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In the

Supreme Court

of the

State of California

IN RE MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365
Court of Appeal No. A110651

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE, COURT OF APPEALS CASE NOS. A110449, A110450, A110451 A110463, A110651, A110652
SAN FRANCISCO SUPERIOR COURT NOS. JCCP43665, 429539, 429548, 504038
LOS ANGELES SUPERIOR COURT NO. BC088506
HON. RICHARD A. KRAMER

APPLICATION TO FILE AMICI CURIAE BRIEF, AND AMICI BRIEF, OF PACIFIC JUSTICE INSTITUTE AND CAPITOL RESOURCE INSTITUTE, IN SUPPORT OF PETITIONERS PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND AND CAMPAIGN FOR CALIFORNIA FAMILIES REGARDING PARTY STANDING OF PETITIONERS AND RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

KEVIN T. SNIDER, ESQ. (170988)
MATTHEW B. MCREYNOLDS, ESQ. (234797)
PACIFIC JUSTICE INSTITUTE
Post Office Box 276600
9851 Horn Road, Suite 115
Sacramento, California 95827
(916) 857-6900 Telephone
(916) 857-6902 Facsimile

Attorneys for Amici Curiae, Pacific Justice Institute

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici Curiae know of no entity or person that must be listed under Rule 8.208(d)(1) or (2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA STATE CASES

FEDERAL CASES

NON-CALIFORNIA STATE CASES

CALIFORNIA STATUTES

FEDERAL STATUTES

OTHER AUTHORITIES

APPLICATION TO FILE *AMICI* BRIEF

To the Honorable Chief Justice of this Court:

Pacific Justice Institute and Capitol Resource Institute Request Leave to File an Amici Brief in this case in support of Petitioners Campaign for California Families (CCF) and the Prop. 22 Legal Defense and Education Fund (Fund).

INTEREST OF APPLICANTS

Applicants Pacific Justice Institute (PJI) and Capitol Resource Institute (CRI) are non-profit legal and public policy-focused organizations based in Sacramento. PJI and CRI promote, educate the public in reference to, and defend pro-family ballot measures and legislation. PJI was recently granted amicus status to defend Proposition 83, popularly known as "Jessica's Law," in *Doe v. Schwarzenegger*, E.D. Cal. Civ. Case No. Civ. S-06-2521 (Karlton, J.) PJI attorneys have either directly participated in, or provided advisory counsel on, a number of matters in California where public interest and civil rights issues have been decided. *See, e.g.*, *Tucker v. California Department of Education*, 97 F.3d 1204 (9th Cir. 1996); *Van Schoick v. Saddleback Valley Unified School District*, 87 Cal.App.4th 522 (2001); *Evans v. City of Berkeley*, 38 Cal.4th 1 (2006).

CRI is an active supporter of pro-family legislation and initiatives, and it was active in the adoption of Proposition 22 by California voters.

This Court's determination as to whether public interest groups have standing to defend ballot initiatives and legislation which they have supported, particularly when the Office of the Attorney General does not support and will not defend the philosophical premises of the legislation, is crucial to the future of citizen initiatives. In a similar vein, the Court's determination as to whether political subdivisions of a state have standing to challenge initiatives based solely on ideological disagreement with a majority of the state's voters will affect the integrity of the initiative process. Allowing a taxpayer-funded local government agency to mount a legal challenge to a ballot initiative—while applying insurmountable standing hurdles for public interest organizations—frustrates the ability of the applicants to promote and defend the adoption and implementation of citizen initiatives.

For these reasons, the applicants seek leave to file the accompanying *amici* brief.

DATED: September 25, 2007

Respectfully submitted,

PACIFIC JUSTICE INSTITUTE

By: _____
Matthew B. McReynolds, Esq.
Counsel for *Amici*

SUMMARY OF THE ARGUMENT

In the maelstrom of marriage litigation pending before the Court, a crucial but largely overlooked issue of justiciability has the potential to affect countless cities, counties, other political subdivisions of the state and public interest organizations across the ideological spectrum. To date, the lower courts have accepted unquestioningly the City and County of San Francisco's novel premise that it somehow possesses standing sufficient to challenge Proposition 22 on behalf of its residents who disapprove of the law. At the same time, the appellate court dismissed two public-interest organizations which sought to defend Proposition 22, in spite of the fact that the Office of the Attorney General has, at best, mixed motives in defending current state law preserving heterosexual marriage.

The dichotomy between the lower courts' treatment of a local government entity versus public interest organizations is unprecedented, untenable and unworkable for similar standing issues which will inevitably recur throughout the courts of this state in the foreseeable future. *Amici* urge this Court to hold that the City and County of San Francisco does not have party standing to challenge Proposition 22, particularly since same-sex couples are already challenging the law. *Amici* further requests that the Court reinstate standing for the Proposition 22 Legal Defense and Education Fund and Campaign for California Families, for this and future

cases where the Office of the Attorney General does not support and will not vigorously defend the philosophical premise of the challenged law.

ARGUMENT

I. San Francisco Lacks Standing to Challenge the Constitutionality of the Initiative in an Action for Pure Declaratory Relief Because the City is a Subdivision of the State.

For all that has been said for and against the standing of CCF and the Fund, it is remarkable that, insofar as *amici* is aware, no party or court has yet recognized the significant justiciability hurdles which, ultimately, the City and County of San Francisco (San Francisco) cannot overcome.

As a political subdivision of the state and not a party which belongs to a class allegedly discriminated against, San Francisco lacks the standing to make a challenge, particularly on equal protection grounds, to the laws of the state. (*Community Television of So. Cal. v. County of Los Angeles* (1975) 44 Cal.App.3d 990, 998.) Therefore, this Court should properly dismiss the City from the current proceedings.

A. The Court may raise the issue of standing on appeal, *sua sponte*, because lack of standing is a jurisdictional challenge that can be raised at any time.

Standing may be raised on appeal, *sua sponte*. "[C]ontentions based on a lack of standing involve *jurisdictional challenges* and may be raised at any time in the proceeding." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438; *McKinny v. Board of Trustees* (1982) 31 Cal.3d

79, 90 (emphasis added); *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 619; *Matrixx Initiatives, Inc. v. Doe* (2006)138 Cal.App.4th 872, 877 ["the issue of standing is so fundamental that it need not even be raised in the trial court—let alone decided—as a prerequisite to the appellate court's consideration."].) Standing can be raised at any time during the proceedings because standing to sue affects the right to relief and goes to the *existence of a cause of action* against the defendant. (See, Code of Civ. Proc. § 430.80; *Killian v. Millard* (1991) 228 Cal.App.3d 1601,1605.)

In addition, courts have a "duty to raise issues concerning [their] jurisdiction on [their] own motion." (*Porter v. United Services Automobile Ass'n*, 90 (2001) Cal.App.4th 837, 838.) Since courts have a duty to raise jurisdictional issues sua sponte and lack of standing is a jurisdictional defect that can be raised at any time during the proceedings, the Court may properly consider the issue of the City's lack of standing at any time during the proceedings. (*Porter*, *supra,* at p. 838; *Common Cause,* 49 Cal.3d at p. 438; Cf. *Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 195 [Courts have a duty to raise jurisdictional defects (such as lack of final judgment) on their own motion, even if the parties do not raise these issues.].)

As courts in other jurisdictions have noted, even when the parties have assumed that standing exists, it is vital for the reviewing court to independently determine it. (*RK Ventures, Inc. v. City of Seattle* (9th Cir.

2002) 307 F.3d 1045, 1056; *San Francisco Drydock, Inc. v. Dalton* (9th Cir. 1997) 131 F.3d 776, 778 ["The plaintiffs assumed that they had standing to bring this suit; the defendants did not deny it; and the district court accepted the case. It is, however, our obligation to be sure that standing exists and to raise, sua sponte if need be, any deficiency"]; *American Civil Liberties Union of Nevada v. Lomax* (9th Cir. 2006) 471 F.3d 1010, 1015 [same]; *Biggs v. Best, Best & Krieger* (9th Cir. 1999) 189 F.3d 989, 998 [holding that the Court is required to raise issues of standing sua sponte, if necessary]; *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, 1126 ["the question of standing is jurisdictional and may be raised at any time by the parties, or *sua sponte*"].)

