

SUPREME COURT
FILED

Case No. S147999

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IN THE

Frederick A. Lynch Clerk

SUPREME COURT OF CALIFORNIA

DEPUTY

**Coordination Proceeding Special Title
(Rule 1550(b))
MARRIAGE CASES**

Judicial Council
Coordination Proceeding
No. 4365

San Francisco County
Superior Court Case
Nos. 429-539, 504-038,
429-548, 503-943,
428-794,

Los Angeles County
Superior Court Case No.
088-506

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Consolidated Appeal, Case Nos. A110449,
A110450, A110451, A110463, A110651, A110652

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FUND OPPOSING PETITIONS FOR REVIEW ON MERITS**

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ADDITIONAL ISSUE FOR REVIEW

Proposition 22 Legal Defense and Education Fund (the “Fund”) does not believe the Court should grant the Petitions for Review on the merits filed in *Clinton v. State* (“Clinton”), *City and County of San Francisco v. State* (“City”), *Woo v. Lockyer* (“Woo”), and *Tyler v. State* (“Tyler”).¹ However, if this Court chooses to grant review, it should also grant full review of the Fund’s case, Court of Appeal Number A110651,² and permit the Fund to participate in briefing and arguing the merits of the case. In the event the Court grants review, it should also address the following issue:

“Whether California Family Code § 308.5 applies to marriages contracted within California.”

WHY THE SCOPE OF SECTION 308.5 SHOULD BE CONSIDERED

The question of the scope of Family Code § 308.5, the voter initiative defining marriage, has been subject to differing appellate results. Division One of the Second District Court of Appeal held that section 308.5 determines only which out-of-state marriages will be recognized in California, and does not apply to California marriages. (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1422-24. [26 Cal.Rptr. 3d 623]) In contrast, the Third District Court of Appeal reached the opposite conclusion, and held that section 308.5 applies to California marriages as well as out-of-state marriages. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 18. [26 Cal.Rptr.3d 687]) The Court of Appeal below ruled that it need not reach the question because it was not

¹There were two Petitions for Review filed in *Tyler*, one by Tyler, and one by intervenor Equality California (“Equality California/Tyler”).

²The Fund has sought review of the Court of Appeal’s ruling that the Fund does not have a justiciable controversy with the City. The Fund’s Petition was also assigned Case No. S147999.

properly presented by the appeal.³ (*In re Marriage Cases* 143 Cal.App.4th 873, 899, [49 Cal.Rptr.3d 675] Petitioners' Appendix at 15 [hereinafter "Slip Op."].) Nevertheless, the scope of section 308.5 is clearly at issue: if the statute applies only to out-of-state marriages, its constitutionality is not at issue in this case, but if it applies to California marriages, its constitutionality is at issue.⁴ Accordingly, the question of the scope of section 308.5 must be determined before deciding whether it is constitutional. Moreover, the scope of section 308.5 also relates to the Legislature's ability to adopt new public policies regarding family and marriage. If section 308.5 applies to California marriages, then any legislative policy adopted subsequent to the enactment of section 308.5 that undermines the marriage policy reflected in it is unconstitutional. Thus, if this Court grants review of the merits of the Court of Appeal's decision, it should also grant review of the issue of the scope of section 308.5 and resolve the conflicting appellate decisions.

BACKGROUND

In addition to the facts set forth by the various petitions, it is important for the Court to take note of a conflict that developed between Family Code § 308.5 ("Proposition 22") and Family Code § 297.5 ("A.B. 205") during this litigation. Section 308.5 was enacted by Proposition 22, a voter initiative, in

³The Woo and Equality California/Tyler Petitioners believe that this issue is properly before the Court, although they did not raise it as a separate issue. (Woo Petition at 6 n.3; Equality California/Tyler Petition at 5 n.2.) The Clinton Petitioners also acknowledge that the scope of section 308.5 is at issue. (Clinton Petition at 2 n.1.)

⁴One of the couples in the *Tyler* case, Troy Perry and Phillip De Blicek, have a Canadian marriage license that is not recognized in California. However, their complaint is that they cannot marry under California law. Thus, their challenge to the constitutionality of the marriage laws is not applicable to section 308.5 if it does not apply to California marriages.

2000. (See West’s Annotated Cal. Fam. Code § 308.5.) In 2003 the Legislature adopted Section 297.5 in Assembly Bill 205, effective January 1, 2005. (See West’s Annotated Cal. Fam. Code § 297.5.)

