SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S147999

Coordination Proceeding Special Title (Rule 1550(b))
IN RE MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

First Appellate District
No. A110449
(Consolidated on appeal with case nos. A110540, A110451, A110463, A110651, A110652)

San Francisco Superior Court Case No. 429539
(Consolidated for trial with San Francisco Superior Court Case No. 429548)

CITY AND COUNTY OF SAN FRANCISCO'S CONSOLIDATED ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Proposition 22 Legal Defense and Education Fund (Fund) and the Campaign for California Families (Campaign) represent supporters of Proposition 22 – which enacted Family Code section 308.5.[1] These organizations or their members supported Proposition 22 by signing the initiative petition, voting for the initiative, donating money toward the passage of the initiative, or campaigning for the initiative. In this respect, they are no different from the hundreds of thousands – if not millions – of other California organizations and citizens who supported Proposition 22 – or opposed it. Nonetheless, both the Fund and the Campaign contend they have an unique interest in the scope and validity of section 308.5 that gives them standing to sue the City and County of San Francisco (City). They further contend they need to be parties because the Attorney General is not defending section 308.5 with sufficient vigor.

They are wrong. California law establishes that neither the Fund, the Campaign, nor their members have standing to maintain any action against the City over the scope or validity of section 308.5.

First, the Fund and the Campaign lack taxpayer standing after *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (*Lockyer*). Because *Lockyer* eliminated all illegal expenditures by the City, it rendered moot all taxpayer claims that they had or could have asserted. Thus, neither the Fund nor the Campaign may assert any taxpayer claims addressing the scope or validity of section 308.5.

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[1] All further statutory references are to the Family Code unless otherwise indicated.

Second, the Fund and the Campaign, as a matter of law, lack injury-based standing. As initiative supporters, they have no greater interest in Proposition 22 than the public-at-large. This would be true even if they had been official proponents of that Proposition under Elections Code section 342 – which they are not.

The Fund is also collaterally estopped from asserting injury-based standing by the final judgment of the Court of Appeal denying its motion to intervene in the actions asserted by the City and certain same-sex couples against the State of California. In its decision, the Court of Appeal held that the Fund lacked a direct or immediate interest in the scope or validity of section 308.5. Under well-established principles of collateral estoppel, the Court of Appeal's final judgment on the merits bars the Fund from establishing injury-based standing to sue.

Indeed, giving the Fund and the Campaign standing would serve no beneficial purpose. The State, as represented by the Attorney General, is the proper party defendant. (See *Serrano v. Priest* (1977) 18 Cal.3d 728, 752 ["it is the general and long-established rule that in actions for declaratory and injunctive relief challenging the constitutionality of state statutes, state officers with statewide administrative functions under the challenged statute are the proper parties defendant"].) And the Attorney General is more than capable of defending section 308.5 and has done so with considerable vigor and success. Moreover, initiative supporters do not have to be parties in order to have their views heard. Instead, supporters like the Fund and the Campaign can meaningfully participate in litigation over the scope or validity of an initiative as amici curiae.

Ultimately, the Fund and the Campaign are asking this Court to set a danagerous precedent. The floodgates of litigation would be wide open if

standing to sue depended only on one's "support" of a law – whether evidenced by some level of political activity, financial contribution, or ideological commitment. Indeed, there is good reason to bar initiative supporters like the Fund and the Campaign from asserting claims defending the validity or scope of an initiative. A contrary holding would permit anyone who supported or *opposed* an initiative – or any other piece of legislation – to sue over the validity or scope of that law. It would also subject anyone who wishes to challenge a law to multiple lawsuits and attorneys' fee requests. The resulting flood of lawsuits would wreak havoc on the courts and discourage legitimate challenges to laws.

Accordingly, this Court should affirm the judgment of the Court of Appeal dismissing the actions filed by the Fund and the Campaign for lack of standing. If the Court nonetheless decides to address the scope of section 308.5, then it should hold that it applies only to out-of-state marriages.

STATEMENT OF FACTS

A. The Fund And The Campaign

The Fund is a nonprofit public benefit corporation established "approximately one year *after* the passage of Proposition 22." (Appellant's Appendix in *City and County of San Francisco v. State of California*, A106760 (Intervener Fund AA) 108, italics added [Exhibit 1 to the City and County of San Francisco's Request for Judicial Notice (CCSF RFJN)].) It represents approximately 15,000 California taxpayers who have financially contributed to it. (*Ibid.*; see also Exhibits in Support of Respondents' Unopposed Motion to Augment the Record on Appeal in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, A110651 (*Prop. 22* Exs.) 1024) The Fund's purpose " 'is to defend the right of the California electors to enforce Proposition 22 and to

approve or reject attempts by the Legislature to amend or repeal its provision, which defines marriage as between a man and a woman and to educate the public regarding legal issues affecting the institution of marriage.' " (Intervener Fund AA 108; see also *Prop. 22* Exs. 1024 [the Fund "serves the public interest by advocating for the proper application and enforcement of" section 308.5].)

The Fund is governed by a Board of Directors. (Intervener Fund AA 108.) Members of that Board include: (1) Natalie Williams, who voted for Proposition 22, "regularly spoke to individuals and organizations urging support for Proposition 22 prior to the initiative being presented to the voters in March 2000," and participated in campaign strategy meetings (Intervener Fund AA 107; see also *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1035 (*CCSF*)); and (2) Dana Cody, who signed the petition, voted for Proposition 22, and "was involved with representatives of the campaign promoting Proposition 22 in approximately 1999 and 2000" (Intervener Fund AA 111-112; see also *CCSF*, at p. 1035). Senator William J. (Pete) Knight, the official proponent of Proposition 22, had been "President of the Fund." (Intervener Fund AA 108; see also *CCSF*, at p. 1035.) Senator Knight, however, died on May 7, 2004, and "no personal representative or successor in interest" appeared "in his place." (*CCSF*, at p. 1038, fn. 7.)

The Campaign is a "nonprofit family values organization." (Appellant's Appendix in *Thomasson* v. *City and County of San Francisco*, A110652 (*Thomasson* AA) 5.) The Campaign " 'stands up for the values of marriage and family, parental rights, freedom of conscience, back-to-basics education, the sanctity of life and financial freedom for families.' " (*Id.* 88.) As part of this mission, the Campaign "actively campaigned for the passage

of Proposition 22 on behalf of constituents located throughout the State of California." (*Thomasson* AA 5; see also *id.* 89.) Its members – including Randy Thomasson, its Executive Director – voted for Proposition 22. (*Thomasson* AA 90.) Neither the Campaign nor its members, however, claim to be the official proponents of Proposition 22. (Elec. Code, § 342.)

B. The Actions Filed By The Fund And The Campaign And Their Coordination With The Other Actions

On February 10, 2004, San Francisco Mayor Gavin Newsom sent a letter to San Francisco County Clerk Nancy Alfaro asking her to take the steps necessary to issue marriage licenses to same-sex couples. Alfaro began issuing marriage licenses to same-sex couples on February 12, 2004. (*Lockyer*, *supra*, 33 Cal.4th at pp. 1069-1071.)

The next day, the Fund and the Campaign filed separate lawsuits challenging the issuance of marriage licenses to same-sex couples (respectively, *Prop. 22* (A110651 [Superior Court Case No. 503943]) and *Thomasson* (A110652 [Superior Court Case No. 428794]) actions). The Fund asserted causes of action for: (1) mandamus relief; (2) injunctive relief; and (3) declaratory relief under Code of Civil Procedure section 1060.[2] (*Prop. 22* Exs. 1024-1027.) The only declaratory relief sought by the Fund was "a judicial declaration that any and all marriage licenses issued, and any and all marriages solemnized, for couples other than those constituting only an unmarried male and an unmarried female, are invalid." (*Id.* 1028.) The Fund also sought "reasonable attorneys' fees and costs pursuant to Civ. Proc. Code § 1021.5, or other applicable law." (*Prop. 22* Exs. 1028.)

