

COPY

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DEPARTMENT OF JUSTICE



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April 21, 2004

The Honorable Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

RE: *Lockyer v. City and County of San Francisco, et al.*
California Supreme Court, Case No. S122923

Dear Chief Justice George and Associate Justices:

This letter brief responds to the Court's April 14, 2004 order requesting supplemental briefing regarding the validity of the same-sex marriage certificates and licenses previously issued by respondents. The Attorney General readily acknowledges that the couples who exchanged vows in the San Francisco ceremonies likely have strong, committed and loving relationships worthy of the state's recognition and respect. In other words, while their marriages cannot be found valid under law, the Attorney General believes there is nothing invalid or deficient about these individuals or the worth of their relationships; on the contrary, the desire of these couples to seek formal recognition and solemnization of their commitment to one another is not only natural but admirable. Nevertheless, California law provides, in unequivocal terms, that only marriage between a man and a woman is valid in California. Absent a determination by an appropriate judicial tribunal that California's marriage laws are unconstitutional -- an issue currently pending in California's superior courts -- this Court can, and should, maintain legal clarity and uniformity by determining in this proceeding that the same-sex certificates and licenses issued by respondents are invalid under California law. Additionally, in fairness to those couples who paid fees for invalid certificates and licenses, this Court should order respondents to refund the fees collected.

The specific questions posed by this Court in its April 14th order are addressed below:

I. This Court Can And Should Resolve The Uncertainty Surrounding The Same-Sex Certificates And Licenses Issued By Respondents

The original writ petition filed by the Attorney General requested an order declaring the invalidity of the same-sex marriage licenses and certificates issued and registered by the respondents, because legal questions can and will arise regarding the certificates and licenses already issued. This Court should eliminate the uncertainty caused by respondents' actions. Uncertainty regarding legal rights poorly serves the cause of liberty. (*Planned Parenthood of Southeastern Penn. v. Casey* (1992) 505 U.S. 833, 844 ["Liberty finds no refuge in a jurisprudence of doubt."].)

Respondents may argue that the same-sex couples would prefer to live with such uncertainty pending a ruling on the constitutionality of same-sex marriage. But a lack of certainty and uniformity is not in the best interests of the State, and could actually prejudice the couples. On January 1, 2005, the California Domestic Partner Rights and Responsibilities Act of 2003 takes effect. (Assembly Bill 205 (2003-2004 Reg. Sess.) ("AB 205"), § 14.) AB 205 provides that registered domestic partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses." (AB 205, § 3 (adding Fam. Code, § 297.5(a).) Married persons, however, are presently excluded from becoming registered domestic partners and will continue to be excluded under AB 205. (Fam. Code, § 297, subd. (b)(3); AB 205, § 3.) If this Court does not clarify that the same-sex certificates and licenses issued by respondents are invalid, the couples might be prejudiced in their ability to obtain the rights and benefits otherwise available to them under AB 205.

Uncertainty could also negatively affect third parties, including employers and governmental entities that may be asked to recognize the certificates and licenses issued by respondents. Confusion and unnecessary court proceedings can be avoided if this Court determines that under current law, the same-sex certificates and licenses issued by respondents are invalid.

II. The Same-Sex Certificates And Licenses Issued By Respondents Are Invalid

Same-sex marriages are invalid in California. Part 1 of Division 3 of the Family Code pertains to the "validity of marriage," and the statutes within that part confirm that only marriage between a man and a woman is "valid." (*See, e.g.*, Fam. Code, § 300 [marriage is a personal relation arising out of a civil contract between a man and a woman]; Fam. Code, § 301 [an unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or

older, are capable of consenting to and consummating marriage]; *see also*, Fam. Code, § 308.5 [only marriage between a man and a woman is valid or recognized in California].)

Part 2 of Division 6 of the Family Code, which does not apply to same-sex marriages, pertains instead to “void” or “voidable” marriages. Under Part 2, incestuous marriages are void (Fam. Code, § 2200), while bigamous and polygamous marriages may be either void or voidable. (Fam. Code, § 2201.) Marriages that involve a minor, a person of unsound mind, fraud, force, or physical incapacity are voidable. (Fam. Code, § 2210.) By contrast, Part 1 of Division 3 expressly provides that only marriages between a man and a woman are valid in California.

Section 2250 et seq. of the Family Code articulates procedures for establishing the nullity of void or voidable marriages, but nothing in the Family Code suggests that those procedures apply to invalid same-sex marriages. In fact, a marriage may be invalid even if it is not “void” or “voidable” under Family Code sections 2200 et seq.¹ (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 106.) In the present case, the same-sex certificates and licenses issued by respondents are invalid because only marriage between a man and a woman is valid and recognized in California.