None of the Petitioners herein relied heavily on A.B. 205 in the trial court, perhaps because its validity was being challenged in *Knight v. Superior Court* (2005) 128 Cal.App.4th 14 [26 Cal.Rptr.3d 687]. Indeed, the plaintiffs in *Woo v. State* and the intervening plaintiff in *Tyler v. State* (“Equality California”)⁵ were defending the *Knight* case at the time by arguing that A.B. 205 did not amend or undermine Proposition 22, a position that the Court of Appeal ultimately adopted in *Knight*. Shortly after the decision in *Knight* this Court issued its decision in *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824 [31 Cal.Rptr.3d 565], which held that “a chief goal of [A.B. 205] is to equalize the status of registered domestic partners and married couples.” (*Id.* at 839.) Thereafter on appeal in the coordinated cases, the *City* plaintiffs, the *Woo* plaintiffs, and Equality California relied heavily on the legislative policy embodied in A.B. 205, and subsequent enactments, to argue that California public policy no longer supports marriage as the union of a man and a woman. That reliance is likely to be prevalent in their briefs in this Court in the event review is granted. (*Cf.* *Woo* Petition at 3, 4-5, 20-21 [referring to recent legislative action]; Equality California/Tyler Petition at 2, 4, 20 [same].) Indeed, no Petitioner can make a public policy argument against marriage without reliance upon A.B. 205, subsequent enactments, and judicial opinions construing the legislative acts.

⁵Not all of the plaintiffs in *Woo v. State* were intervenors in *Knight*, but Equality California and some of the individual plaintiffs were involved.

It is important to recognize that this litigation is not about benefits or legal status. As this Court held in *Koebke*, A.B. 205 has equalized the status of registered domestic partners and married couples. (*Ibid.*) Thus, this litigation is only about who is entitled to have the term “marriage” applied to their relationships. The Court of Appeal properly recognized that the courts do not have the authority to redefine “marriage” to extend that term to same-sex relationships.

I. REVIEW SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO ADDRESS THE MOST FUNDAMENTAL HOLDING OF THE COURT OF APPEAL.

None of the Petitioners have sought review of the most fundamental holding of the Court of Appeal: *the term “marriage” has a meaning*. If the term “marriage” means the union of a man and a woman by definition, none of the arguments for same-sex “marriage” make sense without first redefining the term – after all, it is impossible for a same-sex couple to enter a union of a man and a woman. The Court of Appeal’s conclusion that marriage has a meaning that the Court had no authority to redefine predetermined the outcome of its ruling on the rest of the arguments. This Court cannot reverse the Court of Appeal’s decision on the merits without reversing that holding.

The Court of Appeal recognized that “the term ‘marriage’ has traditionally been understood to describe only opposite-sex unions. Respondents, who are as free as anyone to enter such opposite-sex marriages, clearly seek something different here.” (*Marriage Cases, supra*, 143 Cal.App.4th at p. 909, Slip Op. at 27.) It is not circular reasoning to argue that in addressing Petitioners’ arguments, the Court must recognize that the term “marriage” means and always has meant the union of a man and a woman. As Justice Parrilli observed in her concurrence:

[A] common understanding and meaning of the word “marriage” or the term “to marry,” *is* required before the word, and the institution, can be discussed intelligently. Or we must admit *we* are redefining the historical understanding to accommodate this discussion and the cultural developments that precipitated it. Words do matter and there is much in favor of using terms that differentiate to describe biologically different models.

(*Marriage Cases, supra*, 143 Cal.App.4th at p. 941, Slip Op. Concurrence at 4 [Parrilli, J., concurring] [emphasis original].)⁶ Thus, the issue is not whether “marriage” must always mean the union of a man and a woman, but whether it currently means that, and if so, who has the authority to change the meaning. The Fund’s separation of powers argument throughout this litigation has been that only the people have the authority to change the definition of marriage they adopted in Proposition 22. This Court should not redefine terms in legislation or in a voter initiative absent an express provision in the Constitution authorizing it to do so.

The Petitioners *assume* a definition of marriage that is broad enough to encompass same-sex couples without telling the Court what they think the definition should be. In fact, neither the Petitioners, Judge Kramer in his final decision, nor Justice Kline in his dissent on appeal have offered an alternative definition of marriage or any legal authority for a different definition. That is because there is no legal authority for a different definition. Indeed, the term

⁶The Massachusetts Supreme Judicial Court recognized that it had to redefine “marriage” in order to make the institution encompass same-sex couples. (*Goodridge v. Department of Pub. Health* (2003) 798 N.E.2d 941, 965 [“our decision today marks a significant change in the definition of marriage”].) What it did not appear to recognize was that it was using the new definition in undertaking an analysis of whether marriage had to be redefined. (*See id.* at 948 [opinion begins by describing marriage as “[t]he exclusive commitment of two individuals to each other”].)