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[2] Robert Montgomery, a California taxpayer, was originally named as a plaintiff but was later dismissed. (*Prop. 22* Exs. 1024.)

Asserting similar causes of action (*Thomasson* AA 5-8), the Campaign sought a declaratory judgment "that the Mayor's Directive and actions to implement the Directive are invalid insofar as such Directive and actions violate California Law and Plaintiffs' voting rights" and "that the marriage licenses already issued to same-sex couples are null and void" (*id.* 9).[3] It also asked the trial court to "declare the rights and other legal relations with the subject here in controversy" and to award "reasonable costs and expenses of this action, including attorney's fees, in accordance with California Code of Civil Procedure § 1021.5." (*Thomasson* AA 9-10.)

Both the Fund and the Campaign requested an immediate stay to halt the issuance of marriage licenses to same-sex couples. The trial court denied the request on February 17, 2004 (*Prop. 22* Exs. 1106-1107), and the Court of Appeal did the same on February 18, 2004 (*id.* 1007-1008).[4]

Various same-sex couples and Equality California moved to intervene as defendants in the *Prop. 22* and *Thomasson* actions. (*Prop. 22* Exs. 1034-1047; *Thomasson* AA 22-39.) The trial court granted their motion.

On February 25, 2004, three City taxpayers filed a petition for writ of mandate in this Court (*Lewis v. Alfaro*, S122865). The petition asked this Court "to compel the county clerk to cease and desist issuing marriage

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[3] Thomasson was originally named as a plaintiff but was later dismissed. (*Thomasson* AA 5.)

[4] The City filed cross-complaints against the State of California in both actions, seeking a declaration that the marriage exclusion was "void and unenforceable." (*Prop. 22* Exs. 1055-1061; *Thomasson* AA 46-53.) Various same-sex couples and Equality California did the same. (*Prop. 22* Exs. 1132-1154; *Thomasson* AA 92-114.) They both, however, dismissed the cross-complaints soon thereafter. (*Prop. 22* Exs., 1157-1165.)

licenses to couples other than those who meet state law marriage requirements and on forms that do not comply with state law license requirements, and also sought an immediate stay pending the court's determination of the petition." (*Lockyer*, *supra*, 33 Cal.4th at p. 1073.)

Two days later, the Attorney General filed a writ petition and request for an immediate stay in this Court. In the petition, he sought "an order (1) directing the local officials to comply with the applicable statutes in issuing marriage licenses and certificates, (2) declaring invalid the same-sex marriage licenses and certificates that have been issued, and (3) directing the city to refund any fees collected in connection with such licenses and certificates." (*Lockyer*, *supra*, 33 Cal.4th at p. 1072.) He also asked the Court to "resolve the substantive constitutional issue" surrounding the state statutes prohibiting marriage between same-sex couples (marriage exclusion) but acknowledged that the Court need not do so to grant the relief requested in the petition. (*Id.* at p. 1073.)

On March 11, 2004, this Court "issued an order . . . directing the city officials to show cause why a writ of mandate should not issue requiring the officials to apply and abide by the current California marriage statutes in the absence of a judicial determination that the statutory provisions are unconstitutional." (*Lockyer*, *supra*, 33 Cal.4th at p. 1073.) It also ordered the City to stop issuing marriage licenses to same-sex couples pending resolution of the order to show cause. Finally, the Court stayed the *Prop. 22* and *Thomasson* actions but specified that the stay "does not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes." (*Lockyer*, at pp. 1073-1074.)

Immediately thereafter, the City filed a writ petition and complaint for declaratory relief against the State of California and the State Registrar of Vital Statistics (*CCSF* action (A110449 [Superior Court Case No. 429539])). The City sought, among other things, a declaration that section 308.5 does not apply to in-state marriages and that the marriage exclusion violates the California Constitution. (Respondent's Appendix in *CCSF* Action (*CCSF* RA) 5.)

The next day, a group of lesbian and gay couples and organizations filed suit against the State asserting similar claims (*Woo* action [now retitled *Rymer v. State*] (A110451 [Superior Court Case No. 504308])). The trial court consolidated these cases for trial. Later, another group sued the State in the same court (*Clinton* action (A110463 [Superior Court Case No. 429548])), and a group of lesbian and gay couples sued the County of Los Angeles (*Tyler* action (A110450 [Superior Court Case No. BS088506])). The State was later added as a defendant to the *Tyler* action.

In June 2004, the trial court coordinated the *Prop. 22*, *Thomasson*, *CCSF*, *Woo*, and *Tyler* actions. (*Prop. 22* Exs. 1172-1173.) The *Clinton* action was later added by petition. (*Prop. 22* Exs. 1172-1173.)

C. Denial Of The Fund's Motion To Intervene And Subsequent Appeal

Soon after the City and the *Woo* plaintiffs filed their actions, the Fund moved to intervene in those cases. (See Intervener Fund App. 57-82.) In its verified complaint in intervention, the Fund sought orders denying the relief requested by the City and the *Woo* plaintiffs and an "order declaring constitutional" the State's "policy and practice of refusing to issue marriage licenses to couples other than those meeting state law requirements." (*Id.* 81.) The Fund also sought "litigation expenses, including reasonable

attorneys' fees and costs pursuant to California Code of Civil Procedure § 1021.5, or other applicable law." (Intervener Fund AA 81.) The trial court denied the motion on April 22, 2004.

The Court of Appeal affirmed. In holding that the Fund and its members did not "have a sufficiently direct and immediate interest to support intervention" (*CCSF*, *supra*, 128 Cal.App.4th at p. 1038), the court found that: (1) "the Fund itself played no role in sponsoring Proposition 22 because the organization was not even created until one year *after* voters passed the initiative" (*ibid.*); (2) none of its members was "an official proponent" of an initiative as defined by Elections Code section 342 (*CCSF*, at p. 1038); and (3) "the Fund has not alleged its members will suffer any tangible harm absent intervention" (*id.* at p. 1039). Although the court acknowledged that the Fund and its members had a strong "philosophical or political" interest in defending the marriage exclusion and actively supported Proposition 22, it held that those interests and support are "not an appropriate basis for intervention." (*Ibid.*)

D. This Court's Decision In *Lockyer*

In *Lockyer*, this Court held "that local officials in San Francisco exceeded their authority by" issuing marriage licenses to same-sex couples "in violation of applicable statutory provisions." (*Lockyer*, *supra*, 33 Cal.4th at p. 1069.) In so holding, the Court declined to reach the "substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman." (*Ibid.*) Instead, the Court concluded that "the city officials have no authority to refuse to apply the current marriage statutes in the absence of a judicial determination that these statutes are unconstitutional." (*Id.* at p. 1112.) Consequently, the Court directed the issuance of a writ of mandate

compelling the City "to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes" (*id.* at p. 1120) and "to take all necessary steps to remedy the continuing effect of their past unlawful actions, including the correction of all relevant official records and notification of affected individuals of the invalidity of the officials' actions" (*id.* at p. 1113).

