SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA LEWIS, CHARLES MCILHENNY, AND EDWARD MEI, Petitioners, vs. NANCY ALFARO, COUNTY CLERK OF THE CITY AND COUNTY OF SAN FRANCISCO IN HER OFFICIAL CAPACITY, Respondents.	Case No. S122865

OPPOSITION TO APPLICATION FOR AN IMMEDIATE STAY AND A PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE

DENNIS J. HERRERA, SBN 139669
City Attorney
THERESE M. STEWART, SBN 104930
Chief Deputy City Attorney
ELLEN FORMAN, SBN 147479
WAYNE K. SNODGRASS, SBN 148137
K. SCOTT DICKEY, SBN 184251
KATHLEEN S. MORRIS, SBN 196672
SHERRI SOKELAND KAISER, SBN 197986
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: (415) 554-4700
Facsimile: (415) 554-4747

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A PROFESSIONAL CORPORATION
BOBBIE J. WILSON (No. 148317)
PAMELA K. FULMER (No. 154736)
AMY E. MARGOLIN (No.168192)
SARAH M. KING (No. 189621)
KEVIN H. LEWIS (No. 197421)
CEIDE ZAPPARONI (No. 200708)
GLENN M. LEVY (No. 219029)
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600
Facsimile: 415/217-5910

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes and Codes

Federal Cases

Federal Statutes and Codes

Constitutional Provisions

Rules

San Francisco Statutes, Codes and Regulations

Other Authorities

Other References

INTRODUCTION

Suppose the California Legislature – perhaps in an attempt to discourage gang activity – enacted a statute prohibiting any public school student from donning hats or other head attire. If the highest courts of several other states had already held, in persuasive opinions that rested on state constitutional grounds, that virtually identical legislation could not constitutionally be applied to prevent Muslim girls from wearing head scarves or Jewish boys from wearing yarmulkes in their states, would local school districts in California be required to enforce the California statute until a court of appeal held it violated the free exercise clause of our state constitution? What if the United States Supreme Court had also recently held that Muslims had a fundamental right to express their religion, and the California statute seemed clearly unconstitutional under the federal constitution as well?

Would it matter if the local officials in each case had a sworn duty to uphold the state and federal constitutions? Would it be shocking if officials in a disproportionately Muslim community were the first to stop enforcing these laws? What if enforcing the unconstitutional state law could expose the officials or the city or county for which they worked to multi-million dollar liability in damages and attorneys' fees under federal and state law? Are local officials powerless to stop their own unconstitutional actions until an appellate court confirms that their actions are unconstitutional?

Petitioners ask the Court to answer the last question in the affirmative. They invite the Court to extend Article III, Section 3.5 of the California Constitution to local officials for the purpose of compelling an unwilling local government to deny the fundamental constitutional rights of some of its citizens to marry and enjoy equal protection and due process of

law – at least for the period of time it will take for this contested constitutional question to be decided by two levels of state courts. This invitation to tie the hands of local government in constitutional matters should be rejected.

Petitioners' excessively broad reading of Section 3.5, and by implication, their rush to force immediate obeisance to discriminatory marriage laws, asks this Court to ignore our decentralized, federalist constitutional democracy. The federal Constitution is the highest of our laws. Every branch and every level of government answers to it; each is independently responsible to it; and it protects every citizen every day, without a waiting period for litigation and without regard to inferior laws that might contradict it. So it is in the federal system. And – with the exception only of state "administrative agencies" under Section 3.5 of Article III of the California Constitution – so it is in our state. Barring local governments from taking independent actions to conform their conduct to the state and federal constitutions would undermine this system of government and jeopardize everyone's constitutional rights.

Nothing about Section 3.5 requires this dire result. Section 3.5 made a dramatic change to the longstanding precept commanding all government agencies and officials to adhere to the constitution, but even that change was limited in scope. Article III of the Constitution addresses only *state* government, and the plain language of Section 3.5 restrains only an "administrative agency" from enforcing or refusing to enforce a state law on constitutional grounds. Neither Article III nor Section 3.5 says anything about *local* agencies or officials. In urging a more expansive interpretation of Section 3.5, Petitioners ignore its placement in Article III and the absence of any similar provision in Article XI, which governs "*local*

government." They also disregard (1) this Court's unequivocal holding in *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 36, that Article III "is inapplicable to the government below the state level," (2) the fact that Section 3.5 was enacted specifically in response to a case involving a *state* agency, and (3) the fact that the ballot materials for the referendum that became Section 3.5 repeatedly refer to "state agencies."

Even if Section 3.5 did apply to local officials, it could not impinge on the paramount duty of local officials to obey the federal Constitution. Because marriage discrimination violates the United States Constitution, the Supremacy Clause required Respondent to cease such discrimination immediately. No provision of state law, or even of the state constitution, can handcuff Respondent's duty to do so. To the extent that Section 3.5 might be interpreted as such a bar, it violates the *federal* Constitution and is simply void. And, because of the tie between Section 3.5 and the federal Constitution, Petitioners are wrong that the constitutionality of California's statutory ban on same-sex marriage is "immaterial" to these proceedings. (Petition ("Pet.") at p. 2.) For the Court to grant Petitioners the relief they seek, it would have to decide whether California's statutory ban on same-sex marriage violates the federal Constitution. If it does, then Section 3.5 cannot be given effect under federal supremacy principles.

In sum, though Petitioners claim that Respondent has worked an "irreparable injury to the orderly system of government and rule of law," nothing could be farther from the truth. Instead, Respondent's actions are the ultimate testament to the rule of law in our federalist, constitutional democracy – and the individual duty of each government official at each level of our government to uphold that law. Indeed, in the face of detractors who would gladly sacrifice the civil rights of a minority to the

intolerant sentiments of the majority, the actions of Mayor Gavin Newsom and Respondent Alfaro are a textbook lesson in constitutionally principled civic courage.

Accordingly, Petitioners cannot prevail on the merits of this action. But the Court need not reach the issue. There is no need for immediate intervention by this Court. Contrary to Petitioners' claim that the entire State has been "thrown . . . into a furor" (Pet. at p. 2.), there is no imminent threat to anyone or anything from the acts complained of here. No riots have taken place. Not a single opposite-sex couple has faltered in their wedding vows. Only marriage, not anarchy, has broken out in San Francisco.

Nor is there a need for the Court to exercise its original jurisdiction. Undoubtedly the constitutionality of California's statutory ban on same-sex marriage is of great public importance. But unless the Court is prepared to rule that the ban is unconstitutional as a matter of law, the issue is one best left to the lower courts in the first instance to undertake the extensive fact-finding that will be necessary. The San Francisco Superior Court already has begun to deal expeditiously with the matters at hand and has scheduled a show cause hearing for March 29. This Court should allow this orderly path to resolution.

BACKGROUND

A. San Francisco's Charter Affords Broad Power To The Mayor.

San Francisco's Charter is "the fundamental law of the City and County." (Request for Judicial Notice ("RJN"), Ex. A.) The City enacted the Charter, among other things, "to assure equality of opportunity for every resident." (*Ibid.*)

The Mayor has broad power under the Charter. It provides that the Mayor is the chief executive officer of the City and County with responsibility for "*enforcing all laws relating to the City and County.*" (RJN, Ex. B, emphasis added.) The Mayor is responsible for "[g]eneral administration and oversight of all departments and governmental units in the executive branch" and "[c]oordination of all intergovernmental activities of the City and County." (*Ibid.*)

The Mayor has authority over the County Clerk under Charter sections 18.105 (functions, powers and duties of County Clerk transferred to City Administrator) and 3.104 (City Administrator appointed by Mayor and has responsible for administrative services within executive branch, as assigned by Mayor). (RJN, Exs. C, D.)

B. Under His Broad Power, And Following Weighty State And Federal Court Precedent, The Mayor Directed The County Clerk To Issue Marriage Licenses To Same-Sex Couples.