While there are no California same-sex cases on point, out-of-state and federal cases have discussed the invalid status of attempted marriages between same-sex couples. For example, in *Anonymous v. Anonymous* (N.Y.Sup. 1971) 325 N.Y.S. 2d 499, a court in New York held that a marriage between two males was a nullity under state law. In reaching this determination, the court observed that this action differed from a party seeking an annulment or a declaration of nullity of a void marriage. (*Id.* at 501.) Such actions “presuppose the existence of the two basic requirements for a marriage contract, i.e., a man and a woman.” (*Ibid.*) Accordingly, the court held that the “marriage ceremony itself was a nullity” and that “[n]o legal relationship could be created by it.” (*Ibid.*) A similar analysis was adopted by an appellate court in Kentucky that analyzed and rejected the constitutional claims of two women who sued after they were denied a marriage license. (*Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588.) The Kentucky court held that any issued license would be a nullity because these two parties could not marry one another. (*Id.* at 589.) Moreover, the court found that even if the same-sex couple had concealed their gender from the county clerk and received a license, “the resulting relationship would not constitute a marriage.” (*Ibid.*)

¹ Even if same-sex marriages were to be considered “void” under California law, it would be appropriate for this Court to determine the legal nullity of the marriages in this proceeding. (*See In re Estate of Gregorson* (1911) 160 Cal. 21, 26 [a void marriage is a legal nullity, and a judgment stating that a marriage is void merely recognizes existing circumstances].)

Similarly, in *Adams v. Howerton* (C.D.Cal. 1980) 486 F.Supp. 1119, a federal district court denied a plaintiff's motion for "immediate relative" status under federal immigration law because the district court rejected the plaintiff's alleged same-sex marriage under both Colorado state and federal law. The district court noted that the plaintiff had obtained a license from a county clerk in Colorado, that a marriage ceremony had been performed, and that nothing had been done to void the alleged marriage. (*Id.* at 1120.) Nevertheless, the district court adopted the informal opinion of the Colorado Attorney General that "purported marriages between persons of the same sex were of no legal effect in Colorado." (*Id.* at 1122.) Finally, in *Littleton v. Prange* (Tex.App. 1999) 9 S.W.3d 223, an appellate court in Texas held that a transsexual who was born a man lacked standing to bring a wrongful death claim following the death of the transsexual's alleged male spouse. Even though the "marriage" occurred in 1989 and the couple lived together until the alleged wrongful death occurred in 1996 (*id.* at 225), the Texas court held that because the plaintiff was born a male, the alleged marriage in question was invalid as a matter of law, and the plaintiff could not bring a wrongful death claim as a surviving spouse. (*Id.* at 231.)²

Because only marriages between a man and a woman are valid and legal in California, the same-sex certificates and licenses issued by respondents are invalid and are a legal nullity.³

III. Fairness Dictates A Refund Of Fees Paid

This Court should also order respondents to refund any and all fees collected from applicants in connection with the issuance of same-sex certificates and licenses. Pursuant to this Court's authority under Article VI, section 10 of the California Constitution, this Court can issue a writ commanding governmental officials to take specified actions. (*See, e.g., Perry v. Jordan* (1949) 34 Cal.2d 87, 90.)

² On April 20, 2004, the Circuit Court of the State of Oregon, Fourth Judicial District, issued an opinion and order stating that to the extent ORS Chapter 106 [Oregon's marriage statutes] acts as a bar to the rights and privileges guaranteed by Article I, section 20 of the Oregon Constitution, that portion of Chapter 106 is unconstitutional. Because the decision solely applied Oregon law, it is not applicable to the instant proceeding.

³ Because the same-sex certificates and licenses are a legal nullity, this Court can confirm the invalidity of the certificates and licenses without implicating the Due Process Clause. A state due process claim cannot arise in the absence of a statutorily-defined benefit. (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1048, 1072; *Schultz v. Regents of the University of Calif.* (1984) 160 Cal.App.3d 768, 787.) No statutorily-defined benefit or interest in marriage exists here, because only marriage between a man and a woman is valid and legal in California.

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If this Court determines that respondents did not have authority to issue same-sex certificates and licenses, and if this Court further confirms that the same-sex certificates and licenses are invalid, then fairness dictates that respondents be ordered to refund any fees paid in connection with those invalid certificates and licenses. Respondents should not retain fees for unauthorized activities.

Respectfully submitted,



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DECLARATION OF SERVICE
(C.C.P. §§ 1011, 1012, 1012.5, 1013)

Case Name: ***Bill Lockyer, Attorney General of the State of California v. City and County of San Francisco, Gavin Newsom, in his capacity as Mayor of the City and County of San Francisco; Mabel S. Teng, in her capacity as Assessor-Recorder of the City and County of San Francisco, and Nancy Alfaro, in her official capacity as the San Francisco County Clerk***

I declare: I am employed in the County of San Francisco, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, California.

On April 21, 2004, I served the attached

LETTER TO SUPREME COURT DATED APRIL 21, 2004

in said cause, by placing a true copy thereof enclosed in a sealed envelope and served as follows:

United States mail by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice, whereby the mail is deposited in a United States mailbox in the City of San Francisco, California, after the close of the day's business - ***(SEE ATTACHED LIST)***

California Overnight (Overnight Courier)

Facsimile at the following Number:

Personal Service, via America Net-Working, at the below address(es):

to the parties addressed as follows:

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on April 21, 2004.



CHARLENE BAVA