“marriage,” as used in the California Constitution and California law, has always meant the union of a man and woman. (*Cf.* Cal. Const. 1849, Art. 11, § 14 [referring to “marriage” and separate property of “husband” and “wife”]; *see also* former Cal. Const. Art. 20, § 8 [same]; current Cal. Const. Art. 1, § 21 [referring to property owned before “marriage”].⁷) While California courts undoubtedly have the authority to determine the constitutionality of a statute, they do not have the authority to change the meaning of terms in the Constitution or a statute, or the terms used in prior case law. This Court has no ability to grant the Petitioners what they seek without doing so.

Petitioners are trying to bring a political issue to this Court under the guise of a legal question. There can be no question about what marriage legally *is* – legally marriage is the union of a man and a woman. (Cal. Fam. Code §§ 300, 308.5; *In re DeLaveaga’s Estate* (1904) 142 Cal.158, 171 [describing marriage as “the union for life of one man and one woman”], quoting *Murphy v. Ramsey* (1885) 114 U.S. 15, 45; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274 [250 Cal.Rptr. 254][referring to “[t]he joining of the man and woman in marriage”].) What Petitioners want this Court to address is what marriage *ought to be*. What marriage “is” is clearly a legal question; what marriage “ought to be” is clearly a political one.

⁷According to the Detailed Analysis by the Legislative Counsel of the change removing the references to “husband” and “wife,” the “measure would restate this section without substantive change.” (Clerk’s Transcript on Appeal in A110651 at 593.) Thus, the revision adopted in Article 1, § 21 did not change the historical definition of “marriage” as used in the California Constitution.

II. THE COURT CANNOT PROPERLY REVIEW THE CONSTITUTIONALITY OF THE MARRIAGE LAWS WITHOUT CONSIDERING THE SCOPE OF PROPOSITION 22.

Proposition 22 stands as an unassailable obstacle to Petitioners' claim that California public policy has changed in regard to marriage. Because Proposition 22 is a voter initiative, neither legislative acts nor judicial construction of legislative acts may undermine the policy established in Proposition 22. (Cal. Const., Art. 2, Sec. 10(c).)

As noted above, there is a conflict between the Second District and the Third District as to whether Proposition 22 applies to in-state marriages. (*Armijo v. Miles* (Ct. App. 2nd Dist. 2005) 127 Cal.App.4th 1405, 1422-24 [26 Cal.Rptr.3d 623] [Family Code § 308.5 applies only to out-of-state marriages]; *Knight v. Superior Court* (Ct. App. 3rd Dist. 2005) 128 Cal.App.4th 14, 18 [Family Code § 308.5 prohibits same-sex "marriage" in California].) There is also a conflict between the Governor and the Legislature. The Legislature construed Proposition 22 as applying only to out-of-state marriages when it attempted to redefine marriage in 2005. (*See* Assembly Bill 849 (2005-2006 Reg. Sess.) as amended June 28, 2005.) The Governor expressed the opposite view in vetoing Assembly Bill 849. (Governor's veto message to Assembly on A.B. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-2006 Reg. Sess.) pp. 3737-3738.) In this case the Court of Appeal chose not to determine whether Proposition 22 applies to marriages contracted in California, but implied that it does not. (*Marriage Cases, supra*, 143 Cal.App.4th. at p. 899, Slip Op. at 15 ["We need not resolve this controversy"], 907, Slip Op. at 25 ["if the Legislature someday amends Family Code section 300 to omit gender references, the definition of marriage in this state will encompass same-sex unions"], 937 n.35, Slip Op. at 63 n.35 ["Lest there be any speculation that the

Legislature is powerless to address this issue, because Governor Schwarzenegger vetoed its one attempt to do so . . . one should not oversimplify what the Governor’s veto message actually said”].)

The scope of Proposition 22 is crucial if this Court chooses to review the merits of the Court of Appeal’s decision. If Proposition 22 applies to California marriages, its status as a voter initiative must be considered in determining California’s public policy regarding marriage. The public policy embodied in Proposition 22 cannot be changed by the Legislature without a vote by the people. (Cal. Const., Art. 2, Sec. 10(c).) Thus, the Legislature’s findings about same-sex parenting in enacting the Domestic Partnership Act, this Court’s construction of that Act, and the Legislature’s recent efforts to redefine marriage cannot undermine the validity of the marriage laws if Proposition 22 applies to marriages contracted in California.⁸