E. The Coordinated Proceedings And Trial Court Decision

In light of *Lockyer*, defendants-interveners in the *Prop. 22* and *Thomasson* actions moved to dismiss those actions as moot. (*Prop. 22* Exs. 1358-1371; *Thomasson* AA 117-130.) The Fund and the Campaign simultaneously moved to discharge the alternative writ issued by the trial court and for leave to file amended complaints. Those complaints sought to add a claim seeking a declaration that the marriage laws are constitutional and to clarify that their taxpayer claims – including any declaratory relief claims addressing the constitutionality and scope of section 308.5 – survived. (*Prop. 22* Exs. 1372-1381; *Thomasson* AA 131-165.) In opposition, the City, among other things, contended that the *Prop. 22* and *Thomasson* actions were moot and that the Fund and the Campaign lacked standing. (*Prop. 22* Exs. 1426-1433; *Thomasson* AA 172-179.)

The trial court denied all the motions. (Clerk's Transcript in *Proposition 22* action (*Prop. 22* CT) 344.) It denied leave to amend because it found that the existing complaints filed by the Fund and the Campaign included a claim for declaratory relief addressing the constitutionality of the marriage exclusion. (RT (Oct. 15, 2004) 121-122.) It denied the motion to dismiss because it found "a controversy" over the constitutionality of that exclusion. (*Id.* 118, 122). And it denied the motion to discharge as premature. (*Id.* 126.) Although the issue of standing came up at the hearing,

the court refused to decide it because "nobody ha[d] asked" it "to dismiss" any complaint "for lack of standing." (*Id.* 118.)

At a subsequent hearing, the City orally moved for judgment on the pleadings, asking the trial court to dismiss the *Prop. 22* and *Thomasson* actions for lack of standing. (RT (Dec. 23. 2004) 391-392.) The City had raised and briefed the standing issue as part of its opposition to the motions for summary judgment filed by the Fund and the Campaign in their actions. (*Prop. 22* Exs. 1572-1577; *Thomasson* AA 792-797.) The court denied the motion "as untimely and because the question of standing had been or could have been handled in prior proceedings in this court and in the Supreme Court." (*Prop. 22* CT 631.) It also suggested that the motion lacked merit "because of the remaining question regarding the permanency of an order against Mayor Newsom." (RT (Dec. 23, 2004) 399.)

Ultimately, however, the trial court declared that the marriage exclusion was unconstitutional (State of California Appellant's Appendix 107-133), and issued a writ of mandate directing the State Registrar of Vital Statistics to take the steps necessary to issue marriage licenses to same-sex couples (*Id.* 160-161). The State, the Fund, and the Campaign appealed. (*Id.* 227-228; *Prop. 22* Exs. 2666-2667; *Thomasson* AA 1880-1884.)

F. The Court Of Appeal Decision And This Court's Subsequent Grant Of Review

The Court of Appeal unanimously held that the Fund and the Campaign "lacked standing to pursue" their "declaratory relief claims" relating to "issues about the constitutionality of the" marriage exclusion.[5] (*In re Marriage Cases* (2006) 143 Cal.App.4th 873, 893-894.) Citing its

[5] In a split decision, the Court of Appeal upheld the constitutionality of the marriage exclusion.

prior decision affirming the denial of the Fund's motion to intervene (see *CCSF*, *supra*, 128 Cal.App.4th at p. 1030), the court concluded that neither the Fund nor the Campaign satisfied the "requirements for injury-based standing" (*Marriages Cases*, at p. 894). Observing that the Fund and the Campaign, "and their members, may have a strong philosophical or political interest in defending the validity of California's marriage laws," the court nonetheless found that "they have not alleged or demonstrated any possibility that they will suffer injury from an adverse judgment in these actions." (*Id.* at p. 895.)

The Court of Appeal also rejected two other bases for standing. First, it concluded that the Fund and the Campaign did not have taxpayer standing "to seek declaratory relief because their claims do not identify or challenge any allegedly illegal expenditure of public funds." (*Marriage Cases*, *supra*, 143 Cal.App.4th at p. 895.) Second, it concluded that the citizen suit exception "no longer applies" because "the remaining claims in *Thomasson* and *Proposition 22* seek only declaratory relief about the constitutionality of the marriage laws, and do not seek to enforce a public duty (such as the execution of these laws)." (*Id.* at p. 896.) As a result, the Court of Appeal "determined" that the Fund and the Campaign "lack standing to pursue their declaratory relief claims." (*Ibid.*)

All parties except for the Campaign petitioned for review. This Court granted review on December 20, 2006. In a subsequent order, the Court clarified that it was granting review in all of the cases and on all of the issues addressed by the Court of Appeal.[6]

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[6] Per the Court's order, the Fund and the Campaign filed opening briefs addressing the justiciability issues. This answer brief responds to those briefs and only addresses the issues raised therein.

LEGAL DISCUSSION

I.

STANDING IS A QUESTION OF LAW THAT IS REVIEWED DE NOVO

"[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (*Common Cause of California v. Board of Supervisors of Los Angeles County* (1989) 49 Cal.3d 432, 438.) "Standing is a question of law that" is reviewed "de novo." (*IBM Personal Pension Plan v. City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299; see also *Olson v. Hopkins* (1969) 269 Cal.App.2d 638, 645 [noting that standing is a question of law].) This is especially true where, as here, "the matter can be determined on the undisputed facts." (*People v. Superior Court (Plascencia)* (2002) 103 Cal.App.4th 409, 424; see also *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974 [where the facts are undisputed, the decision to issue declaratory relief is reviewed de novo].) Thus, rulings on jurisdictional questions of justiciability like ripeness and standing are reviewed "without deference to the trial court's determination." (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1451.)

Citing cases holding that courts have discretion to order declaratory relief, the Fund and the Campaign contend the trial court's decision to order such relief should be reviewed for abuse of discretion. But those cases did not involve *jurisdictional* challenges based on lack of standing. In fact, the plaintiffs' standing in those cases was not even at issue.[7] Thus, the cited

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[7] (See *Hannula v. Hacienda Homes, Inc.* (1949) 34 Cal.2d 442, 447-448 [considering whether it was proper to issue declaratory relief when the court could have decided the plaintiff's claims without doing so]; *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 801 [reviewing issuance of declaratory relief for abuse of discretion where both standing and actual controversy existed]; *Application Group, Inc. v. Hunter Group,*

(continued on next page)

cases simply stand for the proposition that the trial court has discretion to issue declaratory relief if the plaintiff has standing to assert that claim.

California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16 makes this clear. As the Court of Appeal explained, a trial court only has discretion to grant declaratory relief "[w]hen justiciability in a jurisdictional sense [already] exists." (*Id.* at p. 23.) If justiciability does not exist because the plaintiff lacks standing, then the trial court abuses its discretion by ordering declaratory relief. Indeed, *Filarsky v. Superior Court* (2002) 28 Cal.4th 419 – which is cited by the Fund and the Campaign – stands for this very proposition. In *Filarsky*, this Court held that the trial court abused its discretion by issuing declaratory relief because the statutes establishing the "exclusive means" for litigating the issue did not authorize the plaintiff "to initiate a judicial proceeding" to resolve it. (See *id.* at pp. 434-435.) In so holding, this Court confirmed that a trial court abuses its discretion whenever it issues declaratory relief to a plaintiff who lacks standing as a matter of law.

II.

THE FUND AND THE CAMPAIGN LACK STANDING TO PURSUE ANY CLAIMS ADDRESSING THE CONSTITUTIONALITY OR SCOPE OF THE MARRIAGE EXCLUSION.