Amici respectfully ask the Court to dismiss San Francisco from the current proceedings for lack of standing, or at the least limit it to *amicus* status. *Amici* will first show that the City cannot sue in this action, because municipal entities are not considered "persons" under the equal protection clause of the California Constitution. Second, *amici* will argue that the City, as a subdivision and a creature of the state, does not have standing to challenge the laws of the state. In this regard, San Francisco can neither sue on its own behalf, nor in a representative capacity, because it is not a member of the class that it is seeking to represent. Moreover, as a subdivision of the state, whose tasks regarding the current dispute are purely ministerial, (*Lockyer v. City and County of San Francisco, supra,*

33 Cal.4th at pp. 1082-87), the City should have followed the advice of the Court in *Lockyer* by denying marriage licenses to homosexual couples and advising them to sue, instead of assuming standing, where there is none, and suing on a behalf of a class, of which the City is not a member. The City should not gain from its own wrongdoings in disobeying the law and disregarding the proper course of litigation as set out by the Court in *Lockyer*. Therefore, the Court should dismiss the City from the current proceedings for lack of standing.

B. San Francisco cannot challenge Prop. 22 because, as a subdivision of the states, it is not a "person" under the California Constitution.

The City cannot invoke the equal protection clause of the California Constitution because as a subdivision of the state, the City is not entitled to the privileges and immunities afforded by the equal protection clause. It is a well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution. (*Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 974.) "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. *Id.* at p. 974-75.

The principle of equal protection is designed to protect citizens, not governmental entities. (*Pennsylvania v. New Jersey* (1976) 426 U.S. 660, 665 [96 S.Ct. 2333, 2335].) Thus, as a general rule, counties, (*New Castle County v. Chrysler Corp.* (Del.Super. 1995) 681 A.2d 1077) and municipal corporations, being creatures of the state, cannot invoke the equal protection clause against an act of the state legislature. (*Williams v. Mayor and City Council of Baltimore* (1933) 289 U.S. 36 [53 S.Ct. 431]; *Shelby v. City of Pensacola* (1933) 112 Fla. 584 [151 So. 53]; *Town of Brighton v. Town of Charleston* (1945) 114 Vt. 316 [44 A.2d 628]; *Town of Northville v. Village of Sheridan* (1995) 274 Ill.App.3d 784 [655 N.E.2d 22] [Generally, a municipality does not have equal protection rights which can be protected by challenging allegedly unconstitutional statutes]; *Board of Com'rs of Howard County v. Kokomo City Plan Commission* (1975) 263 Ind. 282 [330 N.E.2d 92] [A municipal corporation is not a "person" guaranteed the equal protection of the laws.].)

A "line of Supreme Court cases . . . stand generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator." (*Board of Administration v. Wilson* (1997) 57 Cal .App. 4th 967, 975 (internal citations omitted); *see also Coleman v. Miller* (1939) 307 U.S. 433 [59 S.Ct. 972]; *Williams v. Mayor and City Council of Baltimore, supra,* 289 U.S. 36; *City of Trenton v. New Jersey* (1923) 262 U.S. 182 [43 S.Ct. 534];

Hunter v. City of Pittsburgh (1907), 207 U.S. 161 [28 S.Ct. 40]; *United States v. State of Ala.* (11th Cir. 1986) 791 F.2d 1450 [holding that Alabama State University, as a creature of the state, did not have standing to sue the Alabama State Board of Education under § 1983 for Fourteenth Amendment violations]; *see also* cases cited in *Township of River Vale v. Town of Orangetown* (2nd Cir. 1968) 403 F.2d 684, 686.)

The court in *Zisk v. City of Roseville* (1976) 56 Cal.App.3d 41, 49, held that no cause of action can be stated against the City of Roseville because a municipal corporation such as the City of Roseville is not a 'person' subject to suit under U.S.C. §§ 1983 or 1985. Similarly, the City, in the case at hand, is a municipal corporation and therefore not a "person" under the equal protection clause of the California Constitution. Therefore, as a subdivision of the state, the City cannot invoke the equal protection clause of the California Constitution, because that clause is intended to protect "the people," not states and their subdivisions.

Even if the Court finds that the City should be considered a "person" under the equal protection clause of the California Constitution, the Court should still dismiss the City, because the City, as a creature of the state, lacks the proper standing to challenge the laws of its creator.

C. The City lacks standing to challenge the laws of the state because it is a "political subdivision of the state" and its duties are "ministerial."

The City lacks the proper standing to challenge the laws of the state. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court, and not in the issues he wishes to have adjudicated." (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159 quoting *Flast v. Cohen* (1968) 392 U.S. 83, 99 [88 S.Ct. 1942, 1952].) "A party enjoys standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case." (*Harman v. City and County of San Francisco*, *supra,* at p. 150.)

However, political subdivisions of the state lack the requisite standing to challenge the constitutionality of state statutes on their own behalf. (*Community Television of So. Cal., supra,* 44 Cal.App.3d at p. 998.) Other jurisdictions have held that municipalities and subdivisions of the state have standing where they sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." (*In re Multidistrict Vehicle Air Pollution M.D.L. No. 31* (9th Cir. 1973) 481 F.2d 122, 131.) However, in the current case, the City has not alleged any vindications of their own proprietary interests and they have filed the action entirely on behalf of their residents. Nor has San Francisco shown that it has standing in a representative capacity to sue on

behalf of its citizens. For that matter, San Francisco is not a member of the class that it is seeking to represent. *Community Television of So. Cal. v. County of Los Angeles, supra,* 44 Cal.App.3d at 993 (City did not have standing to bring equal protection challenge on behalf of class to which it did not belong).

Since, in the case at bar, San Francisco does not have standing to sue the state on its own behalf, nor does it possess standing to sue the state in a representative capacity (*Parker v. Bowron* (1953) 40 Cal.2d 344, 352-53), the City and County should properly be dismissed from the current proceedings for lack of requisite standing.

i. The City lacks standing to challenge state laws on its own behalf because it is a political subdivision of the state.

The City does not have standing to challenge the laws of the State, because it is a creature of the State and does not have the authority to challenge the laws of its creator. Political subdivisions of the State lack the requisite standing to challenge the constitutionality of state statutes on their own behalf. (*Community Television of So. Cal., supra,* 44 Cal.App.3d at p. 998; *City of South Lake Tahoe v. California Tahoe Regional Planning Agency* (1980) 625 F.2d 231 ["It is well established that "(p)olitical subdivisions of a state may not challenge the validity of a State statute under the Fourteenth Amendment"]; *City of New York v. Richardson* (1973) 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950; *see also*, *Williams*

v. Mayor of Baltimore (1933) 289 U.S. 36, 40; *Newark v. New Jersey* (1923) 262 U.S. 192, 196 [43 S.Ct. 539, 540]; *City of Trenton v. New Jersey, supra,* 262 U.S. 182, 188; *Aguayo v. Richardson* (2d Cir. 1973) 473 F.2d 1090, 1100-01.)

The weight of authority in other jurisdictions is in accord with the principle that political subdivisions of the state do not have standing to challenge the laws of their creator. (*City of Marshfield v. Towns of Cameron, etc.* (1964) 24 Wis.2d 56, 63 [127 N.W.2d 809, 813] ["Municipal corporations, being creatures of the state, are not permitted to censor or supervise the activities of their creator."]; *Denver Urban Renewal Authority v. Byrne* (Colo. 1980) 618 P.2d 1374 ["Political subdivisions of state, and officers thereof, lack standing to challenge constitutionality of a state statute directing performance of their duties"]; *Columbia County v. Bd. of Trustees of Wisconsin Retirement Fund* (1962) 17 Wis.2d 310, 316, [116 N.W.2d 142, 146] ["a county as a quasi municipal corporation and as an arm of the state has no right to question the constitutionality of the acts of its superior and creator or of another arm or governmental agency of the state"]; *South Macomb Disposal Authority v. Washington Tp.* (6th Cir. 1986) 790 F.2d 500, 504 [holding that [t]he nature of the relationship between a public corporation and its creating state has led the court to conclude that a municipal corporation ... "is prevented from attacking the

constitutionality of state legislation on the grounds that its own rights have been impaired."].)

In *Community Television of So. Cal. v. County of Los Angeles, supra,* 44 Cal.App.3d at p. 993 (hereinafter *Community Television*), appellants were the City and County of Los Angeles, challenging the constitutionality of a provision of the tax code (former Rev. & Tax. Code § 271.4) based in part on equal protection grounds. The Court asserted that "as a political subdivision of the state and not being parties who belong to a class allegedly discriminated against, [the City and County of Los Angeles] lack the standing to make such a challenge." (*Id.* at 998.) The court evaluated the federal and state equal protection clauses together for purposes of standing.