Under this broad power, on February 10, 2004, San Francisco Mayor Gavin Newsom directed the County Clerk's Office to arrange for the issuance of marriage licenses to same-sex couples. (RJN, Ex. E.) At least *five high courts* had held, or intimated, that bans on same-sex marriage are unconstitutional. In *Baehr v. Lewin* (Haw. 1993) 74 Haw. 530, 852 P.2d 44, the Hawaii Supreme Court held that the State could not exclude same-sex couples from marriage unless it could show a compelling interest. In *Baker v. State of Vermont* (Vt. 1999) 170 Vt. 194, 744 A.2d 864, the Vermont Supreme Court held that excluding same-sex couples from the rights and benefits of marriage violated the Vermont Constitution. In *Halpern v. Toronto (City)* (2003) 172 O.A.C. 276, 2003 WL 34950, the high court of Ontario concluded that the marriage statute violated equal

protection provisions of Canada's Charter of Rights and Freedoms. In *Lawrence v. Texas* (2003) 123 S.Ct. 2472, the Court's reasons for reversing the infamous decision in *Bowers v. Hardwick* (1986) 478 U.S. 186 and overturning an anti-sodomy criminal statute "dismantle[d] the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." (*Id.* at p. 2498, J. Scalia dissenting.) Finally, in *Goodridge v. Dept. of Public Health* (Mass. 2003) 798 N.E.2d 941, the Massachusetts Supreme Court held that denying marriage licenses to same-sex couples violated state constitutional equal protection principles.

Against the backdrop of these decisions – and the Mayor and County Clerk's sworn oath to "support and defend" the federal and State Constitutions (Cal. Const., art. XX, § 3) – the Mayor concluded that the City could no longer constitutionally continue to engage in the most blatant and direct aspect of discrimination against gay men and lesbians – namely, the refusal to allow them to marry.

Two days later, the Clerks' Office began issuing the licenses. (Alfaro Dec., Ex. 3.) When they heard of the Mayor's directive, hundreds of lesbian and gay couples and their families and friends flocked to City Hall, waiting in lines that surrounded the building in a desire to have their unions formally and legally recognized. (*Id*., ¶ 5.) Many spent the night outside City Hall, despite rain and inclement weather, to ensure they would be allowed to marry. (*Ibid.*) Although the City informed these couples that there was uncertainty as to whether their marriages would be recognized by the State or other entities, thousands of same-sex couples chose to marry. (See *id.*, Ex. 4.) To date, the City has solemnized more than 3,500 same-sex civil marriages. (*Id.*, ¶8.)

C. Lawsuits Are Filed Against The City, The Mayor, And The County Clerk.

On February 13, 2004, two sets of plaintiffs filed separate lawsuits involving the same laws and facts. In the first, *Thomasson et al. v. Newsom et al. ,* S.F. Superior Court case number 428794 ("*Thomasson*"), plaintiffs sought declaratory and injunctive relief against Mayor Newsom and Nancy Alfaro. (Respondent's Appendix ("RA"), Tab 1.) Plaintiffs alleged that by issuing same-sex marriage licenses and solemnizing same-sex marriages, the Mayor and the County Clerk violated Family Code Sections 300, 301 and 308.5, which they allege preclude issuance of marriage licenses to, and solemnizing the marriage of, any couple not consisting of one man and one woman. (*Ibid.*) The *Thomasson* plaintiffs later amended their complaint to add a cause of action for writ of mandate, alleging that the Mayor and the County Clerk violated Article III, Section 3.5 of the California Constitution. (RA, Tab 3.)

In the second lawsuit, *Proposition 22 Legal Defense and Education Fund*, S.F. Superior Court case number 503943 ("*Proposition 22*"), plaintiff sought a writ of mandate, immediate stay, and declaratory and injunctive relief against the City and County of San Francisco, Newsom, and Alfaro. (RA, Tab 2.) Plaintiffs alleged that by issuing same-sex marriage licenses and solemnizing same-sex marriages, the City and County, Newsom, and Alfaro violated Family Code Sections 300 and 308.5, which they allege preclude the issuance and solemnization of marriage licenses to any couple not consisting of one man and one woman. (*Ibid*.) Plaintiffs also allege that the Mayor and County Clerk violated Article III, Section 3.5, which they claim precludes either official from refusing to enforce a state statute, or declare such statute unconstitutional, unless a court of appeal has already done so. (*Id.* at 32-33.)

Judge James L. Warren heard the ex parte application for an immediate stay and issuance of a writ in *Proposition 22* on February 17, 2004. (RA, Tab 13.) At the close of the nearly three-hour hearing, Judge Warren issued an order to show cause on the *Proposition 22* plaintiffs' alternative writ, setting a hearing on March 29, 2004. (*Id.* at 190-193.) Judge Warren refused to issue an immediate stay pending the March 29 hearing, finding the *Proposition 22* Petitioners did not establish "any of the requirements for [] interim injunctive relief." (*Id.* at 191.)

On February 20, 2004, San Francisco Superior Court Judge Ronald Evans Quidachay heard the *Thomasson* ex parte application for TRO, motions to intervene by the Martin group and two others, and motions to consolidate brought by the City defendants and the *Proposition 22* petitioners, the *Thomasson* plaintiffs, and the City defendants. (RA, Tab 16.) Judge Quidachay granted the Martin group's motion to intervene, granted the motions to consolidate, and issued an order to show cause re: preliminary injunction. He refused, however, to grant the immediate TRO sought by the *Thomasson* Plaintiffs, finding they had failed to demonstrate irreparable harm. (*Id.* at 267, 271-277.) The parties have since agreed to have the OSCs in both of the consolidated cases heard on March 29, 2004. (RJN, Ex. F.)

On February 25, 2004, notwithstanding the existing Superior Court actions, Petitioners Lewis, McIlhenny, and Mei – represented by the same lawyers and interest groups as the *Proposition 22* petitioners – filed this original proceeding, alleging the same facts, arguing the same law, and seeking the same relief as the Petitioners and Plaintiffs in *Proposition 22* and *Thomasson*. Two days later, Attorney General Bill Lockyer filed

another original writ in this Court, *Lockyer v. City and County of San Francisco, et al.,* Supreme Court case number S122923.

On February 27, 2004, this Court issued orders directing Respondent to file responses to both the Lewis and Attorney General Petitions in this Court by Friday, March 5, 2004.

D. California's Statutory Ban On Same-Sex Marriage.

Petitioners allege that the Clerk's action violates three provisions of the California Family Code: sections 300, 301, and 308.5. Section 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." Notably, this section did not always specify that marriage must be between a man and a woman. (See former Civ. Code, § 4100 (RJN, Ex. G).) The former statute was gender neutral, and from 1971 to 1977 several same-sex couples sought marriage licenses. (RJN, Ex. H.) Only to prevent these couples from marrying did the Legislature amend the law. According to the Assembly Committee on the Judiciary, "the legal benefits granted married couples were actually designed to accommodate motherhood . . .." Why extend the same windfall to homosexual couples . . .?" (RJN, Ex. I.) According to the bill's sponsor, Assemblyman Bruce Nestande, "while homosexuals have been granted certain privileges enjoyed by all, it is my contention that they should not include any of the rights set out in the marriage code." (RJN, Ex. J.)

Section 301 provides: "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage." The statute is silent as to whom an unmarried male and an unmarried female may marry, and thus is irrelevant.

Section 308.5 provides: "Only marriage between a man and a woman is valid or recognized in California." Voters passed the measure (Proposition 22) on March 7, 2000, after issuance of some of the out-of-state court decisions discussed above holding unconstitutional the ban against lesbians and gay men receiving the benefits of marriage. This statute is irrelevant to the case at hand because it addresses only out-of-state marriages. [1]

Petitioners argue that the Clerk's actions violate these three statutes and thus are preempted by State law and *ultra vires*. (Pet. at pp. 13-18.) Only section 300's definition of marriage is relevant. Section 301 does not address whom an unmarried man or woman may marry, and section 308.5 addresses only out-of-state marriages. The Clerk's action thus did not violate either of them.

In any event, the state preemption doctrine does not apply to this case. A "conflict with general laws" exists only where a local entity has *enacted legislation* that duplicates, contradicts, or enters an area fully

---

[1] Proposition 22 was adopted to prevent California from being required to defer to other jurisdictions on same-sex marriages. As the ballot materials made plain, California already had amended section 300 to allow only different-sex couples to marry. But under section 308, without affirmative legislation, California would have had to recognize marriages entered into by same-sex couples in other jurisdictions. (See Fam. Code, § 308 ["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."].) The Voter Information Guide stated:

> 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. (Voter Information Guide, at 52 [March 7, 2000 Primary Election] (RJN, Ex. K).)

occupied by state law. (See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) Here, the City has not enacted any legislation, let alone legislation that conflicts with state law. Rather, the City has declined to enforce State law that is inconsistent with both the federal and State constitutions.