"The concept of justiciability requires" the examination of both standing and ripeness. (*Sherwyn & Handel v. California Dept. of Social Services* (1985) 173 Cal.App.3d 52, 57 (*Sherwyn*).) Although the two

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(footnote continued from previous page)
Inc. (1998) 61 Cal.App.4th 881, 893 (*AGI*) [noting that the defendant did not challenge the plaintiff's standing]; *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 995, fn. 1 [noting that the plaintiff had "statutory authority to pursue this action"].)

concepts are "intertwined" (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59 (*City of Santa Monica*)), they are distinct, and no justiciable controversy exists unless both are met (see *ibid.* [requiring both standing and ripeness].)

The standing requirement is derived from Code of Civil Procedure section 367 – which states that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." To be a "real party in interest," a plaintiff must have " 'an actual and substantial interest in the subject matter of the action' and stand[] to be 'benefited or injured' by a judgment in the action." (*City of Santa Monica, supra*, 126 Cal.App.4th at p. 60, quoting *Friendly Village Community Assn., Inc. v. Silva & Hill Co.* (1973) 31 Cal.App.3d 220, 225.) Thus, "[i]n order to pursue a cause of action, the plaintiff's standing must be established in some appropriate manner." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232 (*Waste Management*).) "Without standing, there is no actual or justiciable controversy, and courts will not entertain such actions." (*Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751.) Indeed, "[i]t is elementary that a plaintiff who lacks standing cannot state a valid cause of action . . . ." (*McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90.)

This is true for all claims – including claims for declaratory relief under Code of Civil Procedure section 1060. (See, e.g., *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 54-55 [dismissing declaratory relief claim for lack of standing]; *City of Santa Monica, supra*, 126 Cal.App.4th at pp. 59-64 [same]; *Sherwyn, supra*, 173 Cal.App.3d at pp. 58-59 [same]; *Zetterberg v. California State Dept. of Public Health* (1975) 43 Cal.App.3d 657, 665 (*Zetterberg*) [holding that a declaratory

relief claim should be dismissed if the plaintiffs lack standing].) Indeed, Code of Civil Procedure section 1060, by its terms, requires more than just an "actual controversy"; it requires an "actual controversy *relating to the legal rights and duties of the respective parties* . . . ." (Italics added.) Thus, "broad allegations . . . that appellants and respondents were unable to agree as to the constitutionality and interpretation of" a statute do "not render declaratory relief necessary and proper . . . ." (*Auberry Union School Dist. v. Rafferty* (1964) 226 Cal.App.2d 599, 603 (*Auberry Union*).) To obtain declaratory relief, a plaintiff must still establish some form of standing even if there is a controversy over the validity or scope of the statute.[8] (See *Zetterberg*, at p. 665 [issuing declaratory relief to plaintiff without standing constitutes abuse of discretion].)

In this case, the Fund and the Campaign contend they have standing as taxpayers under Code of Civil Procedure section 526a and as parties with an actual and substantial interest in defending the constitutionality and scope of Family Code section 308.5.[9] Neither contention has merit. The Fund and the Campaign lack taxpayer standing because *Lockyer* rendered

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[8] Contrary to the Fund's assertions, *City of Cotati v Cashman* (2002) 29 Cal.4th 69 does not suggest otherwise. In *City of Cotati*, this Court held that the plaintiff's declaratory relief action did not constitute a strategic lawsuit against public participation (see Code Civ. Proc., § 425.16), because it did not "arise from" a federal lawsuit filed by the defendants challenging its ordinance (*City of Cotati*, at p. 80). According to the Court, the actual controversy pled by the plaintiff was the controversy over the validity of the ordinance – and not the federal lawsuit. (*Ibid.*) The plaintiff's standing was not at issue, and this Court did not even mention standing in its decision.

[9] Neither the Fund nor the Campaign contend the citizen suit exception to the standing requirements applies. (See *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.)

moot any claims they had or could have asserted as taxpayers. And their interest as supporters of Proposition 22 is insufficient, as a matter of law, to establish injury-based standing. Accordingly, this Court should affirm the dismissal of the *Prop. 22* and *Thomasson* actions.

A. Because *Lockyer* Ended All Illegal Expenditures By The City, The Fund And The Campaign No Longer Have Taxpayer Standing To Pursue Claims Addressing the Constitutionality Of The Marriage Exclusion.

The Fund and the Campaign contend they have taxpayer standing to seek declaratory relief notwithstanding *Lockyer*. According to the Fund and the Campaign, they had taxpayer standing to assert declaratory relief claims challenging the City's issuance of marriage licenses to same-sex couples when they originally filed their actions. Because *Lockyer* did not decide those claims, they contend they still have taxpayer standing to pursue them, as well as claims for injunctive relief. They are wrong. *Lockyer* rendered moot all taxpayer claims asserted by the Fund and the Campaign. All of those claims – including any declaratory relief claims addressing the constitutionality of the marriage exclusion – should therefore be dismissed.

Under Code of Civil Procedure section 526a, a taxpayer has standing to maintain "[a]n action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the State . . . ." "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, quoting Comment, *Taxpayer Suits: A Survey and Summary* (1960) 69 Yale L.J. 895, 904.) Consistent with "the policy of liberally construing section 526a to foster its remedial purpose, our courts

have permitted taxpayer suits for declaratory relief, damages and mandamus." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 449-450.)

Nonetheless, the gravamen of any taxpayer action is still "an illegal expenditure of public money." (*Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th at p. 29.) And to maintain a taxpayer action, the plaintiff must allege "an *actual* or *threatened* expenditure of public funds." (*Waste Management*, *supra*, 79 Cal.App.4th at p. 1240, italics added.) "General allegations, innuendo, and legal conclusions are not sufficient [citation]; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." (*Ibid.*) Thus, no taxpayer action may be maintained if the actual or threatened injury to the public fisc has been eliminated. (See *Zetterberg*, *supra*, 43 Cal.App.3d at p. 662 [holding that mere allegation of taxpayer status is insufficient to establish standing to pursue declaratory relief claim].)

This Court's decision in *Lockyer* did just that. In *Lockyer*, this Court held that City officials "have no authority to refuse to apply the current marriage statutes in the absence of a judicial determination that these statutes are unconstitutional." (*Lockyer*, *supra*, 33 Cal.4th at p. 1112.) Based on this holding, it issued a writ of mandate "compelling" City officials "to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes" and to undo their unauthorized actions. (*Id.* at p. 1120.) In doing so, this Court necessarily found that the City had made illegal expenditures in issuing marriage licenses to same-sex couples and effectively prevented such expenditures in the future. (See *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 751 ["There is a presumption that state officers will

obey and follow the law"].) Thus, after *Lockyer*, no "illegal expenditure or injury to the public fisc [was] occurring or [would] occur." (*Waste Management, supra*, 79 Cal.App.4th at p. 1240.) And all taxpayer claims – including any declaratory relief claims – brought by the Fund and the Campaign became moot. (See *Pittenger v. Home Savings and Loan Assn. of Los Angeles* (1958) 166 Cal.App.2d 32, 37 (*Pittenger*) [suggesting that controversy may "be deemed moot" where "there was no evidence whatever that there was a reasonable expectation that the wrong, if any, will be repeated"].)

The fact that this Court did not order declaratory relief in *Lockyer* is immaterial. Once the Court held that City officials exceeded their authority by issuing marriage licenses to same-sex couples, it would have been "an idle and superfluous act for the trial court to issue a declaratory judgment that merely restate[d] the holding of" *Lockyer*. (*Connerly v. Schwarzenegger, supra*, 146 Cal.App.4th at p. 747.) In any event, after *Lockyer* – which determined the illegality of the City's expenditures without deciding the constitutional issues – the Fund and the Campaign are, at most, entitled to a declaratory judgment that City officials previously authorized "the improper expenditure of public funds." (*Stanson v. Mott* (1976) 17 Cal.3d 206, 222-223.) Because this Court has already decided that issue and rectified any illegality in *Lockyer*, any such claim is moot. The Fund and the Campaign are therefore not entitled to a declaratory judgment addressing the constitutionality of the marriage exclusion once any illegal expenditure was halted by this Court.