Likewise, the City and County of San Francisco lack the requisite standing to challenge the constitutionality of the Family Code provision. Similar to *Community Television*, where the court held that the City and County of Los Angeles did not have standing to challenge the constitutionality of the provisions of the Tax Code because the City and County of Los Angeles were "political subdivision[s] of the state and not [] parties who belong to a class allegedly discriminated against," the City and County of San Francisco in the current proceedings do not have standing to challenge the constitutionality of the provisions of the Family Code because they are political subdivisions of the state and do not belong to the class

that they are seeking to represent. Therefore, as creatures of the state, the City and County of San Francisco do not have proper standing to challenge the laws of their creator.

The holding in *Community Television* has led other appellate courts in this state to similar results. In the unpublished decision *City of Compton v. Bunner* (1988) 243 Cal.Rptr.100, 118-21 (Cal. Ct. App., 2d Dist.), the City of Compton (Compton), along with the Southern Christian Leadership Conference (SCLC) challenged the constitutionality of Insurance Code § 11628 by petition for declaratory relief, naming as the defendants the Commissioner of the California Department of Insurance (Commissioner), the State of California (State), Farmers Insurance Exchange (Farmers) and Does 1-100. The court held that while SCLC had taxpayer standing to sue on behalf of its members who were affected by the Insurance Code, the City of Compton, as a "political subdivision of the state" did not have the standing to challenge the constitutionality of state laws neither "on its own behalf" nor "in a representative capacity."

The court explained that Compton did not have standing to sue the State, Commissioner, and Farmers, on its own behalf because it "failed to allege, and d[id] not contend that it can amend the complaint to allege, facts which show it has a right to relief against Farmers based upon an allegation of facts showing that it has been injured as the *direct* result of any act or

omission on the part of Farmers." *City of Compton*, *supra,* 243 Cal.Rptr. at p. 118-19.

While the *City of Compton* decision is unpublished, it further demonstrates that the standing hurdles presented by *amici* to the party participation of San Francisco are being recognized by courts throughout the state, and should be confirmed by this Court. In the current case, the City has failed to allege, and does not content that it can amend the complaint to allege, facts which show it has a right to relief against the State or any of the other defendants based upon an allegation of facts showing that it has been injured as the *direct* result of the disputed provisions of the Family Code or any act or omission on part of the state or any of the other defendants.

ii. The City does not have standing in a "representative capacity" because it is not a member of the class it seeks to represent.

The City does not have standing to challenge the constitutionality of State laws in a representative capacity, because having failed to allege that they have been affected by the Family Code, the City is not a member of the class that it seeks to represent. In pertinent part, the Code of Civil Procedure § 382 states, "[W]hen the question is one of a *common or general interest*, of many persons ... one or more may sue or defend for the benefit of all." (C.C.P. § 382) (emphasis added). The Court in *Parker v. Bowron* (1953) 40 Cal.2d 344, 352-53, explained § 382 as follows:

> The statutory provision is based upon the doctrine of virtual representation and is an exception to the general rule of compulsory joinder of all interested parties. (*Weaver v. Pasadena Tournament of Roses Assn.*, 32 Cal.2d 833, 837 [198 P.2d 514].) It is a codification of "the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy." (*Fallon v. Superior Court,* 33 Cal.App.2d 48, 50 [90 P.2d 858].) "[R]egardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined *'community of interest' in the questions of law and fact* involved as affecting the parties to be represented." (*Weaver v. Pasadena Tournament of Roses Assn., supra; Jellen v. O'Brien,* 89 Cal.App. 505, 509 [264 P. 1115].)] (emphasis added.)

In *Parker*, Lester A. Parker sought a writ of mandate to compel the respondent City to fix a salary wage for all of the City's employees in certain classifications. (*Id.* at p. 347.) The petitioner, Parker, brought this action on behalf of himself and as Secretary Treasurer" of the Council of Federated Municipal Crafts of Los Angeles (the Council) "and for and on behalf of" its affiliated unions "and the members thereof." (*Id.*) The appeal from lower court's dismissal "primarily present[ed] the question as to whether the proceeding [was] brought by a person or persons having the requisite beneficial interest." (*Id.*) After noting that Parker had no individual standing in the proceedings, (*Id.* at p. 352-53,) the Court held that Parker and the Council lacked standing to sue on behalf of the City employees under § 382 because Parker and the Council could not gain standing by "*purporting to represent a class of which [they were] not a member*." (*Id* at p. 353) (emphasis added). The Court explained,

> "No facts have been alleged to bring Parker within this well established rule regarding class suits. He does not claim to be a member of the interested class, and there is nothing to indicate that he is "similarly situated" with those whom he pretends to represent. There can be no "common or general interest" in the subject matter of the controversy (*Weaver v. Pasadena Tournament of Roses, supra,* p. 842) between Parker, who is not employed by the city, and city employees. Parker cannot give himself standing to sue by purporting to represent a class of which he is not a member.

(*Id. See also, Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520, 531 ["[t]o challenge the constitutionality of a statute on the ground that it is discriminatory, the party complaining must show that he is a party aggrieved or a member of the class discriminated against."] quoting *Estate of Horman* (1971) 5 Cal.3d 62, 77-78, cert. den. *sub nom., Gumen v. California* (1972) 404 U.S. 1015 [92 S.Ct. 672].)

Similarly, in the present case, San Francisco cannot have standing to sue in a representative capacity, because it is not a member of the class it seeks to represent. In the instant case, by bringing an equal protection challenge against the challenged provisions of the Family Code, San Francisco is purporting to represent homosexual individuals whose "marriage" will not be recognized in California. However, like Parker who had alleged no facts to bring him within the well-established rule of class suits, (*Parker*, *supra,* 40 Cal.2d at 353,) the City and County of San Francisco cannot allege that it can sue on behalf of the homosexual residents of California. The City does not claim to be a member of the interested class and there is nothing to indicate that it is "similarly situated"

with those whom it pretends to represent. There can be "no common or general interest" in the subject matter of controversy between the City, who is incapable of forming any type of domestic partnership, and the homosexual residents of California. Similar to Parker who could not gain standing by purporting to represent a class of which he was not a member, the City, in the current proceedings, "cannot give itself standing to sue by purporting to represent a class of which is it not a member." (*Id.*) (*See also*, *City of Compton, supra,* 243 Cal. Rptr. at 119 (quoting *Greater Westchester Homeowners Assn. Inc. v. City of Los Angeles* (1970) 13 Cal.App.3d 523, 526).

Therefore, in the current proceedings, the City does not have standing to challenge the constitutionality of State laws in a representative capacity, because they cannot allege that they have been affected by the Family Code.

iii. The City lacks standing to sue as *parens patriae* because it is not vindicating its own proprietary interests.

Nor can the City sue in a representative capacity as *parens patriae*. The power to sue as *parens patriae* is reserved for sovereign entities such as states and the federal government. "Although cities may 'sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants,' only the states and the federal government may sue as parens patriae." (*U.S. v. City of Pittsburg,* Cal. (9th Cir. 1981)

661 F.2d 783 quoting *In Re Multidistrict Vehicle Air Pollution M.D.L. No.* (9th Cir.) *31*, 481 F. 2d 122, 131, *cert. denied sub nom. Morgan v. Automobile Manufacturers Ass'n, Inc.* (1973) 414 U.S. 1045 [94 S.Ct. 551].) Moreover, "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as Parens patriae." (*In Re Multidistrict*, 481 F.2d at 131.)

In the current proceedings, the City lacks standing to sue as *parens patriae* because as a political subdivision of the state, its power is derivative and not sovereign. Moreover the City lacks standing because it is not suing to vindicate its own proprietary interests. Instead the City is suing on behalf of the homosexual citizens of California.

In *City of Rohnert Park v. Harris* (9th Cir. 1979) 601 F.2d 1040, 1042, the City (Rohnert Park) sought to enjoin the neighboring City of Santa Rosa from developing a shopping center based on allegation of violation of the Sherman Act. Rohnert Park sought to establish its standing as *parens patriae* on behalf of its property owners, taxpayers, and inhabitants who might be injured by the loss of investment profits and tax revenues if the center is not built in Rohnert Park. *Id.* at 1044. The Court held that this argument failed because "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as Parens patriae." *Id.* quoting *In Re Multidistrict*, 481 F. 2d at p. 131. The *City of Rohnert Park* Court proceeded to evaluate Rohnert Park's

contentions that it was suing to vindicate its own proprietary interests. *Id.* The Court ruled,

> Rohnert Park has not made a sufficient showing that, absent the alleged antitrust violations by appellees, its commercial area would have been selected as a site for shopping center development. [] the question whether these appellants would have benefited but for appellees' actions is entirely speculative. They have not demonstrated potential injury which confers standing to sue under [the Sherman Act].