ARGUMENT

I. THIS COURT SHOULD NOT ACCEPT ORIGINAL JURISDICTION.

While this Court has original jurisdiction to consider a writ of mandate in the first instance without it having been litigated first in the lower courts, its longstanding policy has been to exercise extreme restraint in this area. Only in the rarest of cases will the Court exercise original jurisdiction. (See *Roma Macaroni Factory v. Giambastiani* (1933) 219 Cal. 435, 436-38 [ordinarily applications for writs should first be made to superior court; exception where "*emergency* exists" or "the public welfare is involved"] (emphasis added); 8 B. Witkin, California Procedure, Extraordinary Writs, 4th §142 (4th ed. 1997) ["policy of the Supreme Court and Courts of Appeal to refuse to exercise their original jurisdiction in the first instance, unless the circumstances are *exceptional*"] (emphasis added).) This policy is reflected in California Rule of Court 56, which requires a petitioner seeking a writ in an appellate court that could have been initiated in a lower court to set forth circumstances justifying the appellate court's exercise of original jurisdiction. (Cal. Rule of Court, Rule 56.)

Petitioners seek to meet this burden by pressing the importance of the issue raised. But not every important unresolved question of public law justifies bypassing the superior court's jurisdiction. (See *County of Los Angeles v. Nesvig* (1965) 231 Cal.App.2d 600, 601.) If the proceedings

"could as well have been instituted in the superior court," there must be "some good reason why it should not be filed with the superior court" to "justify [the appellate] court in exercising its original jurisdiction." (*Id*. at pp. 601-602.) The fact that proceeding via the trial court and an appeal will take more time is not – absent some emergency – grounds for avoiding the normal process. (See *Omaha Indemnity Co. v. Super. Ct.* (1989) 209 Cal.App.3d 1266, 1269 ["A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of law."].)

Courts have held that where the same parties – or even non-identical parties – are already pursuing litigation raising the same issues in the superior court, there is no reason for concluding that the lower court cannot provide an adequate remedy and the appellate court should deny the writ. Thus, in *Irvine v. California Gibson, Inc*. (1941) 19 Cal.2d 14, 16, the court observed:

> The petitioner in the present proceeding has not only shown that there is an adequate legal remedy for the enforcement of the right which he claims, but also that he is concurrently pursuing that remedy. Without bringing his action in the superior court to trial, he is attempting, by this proceeding in mandamus, to attain the same result for which he brought suit. . . .

(See also *Keyston v. Banta-Carbona Irrigation Dist.* (1937) 19 Cal.App.2d 384, 385-86 [denying writ where action pending in superior court, even though plaintiffs and defendants were not identical to parties to writ proceeding, where "it does appear generally that they are the same and that in order to present the issues sought to be raised by the petition filed in this court the issues there suggested must be considered and determined"].)

This case is the same. Here, the State, the parties affiliated with the private petitioners (represented here by the same counsel), both sets of

proposed intervenors, and the City are already parties to litigation commenced in the Superior Court. The plaintiffs have twice requested, and the Superior Court has twice denied, an immediate stay or temporary restraining order. It also has scheduled a hearing on those petitions for writ of mandate and on one set of petitioners' application for preliminary injunction. The observation of the Court of Appeal in *Ogden v. Bd. of Trustees of the City of Colton* (1925) 74 Cal.App.159, 160-161, is particularly apposite here:

> It is a long established rule that where a proceeding of this nature has been instituted in a superior court and the writ denied, this court will not issue the writ on a duplicate petition filed here for the purpose of invoking the original jurisdiction of this court in such matter. . . . *It is contrary to the policy of the law and to the principles of orderly procedure, that a party who has invoked the jurisdiction of one court and who has a right of appeal to a higher court, should be permitted to substitute for such appeal a second and like application to the higher court as a court of original jurisdiction*. (Emphasis added; citations omitted.)

There are good jurisprudential reasons for this Court and the Courts of Appeal to refrain from entertaining original writs in cases like this one.

> Writ relief, if it were granted at the drop of a hat, would interfere with an orderly administration of justice at the trial and appellate levels. Reviewing courts have been cautioned to guard against the tendency to take . . . too lax a view of the extraordinary nature of prerogative writs . . . lest they run the risk of fostering the delay of trials, vexing litigants and trial courts with multiple proceedings, and adding to the delay of judgment appeals pending in the appellate court . . .. (*Omaha Indemnity*, 209 Cal.App.3d at p. 1272 (citations omitted).)

More importantly, the ordinary process of litigating cases through development of the factual and legal issues in the trial court followed by appeal and discretionary review will produce more well considered and ultimately better reasoned results:

> The Court of Appeal is generally in a far better position to review a question when called upon to do so in an appeal instead of by way of a writ petition. When review takes place by way of appeal, the court has a more complete record, more time for deliberation and, therefore, more insight into the significance of the issues. Unlike the ordinary appeal which moves in an orderly, predictable pattern onto and off the appellate court's calendar, writ proceedings follow no set procedural course. (*Id*. at p. 1273, citation omitted.)

The need to proceed with great caution and restraint is especially strong where the issues at hand affect the lives of thousands of citizens and are matters of the deepest personal nature. Equally important, the Petition presents factual, as well as legal, questions, and superior courts are in the best position to resolve fact questions. (See, e.g., *Mexican-American Political Assn. v. Brown* (1973) 8 Cal.3d 733, 734 [facts at issue were not subject to judicial notice and were disputed; court therefore concluded action should "more appropriately be undertaken in the superior court"]; *Robinson v. Moran* (1935) 3 Cal.2d 636, 637 ["we are of the opinion that the several issues of fact presented in this proceeding may more readily be determined in the superior court wherein exist facilities for the expeditions disposition of such matters"].)

Petitioners concede that "[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts." (Pet. at p. 12.) But their claim that this Court need not reach the constitutional issues in deciding whether Respondent has violated Article III, Section 3.5 of the California Constitution is wrong. If the Court concludes that Section 3.5 does not apply to the County Clerk, it cannot finally resolve the validity of her acts without also addressing the state and federal constitutional issues. If the Court concludes that Section 3.5 does apply to the County Clerk, it must decide if California's statutory ban on same-sex marriage violates the federal Constitution; if it does, then Section 3.5 must yield to the

supremacy of federal law every bit as much as the marriage ban itself must yield.

These constitutional issues plainly require an extensive factual inquiry. Respondent intends, for example, to put on both lay and expert testimony demonstrating that relegating same-sex relationships to inferior, second-class status, severely stigmatizes gay men, lesbians, and their families. In particular, it contributes to the social antipathy toward gay men and lesbians that the California Court of Appeal has described as a "pernicious and sustained hostility" and "history of persecution comparable to that of Blacks and women." (See *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276, 1279.) The destructive impacts of anti-gay animus, in turn, are legion, including school-place harassment of gay students and children of gay parents, and violence against gay people resulting often in serious bodily harm or even death. Respondent will present evidence on these effects and the connection between them and the social stigmatization of gay relationships via denial of marriage. Further, Respondent will proffer expert and lay testimony about the fact and extent of the economic harm that lesbian and gay couples and families have suffered by virtue of the prohibition on same-sex marriage.

In order for this Court to fully assess the constitutional questions, then, it would be necessary for the Court to hear this evidence, perhaps appoint a referee or Special Master, and devote far more time and resources than it ordinarily devotes to reviewing a voluminous evidentiary record. This Court would no doubt be called on to make rulings on evidentiary objections, assess the credibility of witnesses, weigh conflicting testimony, and generally engage in a process that is ordinarily reserved for the Superior Courts of this State.

There is good reason for the Court to hesitate before assuming such a task. The ordinary three-level process of our judicial system enables both the facts and legal issues to be vetted first by the trial courts, reviewed by the Courts of Appeal, and in significant cases, reviewed again by this Court. That three-level process necessarily enhances the quality of the result because it permits issues to be narrowed and honed and provides each reviewing court with the reasoned analyses and deliberations of each lower court. In a case raising issues as vitally important to the lives and dignity of an entire class of citizens as this one, it is all the more important to employ our traditional judicial process, rather than an abbreviated, hurried, one-tier writ proceeding originating in this Court.

II. INTERIM RELIEF SHOULD NOT BE GRANTED BECAUSE THERE IS NO IMMINENT AND IRREPARABLE HARM.

A. This Court Can Order An Immediate Halt To Same-Sex Marriages Only On A Competent Evidentiary Showing Of Immediate And Imminent Harm To Petitioners.