Likewise, the fact that the Fund and the Campaign had standing to maintain a taxpayer action when they first filed their actions is immaterial. " 'For a lawsuit properly to be allowed to continue, standing must exist *at*

all times until judgment is entered and not just on the date the complaint is filed.' " (*Connerly v. Schwarzenegger*, *supra*, 146 Cal.App.4th at p. 749, quoting *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232-233, italics added.)

The fact that this Court only ordered the City to enforce the marriage exclusion "unless and until they are judicially determined to be unconstitutional" also does not give the Fund or the Campaign taxpayer standing to seek additional declaratory or injunctive relief. (*Lockyer*, *supra*, 33 Cal.4th at p. 10691.) Contrary to the Campaign's assertion, *Lockyer does* prevent the City from engaging in illegal actions in the future. If this Court finds that the marriage exclusion is unconstitutional, then the issuance of marriage licenses to same-sex couples would be legal, and no *illegal* expenditures would occur if the City resumed issuing such licenses. Thus, the caveat to this Court's order in *Lockyer* creates *no* risk that any *illegal* actions will recur and renders moot any taxpayer claims asserted by the Fund or the Campaign. (See *Pittenger*, *supra*, 166 Cal.App.2d at p. 37.)

All taxpayer claims asserted by the Fund and the Campaign are therefore moot after *Lockyer.* Because a claim for declaratory relief "will not lie to determine a matter which is or has become moot," they no longer have taxpayer standing to pursue such a claim. (*Burke v. City and County of San Francisco* (1968) 258 Cal.App.2d 32, 34.) And the trial court abuses its discretion by deciding a declaratory relief claim where, as here, there is no "violation or threatened violation of the statute." (*Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1183-1184.) Courts are "not in the business of deciding issues that have lost their vitality as matters in 'actual controversy.' " (*AGI*, *supra*, 61 Cal.App.4th at p. 894.) And since this Court issued its decision in *Lockyer*, there is no "actual controversy"

over whether the City's expenditures in issuing licenses to same-sex couples was illegal. Accordingly, all claims predicated on the Fund's and the Campaign's taxpayer status – including declaratory relief claims – should be dismissed. (See *Pittenger*, *supra*, 166 Cal.App.2d at p. 36 ["An action for declaratory relief should be dismissed where it appears that no justiciable controversy exists"].)

B. Neither The Fund, The Campaign, Nor Their Members Have An Actual Or Substantial Interest In The Constitutionality And Scope Of Section 308.5.

To maintain a declaratory relief action addressing the validity or scope of a statute, a party "must have a sufficient beneficial interest to have standing to prosecute" it. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1085; see also *Personnel Com. of the Barstow Unified School Dist. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 877 [observing that beneficial interest requirement is similar to the requirement imposed by Code of Civil Procedure section 367].) In other words, a party seeking declaratory relief relating to the validity or scope of a statute "must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " (*Holmes v. California National Guard* (2001) 90 Cal.App.4th 297, 315, quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) "This standard . . . is equivalent to the federal injury in fact test, which requires a party to prove . . . that he has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." (*Associated Builders & Contractors, Inc. v. San Francisco Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362 (*Associated Builders*), internal quotations omitted.) Thus, the standard for injury-based standing is

similar, if not identical, to the interest requirement for intervention – which requires that "the intervener's interest in the outcome of the litigation . . . be direct and immediate rather than consequential." (*People ex rel. Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 660 (*Rominger*).)

Here, the Fund and the Campaign contend they have injury-based standing because they are proponents of Proposition 22. They also contend they have associational standing because their members – who voted and actively campaigned for Proposition 22 – have injury-based standing. (See *Associated Builders*, *supra*, 21 Cal.4th at p. 361 ["To establish associational standing," an organization "must demonstrate that its members would otherwise have standing to sue in their own right"].) As explained below, these contentions are meritless.

1. An initiative's political supporters do not have standing to defend that law.

According to the Fund and the Campaign, supporters who voted and campaigned for an initiative have injury-based standing to defend the constitutionality and scope of that initiative. But they do not cite a single case suggesting that the interest of initiative supporters is any different than the interest of the public-at-large. There is good reason for this omission. Giving initiative supporters the right to assert claims addressing the validity or scope of an initiative contravenes well-settled California and federal law.

As an initial matter, neither the Fund nor the Campaign claim that a judgment resolving the constitutionality or scope of section 308.5 will directly benefit or injure them or their members. In fact, they do not claim that such a judgment will affect *any* rights of their members – much less their right to marry. Indeed, the Fund concedes this. (See Proposition 22 Legal Defense and Education Fund Opening Brief 17, fn. 9.)

Nonetheless, the Fund and the Campaign assert that their members have an unique interest in the validity and scope of section 308.5 due to their personal and financial support of the initiative resulting in the passage of that statute. But as the Court of Appeal explained in denying the Fund's motion to intervene, any investment of time, money, or personal reputation goes to the strength of their interest – and not to its nature. (See *CCSF*, *supra*, 128 Cal.App.4th at p. 1039.) The "fundamental *nature* of [their] interest . . . is [still] philosophical or political." (*Ibid.*) And the nature of that interest is no different than the nature of the interest of any other California citizen in section 308.5. It is therefore insufficient, as a matter of law, to establish their standing to assert claims addressing the constitutionality or scope of section 308.5. (See *Auberry Union*, *supra*, 226 Cal.App.2d at p. 603 [holding that disagreement over the scope or validity of a statute is insufficient to confer standing].) Indeed, the purported political interest of the Fund and the Campaign is neither concrete and particularized nor imminent. (See *CCSF*, at p. 1044 [holding that initiative supporters lack a "direct and immediate interest in litigation challenging the initiative's validity"]; *Rominger*, *supra*, 147 Cal.App.3d at p. 662 [refusing to hold that "a general political interest in upholding a statute is sufficient to intervene in a challenge to it"].)

The cases cited by the Fund and the Campaign do not suggest otherwise. The Fund cited these same cases in support of its motion to intervene in the *CCSF* and *Woo* actions. There were inapposite there, and they are inapposite here. As the Court of Appeal explained, "*none* of the California cases cited addresses whether" initiative supporters have standing to assert claims defending the validity of that initiative. (*CCSF*, *supra*, 128 Cal.App.4th at p. 1041.)

> Some simply note that an initiative sponsor was permitted to intervene in earlier proceedings (e.g., *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241), while others refer to initiative sponsors as "interveners" without mentioning whether an objection was ever made to their intervention (e.g., *Legislature v. Eu* (1991) 54 Cal.3d 492, 500; *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 626.) (*CCSF*, *supra*, 128 Cal.App.4th at pp. 1041-1042.)

"Because these cases do not address" the issue of standing, "they do not constitute authority supporting the Fund's position." (*Id.* at p. 1042 [finding same cases unpersuasive in intervention context because they "do not address the propriety of intervention"].)