Id. at 1045.

In the current proceedings, the City cannot establish its standing as *parens patriae*, because it is a political subdivision of the state that is not seeking to vindicate its own proprietary interests. Similar to Rohnert Park, which could not sue as *parens patriae* on behalf of its resident property owners, the City, in the instant case, cannot assert standing on behalf of its same-sex residents, because, as the *City of Rohnert Park* court held, "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as parens patriae." *City of Rohnert Park, supra,* 601 F.2d at p. 1044. Moreover, the City cannot allege that it is acting to preserve its own proprietary interests. Under no circumstances, other than mere speculation, would the City be affected by the disputed provisions of the Family Code, because the City is a municipal entity and thus incapable of marrying, or forming a family. Since the City cannot sue as *parens patriae* on behalf of California citizens and is not seeking to

vindicate its own proprietary interests, it should be dismissed from the current proceedings.

D. The City should be dismissed because it is a ministerial agent of state and lacks standing to challenge the laws of the state.

In the current proceedings the City should particularly be enjoined from challenging the laws of the state because, as the Court held in *Lockyer*, "the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary." (*Lockyer v. City and County of San Francisco, supra,* 33 Cal. 4th at p. 1081.) As the Colorado court noted in *People ex rel. Manville v. Leddy* (Colo.1912) 53 Colo. 109, 110 [123 P. 824, 825], as early as 1912, "[a]s every enrolled bill, signed by the proper officers and lodged with the Secretary of State, however repugnant to the Constitution, has the appearance, semblance, and force of law, the general rule is that public officials shall obey its terms *until some one, whose rights it invades*, complains, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights." (emphasis added).

Giving a municipal entity standing and authority to challenge the statute will "cripple" the executive ability of the state (*People v. Ames*, (Colo.1897) 51 P. 426, 429), and turn the administrative agencies of the state into quasi-legislative entities. This is especially so, when the duties of that municipal entity with regards to the statute in question are purely

ministerial. In the current case, there are other appropriate plaintiffs with sufficient interest in challenging the constitutionality of the disputed laws who are seeking declaratory relief. (*Woo v. Lockyer* (A110451 [S.F. City & County Super. Ct. No. CGC-04-504038]; *Tyler v. State of California* (A110450 [L.A. County Super. Ct. No. BS-088506]; *Clinton v. State of California* (A110463 [S.F. City & County Super. Ct. No. CGC-04-429548].) The City, as a ministerial entity who has no practical stake in the proceedings lacks proper standing to challenge the constitutionality of the state laws and should be dismissed.

In line with the reasoning of the Colorado Courts, the Supreme Court of California in *Lockyer* suggested that the City is not a proper party to challenge the constitutionality of the laws of the state. (*Lockyer*, *supra,* 33 Cal.4th at p. 1099.) The *Lockyer* Court noted that the proper procedure for the City officials to test the constitutionality of marriage statutes would have been to "den[y] a same-sex couple's request for marriage license and *advise the couple* to challenge the denial in superior court." *Id* (emphasis added).[1] Not content with the court's recommendation, San Francisco

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[1] The Court in *Lockyer, supra,* 33 Cal.4th at p. 1099, noted, "If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure-a lawsuit brought by a couple who has been denied a license under existing statutes-is the procedure that was utilized to challenge the constitutionality of

assumed its own standing and proceeded with an action for declaratory relief, challenging the constitutionality of the very laws that it was charged with enforcing.

The City's assumption of its own standing was erroneous. As discussed above, the City, being a political subdivision of the state, does not have proper standing to challenge the laws of the state. Moreover, the City does not have standing to sue in a representative capacity, because it is not directly affected by the disputed provisions of the Family Code and is not a member of the class it is seeking to represent. Consequently, as a political subdivision of the state, who is not affected by the disputed provisions of the Family Code, is not suing to vindicate its own proprietary interests, and whose duties regarding these provisions are purely ministerial, the City does not have standing to pursue its claims in the current proceedings and should be dismissed.

San Francisco's lack of party standing is in sharp contrast to the standing possessed by CCF and the Fund, who were wrongly dismissed by the Court of Appeal. *Amici* will next turn to the miscarriage of justice which their dismissal entailed.

California's antimiscegenation statute in *Perez v. Sharp* (1948) 32 Cal.2d 711, and the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states. (See, e.g., *Baehr v. Lewin* (1993) 74 Haw. 530 [852 P.2d 44]; *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309 [798 N.E.2d 941]; *Baker v. State of Vermont* (1999) 170 Vt. 194 [744 A.2d 864].

II. The Fund and CCF Possess Standing to Defend the Validity of Proposition 22 and Their Claims are Not Moot.

The Court of Appeal erred in finding that CCF and the Fund lacked standing to pursue their claims. In this part of the brief, amicus will first demonstrate that the Court of Appeal may have conflated the issues of standing and mootness by discounting notions of fundamental fairness and judicial economy that favor more relaxed standards for mootness, leading the court to use the wrong legal standard in evaluating the claims of CCF and the Fund. Second, the amicus will argue that CCF and the Fund have proper standing under the doctrines of taxpayer and citizen standing to bring their respective actions in *Thomasson v. Newsom* (Super.Ct. S.F. City & County, 2004, No. CGC-04-428794) (hereinafter *Thomasson*) and *Prop. 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super.Ct. S.F. City & County, 2004, No. CPF-04-503943) (hereinafter *Proposition 22*). Finally, amicus will argue that the claims of CCF and the Fund are not moot, because the issues raised by CCF and the Fund in their respective actions are issues of general public interest that are likely to arise in the future, and the notions of fundamental fairness and judicial economy favor allowing CCF and the Fund to pursue their claims.

A. The Court of Appeal conflated the issues of standing and mootness, leading to an erroneous ruling on these issues.

The Court of Appeal erred in dismissing CCF and the Fund, in that the court conflated the issues of standing and mootness, thus applying the wrong standard in evaluating the claims of CCF and the Fund. Although mootness has at times been described as "the doctrine of standing set in a time frame," *S. Parole Commission v. Geraghty* (1980) 445 U.S. 388, 397 [100 S.Ct. 1202, 1209], Monaghan, *Constitutional Adjudication: The Who and When* (1973) 82 Yale L.J. 1363, 1384), the U.S. Supreme Court has more recently noted that this description is "not comprehensive," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (2000) 528 U.S. 167, 170 [120 S.Ct. 693, 698], and has led federal courts of appeal to conflate mootness and standing, as has happened in the present case.

By contrast, *Friends of the Earth* noted that by the time mootness is an issue, "abandonment of the case may prove more wasteful than frugal. Courts have no license to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, but the foregoing examples highlight an important difference between the two doctrines." *Id.*

In the case at bar, it is crucial to keep the concepts of standing and mootness separate, because this case falls within the circumstance described above, where by the time mootness became an issue, dismissing the arguments made by CCF and the Fund was not only "wasteful," but

manifestly unjust, particularly in light of interest groups and even public entities which were given a free pass to represent opposite viewpoints.

At the outset of their actions in *Thomasson* and *Proposition 22*, CCF and the Fund had proper standing under both taxpayer (Cal. Code of Civ. Pro. § 526(a)) and citizen standing doctrines. This much is clear from the opinion of the Court of Appeal. (*In Re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 688-91 [143 Cal.App.4th 873].) After the Supreme Court's grant of writ of mandate in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (hereinafter *Lockyer*), CCF and the Fund sought to amend their complaints to include a claim for declaratory relief. The City and certain intervenor defendants opposed this request and moved to dismiss *Thomasson* and *Proposition 22* as moot. (*In Re Marriage Cases, supra,* at 688-91). The trial court denied the plaintiff's request for leave to amend, but also denied the defendants' motion to dismiss, because *Thomasson* and *Proposition 22* "adequately stated" claims for declaratory relief concerning the constitutionality of the marriage laws. (*Id.* at 689.) The Court of Appeal reversed the trial court, stating "the [trial] court erred in denying the motion to dismiss because CCF and the Fund lacked *standing* to pursue these pure declaratory relief claims." (*Id.* at 689) (emphasis added).