Petitioners ask this Court for an immediate stay (i.e., injunction[2]) preventing the County Clerk from issuing same-sex marriage licenses while this action is pending. (Pet. at pp. 1, 18-19.) To be entitled to an injunction, a party must show it will suffer an irreparable injury and its injury outweighs the harm the injunction will inflict on the respondents and the public. (*Cohen v. Bd. of Supervisors* (1986) 178 Cal.App.3d 447, 452-453; *Socialist Workers etc. Comm. v. Brown* (1975) 53 Cal.App.3d 879, 888-889.) A writ of mandate likewise may not issue absent a showing of

[2] Petitioners characterize their request as seeking a "stay," but what they actually seek is an "order requiring the clerk to stop issuing marriage licenses to same-sex couples." (Pet. at p. 18.) However denominated, this is a request for an injunction. (See Code Civ. Proc., § 525 ["[a]n injunction is a writ or order requiring a person to refrain from a particular act."].)

irreparable injury. (See *Creanor v. Nelson* (1863) 23 Cal. 464, 466 [affirming order dissolving writ of mandate].)

Irreparable injury must be shown with specific facts — not merely generalized assertions — demonstrating how petitioners will be harmed. (*Volpicelli v. Jared Sydney Torrance Memorial Hosp.* (1980) 109 Cal.App.3d 242, 267.) Petitioners' burden is even higher where, as here, they ask the Court to enjoin government action. In such cases, a party must make a "significant showing of irreparable injury" (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1473), and "courts should not intervene unless the need for equitable relief *is clear*, not remote or speculative." (*City of Vernon v. Central Basin Muni. Water Dist.* (1999) 69 Cal.App.4th 508, 517, emphasis added.)

1. Petitioners Have Not Shown They Will Suffer Irreparable Harm.

Petitioners do not proffer specific facts concerning any alleged injury, or show how they as individuals will be harmed by the Clerk's issuance of same-sex marriage licenses. They allege only that the County Clerk has harmed "the orderly system of government and rule of law" (Pet. at pp. 1, 2, 4, 10, 17, 21, and 22) – which is simply another way of arguing Respondent has violated the law. That argument goes to the merits, not to irreparable harm. Petitioners also assert conclusorily that the Clerk's actions "can have nothing but an adverse effect on both the local community and the state as a whole." (*Id.* at pp. 17-18.) These assertions are a far cry from the clear, significant, and personal showing of irreparable harm the law requires. (*Volpicelli, supra,* 109 Cal.App.3d at p. 267.)

Because Petitioners have failed to establish that they will suffer any harm – irreparable or otherwise – this Court must deny their request for an immediate stay.

2. The Public Interest And Balance Of Hardships Weigh Heavily Against Granting The Requested Relief.

Even if Petitioners had proven some harm, their request for a stay should be denied because the harm to the public interest and the balance of hardships weighs heavily against granting immediate relief. Same-sex couples denied the right to marry and their families face far greater harm than the petitioners here, who presumably enjoy the right to marry. Marriage confers a host of legal and economic benefits that are unavailable to same-sex couples and their children. Married couples enjoy tax and Social Security benefits, get the benefit of community property laws, have automatic visitation rights when a spouse is hospitalized, and receive favorable income tax treatment when their incomes are disparate. Even more injurious than the denial of these and myriad other legal and economic benefits is the denial of the emotional and psychological benefits of marriage that defy quantification. Marriage confers a level of contentment, commitment, and dignity to a relationship unavailable through any other legal union. (See RA, Tabs 4-12.)

III. ARTICLE III, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION DOES NOT IMPEDE RESPONDENT'S IMMEDIATE AND PARAMOUNT DUTY TO PROTECT THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS OF ALL CITIZENS AS SHE EXERCISES HER OFFICIAL DUTIES.

Petitioners' request for temporary stay and petition for writ of mandate rest on a faulty premise: that California Constitution Article III,

Section 3.5 bars the County Clerk[3] from acting to uphold the California and United States Constitution, and requires her to implement the literal language of the California marriage laws even if doing so is unconstitutional. Petitioners are wrong.

A. Respondent Has A Paramount Duty To Ensure That Her Official Actions Comport With The Federal And State Constitutions At All Times.

All "members of the Legislature, and all public officers and employees, executive, legislative, and judicial" must swear upon taking office that they will "support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; . . . bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; . . . [and will] well and faithfully discharge" these sworn duties. (Cal. Const. art. XX, § 3.) Respondent, as a public officer and employee, is bound by this oath.

Accordingly, Respondent must ensure that her official conduct conforms to the dictates of these constitutions at all times. Because the federal Constitution is the supreme law of the land (U.S. Const. Art. VI, cl. 2) and because the California Constitution similarly prevails over all contrary state statutory law (see *Hotel Employees and Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 602), Respondent's paramount duty to these constitutions requires her to refrain

[3] Petitioners name as the sole Respondent herein Nancy Alfaro in her capacity as San Francisco County Clerk. The actual County Clerk is Darryl Burton, but since Ms. Alfaro is the Director of the County Clerk's Office, and since we treat the suit as one against the City and County in any event, Petitioners' failure to sue the actual County Clerk is inconsequential.

from taking any official action that would violate them, even if the action in question would otherwise be authorized or required by state statutes.

> [H]ow can any officer, who is responsible for his official acts and who has taken the required oath of office that he 'will support, obey, and defend' the Constitution of the state, justify any act which in his judgment is contrary to or is forbidden by the Constitution, and which is in fact so, although the act be required of him by some legislative enactment? . . . If the legislative enactment under which he is required to act is in conflict with the Constitution, the Constitution and not the enactment prevails, and the officer must obey the Constitution or violate his oath of office. (*State ex rel. Univ. of Utah v. Candland* (Utah 1909) 104 P. 285, 290.)

(See also *Bd. of Educ. v. Allen* (1968) 392 U.S. 236, 241 n.5 ["[Local school board officials] have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step--refusal to comply with § 701"); *Zee Toys, Inc. v. County of Los Angeles* (1979) 85 Cal.App.3d 763, 768 [upholding county board of supervisors' refusal to act in accordance with state statute they believed to be unconstitutional and explaining that "[t]he board of supervisors, like all other public officers, were required to take an oath of office which included the undertaking to 'support and defend the Constitution of the United States' as well as to 'faithfully discharge the duties' of their office."].)

This constitutional restraint on all official action is a bedrock principle on which our democracy depends. "We were just following orders" is no defense to our government's intrusion on its citizens' constitutional rights. The duty to obey the Constitution extends to all branches and all levels of government at all times. (See, e.g., *County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 727 ["[T]he provisions of the constitution are binding upon every department of government: legislative,

executive and judicial"]; *United Farm Workers Organizing Com., AFL-CIO v. Super. Ct. of Kern County* (1967) 254 Cal.App.2d 768, 769 ["[T]he exercise of viable constitutional rights should not be made to depend upon a slowly evolving test of their correctness; the Constitution is a live document which persists in full strength at all times"]; *Suss v. Am. Society for Prevention of Cruelty to Animals* (S.D.N.Y. 1993) 823 F.Supp. 181, 187, fn. 11 ["[T]he duty to obey constitutional requirements to the best of one's ability applies to the entire public sector at federal, state and local levels. [¶] It is an abdication of responsibility if administrative and other public sector personnel who made crucial decisions on the spot leave application of established constitutional principles [] to judicial enforcement alone"].)

This ever-present, shared responsibility among all government officials to obey the constitution ensures the greatest possible protection of all citizens' constitutional rights. But it is not, as Petitioners suggest, license to run amok. An official may not refuse to enforce a statute based on personal or political objections; she must believe that the statute is unconstitutional. (Cf. *State ex. rel. Test v. Steinwedel* (Ind. 1932) 203 Ind. 457, 180 N.E. 865, 867 ["We believe that it 'may not be a wise thing, as a rule, for subordinate, executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid.' We know, however, that public officials usually act, or refuse to act, only after advising with competent legal counsel; and we do not think that a positive rule of law should rest upon the assumption that officials will dishonestly or without reason rely upon unconstitutionality as an excuse for nonperformance of a duty"].)

Moreover, while a government official such as Respondent must act her conscience on the constitutional question, hers will not be the last word on the subject. Under our system of checks and balances, her official actions will be subject to review by the judiciary, to which she must defer. (*Marbury v. Madison* (1803) 5 U.S. 137, 177 ["It is emphatically the province and duty of the judicial department to say what the law is"].) Indeed, that is precisely the case here: Respondent's actions are receiving judicial scrutiny, as they should, and she will defer to the courts' orders.