The Fund's reliance on *Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727 is also misplaced. Because the United States Supreme Court vacated that decision in *Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, it has no precedential authority (*O'Connor v. Donaldson* (1975) 422 U.S. 563, 577, fn. 12 ["Of necessity our decision vacating the judgment of the Court of Appeals deprives the court's opinion of precedential effect"].) Moreover, "the United States Supreme Court sharply criticized the Ninth Circuit's decision to allow the initiative sponsors to intervene and prosecute the appeal" (*CCSF*, *supra*, 128 Cal.App.4th at pp. 1043-1044), and expressed "grave doubts whether" initiative sponsors "have standing under Article III to pursue appellate review" (*Arizonans for Official English*, at p. 66). *Yniguez* is therefore not persuasive authority.

Indeed, several federal cases strongly suggest that an initiative's political supporters lack standing to assert a claim defending the validity or scope of an initiative. For example, in *Schaffer v. Clinton* (10th Cir. 2001) 240 F.3d 878, 884, the Tenth Circuit held that the intensity or fervency of a

litigant's support of a statute or constitutional provision "does not endow him with standing to sue."

Similarly, in *Keith v. Daley* (7th Cir. 1985) 764 F.2d 1265, the Seventh Circuit concluded that a non-profit organization – which had actively supported and lobbied for the passage of a statute – "presented no direct and substantial interest" (*id.* at p. 1272), and had no " 'right to maintain a claim' " defending the validity of that statute (*id.* at pp. 1268, quoting *Heyman v. Exchange National Bank of Chicago* (7th Cir. 1980) 615 F.2d 1190, 1993). It therefore held that the organization's "interest as chief lobbyist" in favor of the statute "is not a direct and substantial interest sufficient to support intervention."[10] (*Id.* at p. 1269.)

Finally the federal district court in *National Right to Life Political Action Committee State Fund v. Devine* (D.Me. 1997) 1997 WL 33163631, *1 (*National Right to Life Fund*) concluded that the drafters and sponsors of an initiative "have only the interest that all citizens possess who support particular legislation." The court reached this conclusion even though the drafters and sponsors had "gone to great lengths to bring this legislation into effect through the initiative process and ha[d] spent vast quantities of time and money in the process." (*Ibid.*) According to the court, "the more appropriate way to recognize" those interests "is to permit the organization to participate as *amicus curiae*." (*Id.* at p. *2.)

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[10] Under federal law, "the 'injury in fact' requirement is stricter than the 'substantial interest' inquiry" for intervention. (*Providence Baptist Church v. Hillandale Committee, Ltd.* (6th Cir. 2005) 425 F.3d 309, 318.) Thus, "[i]t is possible to have standing to intervene in a lawsuit, but not have Article III standing to bring an independent appeal." (*Ibid.*)

Thus, both California and federal law establish that initiative supporters like the Fund and the Campaign lack standing to assert claims addressing the validity or scope of an initiative. This is so regardless of the amount of time, money, and personal reputation they may have spent supporting that initiative. Instead, the interests of supporters like the Fund and the Campaign are more appropriately served through their participation as amici curiae.

2. Neither the Fund, the Campaign, nor their members can establish standing as official proponents of Proposition 22.

Although both the Fund and the Campaign state that they are "proponents" of Proposition 22, that is inaccurate. The term has a precise meaning under the Elections Code, and neither they nor their members meet that definition. (See Elec. Code, § 342.)[11] Indeed, the Fund did not come into being until one year *after* the passage of Proposition 22. The Fund does claim that Senator Knight, the official proponent of Proposition 22, *was* its President. But Senator Knight died in 2004, and "no personal representative or successor in interest has appeared . . . in his place." (*CCSF*, *supra*, 128 Cal.App.4th at p. 1038, fn. 7.) Thus, neither the Fund nor the Campaign are official proponents of Proposition 22, and their interest in section 308.5 is no different than any other supporter of the

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[11] " 'Proponent or proponents of an initiative or referendum measure' means, for statewide initiative and referendum measures, the person or persons who submit a draft of a petition proposing the measure to the Attorney General with a request that he or she prepare a title and summary of the chief purpose and points of the proposed measure; or for other initiative and referendum measures, the person or persons who publish a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body." (Elec. Code, § 342.)

Proposition. For these reasons, this Court need not and should not decide whether official proponents of an initiative have standing to defend the constitutionality or scope of that initiative.

If the Court does reach this issue, however, it should hold that official proponents lack such standing. Although no California cases have apparently addressed the issue,[12] federal courts have consistently held that legislators do not have standing to defend or challenge a statute. For example, in *Raines v. Byrd* (1997) 521 U.S. 811, the United States Supreme Court held that "individual members of Congress" who voted against a bill "have not alleged a sufficiently concrete injury to have established Article III standing" to challenge the validity of that bill. (*Id.* at p. 830.) Similarly,

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[12] There is dicta in *Building Industry Assn. of Southern California v. City of Camarillo* (1986) 41 Cal.3d 810, 822 – which neither the Fund nor the Campaign cited – suggesting that initiative proponents should be permitted to intervene in cases addressing the constitutionality of an initiative in narrow circumstances. But this dicta, even if persuasive (see *CCSF*, *supra*, 128 Cal.App.4th at p. 1042, fn. 9 [finding this dicta unpersuasive]), does not apply here. *Building Industry Assn.* considered whether Evidence Code section 669.5 – which shifted the burden of proof to local government officials to demonstrate that a local growth control ordinance is necessary to protect the public health, safety, or welfare – applies to ordinances enacted by initiative. In holding that it does, this Court rejected the argument that Evidence Code section 669.5 impairs the ability of the people to exercise initiative power because the officials may not defend a local growth initiative with enough vigor *in light of the statutory shift in the burden of proof.* (See *Building Industry Assn.*, at p. 833.) Under these narrow circumstances, the Court suggested that initiative proponents "in most instances" should be permitted to intervene. (*Ibid.*)

Those circumstances do not exist here. There is no statute that alters the burden of proof for the State in defending section 308.5. Moreover, the State is vigorously defending the marriage exclusion and has already prevailed before the Court of Appeal. Finally, neither the Fund nor the Campaign is an official proponent of Proposition 22. Thus, the dicta in *Building Industry Assn.* does not support a finding of standing here.

the Eighth Circuit in *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann* (8th Cir. 1998) 137 F.3d 573, 578, held that 10 legislators who voted for a bill lacked standing to defend the constitutionality of that bill.

Just as legislators cannot meet the federal injury-in-fact test for standing – the same test used for injury-based standing under California law (see *ante*, at pp. 21-22.) – so must official proponents of an initiative lack standing to assert claims addressing the validity or scope of that initiative. Indeed, such proponents have no greater interest in an initiative than elected representatives do in legislation that they voted for or sponsored. Because no California law appoints initiative proponents "to defend, in lieu of public officials, the constitutionality of initiatives made law of the State" (*Arizonans for Official English*, *supra*, 520 U.S. at p. 65), neither the Fund, the Campaign, nor their members have standing to do so.

3. The Fund is collaterally estopped from establishing injury-based standing.

In affirming the denial of the Fund's motion to intervene in the *CCSF* and *Woo* actions, the Court of Appeal made a final ruling on the merits which resolved several issues relevant to the standing question presented here. Under the doctrine of collateral estoppel, the Fund cannot relitigate those issues. As such, it cannot establish injury-based standing to assert claims addressing the validity or scope of section 308.5.

"The doctrine of collateral estoppel precludes relitigation of an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous

suit." (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.)

The second and third prongs are readily met here. As conceded by the Fund, the denial of its motion to intervene was a final judgment appealable under Code of Civil Procedure section 904.1, subdivision (a) "because it finally and adversely determine[d] the right of the" Fund "to proceed in the action." (Appellant's Opening Brief in *City and County of San Francisco v. State of California*, A1067603 [Exhibit 3 to CCSF RFJN] 3, citing *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1363.) Thus, the order denying intervention is a final judgment with preclusive effect. Because the Fund was also a party to that motion and appeal, it may no longer litigate the issues decided therein.