In reversing the trial court, the Court of Appeal conflated the issues and standing and mootness. CCF and the Fund have proper standing, under

either taxpayer or citizen standing doctrines, to bring actions in mandamus and declaratory relief, because the City's action threatened illegal expenditure of public funds. The Court of Appeal, however, contends that "although members of CCF and the Fund may be taxpayers, these organizations do not have *standing* under Code of Civil procedure section 526(a) to seek declaratory relief because their claims do not identify or challenge any allegedly illegal expenditure of public funds." (*Id.* at p. 690) (emphasis added). In support of this theory, the Court of Appeal suggested that "in accordance with the Supreme Court's directive in *Lockyer*, the City has stopped issuing marriage licenses to same-sex couples, and neither the Fund nor CCF has identified any continuing public expenditure it challenges." (*Id.* at p. 690.) Thus, the Court of Appeals held that since CCF and the Fund do not identify illegal expenditures after *Lockyer*, they no longer have *standing*.

What the Court of Appeal is in reality suggesting is that the Supreme Court's decision in *Lockyer* rendered the claims of CCF and the Fund *moot*. The Court of Appeal made a similar mistake in its analysis of CCF and the Fund's citizen standing by asserting, "because the remaining claims in *Thomasson* and *Proposition 22* [after *Lockyer*] seek only declaratory relief about the constitutionality of the marriage laws, and do not seek to enforce a public duty, the citizen suit exception [to regular standing doctrines] *no longer applies.*" *Id.* at 691 (emphasis added). Once again the court held

that CCF and the Fund lack *standing*, when what the court was essentially suggesting was that the claims of CCF and the Fund were mooted by the decision in *Lockyer*.

The Court of Appeal failed to evaluate the claims of CCF and the Fund properly, because by conflating the issues of standing and mootness, that court failed to take into account the special considerations that apply only to mootness. As the Supreme Court stated in *Friends of the Earth, supra,* at 170-71, in certain circumstances, by the time mootness becomes an issue, abandonment of the case may prove more wasteful than frugal. California courts have held that a claim which would otherwise be moot under the ordinary mootness standards, does not become moot, if it involves issues of general public interest that are likely to arise in the future. (*Madera County v. Gendron* (1963) 59 Cal.2d 798, 804.) Therefore, standards for mootness involve elements that are not considered when evaluating a party's standing. By conflating the issues of standing and mootness, the Court of Appeal failed to account for considerations that are unique to discussions of mootness and therefore erred in dismissing the actions of CCF and the Fund for lack of standing.

It is the position of *amici* that the Court of Appeal erred in finding that CCF and the Fund lacked standing *or* that their claims are moot. In the following sections, amicus will first clarify that CCF and the Fund have proper standing to pursue their claims for pure declaratory relief. Second,

Amicus will argue that the claims of CCF and the Fund are not moot. Finally, Amicus will argue that even if the claims of CCF and the Fund were found to be moot, the Court may nonetheless allow CCF and the Fund to pursue their claims, in the interest of justice.

B. CCF and the Fund have taxpayer standing, because they were seeking to restrain illegal expenditures of public funds.

CCF and the Fund have proper taxpayer standing to bring their mandamus and declaratory relief actions, because they were seeking to restrain illegal expenditures of public funds. Under the Code of Civil Procedure § 526(a), a taxpayer can bring an action to "prevent or restrain" an illegal expenditure of public money without any showing of special damages to a particular taxpayer. (*See also, Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.) The primary purpose of this statute is to "enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268.) California courts have consistently construed § 526a liberally to achieve this remedial purpose, (*Id.* at p. 268,) holding that it "is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (*Id.* quoting *Wirin v. Parker* (1957) 48 Cal.2d 890, 894.) In furtherance of the policy of liberally construing § 526a to foster its remedial purpose, California courts have permitted

taxpayer suits for *declaratory relief*, damages, *and mandamus*. (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 449-50.)

In *Van Atta,* the plaintiffs, who were not detainees of any sort, attacked the constitutionality of statutes providing for pretrial release of detainees. The court held that plaintiffs had proper standing under § 526(a) to bring an action for declaratory relief. The *Van Atta* court further explained that since plaintiff had proper standing under § 526(a), a case or controversy existed, and plaintiff did not need to independently satisfy the "actual controversy" requirement of C.C.P. § 1060. *Id.* The *Van Atta* court held that Plaintiffs had proper standing under § 526(a), once they established that: (1) they are residents of, and pay property taxes to, the City and County of San Francisco; (2) [the defendants] were the officials charged with the custody of all pretrial detainees; and (3) monies raised by general property taxes are expended by the City and County of San Francisco to maintain the challenged pretrial release and detention system. (*Id.* at 447, fn. 20.)

In the instant case, CCF and the Fund have demonstrated standing to bring their actions for declaratory relief and mandamus under § 526(a). By issuing marriage licenses in violation of the California Family Code, using public funds raised by taxing California citizens, the City engaged in illegal expenditure of public moneys. Therefore, under § 526(a) and the holding of *Van Atta,* CCF and the Fund have proper taxpayer standing to bring their

respective suits for declaratory relief against the City, regarding the constitutionality of the family code provisions.

Similar to the plaintiffs in *Van Atta*, CCF and the Fund can establish that (1) they [and their members] are residents of, and pay property taxes to, the City and County of San Francisco; (2) The City and County of San Francisco is the entity charged with issuing marriage licenses to California citizens; and (3) monies raised by general property taxes are expended by the City and County of San Francisco to issue and process marriage licenses. Thus, similar to the plaintiffs in *Van Atta*, CCF and the Fund have proper standing to bring an action for declaratory relief to determine the constitutionality of the disputed Family Code provisions.

The Court of Appeal erroneously held that after the decision in *Lockyer*, CCF and the Fund no longer had standing to pursue their claims. (*In Re Marriage Cases*, *supra,* 49 Cal.Rptr.3d at p. 690.) As noted above, the Court of Appeal conflated the issues of standing and mootness in reaching this conclusion. To the extent that the rationale of the Court of Appeal concerns the mootness of the claims of CCF and the Fund, *amici* will address that issue *infra*. The Court of Appeal, thus, relied on its analysis of C.C.P. § 1060, finding that "neither the Fund nor CCF satisfies [the] requirements for *injury-based* standing." (*Id.* at p. 689.) (emphasis added) However, as the Court noted in *Van Atta*, where plaintiff's contention met the requirements of § 1060, because standing was proper

under § 526a (since that section authorizes taxpayer suits for declaratory relief), the further contention that this suit lacks justiciability because plaintiffs have not satisfied the "actual controversy" requirements of C.C.P. § 1060 must fail. An action, such as the case at hand, which meets the criteria of § 526a satisfies case or controversy requirements. (*Id.*; *see also, Blair v. Pitchess, supra*, 5 Cal.3d at p. 269; *White v. Davis* (1975) 13 Cal. 3d 757, 764.) Thus, CCF and the Fund have taxpayer standing to pursue claims for declaratory relief.

C. CCF and the Fund have proper citizen standing, because they seek to enforce a public duty that the City is ignoring.

CCF and the Fund also have proper standing under the "citizen suit" doctrine. Citizen suits may be brought "without the necessity of showing a legal or special interest in the result, where the issue is one of public right and the object is to procure the enforcement of a public duty." (*Connerly v. State Personnel Bd., supra,* 92 Cal.App.4th 16, 17; *Board of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d. 98, 100-01 ("Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced."))

CCF and the Fund filed their respective actions in mandamus and declaratory relief, in order to procure the enforcement of a public duty by compelling the City to enforce the provisions of the Family Code. Therefore, as the Court of Appeal noted, CCF and the Fund had proper standing to bring their actions in *Thomasson* and *Proposition 22*. (*In Re Marriage Cases*, *supra,* 49 Cal.Rptr.3d at p. 691.) However, the Court of Appeal states that, "mandamus having been granted by the Supreme Court, the "citizen suit" exception does not give these organizations standing to pursue declaratory relief claims..." *Id.* The Court of Appeal, once again, conflates the issues of mootness and standing. To the extent that the Court of Appeal's argument is referring to the mootness of the claims of CCF and the Fund, *amici* will discuss that issue below. A weak inference from the arguments of the Court of Appeal may suggest that the court's contention was that CCF and the Fund never had standing to bring an action for "pure declaratory relief."