Ordinary rules of statutory construction require that Proposition 22 be interpreted to apply to marriages contracted in California.⁹ (*See People v. Rizo*, (2000) 22 Cal.4th 681, 685 [94 Cal.Rptr.2d 375] [same rules of interpretation for initiative measures as for statutes].) Considering the ordinary meaning of the words, Proposition 22 states that only marriage between a man and a woman is valid in California, and only marriage between a man and a

⁸The New Jersey Supreme Court’s recent decision in *Lewis v. Harris* (2006) 908 A.2d 196 relied heavily on the public policy formed through a combination of legislative enactments and judicial decisions in concluding that the New Jersey Constitution requires that same-sex couples be treated the same as married couples. (*Id.* at 215.) Proposition 22 precludes a similar result here. Regardless, California already grants same-sex couples the status ordered in *Lewis*. (*See id.* at 224; *Koebke*, 36 Cal.4th at p. 839.)

⁹Proposition 22 states as follows: “Only marriage between a man and a woman is valid or recognized in California.” (Cal. Fam. Code § 308.5.)

woman can have legal recognition in California. The reference to “valid” obviously refers to marriages within the state, and the reference to “recognition” refers to same-sex “marriages” from out-of-state. That construction would be required even if the provision could potentially be interpreted as applying only to out-of-state marriages. Otherwise, the initiative would preclude recognition of same-sex “marriages” from Massachusetts, while allowing the existence of same-sex “marriages” in California. Such a construction would violate Article IV, Section 2 of the United States Constitution, the privileges and immunities clause. (*See Hicklin v. Orbeck* (1978) 437 U.S. 518, 523-24 [states must treat residents of other states as favorably as their own residents].) Courts must construe statutes “in a fashion that avoids rendering [their] application unconstitutional.” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.* (1999) 20 Cal.4th 1178, 1216. [86 Cal.Rptr.2d 778]) Thus, Proposition 22 must be construed to apply to marriages in California.

Because California’s public policy on marriage cannot be determined without considering Proposition 22, this Court should grant review of the scope of Proposition 22 if it reviews the merits of the Court of Appeal’s decision.

III. THE EQUALITY CALIFORNIA PETITIONERS SHOULD BE ESTOPPED FROM RELYING UPON A.B. 205 TO UNDERMINE THE MARRIAGE LAWS.

This Court should not grant Equality California’s petitions for review in the *Woo* and *Tyler* cases for the additional reason that it is judicially estopped from making its public policy arguments against the validity of the marriage laws. Judicial estoppel:

prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or

some earlier proceeding. The dual purposes for applying this doctrine are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. Judicial estoppel is intended to prevent litigants from playing fast and loose with the courts.

(*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1468 [45 Cal.Rptr.3d 560], [citations and internal quotation marks omitted].)

The doctrine applies when “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.”

(*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986 [12 Cal.Rptr.3d 287] [citation omitted].)

Equality California's conflicting positions on A.B. 205's relationship with Proposition 22 fit all five of the *Aguilar* criteria. It has taken two positions: first that A.B. 205 does not affect Proposition 22, and now that A.B. 205 undermines Proposition 22. The earlier position was taken in a judicial proceeding, the *Knight* litigation, and the Equality California Petitioners were successful in that litigation because the court accepted their position. (*Knight*, 128 Cal.App.4th at 19, 30-31.) The two positions are irreconcilable because they cannot both be true. And the first position was not taken as the result of ignorance, fraud, or mistake, but as a deliberate litigation strategy. Thus, Equality California should be judicially estopped from taking an inconsistent position in this litigation. Absent its policy arguments relying upon recent legislative enactments, Equality California's arguments give this Court no reason to grant review.

CONCLUSION

For the foregoing reasons, this Court should deny review on the merits of the Court of Appeal's decision. In the alternative, the Court should address the issue of the scope of Proposition 22 and order full review of the Fund's case against the City as well, Court of Appeal No. A110651.

Dated: December 1, 2006

Respectfully submitted,

By:



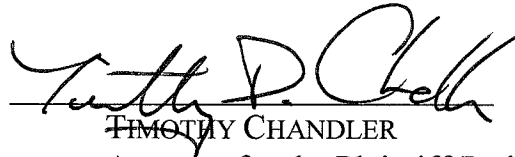
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**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE OF COURT 14**

Pursuant to California Rule of Court 14(c)(1), counsel for Plaintiff-Petitioner hereby certifies that this brief was prepared in Times New Roman 13 font, and that the number of words contained in the foregoing Plaintiff-Petitioner's Petition for Review, including footnotes, but excluding the Table of Contents, Table of Authorities, This Certificate, and any attachments, is 3,116, as calculated by using the word count feature of WordPerfect, the computer program used to prepare this brief.

Dated: December 1, 2006


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