And as to the first prong, those issues are identical to the issues to be decided in resolving the standing question presented in this appeal. The Fund in this appeal is claiming an actual and substantial interest in the validity and scope of section 308.5. To decide whether this claim is valid, this Court must decide whether that interest is concrete and particularized or actual and imminent. But the Fund already litigated those issues in the *CCSF* appeal, and the Court of Appeal found that: (1) "the Fund itself played no role in sponsoring Proposition 22" (*CCSF*, *supra*, 128 Cal.App.4th at p. 1038); (2) the Fund no longer represents the interests of Senator Knight (*ibid.*); (3) no other member of the Fund "was an official proponent of Proposition 22" (*ibid.*); and (4) the Fund did not have an interest "of such a direct and immediate nature that" it "will either gain or lose by the direct legal operation and effect of the judgment" (*id.* at pp. 1037, internal quotations omitted). These findings establish that the Fund lacks injury-based standing to assert any claim addressing the validity or

scope of section 308.5.[13] Accordingly, the Fund is collaterally estopped from claiming such standing.

C. Conferring Standing On An Initiative's Supporters To Defend That Initiative Will Open The Litigation Floodgates And Serve No Beneficial Purpose.

Conferring standing on initiative supporters like the Fund and the Campaign to assert independent claims addressing the validity or scope of an initiative would open the floodgates of litigation. If the Fund and the Campaign can state a justiciable claim against the City, then *any* person or organization who "supported" an initiative in some fashion – i.e., by collecting signatures, writing letters, campaigning, making a campaign contribution, or even just voting – may file a separate lawsuit defending that law. And that enormous class of potential plaintiffs may sue not just a public entity like the City, but anyone who has the temerity to challenge the validity of the law or who disagrees with their interpretation of that law. And they may file that lawsuit even if the purported defendants have not challenged the law in court. (See *City of Cotati*, *supra*, 29 Cal.4th at p. 80 [holding that the existence of an "actual controversy" over the validity of an

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[13] Although the Court of Appeal in *CCSF* held that the Fund did not have an interest sufficient to justify intervention under Code of Civil Procedure section 387, this interest appears to be no different than the interest required for injury-based standing. (Compare *CCSF*, *supra*, 128 Cal.App.4th at p. 1037 ["the interest must be of such a direct and immediate nature that the moving party will either gain or lose by the direct legal operation and effect of the judgment," internal quotations omitted] with *Associated Builders*, *supra*, 21 Cal.4th at p. 362 [standing requires a legally protected interest that is "concrete and particularized" and "actual and imminent," internal quotations omitted].) In any event, the Court of Appeal's findings preclude a finding of injury-based standing even if the legal standards are different.

ordinance does not depend on the existence of a lawsuit challenging that ordinance].)

Moreover, if the interest of initiative supporters like the Fund and the Campaign is sufficient to confer standing to sue over the validity or scope of that initiative, then so too is the interest of initiative opponents. Although opposite in substance, the interests of supporters and opponents are identical in nature. And if initiative supporters have standing to sue, then any person or organization who voted, made a contribution, or campaigned against an initiative must have standing as well.

This reasoning is not limited to initiatives; it applies to any piece of legislation enacted enacted into law. Thus, if the Fund and the Campaign can state a justiciable claim defending the validity or scope of section 308.5, than any person or organization who politically supported or opposed a piece of legislation – including legislators, lobbyists, or concerned citizens – may file a lawsuit defending or challenging that law. Indeed, there is no principled basis for distinguishing between the Fund and the Campaign and any other person or organization that supports or opposes a law. The resulting political free-for-all would lead to a flood of lawsuits and cause the "courts to lose control over their workload." (*Sherwyn*, *supra*, 173 Cal.App.3d at pp. 58-59.) This alone justifies affirmance here. (See *ibid.*)

But there is more. Broadening the grounds for standing as suggested by the Fund and the Campaign would discourage legitimate challenges to questionable laws. As soon as they voiced their opposition to a questionable law – whether through a lawsuit or some other means – those actually injured by that law would face the specter of litigating multiple lawsuits initiated by the many supporters of the law. More significantly, if those

injured by the law do not prevail in those lawsuits, they would likely face multiple requests for attorneys' fees from those who filed the lawsuits. Indeed, both the Fund and the Campaign seek attorneys' fees in their complaints against the City. The possibility of significant financial liability would discourage all but the wealthiest organizations or persons from challenging the validity or scope of a questionable law.

At the same time, allowing initiative supporters like the Fund and the Campaign to assert claims defending the validity of a law serves no beneficial purpose where, as here, the State Attorney General is the proper party defendant. (See *Serrano v. Priest*, *supra*, 18 Cal.3d at p. 752.) Giving others separate standing to defend the exclusion is therefore unnecessary.

And even if the adequacy of the Attorney General's defense was relevant, it would not support giving the Fund and the Campaign standing to sue. "[W]hen the government is acting on behalf of a constituency it represents," there is "an assumption of adequacy." (*Arakaki v. Cayetano* (9th Cir. 2003) 324 F.3d 1078, 1086.) In this case, the Attorney General has mounted a full-fledged defense of section 308.5 and the other marriage statutes. He has vigorously opposed the City and other plaintiffs at every stage of the litigation and has prevailed before the Court of Appeal. His purported reluctance to make certain arguments raised by the Fund and the Campaign does not suggest otherwise. Lawyers often disagree about the strength and importance of arguments. The decision by the Attorney General to eschew certain arguments that the Fund and the Campaign believe are persuasive does not mean that the Attorney General has been

less than vigorous or effective in his defense of the marriage exclusion.[14] Unless the Attorney General *refuses* to participate in litigation challenging the validity or scope of a state statute, third party standing should not depend at all on the Attorney General's actions. Otherwise, courts would have to second-guess the Attorney General's litigation decisions whenever a third party claims standing to sue.

In any event, conferring standing on the Fund and the Campaign is unnecessary here because those organizations can "meaningfully participate" in these proceedings and can have their arguments "heard and fully considered" as amici curiae. (*Lockyer*, *supra*, 33 Cal.4th at p. 1116.) Indeed, the Court of Appeal, in rendering its decision, carefully considered the briefs and arguments of *all* parties and amici alike. (See *Marriage Cases*, *supra*, 143 Cal.App.4th at p. 891.) This Court will surely do the same. Thus, allowing the Fund and the Campaign to participate in these proceedings as amici curiae – rather than as parties – does not circumscribe the right of initiative in any way. Instead, it is the "more appropriate way to recognize [their] interests." (*National Right to Life Fund*, *supra*, 1997 WL 33163631 at p. *2.) Accordingly, this Court should affirm the judgment of the Court of Appeal dismissing the *Prop. 22* and *Thomasson* actions.

III.

SECTION 308.5 ONLY APPLIES TO OUT-OF-STATE MARRIAGES.

Neither the Fund nor the Campaign have standing to assert any claim addressing the scope of section 308.5. Moreover, the scope of section 308.5

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[14] Indeed, the Attorney General correctly recognized that the arguments asserted by the Fund and the Campaign "are clearly inconsistent with California's decision to afford substantially equivalent rights and benefits to same-sex couples." (Appellant's Opening Brief in *In re Marriage Cases* (A110449) 35, fn. 22.)

is irrelevant if this Court agrees with the City and holds that the marriage exclusion is unconstitutional. Nonetheless, the scope of section 308.5 could be at issue. (See *CCSF* RA 5 [seeking declaration that section 308.5 "does not apply to in-state marriages"].) And in the event this Court chooses to address that issue, the City responds here to the Fund's contention that section 308.5 applies to in-state marriages. As explained below, application of the rules of statutory construction establishes that section 308.5 only applies to out-of-state marriages.