This argument, if it may be inferred from the assertions of the Court of Appeal, is flawed in a number of ways. First, the claims of CCF and the Fund were not for "pure declaratory relief." In *Thomasson* and *Proposition 22*, CCF and the Fund were asking for a writ of mandate *and* declaratory relief. The decision of the Supreme Court in *Lockyer* is irrelevant to the standing of the parties, because standing is determined according to the facts as they stand at the outset of the action. (*Friends of the Earth, Inc.,*

supra, 528 U.S. at p. 170.) To that effect, if anything, the correct argument on part of the City should be that the claims of CCF and the Fund were moot. As has already been noted, CCF and the Fund had standing to bring their action for declaratory relief based on taxpayer standing, to halt the City's illegal expenditure of public funds. Having a separate basis for standing as taxpayers, the claims of CCF and the Fund even for "pure declaratory relief" would be proper under the holdings of *Van Atta* and its progeny. Finally, there is no authority holding that citizen standing is not proper in cases of "pure declaratory relief." To the contrary, there is abundant authority demonstrating that CCF and the Fund have proper standing to bring actions for declaratory relief under the citizen suit doctrine.

i. CCF and the Fund have proper citizen standing to bring an action for declaratory relief on behalf of their members.

CCF and the Fund have proper standing to bring an action for declaratory relief on behalf of their members, under the citizen suit doctrine. California courts have applied the citizen suit and taxpayer suit doctrines liberally, especially in cases of important public interest. Courts have explained that this citizen suit exception to the general rules of standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Venice Town Council, Inc. v. City*

of Los Angeles (1996) 47 Cal.App.4th 1547, 1564 (hereinafter *Venice Town*) quoting *Green v. Obledo* (1981) 29 Cal.3d 126; *see also, Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439; *McKeon v. Hastings College of the Law* (1986) 185 Cal.App.3d 877, 892-893; 8 Witkin, Cal. Procedure, Extraordinary Writs, § 74, pp. 713-714 and cases cited; Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 1995) § 15:16, pp. 15-9 to 15-10.) Noting this trend, the court in *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 122, explained, "in recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue ... where matters relating to the 'social and economic realities of the present-day organization of society' are concerned."

In *Venice Town Council, Inc. v. City of Los Angeles*, *supra,* 47 Cal.App.4th at pp.1552-64, the court upheld the plaintiff's standing where the plaintiff brought an action in mandamus and declaratory relief to enforce and clarify the City's duties under the provisions of the Mello Act. Noting that the plaintiffs had citizen standing to bring a mandamus proceeding on behalf of their members, the *Venice Town* court held that plaintiffs had stated a sufficient cause of action for declaratory relief. *Id.* at 1565-67.

In reaching this holding, the court stressed the fact that the potential for recurring problems and the notions of judicial economy advised in favor

of granting declaratory relief. The court noted that "appellants seek to resolve the City's fundamental misunderstanding of its responsibilities under the Mello Act to avoid continued violations or non-enforcement in the future." *Id.* Thus, cautioning that "any doubt should be resolved in favor of granting declaratory relief," the *Venice Town* court held that the plaintiff's had "adequately stated a cause of action for declaratory relief." *Id.* In reaching this conclusion, the court noted that "the City's interpretation of its responsibilities under the Mello Act is a recurring problem and one involving the interpretation of a statute. The proper interpretation of a statute is a particularly appropriate subject for judicial resolution." *Id.* The court further noted that "judicial economy strongly favors the use of declaratory relief to avoid a multiplicity of actions to challenge the City's statutory interpretation or alleged policies." *Id.* Therefore, the *Venice Town* court held that the Plaintiffs, who had proper citizen standing, adequately stated a cause of action for declaratory relief.

Similar to the plaintiffs in *Venice Town*, the plaintiffs in the instant case have standing under the citizen suit doctrine, and as the trial court properly held, "adequately state" claims for declaratory relief concerning the constitutionality of the marriage laws. (*In Re Marriage Cases*, 49 Cal. Rptr. 3d at p. 688.) Similar to *Venice Town*, the factors of potential for recurring problems and judicial economy advise upholding the standing of CCF and the Fund in the case at hand. Similar to Plaintiffs in *Venice Town*,

supra, 47 Cal.App.4th at p. 1566, CCF and the Fund sought "to resolve the City's fundamental misunderstanding of its responsibilities under the Family Code to avoid continued violations or non-enforcement in the future." Moreover, as fully argued by the parties in their respective briefs, the City's interpretation of its responsibilities under the California Family Code is a recurring problem and one involving the interpretation of the relevant family code provisions. (Opening Brief of Prop. 22 Legal Defense and Education Fund (Fund OB), at p. 27-32.)

Since "[t]he proper interpretation of a statute is a particularly appropriate subject for judicial resolution," (*Venice Town Council, Inc., supra,* 47 Cal.App.4th at p. 1566,) and "any doubt should be resolved in favor of granting declaratory relief," (*Id.*), the trial court in the current action properly held that CCF and the Fund "adequately stated" a cause of action for declaratory relief.

In addition, the preference for judicial economy advises in favor of granting declaratory relief in the instant action. As fully argued in the Fund's opening brief, dismissing CCF and the Fund from the current proceedings will result in continuing doubts about the scope of the California Family Codes. Fund OB, at 27-32. Therefore, similar to the action in *Venice Town, supra,* 47 Cal.App.4th at 1566, where "judicial economy strongly favor[ed] the use of declaratory relief to avoid a multiplicity of actions to challenge the City's statutory interpretation or

alleged policies," the notions of judicial economy in the case at hand favor the use of declaratory relief to avoid recurrence of actions regarding the scope of the Family Code provisions in the future. Consequently, the trial court's holding that CCF and the Fund have proper standing to bring an action for declaratory relief was proper and should not have been reversed. CCF and the Fund have proper standing under both citizen suit and taxpayer suit doctrines to bring an action for declaratory relief in order to determine the constitutionality of the disputed provisions of the Family Code.

ii. The Court should not have dismissed CCF and the Fund, because they can amend their complaints to allege proper standing.

The Court should not dismiss the actions in *Thomasson* and *Proposition 22* because, but for the error of the lower court, CCF and the Fund could have amended their complaints to include a writ of mandate for declaratory relief.

In *Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th at p. 18, the court held that "mandate can be used to test the constitutional validity of a legislative enactment." In *Floresta, Inc. v. City Council of City of San Leandro* (1961) 190 Cal.App.2d 599, 601-02, plaintiff brought a mandamus proceeding against the city and requested a declaration that a zoning ordinance prohibiting cocktail lounges in shopping centers was unconstitutional. The *Floresta* court held that mandamus "may be invoked

to challenge the constitutionality of ordinances and regulations." (*Id.* at p. 612; *See also, Reynolds v. Barrett* (1938)12 Cal.2d 244, (validity of a zoning ordinance); *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, (constitutionality of rules regulating the use of school property for public purposes); *Roman Catholic Welfare Corp. of San Francisco v. City of Piedmont* (1955) 45 Cal.2d 325 (constitutionality of zoning ordinance).)

In *Floresta*, the plaintiff had joined a writ of mandate with an action for declaratory relief. (*Id.*) The court noted, "since mandamus and declaratory relief actions can be joined (15 Cal.Jur.2d 148), appellant has properly sought a review of the agencies' decision in its petition for a writ of mandamus and a test of the constitutionality of the ordinance in its request for declaratory relief." (*Id.*)

Similar to *Floresta*, *supra*, 190 Cal.App.2d at 612 where the plaintiff joined an action for declaratory relief and a petition for writ of mandamus to test the constitutionality of the zoning ordinance, CCF and the Fund could have joined their actions for declaratory relief with a mandamus proceeding to test the constitutionality of the disputed California Family Code provisions. Since the lower court allegedly erred in granting standing to CCF and the Fund, the two organizations lost their opportunity to amend their pleading to include a writ of mandamus for declaratory relief. Prior to dismissal, they should at least be granted the opportunity to amend their

pleadings and include a writ of mandamus to test the constitutionality of the disputed California Family Code provisions. (*Sheehan v. San Francisco 49ers, Ltd.* (2007) 153 Cal.App.4th 396, 406 ("Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not. Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance, if a fair prior opportunity to correct the substantive defect has not been given.").)