B. Article III, Section 3.5 Of The California Constitution Does Not Prohibit Respondent From Fulfilling Her Duty To Uphold The State And Federal Constitutions.

1. Section 3.5 Applies Only To Agencies Of *State* Government And Not To Local Government Agencies Or Officials.

The California Constitution "is divided into separate Articles. Each Article treats, in the main, of a particular subject, to the exclusion of other matters, which subject is stated at the head of the Article." (*People ex rel. Atty. Gen. v. Provines* (1868) 34 Cal. 520, 534.) Article III, which is headed "STATE OF CALIFORNIA,"[4] sets forth the structure of the state government, including the supremacy of the federal Constitution, the political boundaries of the state, and the existence of three branches of state government and separation of powers between them. (*Id*., §§ 1-3.) Articles IV through VI more specifically address the powers and responsibilities of each branch of state government: legislative, executive and judicial.

---

[4] "'[C]hapter and section headings [of an act] may properly be considered in determining legislative intent" [citation], and are entitled to considerable weight.'" (*Howard Jarvis Taxpayers Assn. v. County of Orange* (2003) 110 Cal.App.4th 1375, 1385, quoting *People v. Hull* (1991) 1 Cal.4th 266, 272.)

The subject of "LOCAL GOVERNMENT" is addressed by Article XI. "Article XI of the Constitution [is] the conduit through which the Legislature vested in 'local agencies' whatever powers it [is] entitled to vest in them. . . . [I]t was and is the instrument by and through which the Legislature takes the powers it is constitutionally entitled to bestow and in turn bestows them at least in part on governmental units below the state level." (*Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 41; see also *id*. at p. 43, fn. 16.)

As this Court recognized in both *Provines* and *Strumsky*, Article III applies only to state government, not to local government. *Strumsky* held that the separation of powers clause contained in Article III, Section 3 "is inapplicable to the government below the state level." (*Id*. at p. 36, see also *People ex rel. Atty. Gen. v. Provines, supra,* 34 Cal. 520, 534.)

Because section 3.5 is also in Article III, that section likewise "is inapplicable to the government below the state level." The administrative agency powers Section 3.5 limits are thus powers of *state* administrative agencies, not local ones.

The legislative history of Section 3.5 confirms that Section 3.5 was intended to apply only to *state* agencies. Section 3.5 was adopted by referendum in 1978 in response to this Court's decision in *Southern Pacific Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308. (*Reese v. Kizer* (1988) 46 Cal.3d 996, 1002.), which held that the California Public Utilities Commission, a state administrative agency, had the power to declare a state statute unconstitutional. (*Ibid*., citing *Southern Pacific, supra*, 18 Cal.3d at p. 311, fn. 2.) In overturning *Southern Pacific*, the voters and the legislators who placed the proposition on the ballot were concerned with actions by state agencies, not local ones.

A measure enacted by popular vote may not be interpreted in such a way that it is contrary to the intent of the voters. (*In re Delong* (2001) 93 Cal.App.4th 562, 569.) Thus, the reach of Section 3.5 is limited by the materials presented to the voters in the ballot pamphlet, even if the language of Section 3.5, standing alone, might arguably support a broader meaning. (See *Hodges v. Super. Ct.* (1999) 21 Cal.4th 109, 114.) Here, the ballot pamphlet – in both the analysis prepared by the Legislative Analyst and the arguments in favor of and against the proposition – refers consistently and repeatedly to "*state* agencies" and "*state* administrative agencies." (See RJN, Ex. L.) Because the ballot pamphlet did not ask voters to consider local agencies, Section 3.5 cannot be read to address them.

Some may regard this as anomalous, even as intolerable, that only state agencies, not local officials, are barred from questioning the constitutional validity of a statute before a court has passed on the question. But that would not be license to rewrite Section 3.5 and give it a meaning nobody had in mind when it was passed. The voters were responding to a specific problem when they enacted Section 3.5, and they chose specific means to address that problem. In the end, if some in hindsight question the wisdom of that choice, the answer lies in amending California's Constitution, not judicially rewriting it. (See Code Civ. Proc., § 1858.)

If Section 3.5 applied to local public officials, moreover, there would have been no need for the California Legislature to pass specific legislation a very short time later that achieved a similar purpose as Section 3.5 with regard to just one subset of local official: the tax collector. Shortly after the voters adopted 3.5, the Legislature enacted Revenue and Taxation Code Section 538, which provides that a local "assessor who believes a tax

measure to be unconstitutional or otherwise invalid to seek declaratory relief to that effect, instead of simply imposing an assessment contrary to the questioned law." (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 10.) If Section 3.5 was intended to prohibit *local* agencies from "refus[ing] to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional," it would have been unnecessary for the Legislature to forbid a local assessor from imposing an assessment contrary to a law the assessor believed was "unconstitutional." (See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 478 [statutes should be construed to avoid redundancy or surplusage].)

The legislative history of Section 538 shows that as of late August 1978 – three months after Section 3.5 had been voted into law – the Legislature believed "current law" *required* an assessor who believed that a specific provision of the California tax laws was "unconstitutional" to "assess the property *contrary* to such provision," with the result of forcing a taxpayer suit to resolve the issue. (RJN, Exs. M, N, emphasis added.) In other words, the Legislature believed the assessor had the ability (and that her "*only option*" was) to refuse to enforce the provision she believed was unconstitutional or invalid. (*Ibid.*) Obviously, that would not have been so if Section 3.5 was intended to apply to local government officials. This contemporaneous construction by the Legislature must be accorded great weight. (See *Riley v. Thompson* (1924) 193 Cal. 773, 778.)

The cases that have applied Section 3.5 since its adoption have applied it to *state* rather than local agencies. (See, e.g., *Delta Dental Plan v. Mendoza* (1976) 139 F.3d 1289 [Commissioner of Corporations]; *Southern Cal. Labor Mgmt. Operating Eng'rs Contract Compliance Com.*

v. Aubry (1997) 54 Cal.App.4th 873 [Department of Industrial Relations]; *Leek v. Washington Unified School Dist*. (1981) 124 Cal.App.3d 43 [Public Employment Relations Board].) Petitioners mistakenly rely on dicta in *Billig v. Voges* (1990) 223 Cal.App.3d 962 for the proposition that "[c]ounties – as subdivisions of the state according to Cal. Const. Art. XI, § 1 – and their officers and clerks are administrative agencies of the state and thus subject to the provisions of art. III, § 3.5." (Pet. at pp. 4-5.) But *Billig* neither addressed nor decided that issue, and thus this Court should give it no weight. In that case, appellants sought a writ of mandate to compel the City Clerk to process their referendum petition, which the clerk had rejected for failure to comply with state Election Code requirements. (*Billig, supra,* 223 Cal.App.3d at p. 964.) The sole issue was "whether appellants failed to comply with [Elections Code] section 4052 by not printing the entire text of the ordinance, including its exhibits, on their petition." (*Id*. at p. 465.) The power of the clerk to enforce state law was never at issue, much less the clerk's power to *decline* to enforce a statute on constitutional grounds; the clerk in that case had *enforced* the statute at issue. The court's passing comment that Section 3.5 somehow required the clerk to enforce state law is dicta, devoid of any analysis or reasoning. (See *In re Chavez* (2003) 30 Cal.4th 643, 656 ["[A] case is authority only for a proposition actually considered and decided therein."].)

2. That A County Is A Political Subdivision Of A State Does Not Make It A State Administrative Agency.

It also does not matter for purposes here that, as Petitioners correctly point out, a county is a political subdivision of the state. A "political subdivision" is quite different from an "administrative agency" of the state. (See 9 B. Witkin, California Procedure, Administrative Proceedings, §§

126-163 (4th ed. 1997) [identifying as "state agencies" seven major agencies and the boards, commissions, departments and other subagencies thereof; no local agencies included].) If every political subdivision were a state "administrative agency" for all legal purposes, then county governments would have to operate very differently than they do. They would be subject to the state Administrative Procedure Act, Government Code Section 11500 et seq. (But see *Allen v. Humboldt County Bd. of Supervisors* (1963) 220 Cal.App.2d 877, 883; *Hansen v. Civil Service Bd.* (1957) 147 Cal.App.2d 732, 734; *Mahoney v. San Francisco City and County Employees' Retirement Bd.* (1973) 30 Cal.App.3d 1, 4 ["local administrative agencies are not necessarily held to the higher standards of others, or of courts"]) and to other Government Code regulations for state agencies governing everything from leasing property to office hours to reimbursement of travel expenses (see Gov't Code §§11001, 11000-11146.4), instead of being permitted to regulate their own departments, divisions and agencies—as they are, by charter and ordinance, permitted to do.[5] (Cal. Const. art. XI, §§3-5, 7.)

