v. Lerner*, *supra*, 32 Cal.4th at pp. 30-31 [refusing to apply judicial estoppel because positions were not “totally inconsistent”].)

Second, the Campaign’s argument that it continues to have a valid taxpayer standing suit simply because the Campaign sought injunctive as well as declaratory relief in its original complaint against the City and County of San Francisco (the “City”) has no merit and provides no basis to grant review of the Court of Appeal’s holding that the Campaign lacks standing. In its original complaint, the Campaign sought, among other relief, a permanent injunction enjoining Defendants San Francisco Mayor Gavin Newsom and San Francisco County Clerk Nancy Alfaro “from implementing the Mayor’s Directive, revising forms and documents used to apply for and issue marriage licenses, issuing marriage licenses to same-sex couples and from illegally expending public funds.” (Campaign’s Appendix, Case No. A110652, p. 9.) In *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, however, this Court rendered the Campaign’s request for a permanent injunction completely moot by issuing a writ of mandate compelling all relevant City officials “to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes.” (*Id.* at 1120.) The City immediately complied with this Court’s ruling. Accordingly, because this Court already granted the relief sought by the Campaign in its request for permanent injunctive relief and because there is no ongoing expenditure of public funds for the Campaign to challenge by means of a taxpayer standing suit, the Campaign’s argument on this point has no merit and does not provide a reason for this Court to grant review of the Court of Appeal’s ruling that the Campaign lacks standing, which resulted from the Court of Appeal’s straightforward application of settled law.

CONCLUSION

This Court should grant review of the constitutional questions posed by the five petitions for review challenging the marriage statutes (listed *supra* in footnote two) and should deny review of the of the Court of Appeal's unremarkable conclusion that this Court's decision in *Lockyer v. City and County of San Francisco* deprived the Fund and the Campaign of standing to seek further declaratory or injunctive relief against the City.

Dated: December 11, 2006 Respectfully submitted,

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**CERTIFICATE OF WORD COUNT
PURSUANT TO RULE 14(c)(1)**

Pursuant to California Rule of Court 14(c)(1), counsel for Respondents hereby certifies that the number of words contained in this Reply to Answers to Petitions for Review, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 1,416 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: December 11, 2006

Respectfully submitted,

By: 
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I, Elizabeth Terry, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 870 Market Street, Suite 370, San Francisco, California 94103.

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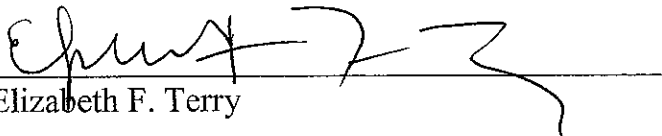
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San Francisco Superior Court Case No. CGC-04-429539
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