Thus far, it has been established that by conflating the issues of standing and mootness, the Court of Appeal erroneously held that CCF and the Fund lacked standing to bring their respective actions. Next, *amici* will argue that even if the Court of Appeal had correctly identified the issue as one of mootness, its final disposition of dismissing the actions of CCF and the Fund was erroneous, because the claims of CCF and the Fund are not moot.

D. The claims of CCF and the Fund are not moot because this case involves issues of general public interest that will arise again in the future.

The Court should not dismiss the actions of CCF and the Fund in *Thomasson* and *Proposition 22,* because the case at hand involves matters of general public interest that are likely to arise in the future.

"Courts must proceed with caution when presented with a mootness claim. Granting the motion results in dismissal and deprivation of the plaintiff's day in court." (*Davis v. Superior Court* (1985) 169 Cal.App.3d 1054, 1985.) Therefore, courts should consider a variety of factors in deciding the mootness of a claim. Some important factors in this regard are the vitality of the issues, public interest in the issues involved, and the likelihood that the issues involved in the current case will arise in the future.

As this Court stated in a unanimous decision in *In re William M.* (1970) 3 Cal.3d 16, 23: "[I]f a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot. Such questions [of general public concern] do not become moot by reason of the fact that the ensuing judgment may no longer be binding upon a party to the action." (See, *Ballard v. Anderson* (1971) 4 Cal.3d 873, 876.)

In like manner, the Court in *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 719, noted, "[an] issue does not become moot merely because the question is of no further immediate interest to the person who raised it." (See Also, *Board of Education v. Watson* (1966) 63 Cal.2d 829, 832.) Where, in a proceeding, issues of general public interest are raised, which, if left undecided, will arise again at future, such issues do not become moot.

(*Zeilenga, supra,* at p. 719-20; *Rees v. Layton* (1970) 6 Cal.App.3d 815, 819 ["Since the election has been held, these cases (concerning the validity of the election code) are now moot. However, since the questions raised thereby will arise at future ... elections, the basic issues are not moot and an opinion thereon is proper."].)

Questions of general public interest do not become moot by reason of the fact that the ensuing judgment may no longer be binding upon a party to the action." (*Madera County v. Gendron*, *supra*, 59 Cal.2d at p. 804; *DiGiorgio Fruit Corp. v. Department of Employment* (1961) 56 Cal.2d 54, 58; *In re Newbern* (1961) 55 Cal.2d 500, 505; *Almassy v. Los Angeles County Civil Service Com.* (1949) 34 Cal.2d 387, 390; *Terry v. Civil Service Com.* (1952) 108 Cal.App.2d 861, 872; *Southern Pac. Terminal Co. v. Interstate Commerce Com.* (1911) 219 U.S. 498 [31 S.Ct. 279].)

The Court should hold that the claims of CCF and the Fund are not moot, because the issues involved in the current case are important questions of general public interest that will arise in the future.

In *Madera County v. Gendron*, *supra*, 59 Cal.2d at p. 804 (hereinafter *Madera County*), the Court considered whether the District Attorney of Madera County may engage in the private practice of law during his term of office is a question of general public interest, even though the fact that Defendant was replaced by his successor in the office would ordinarily have rendered this issue moot. The Court decided that

since the issue considered in that case was a question of general public interest that is likely to occur in the future, the Court should properly consider the issue, even though the issue would ordinarily be considered moot. (*Id.*) The Court noted,

> the issue of whether the District Attorney of Madera County may engage in the private practice of law during his term of office is a question of general public interest ... a determination of the instant question affects the defendant's successors in office as well as the district attorneys of other counties who serve under similar statutory disabilities. The certainty afforded by appellate resolution of this question is preferable to the uncertainty we would engender in Madera and other counties by failure to resolve the issue.

(*Id.*)

Similar to *Madera County*, where the Court held that the issue was not moot because of the public interest nature of the issue involved, in the case at hand, the validity and scope of the California Family Code provisions are matters of general public interest. The issues of the validity of the California Family Code provisions and the issue of whether Proposition 22 only applies to marriages outside of California, or whether it also applies to the validity of marriages within California are questions of general public interest. A determination of the questions in the instant case affects the future plans and ability of CCF and the Fund to pass or supplement current provisions through initiatives, because, if the issue of the scope of Proposition 22 is not determined, this issue will certainly result in further litigation and initiative efforts, as already evidenced by the bills

and amendments circulating in the California Secretary of State. (See, http://www.sos.ca.gov/elections/elections_j.htm#circ, Initiatives, 1247, 1263, 1254, 1255, and 1264.) The certainty afforded by appellate resolution of these issues is preferable to the uncertainty that a failure to resolve these issues would engender in California as to the scope of the Family Code provisions.

In *Zeilenga v. Nelson, supra,* 4 Cal.3d at p. 719 (hereinafter *Zeilenga*), the plaintiff brought an action in mandamus and declaratory relief against the County Clerk of Butte County to declare a county charter provision, which had prevented the plaintiff from nomination for County Supervisor, unconstitutional. Although the court noted that the specific issues raised with respect to the particular election were moot, since the election was over, nonetheless, the court held that the action for declaratory relief was not moot. (*Zeilenga, supra,* at p. 719.) The *Zeilenga* court explained, "the basic issue—namely, Is the county charter provision, hereinafter discussed, constitutional?—is one which deprives any Butte County resident who has not lived in Butte County five years of the right to run for county supervisor. This issue is a vital one for the people of Butte County, and is one of general public interest and should be determined before the next election for county supervisor." (*Id.*)

Similar to *Zeilenga*, where even though the issue as to the specific election was moot, the vitality and public interest nature of the proceeding

prevented the declaratory relief claim from becoming moot, in the case at hand, the issues of the constitutionality of Proposition 22, and the scope of that provision are vital issues for *all* residents of California, and these issues concern matters of general public interest. A final disposition as to the constitutionality and scope of Proposition 22 is a matter of general public interest to both supporters and opponents of that proposition, in addition to all California residents, who by their votes in the 2001 election, adopted Proposition 22 as part of their Family Code. Moreover, issues that were raised in this case, such as the issue of the scope of Proposition 22, will arise in the future, if not decided by this Court. (Prop. 22 Opening Brief, at p. 27-32.)

The claims of CCF and the Fund for declaratory relief are not moot, because of the vitality of the issues involved in the current proceeding, the public interest nature of the case, and the high likelihood that these issues will arise in the future. Therefore, the Court should not dismiss CCF and the Fund from the current proceedings.

E. The Court should not dismiss CCF and the Fund because the problems and principles involved are issues of great public interest.

Even if the claims of CCF and the Fund are found to be mooted by the Supreme Court's decision in *Lockyer*, the Court should allow CCF and the Fund to pursue their claims as parties to this case.

In *Ballard v. Anderson* (1971) 4 Cal.3d 873, 877, the Court held that "where the problem presented and the principle involved are of great public interest, the courts have deemed it appropriate to entertain the proceedings rather than to dismiss the same as being moot."

In *Kirstowsky v. Superior Court In and For Sonoma County* (1956)143 Cal. App.2d 745, 749, the court considered whether the members of the public should have been excluded from a trial, even though the trial had ended months before. In that case, all parties agreed that the question presented at trial was moot. However, the court did not dismiss the issues because they involved matters of important pubic interest. (*Id.*) The *Kirstowsky* court noted that "[s]ince the problem presented and the principle involved in the instant proceedings are of great importance in the administration of the criminal law and are likely to arise in the future, we deem it appropriate to discuss the questions involved, even though, so far as the issuance of a writ is concerned, the matter has become moot." (*Id.*)

Similar to *Kirstowsky*, where the court decided moot questions because of their public importance, the problems presented and the principles involved in the case at bar involve matters of great public importance in the administration and substance of many areas of the law, including family law and constitutional law. These issues are likely to arise in the future, if they remain unresolved. Dismissing CCF and the Fund would result in leaving some of the questions and arguments that were

raised in this case unresolved. Therefore, the Court should allow CCF and the Fund to pursue their claims, even if those claims are found to be moot, because the issues raised in the current case involve matters of great public importance that are likely to arise in the future if the CCF and the Fund are dismissed.