Petitioners also cite Article XI, Section 1 for the proposition that the state is the source of a county's powers, which they claim means that counties are therefore "state agencies." This is a nonsequitur. The fact that counties – like cities (see Cal. Const. art. XI, § 2) – derive their powers from state government is obvious, but it cannot mean that cities and counties are the equivalent of the state for any and all legal purposes. As

[5] Even if counties generally were considered state agencies, this would not be true for agencies of consolidated charter cities and counties like San Francisco, as to which charter city status prevails. (Cal. Const., art. XI, § 6.)

the United States Supreme Court explained in holding that counties are not entitled to claim the State's immunity under the Eleventh Amendment: "while the county is territorially a part of the state, . . . it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state." (*Lincoln County v. Luning* (1890) 133 U.S. 529, 530.) What matters is not that counties are subdivisions of the state or that the state is the source of their powers, but rather the specific meaning of Section 3.5. As discussed above, Section 3.5 does not by its terms address local agencies.

3. Even If Article III, Section 3.5 Of The California Constitution Applied To Local Agencies, It Does Not Apply To The County Clerk.

Petitioners ask this Court to interpret Section 3.5 as if it referred, across the board to all "public officials." But that is not what Section 3.5 says, and nothing in its legislative history or the structure of the California Constitution bears out that strained interpretation.

Respondent County Clerk is a public official, not an "administrative agency" subject to the limitations of Section 3.5. Further, even if the County Clerk's Office, and the Clerk as its head, were considered an administrative agency, it is not the Clerk, but the *Mayor*, whose interpretation of the Constitution – and directive to the Clerk – is at issue in this case. (See Newsom Dec., ¶ 5 [Mayor requested that Clerk begin issuing marriage licenses to same sex couples].) The Mayor is not an "administrative agency"; he is the Chief Executive Officer of the City and County. (See *id.*, ¶ 1.) The Mayor has authority over the County Clerk. (*Ibid.*)

Indeed, to read Section 3.5 as Petitioners wish, the Court would have to conclude that *all* state public officials, including the Governor of the State of California and the Attorney General, are "administrative agencies" for purposes of Section 3.5, and that they, too, lack any role or responsibility in interpreting and enforcing the state constitution. Clearly that is not the law. (See *People v. Sinohui* (2002) 28 Cal.4th 205, 211-212 [statutes should not be construed to produce absurd results].)

4. There Are Logical And Practical Reasons For Treating Local And State Agencies And Officials Differently With Respect To Their Obligations To Comply With The Constitution.

Petitioners' reading of Section 3.5, if adopted, could unfairly expose local governments to monetary liability. If a local agency or official violates the federal constitution or laws – even in enforcing a state statute not previously held to be unconstitutional – the agency or official and/or the city or county of which they are a part face serious exposure for damages under 42 U.S.C. Section 1983 and attorneys' fees under 42 U.S.C. Section 1988. (*Mount Healthy City School Bd. District Bd. of Education v. Doyle* (1977) 429 U.S. 274, 280.) By contrast, states and state actors who violate federal constitutional or statutory norms are insulated from such liability by the Eleventh Amendment. (*Ibid*.) Moreover, even if the state is liable for its constitutional violations in state courts, at least the damages assessed against it result from the state's *own* decisions to adopt and enforce unconstitutional legislation. The same is true of a local government that willingly acts in an unconstitutional manner. But to force a local government against its will to comply with unconstitutional state legislation while simultaneously exposing the local government to substantial liability for that forced unconstitutional conduct is inherently unfair. These

distinctions are sufficient reasons for the Legislature and the voters to have treated state agencies differently than local agencies with respect to their obligations to adhere to constitutional and federal law norms.

5. Section 3.5 Itself Is Unconstitutional To The Extent That It Would Require Any Government Officials To Violate The Federal Constitution.

Even if the Court disagrees, Petitioners' reliance on Section 3.5 fails because a state lacks the power to require its officials to act in violation of federal law. Section 3.5 purports to require administrative agencies to enforce state laws that violate the federal constitution, federal law or federal regulations until an appellate holds that particular state law unconstitutional or otherwise in violation of federal law. (Cal. Const., art. III, § 3.5(a), (c).) Ironically, Section 3.5 is itself unconstitutional to the extent that it would require state officials to act in conflict with federal law.

Under the Supremacy Clause of the United States Constitution, state and local officials have no power to disobey federal law, and a state cannot empower them to do so. (U.S. Const., Art. VI, cl. 2.). As the Court explained in *Ex parte Young*, its seminal decision on the matter:

> It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (*Ex parte Young* (1908) 209 U.S. 123, 159-160.)

Thus, regardless of state law, and regardless of any decision or lack of decision by an appellate court, a state official's paramount duty is always

to obey federal law. (See, e.g., *Voinovich v. Quilter* (1993) 507 U.S. 146, 159 [finding that a state official's individual decision to disobey the Ohio Constitution when he believed it inconsistent with federal law "demonstrates obedience to the Supremacy Clause of the United States Constitution"].)

Relying on the Supremacy Clause, the Ninth Circuit has squarely rejected California officials' attempts to seek shelter behind Section 3.5 to justify actions that violate the federal constitution. (See *LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1159-60.) In *Stroh*, state officials from the California Department of Alcoholic Beverage Control sought to prevent a display of sexually explicit artwork at a convention where alcohol would be served, citing state-law restrictions on liquor licenses. (*Id*. at p. 1150.) The Ninth Circuit concluded that such licensing restrictions unconstitutionally intruded upon the plaintiff's First Amendment rights to engage in protected speech. (*Id*. at p. 1159.) It then soundly rejected the state officials' arguments that Section 3.5 of Article III of the California Constitution had required them to enforce the unconstitutional state-law licensing restrictions until an appellate court declared them unconstitutional. As the Ninth Circuit explained, "[t]his argument . . . takes no account of the Supremacy Clause of the United States Constitution. It is a long-standing principle that a state may not immunize its officials from the requirements of federal law." (*Id* at pp. 1159 -1160, citing *Martinez v. California* (1980) 444 U.S. 277, 284.)

For this reason, even if Petitioners were correct that Section 3.5 is intended to apply to Respondent Alfaro, the State of California has no power to forbid her to obey the federal Constitution. The Supremacy

Clause imposes a paramount duty on her to act immediately to bring local practices into compliance with supreme federal law.

For this same reason, Petitioners' contention that Respondent Alfaro has somehow jeopardized "the rule of law" by usurping the role of the courts has it precisely backwards. Indeed, the proposition is antithetical to the principles that underpin our federalist constitutional democracy. Judge Easterbrook of the Seventh Circuit Court of Appeals has perhaps put it best:

> Often we are told that chaos would break out if everyone made his own decision about which legal rules are enforceable. Let us leave difficult questions to the courts, the refrain goes, so that we may have order. . . . [T]he proposition that there must be a chain of command takes us only so far. Public officials owe their allegiance to the Constitution first, federal laws second, and state laws third. Even a command from the President of the United States does not relieve public employees of their duty to follow the Constitution. . . .
>
> Perhaps functionaries are entitled to follow the orders of their superiors, unless clearly unlawful, so that there may be efficient and consistent administration. [But a state official] is no functionary. (*Alleghany Corp. v. Haase* (7th Cir. 1990) 896 F.2d 1046, 1054-55 [Easterbrook, J., concurring], overruled on other grounds by *Dillon v. Alleghany Corp.* (Mem. 1991) 499 U.S. 933.)

The Supremacy Clause commands that Article III, Section 3.5 does not – indeed cannot – bar state and local officials from conforming their conduct to federal law. To the contrary, under the Supremacy Clause, Respondent Alfaro had no choice but to stop violating the rights of same-sex couples to equal protection and due process under the United States Constitution – and to do so immediately.

IV. AS EXTENSIVE FACTUAL EVIDENCE WILL SHOW, THE FAMILY CODE UNCONSTITUTIONALLY DENIES LESBIANS AND GAY MEN THEIR FUNDAMENTAL RIGHT TO MARRY.