"In interpreting a voter initiative," California courts "apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685 (*Rizo*).) Thus, the words of an initiative must be given "their ordinary meaning." (*Ibid.*, internal quotations omitted). And "[i]f the language is clear and unambiguous, [courts] follow[] the plain meaning of the measure." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.)

That language, however, must still be construed "in the context of the statute as a whole and the overall statutory scheme." (*Rizo*, *supra*, 22 Cal.4th at p. 685, internal quotations omitted.) "[T]he plain meaning rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, internal quotations omitted.) Thus, courts should " 'read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." ' " (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065 (*Calatayud*), quoting *People v. Pieters* (1991) 52 Cal.3d 894, 899.) And "[w]hen the language is ambiguous" – whether on its face or in context – courts may "refer to other indicia of the voters' intent, particularly the

analyses and arguments contained in the official ballot pamphlet." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, internal quotations omitted.)

Application of these rules reveals that section 308.5 does not apply to in-state marriages and only bars the State from recognizing out-of-state marriages between same-sex couples. As an initial matter, the literal language of section 308.5 –which states that "[o]nly marriage between a man and a woman is valid or recognized in California" – is ambiguous. On the one hand, this language, by stating that only such marriages are "valid," arguably reaffirms that marriage in California must be between a man and a woman. On the other hand, this language could also be reasonably construed to mean that California will only consider out-of-state marriages between opposite-sex couples to be "valid" marriages and will not recognize out-of-state marriages between same-sex couples in any way, including as domestic partnerships.[15]

But this ambiguity disappears when section 308.5 is construed in context. (See *Calatayud*, *supra*, 18 Cal.4th at p. 1065.) Section 300[16]

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[15] Under this construction, the terms, "valid" and "recognized," would have separate meanings. "Valid" would refer to valid marriages, and "recognized" would refer to any other form of legal recognition permitted by California law such as domestic partnerships. In any event, a minor redundancy between two terms used in a single statute may be permissible in order to effectuate the voter's intent. (See *Rizo*, *supra*, 22 Cal.4th at p. 687 [permitting an interpretation that renders the statutory term "true" a minor redundancy in order to effectuate the voter's intent].)

[16] Section 300 states:

> Marriage is a personal relation arising out of a civil contract between a man and a woman. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as

(continued on next page)

already establishes that only marriages between opposite-sex couples are valid in California. Thus, construing section 308.5 to apply to in-state marriages would render language in section 300 superfluous. Because such a construction violates the rules of statutory construction, section 308.5 should be construed to apply only to out-of-state marriages. (See *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 715-716 [precluding "judicial construction that renders part of the statute 'meaningless or inoperative' "].)

The pertinent ballot analyses and arguments bolster this conclusion. As the Legislative Analyst explained in its analysis of Proposition 22,

> Under current California law, "marriage is based on a contract between a man and a woman. Current law provides that a legal marriage that took place inside of California is generally considered valid in California. No state in the nation currently recognizes a civil contract or any other relationship between two people of the same sex as a marriage. (*CCSF* RA 90.)

By acknowledging that only opposite-sex marriages in California are valid under existing law and by impliedly recognizing that other states may permit same-sex marriages, this analysis strongly suggests that section 308.5 addresses only the risk that the State would have to recognize out-of-state marriages between same-sex couples under section 308.[17]

The ballot arguments confirm this. The argument in favor of Proposition 22 acknowledged that "California law already says only a man

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(footnote continued from previous page)

> provided by Section 425 and Part 4 (commencing with Section 500).

[17] Section 308 states: "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state."

and a woman may marry" (*CCSF* RA 92), but claimed that Proposition 22 was "necessary" to prevent California from recognizing out-of-state marriages between same-sex couples (*ibid.*).[18] Similarly, in explaining the need for section 308.5, the rebuttal to the argument in opposition to Proposition 22 stated:

> THE TRUTH IS, UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE "SAME-SEX MARRIAGES" PERFORMED IN OTHER STATES. [¶] That's why 30 other states and the federal government have passed laws to close these loopholes. California deserves the same choice. (*CCSF* RA 91.)

Together, the analyses and ballot arguments establish that section 308.5 "was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming . . . that their marriages must be recognized as valid marriages." (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1422.)

The Fund counters that voters passed Proposition 22 to prevent the Legislature from amending the definition of marriage found in sections 300 and 301. But it cites nothing to support its contention. Indeed, nothing in the ballot analyses or arguments suggests that section 308.5 was intended to supersede sections 300 and 301 in any way. Instead, those materials

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[18] This argument states:

> When people ask, "Why is this necessary?" I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman.

indicate that section 308.5 was intended to complement those statutes by barring California from recognizing out-of-state marriages between same-sex couples. (See *CCSF* RA 90-92.)

The Fund's contention that construing section 308.5 to apply only to out-of-state marriages would render it unconstitutional also lacks merit. Both at this time and at the time Proposition 22 was passed, California's marriage statutes – sections 300, 301, and 308.5 – treat residents of other states the same as its own residents. Thus, construing section 308.5 to apply only to out-of-state marriages does not violate the privileges and immunities clause. Indeed, such a violation would become possible only if, in the future, the Legislature or voters enact a law defining marriage in California as encompassing more than just a man and a woman without changing or deleting section 308.5. The Fund cites, and the City has found, no cases even suggesting that a statute should be construed to avoid a hypothetical constitutional violation that *may* occur *only if* another statute is enacted or amended.

Finally, *Knight v. Superior Court* (2005) 128 Cal.App.4th 14 is not persuasive authority. In *Knight*, the Court of Appeal considered the language of section 308.5 in isolation – and not in context. Moreover, the court did not even mention – much less consider – the ballot materials. Its reasoning is therefore flawed and should not be followed. Accordingly, this Court, if it reaches the issue, should hold that section 308.5 applies only to out-of-state marriages.

CONCLUSION

Under well-established California law, a plaintiff must have standing to assert a declaratory relief claim. Absent such standing, the action must be dismissed. The Court of Appeal properly dismissed both the *Prop. 22* and *Thomasson* actions for failure to satisfy this standing requirement. Its ruling on the standing issue should therefore be affirmed.

Dated: June 14, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 10,147 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 14, 2007.

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PROOF OF SERVICE

I, HOLLY TAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, California, 94102.

On June 14, 2007, I served:

CITY AND COUNTY OF SAN FRANCISCO'S CONSOLIDATED ANSWER BRIEF ON THE MERITS

on the interested parties in said action, by placing a true copy thereof in sealed envelopes addressed as follows:

ATTACHED SERVICE LIST

and served the named document on the parties as set forth on the attached list in the manners indicated below:

☒ **BY EXPRESS SERVICES OVERNITE:** I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the offices of the addressees.

☒ **BY ELECTRONIC MAIL:** I caused a copy of such document to be transmitted via electronic mail in Portable Document Format ("PDF") Adobe Acrobat from the electronic address: *monica.quattrin@sfgov.org*

☒ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelopes and caused such envelopes to be delivered by hand at the above locations by a professional messenger service.

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

Executed June 14, 2007, at San Francisco, California.

HOLLY TAN

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San Francisco Superior Court Case No. CGC-04-429539
consolidated with
Woo v. Lockyer
San Francisco Superior Court Case No. CPF-04-504038

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