As we have noted, CCF and the Fund have proper standing to bring their respective actions, and their claims are not moot. Even if their claims were to be considered moot, the Court should not dismiss CCF and the Fund, because the issues raised by them involve matters of general public interest that are likely to arise in the future. Contrary to CCF and the Fund, who have proper standing to prosecute their claims, the City, in the current proceedings, lacks standing to challenge the constitutionality of the Family Code provisions. Therefore, the Court of Appeal erred, not only in dismissing CCF and the Fund from the current proceedings, but also in allowing the City to challenge the constitutionality of the Family Code provisions. This Court should reverse the errors of the lower court, by upholding the standing of CCF and the Fund and dismissing the City from the current proceedings for lack of standing.

F. Other public interest groups have been allowed to intervene in this litigation on the opposite side of the same-sex marriage issue.

Beyond all the substantive legal arguments that have been presented to show that CCF and the Fund have standing, it should not go unnoticed

that the lower courts in this action had no problem allowing other advocacy groups on the opposite end of the ideological spectrum participate as plaintiffs. The Court of Appeal notes, in footnote 3 of its decision, "[T]he advocacy groups Our Family Coalition and Equality California participated as plaintiffs in the *Woo* case, and Equality California was granted leave to intervene as a plaintiff in the *Tyler* case." (*In Re Marriage Cases, supra,* 49 Cal.Rptr.3d at p. 686, fn. 3 [143 Cal.App.4th 873].) A*mici* submit that it is manifestly unjust to liberally construe standing for only one side of a highly controversial public issue, while denying it to the opposing viewpoint.

CONCLUSION

In summation, the previous dispositions in this action which have assumed standing for San Francisco while denying it to CCF and the Fund are illogical, inconsistent and unprecedented. It is imperative that the integrity of the citizen initiative process be preserved. Allowing large cities with significant resources to file suit any time they disagree with the philosophical premise of a ballot initiative undermines the will of the people and upends local governments' subordinate status as political subdivisions of the state. Further denying standing to public interest organizations which seek to defend the validity of citizen initiatives they

have actively promoted exacerbates the injustice and erodes confidence in our democratic form of government.

For these reasons, and in accord with the weight of authority, *amici* urge the Court to hold that CCF and the Fund have standing to proceed as parties to this action, while San Francisco does not

Date: September 25, 2007

Respectfully submitted,

By: PACIFIC JUSTICE INSTITUTE

Kevin T. Snider, CA Bar No. 170988
Matthew B. McReynolds, CA Bar No. 234797
Post Office Box 276600 (mail)
9851 Horn Road, Suite 115 (deliveries only)
Sacramento, California 95827
916-857-6900 (Telephone)
916-857-6902 (Facsimile)

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* hereby certifies that the foregoing brief complies with the type-volume limitation of Rule 14(c)(1) of the California Rules of Court, because the brief contains 12,027 words, inclusive of all text on pages number 1-49, based upon the computer program utilized to draft the brief, and excluding tables, cover pages and other portions of the brief exempted by the rule.

Date: September 25, 2007

Matthew B. McReynolds, Esq.
Counsel for Amici Curiae

State of California)
County of Los Angeles)
)

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I, Maurice L. Harrington , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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SERVICE LIST

Clerk of Court Superior Court of California County of San Francisco Civic Center Courthouse 400 McAllister Street San Francisco, California 94102 [One (1) copy for delivery to the Honorable Richard A. Kramer]	Superior Court
Clerk of Court California Court of Appeals 1st Appellate District 350 McAllister Street San Francisco, California 94102	Appellate Court
Therese Marie Stewart Office of the City Attorney #1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco California 94102 Bobbie Jean Wilson Howard, Rice, Nemerovski, Canady, Falk & Rabkin A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, California 94111	City and County of San Francisco: Plaintiff and Respondent
Christopher Edward Krueger Office of the Attorney General 1300 I Street, #125 P.O. Box 944255 Sacramento, California 94244-2550	State of California: Defendant and Appellant
Christopher Edward Krueger Office of the Attorney General 1300 I Street, #125 P.O. Box 944255 Sacramento, California 94244-2550	Schwarzenegger, Arnold: Defendant and Appellant

Kenneth C. Mennemeier Mennemeier Glassman et al 980 9th St #1700 Sacramento, California	Schwarzenegger, Arnold: Defendant and Appellant (Cont.)
Sherri Sokeland Kaiser Therese Marie Stewart Office of the City Attorney 1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, California 94102-4682	Newsom, Gavin: Defendant and Respondent
Terry L. Thompson 199 East Mesa Linda, Suite 10 Danville, California 94526 Robert H. Tyler Advocates for Faith and Freedom 24910 Las Brisas Road, Suite 110 Murrieta, California 92562 Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Drive, Suite 100 Folsom, California 95630-4726 Timothy Donald Chandler Alliance Defense Fund 101 Parkshore Drive, #100 Folsom, California 95630	Proposition 22 Legal Defense and Education Fund: Plaintiff and Respondent

Ross Steven Heckmann 1214 Valencia Way Arcadia, California 91006 Mathew D. Staver Liberty Counsel 1055 Maitland Center Commons, 2nd Floor Maitland, Florida 32751-7214	Randy Thomasson and Campaign for California Families: Plaintiff and Respondent
Rena M. Lindevaldsen Mary Elizabeth McAlister Liberty Counsel 100 Mountain View Road, Suite 2775 Lynchburg, Virginia 24502-2272	Randy Thomasson and Campaign for California Families: Plaintiff and Respondent (Cont.)

Shannon Minter National Center for Lesbian Rights 870 Market Street, Suite 570 San Francisco, California 94102 Stephen Victor Bomse Heller Ehrman LLP 333 Bush Street, Suite 3100 San Francisco, California 94104 Jon Warren Davidson Lambda Legal Defense & Education Fund 3325 Wilshire Boulevard, #1300 Los Angeles, California 90010-1729 Peter J. Eliasberg ACLU Foundation of Southern California 1616 Beverly Blvd. Los Angeles, CA 90026-5752 Alan L. Schlosser ACLU Foundation Of Northern California 39 Drumm Street San Francisco, California 94111 David Charles Codell 9200 Sunset Boulevard, Penthouse Two Los Angeles, California 90069	Rymer, Joshua: Plaintiff and Respondent
Shannon Minter National Center for Lesbian Rights 870 Market Street, Suite 570 San Francisco, California 94102	Frazer, Tim: Plaintiff and Respondent

Stephen Victor Bomse Heller Ehrman LLP 333 Bush Street, Suite 3100 San Francisco, California 94104	Frazer, Tim: Plaintiff and Respondent (Cont.)
Waukeen Quandrico McCoy Law Offices of Waukeen McCoy 703 Market Street, Suite 1407 San Francisco, California 94103 Jason Elkins Hasley Paul, Hanley & Harley LLP 1608 4th Street, Suite 300 Berkeley, California 94710	Clinton, Gregory: Plaintiff and Respondent
Shannon Minter National Center for Lesbian Rights 870 Market Street, Suite 570 San Francisco, California 94102	Equality California: Plaintiff and Respondent
Gloria Rachel Allred Allred Maroko & Goldberg 6300 Wilshire Boulevard, Suite 1500 Los Angeles, California 90048-5217	Tyler, Robin: Plaintiff and Respondent
Gloria Rachel Allred Allred Maroko & Goldberg 6300 Wilshire Boulevard, Suite 1500 Los Angeles, California 90048-5217	Perry, Troy: Plaintiff and Respondent
Gloria Rachel Allred Allred Maroko & Goldberg 6300 Wilshire Boulevard, Suite 1500 Los Angeles, California 90048-5217	Olson, Diane: Plaintiff and Respondent

Gloria Rachel Allred Allred Maroko & Goldberg 6300 Wilshire Boulevard, Suite 1500 Los Angeles, California 90048-5217	Deblieck, Phillip: Plaintiff and Respondent
Ross Steven Heckmann 1214 Valencia Way Arcadia, California 91006	Campaign for California Families: Defendant and Appellant
Mathew D. Staver Liberty Counsel 1055 Maitland Center Commons, 2nd Floor Maitland, Florida 32751-7214 Mary Elizabeth McAlister Liberty Counsel 100 Mountain View Road, Suite 2775 Lynchburg, Virginia 24502-2272	Campaign for California Families: Defendant and Appellant (Cont.)
	The Equal Justice Society: Pub/ Depublication Requester Eva Patterson 220 Sansome Streetm, 14th Floor San Francisco, California 94104
Daniel Joe Powell Munger, Tolles & Olson, LLP 560 Mission Street, 27th Floor San Francisco, California 94105	Bay Area Lawyers for Individual Freedom: Pub/ Depublication Requester.