Petitioners seek to limit this Court's exercise of original jurisdiction to the question of the meaning of Article III, Section 3.5 and urge it to avoid deciding the other constitutional questions. But, for the reasons set forth above, the Court's inquiry cannot be so limited. This Court cannot resolve this case without deciding whether the state or federal constitution prohibit the state from denying lesbians and gay men the right to marry. If the marriage ban does not fail outright as a matter of law, then assessing those questions will require the development of an extensive evidentiary record on a variety of factual matters. The following discussion is intended to highlight just some of them.

A. The Right To Marry The Person Of One's Choice Is A Fundamental Right

The decision whether to marry, and who to marry, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." (*Loving v. Virginia* (1967) 388 U.S. 1, 12 [holding prohibitions on interracial marriage violate substantive due process].) "[M]arriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-75.) As the Massachusetts Supreme Court recently recognized in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309, 322, 798 N.E.2d 941 – holding that denying same-sex couples the right to marry violates the equal protection and due process clauses of the Massachusetts Constitution – civil marriage "is a social institution of the highest importance," and "the decision whether and whom to marry is among life's momentous acts of self-definition":

> Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds …. Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. (*Id*. at p. 322.)

Both the United States Supreme Court and this Court have concluded that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (*Loving, supra,* 388 U.S. at p. 12, citation omitted; see *Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715.)

B. The Family Code Unconstitutionally Denies This Fundamental Right.

1. The Family Code Violates Equal Protection Guarantees Under The United States And California Constitutions.

The Family Code definition of marriage exclusively as "a civil contract between a man and a woman" (§ 300) operates to prevent same-sex couples from entering into legal marriage in California. The statute thus creates a classification on the basis of sexual orientation and gender. Such a legislative distinction must be examined (and ultimately invalidated) under both the federal and State Equal Protection Clauses.

a. The Family Code Discriminates On The Basis Of Sexual Orientation

"One century ago, the first Justice Harlan admonished [the Supreme Court] that the Constitution 'neither knows nor tolerates classes among citizens.' *Plessy v. Ferguson* (1896) 163 U.S. 537, 559 (dissenting). Unheeded then, those words now are understood to state a commitment to

the law's neutrality where the rights of persons are at stake." (*Romer v. Evans* (1996) 517 U.S. 620, 623 (citations omitted).) Thus began the Supreme Court's opinion in *Romer*, in which it affirmed once and for all that under the Fourteenth Amendment's Equal Protection Clause, the state may neither grant nor withhold favorable treatment on the basis of sexual orientation absent a demonstrably rational basis for doing so. (*Id.* at pp. 633-635; see also *Flores v. Morgan Hill Unified School Dist.* (9th Cir. 2003) 324 F.3d 1130, 1137 [Ninth Circuit established "[a]s early as 1990" that states actors "who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection"].)

Despite the deferential nature of rational basis review, appellate courts – including the United States Supreme Court – have repeatedly struck down statutes where they have found the classification not to have a rational basis. (See Robert C. Farrell, "Successful Rational Basis Claims in the Supreme Court from the 1971 Term through *Romer v. Evans*, 32 Ind.L.Rev. 357 (1999).) And even when applying rational basis review, the United States Supreme Court has been particularly suspicious in situations where a classification discriminates against a disadvantaged minority. (See *City of Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 448, [striking down statute that required homes for mentally retarded to obtain special permit, when other care facilities needed no such permit]. In the context of a regulation that discriminated against the mentally retarded, the Court applied what has been described as "active" rational basis review. (See *Pruitt v. Cheney* (9th Cir. 1992) 963 F.2d 1160, 1165-66; see also *Lawrence, supra,* 123 S.Ct. at p. 2485 ["When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching

form of rational basis review to strike down such laws under the Equal Protection Clause."] (O'Connor, J., concurring).)

Moreover, because the Family Code's classification burdens the fundamental right to marry, an even higher level of scrutiny is required. In reviewing classifications challenged under federal Equal Protection,

> A more stringent test is applied ... in cases involving 'suspect classifications' or touching on 'fundamental interests.' Here the courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.' (*D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d at 1, 17, citations omitted.)

This same exacting level of scrutiny applies under the State Equal Protection Clause, which affords greater protection from discrimination than its federal counterpart. (Cal. Const., art. I, § 7(a); see *King v. McMahon* (1986) 186 Cal.App.3d 648, 656-57: ["Recognizing the independent vitality of the California Constitution, the courts of this state traditionally extend strict scrutiny to a broader range of classifications than are so rigorously reviewed under identical provisions of the federal constitution." (Citations omitted.)].)

Thus, in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co., supra,* 24 Cal.3d 458, 469-472, this Court struck down a blanket ban on hiring gay men and lesbians, applying a standard significantly more searching than the heightened rational basis test applied under the federal Equal Protection Clause. (See *id.* at p. 474 ["The [State] equal protection clause *prohibits* . . . arbitrary discrimination on grounds unrelated to a worker's qualifications."].) The Court's discussion suggests that in California, sexual orientation is a "suspect classification"; thus, blanket discrimination

on the basis of sexual orientation is automatically suspect and subject to heightened scrutiny. (See also *Holmes v. Cal. Nat'l Guard* (2001) 90 Cal.App.4th 297, 302 [implying that sexual orientation discrimination permissible under federal equal protection standards may violate the California Constitution].)

b. The Family Code Discriminates On The Basis Of Gender.

By limiting marriage to opposite-gender couples, the Family Code also creates a classification based on gender. The Alaskan Superior Court has held that a virtually identical provision in the Alaska Marriage Code was a sex-based classification. (See *Brause v. Bureau of Vital Statistics* (Alaska Super. Ct. 1998) 1998 WL 88743 *6.) Like the California Family Code, the Alaska Marriage Code defined marriage as "a civil contract entered into by one man and one woman." (*Id.* at p. *1.) The Court found that "a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law." (*Id.* at p. *6.) The same is true under the Family Code.

The fact that both men and women, as a class, are prevented from entering into same-sex marriages does not transform the Family Code into a gender-neutral law. This Court has long held that the Equal Protection Clause protects *individuals* and the constitutionality of any legislation "must be tested according to whether the rights of an individual are restricted . . . ." (*Perez v. Sharp, supra*, 32 Cal.2d at p. 716.) The fact that different racial or gender groups are treated the same *as a class* will not immunize state action from the Equal Protection analysis.

In *Perez*, for example, this Court was called on to determine the constitutionality of California's miscegenation laws. Like the Family Code, the miscegenation law applied equally to all groups, no matter their race. The Court nevertheless held that the law violated the Equal Protection clause. "The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups . . . . Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry." (*Id.* at pp. 716-717.)

The United States Supreme Court reached the identical conclusion under the federal Constitution nearly 20 years later. In *Loving, supra,* 388 U.S. 1, the Court emphasized that where a statute relies on suspect classifications such as race, the fact that the statute punishes all races equally does not remove the statute from the proscription against invidious discrimination. (*Id.* at pp. 8, 10.) Likewise, the fact that the Family Code purports to prevent both men and women from entering into same-gender marriages does not alter the fact that it does so based explicitly on the gender of their chosen partners. (See also *Baker v. State of Vermont, supra,* 744 A.2d 864, 906 ["Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. . . . This is sex discrimination."] (Johnson, J., concurring in part and dissenting in part).)

There can be little question that by limiting marriage to opposite-gender couples, the Family Code was adopted to preserve traditional gender roles. (See *ibid.* ["the sex-based classification contained in the marriage laws is . . . a vestige of sex-role stereotyping that applies to both men and

women . . . .”] (Johnson, J., concurring in part and dissenting in part).) Moreover, these gender stereotypes are intimately linked with gender discrimination and inequality, the very type of ill that the Equal Protection Clause is designed to eradicate. (See *ibid.* [opposite-gender classification “is still unlawful sex discrimination even it applies equally to men and women.”]; see also Sunstein, C., *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 20-21 (1994) [“the prohibition on same-sex marriages, as part of the social and legal insistence on ‘two kinds,’ is as deeply connected with male supremacy as the prohibition on racial intermarriage is connected with White Supremacy.”]; Law, Sylvia, *Homosexuality and the Social Meaning of Gender*, 1988 Wisc. L. Rev. 187, 188 & 209 (1988) [positing that “the persistence of negative social and legal attitudes toward homosexuality can best be understood as preserving traditional concepts of masculinity and femininity as well as upholding the political, market and family structures premised on gender differentiation” and that “[t]he social significance of gender is fabricated to systematically favor men.”].)

In turn, the ban on same-sex marriage has resulted in the sort of subjugation that the United States Supreme Court has long found to violate the Equal Protection Clause. More than 20 years ago, in *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, the Court struck down the single-sex admissions policy of a state nursing school because it “reflect[ed] archaic and stereotypic notions” of the “proper” roles of men and women, thereby relegating women to inferior status. (*Id.* at pp. 725-726.) The same is true with respect to laws limiting marriage to opposite-gender couples.

Because the Family Code conditions the right to marriage on the gender of the applicant and seeks to preserve outdated stereotypic notions

of the traditional roles of men and women in society, the Family Code discriminates on the basis of gender and must be subjected to at least intermediate scrutiny under the federal Constitution. (See *id.* at p. 723.) "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." (*Id.* at p. 724 (quoting *Kirchberg v. Feenstra* (1981) 450 U.S. 455, 461.) "The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (*Ibid.,* quoting *Wengler v. Druggists Mutual Ins. Co.* (1980) 446 U.S. 142, 150.)

And because classifications based on sex are considered "suspect" in California, the Family Code is subject to strict scrutiny under State Equal Protection analysis. (See, e.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37; *County of Los Angeles v. Patrick* (1992) 11 Cal.App.4th 1246, 1252.) "Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose . . . , they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available." (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 20, 33.)

2. The Family Code Violates Due Process Guarantees Under The United States And California Constitutions.

The Family Code's ban on same-sex marriage also must be invalidated under the Due Process Clauses of the United States and California Constitutions. Each contains a substantive due process component that protects against undue governmental interference with

certain fundamental rights and liberty interests.[6] (See *Washington v. Glucksberg* (1997) 521 U.S. 702, 719-20 [federal Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them," and "provides heightened protection against government interference with certain fundamental rights and liberty interests"]; *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771 [California's Due Process Clause "prevents government from enacting legislation that is arbitrary or discriminatory or lacks a reasonable relation to a proper legislative purpose"] (internal quotes omitted).)

Among the fundamental interests protected is the right to marry a person of one's choice. (See *Washington, supra,* 521 U.S. at p. 720 ["the liberty' specially protected by the Due Process Clause includes the right[] to marry"].) As the Court noted in *Lawrence, supra,* 123 S.Ct. at p. 2481:

> In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851, 112 S.Ct. 2791. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
> > These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to

[6] U.S. Const., Am. 14; Cal. Const., art. I, §§ 7, 15. The California courts are not required to interpret the California Constitution's due process guarantee identically to its federal counterpart. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367, fn. 21.)

> define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. *Id.*

Under federal and State substantive due process analysis, a legislative enactment that infringes on a fundamental right or liberty interest "must be based upon more than prejudice and must be free from oppressive discrimination . . .." (*Perez v. Sharp, supra,* 32 Cal.2d at p. 715.) Indeed, the law must survive strict scrutiny; the government cannot "infringe certain fundamental liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Dawn D. v. Super. Ct.* (1997) 17 Cal.4th 932, 939-40 [emphasis original, internal quotes omitted]; *Reno v. Flores* (1993) 507 U.S. 292, 301-02 [reaffirming that due process "forbids the government to infringe certain 'fundamental' liberty interests ... unless the infringement is narrowly tailored to serve a compelling state interest"].)

3. The Family Code Violates Privacy Guarantees Under The California Constitution.

Finally, the Family Code's ban on same-sex marriage must be invalidated under the individual right to privacy in the California Constitution.[7] (See *Am. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.) This constitutional privacy guarantee includes a "right of privacy or liberty in matters related to marriage[.]" (*Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275;

[7] Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Conservatorship of Valerie N. (1985) 40 Cal.3d 143, 161 [Article I, Section 1 protects "right to marriage"].)

The level of scrutiny applicable to the assertion of a privacy interest under Article I, section 1 depends on "the specific kind of privacy interest involved and the nature and the seriousness of the invasion and any countervailing interests . . .." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34.) "Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or *the freedom to pursue consensual familial relationships*, a 'compelling interest' must be present to overcome the vital privacy interest." (*Ibid*., emphasis added.)

C. Denying The Fundamental Right To Marry Cannot Be Justified Under Any Level Of Scrutiny.

Petitioners have not attempted to articulate any justifications for barring same-sex marriage, but instead concede that "[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts." (Petition at p.12, fn. 1.) But if this Court disagrees, the Family Code ban on same-sex marriage cannot be justified under any level of scrutiny.

Even under rational basis review, some of the expected justifications for the ban fail as a matter of law. Over the years, courts considering the constitutionality of the ban on same-sex marriage have rejected many of the traditional grounds advanced in its support. For example, such bans can no longer be justified on the basis of furthering the State's interest in promoting procreation. Courts have recognized that not every opposite-sex couple gets married to have children or is even capable of doing so if that is their intent. And same-sex couples in California, like opposite-sex couples,

often become parents through a variety of methods, including biological procreation, surrogacy, and adoption. (See, e.g., *Baker v. State of Vermont, supra*, 744 A.2d at pp. 881-882 [citing five sociological studies showing that "a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques"].) As the *Goodridge* court noted: "[f]ertility is not a condition of marriage, nor is it grounds for divorce[; rather,] . . . it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." (440 Mass. at pp. 331-332.)

Nor can the ban on same-sex marriages be justified on the basis of furthering traditional notions of morality. In both *Romer* and *Lawrence*, the Court erased any doubt about the impropriety of justifying the ban on this basis. As the Court stated: In interpreting the contours of constitutional due process, "[the court's] obligation is to define the liberty of all, not to mandate our own moral code." (*Lawrence, supra*, 123 S.Ct. at p. 2480, citation omitted.) "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." (*Id.* at p. 2483, citation omitted.)[8]

---

[8] In addition to evidence on these subjects, the City plans to present evidence refuting arguments based on the notion that "tradition" provides a justifiable basis for the preferential treatment of opposite-sex marriages. The City anticipates providing expert anthropological testimony (1) confirming a century of research indicating that neither civilization nor viable familial structures depend on marriage as a heterosexual institution,

(continued on next page)

Moreover, Petitioners will be unable to prove the oft-offered justification that laws banning same-sex marriage are necessary to protect families and children. As one survey of research regarding gay and lesbian parenting noted:

> [N]o evidence . . . suggest[s] that lesbians and gay men are unfit to be parents or that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth. (Charlotte J. Patterson, Lesbian and Gay Parenting (1995) at http://www.apa.org/pi/parent.html.)

In fact, Respondent would expect to present evidence that society as a whole benefits when same-sex families and their children are provided the rights and obligations that marriage affords opposite-sex couples because same-sex couples generally have the same longevity and capacity for healthy relationships as their heterosexual counterparts. (See RA, Tab 18 at 335, 337-343 ["Social science research demonstrates that lesbians and gay men have the same capacity as heterosexuals to form stable, long-lasting, intimate relationships that are comparable in quality to heterosexual relationships"].) Numerous studies show that children of gay and lesbian parents are as psychologically healthy and as well adjusted as are children of heterosexual parents. (See RA, Tab 18 at 350-370.)

(footnote continued from previous page)
and (2) illustrating that same-sex partnerships have traditionally provided successful family models.

Because the traditional, and intolerant, reasons advanced in support of bans on same-sex marriage are either baseless on their face, or cannot be proven, such bans cannot be justified even under the most deferential scrutiny. Assessing whether they pass any higher level of review, moreover, would require this Court to wade into factual questions about the availability of less restrictive means to further the State's asserted interest(s) in restricting civil marriage to same-sex couples. If the Court reaches these constitutional issues, the Court should permit the parties to submit evidence and conclude that the Family Code's definition of marriage as only between a man and a woman is unsupported and unconstitutional.

CONCLUSION

Respondent respectfully requests that the Court deny the writ and Petitioners' request for immediate relief.

Dated: March 25, 2004

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
Chief Deputy City Attorney
ELLEN FORMAN
WAYNE K. SNODGRASS
K. SCOTT DICKEY
KATHLEEN MORRIS
SHERRI SOKELAND KAISER

BOBBIE J. WILSON
PAMELA K. FULMER
AMY E. MARGOLIN
SARAH M. KING
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A Professional Corporation

By:_____
THERESE M. STEWART
Chief Deputy City Attorney
Attorneys for Respondents City & County of San Francisco, Gavin Newsom and Nancy Alfaro

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 13,661 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 March 5, 2004.

DENNIS J. HERRERA
City Attorney

By:_____
THERESE M. STEWART
Chief Deputy City Attorney

Attorneys for Respondents City & County of San Francisco, Gavin Newsom and Nancy Alfaro