IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BILL LOCKYER, Attorney General of the State of California, Petitioner, **v.** **CITY AND COUNTY OF SAN FRANCISCO, GAVIN NEWSOM, in his official capacity as Mayor of the City and County of San Francisco; MABEL S. TENG, in her official 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,** Respondents.	No. S122923

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI AND/OR OTHER APPROPRIATE RELIEF

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CITY AND COUNTY OF SAN FRANCISCO, GAVIN NEWSOM, in his official capacity as Mayor of the City and County of San Francisco; MABEL S. TENG, in her official 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,

Respondents.

INTRODUCTION

The foundation of our constitutional structure consists of a separation of powers and a system of checks and balances. Under this system, the power of judicial review is expressly reserved to the courts. Those sworn to uphold the Constitution are bound by the limitations and responsibilities imposed by this structure. Although the federal and state Constitutions articulate basic individual rights, they also define the limits of governmental authority.

Respondents purport to be defenders of the Constitution, yet they ignore these most fundamental concepts. As Justice Stanley Mosk wrote on the bicentennial of our nation's independence, a public officer "faithfully upholds the Constitution by complying with the mandates from the Legislature, leaving to the courts the decision whether those mandates are invalid." (*Southern Pacific Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, 318-319 [concurring and dissenting].) Justice Mosk added that the oath of office to obey the constitution "requires obedience to the Constitution not as self-

indulgently defined" by a public official, "but as interpreted by objective judicial tribunals." (*Ibid.*)

Justice Mosk's contributions to the advancement of civil rights are well known. Yet he recognized that at the heart of our free society is a constitutional system of government that imposes certain limits and responsibilities on our public officials.

As this Court correctly recognized in its March 11 order, this proceeding is not about the constitutionality of same-sex marriage. It is not a litmus test on marriage or societal values. This case is about the proper role of public officials in carrying out their governmental duties.

Respondents claim for themselves the judicial power to declare laws unconstitutional, along with the legislative power to craft an alternative system of marriage. In other words, they claim for themselves, as local ministerial officers, more power than the Governor, or the Supreme Court, or the Legislature, because they seek to wield executive, judicial and legislative powers simultaneously. Respondents' position is untenable and has no basis in the law.

Although respondents devote much of their Return to the definition of an "administrative agency," and to the intended purpose of article III, section 3.5 of the California Constitution, the resolution of this case does not depend on such legal subtleties. This proceeding can be resolved with a straightforward reaffirmation that under the doctrines of judicial review and separation of powers, the authority to determine the constitutionality of state statutes is expressly reserved to the courts.

Because respondents exceeded their authority in declaring provisions of the Family Code unconstitutional and by refusing to comply with these statutory provisions, a writ of mandate should issue directing respondents to

apply and abide by the provisions of the Family Code, absent a judicial determination to the contrary.

ARGUMENT

I.

THE AUTHORITY TO DECLARE CALIFORNIA STATUTES UNCONSTITUTIONAL IS EXPRESSLY RESERVED TO THE COURTS

A. Local Ministerial Officers Do Not Have The Power Of Judicial Review.

In their return to the writ petition, respondents claim for themselves broad and unprecedented powers to declare laws unconstitutional within their City and County. They also claim the power to unilaterally take action based upon their own determination of unconstitutionality.[1/] But respondents do not have such authority. The power to declare state laws unconstitutional is expressly reserved to the judicial branch of government. It is not a power granted to the County Clerk[2/] as an incident of her purely ministerial duties,

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1. Respondents suggest this Court's order to show cause was not "fair" in describing respondents' actions as based on the "'personal' view or opinion" of the Mayor. (Supplemental Opposition To Application For An Immediate Stay And Peremptory Writ Of Mandate In The First Instance ("Supp. Opp.") at 1.) But respondents subsequently argue that any determination of the constitutionality of California's marriage laws would require a judicial proceeding involving "a great deal of evidence, expert and otherwise, dealing with deeply complex subject-matter areas." (Supp. Opp. at p. 40.) Yet the Mayor's six-paragraph declaration filed with this Court indicates that he made his own determination of constitutionality in the weeks between January 20, 2004 and February 10, 2004, based only on private consultations with advisors and advocates. (Declaration Of Gavin Newsom ("Newsom Decl."), Mar. 4, 2004, ¶ 3.)

2. In their answer, respondents state that Ms. Alfaro is not actually the County Clerk. Daryl M. Burton is the County Clerk, and Ms. Alfaro is Director

even upon direction by the Mayor, who has no duties or powers under the Family Code. Respondents' contrary contention, that the oath that local officials take to uphold the Constitution empowers ministerial officials to declare the unconstitutionality of state laws, is simply not supported by any California precedent. To the contrary, such questions are reserved for the judicial branch by our Constitution.

When respondents took it upon themselves to determine the constitutionality of California's marriage laws, they violated one of the most fundamental and longstanding principles of our system of government: the principle of judicial review. Judicial review of state laws has been the province of judges since Chief Justice Marshall stated in *Marbury v. Madison* (1803) 5 U.S. 137, that "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . ." (*Id.* at 177; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 115; *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698-1699 [holding that since *Marbury* "judges have been given the task of construing laws passed by voters or their representatives. It is too late in the day to deny this power."].) This Court has held that "[t]he ultimate interpretation of a statute is an exercise of the judicial power." (*Bodinson Mfg. Co. v. California Employment Com.* (1941) 17 Cal.2d 321, 326.) This power is conferred upon the courts by the Constitution, and it

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of the County Clerk's Office, "to whom all of the responsibility and privileges of the County Clerk have been delegated." (Respondents' Answer To Petition, ¶ 5.) Ms. Alfaro has been designated as "commissioner of civil marriages" for the county. (*Ibid.*) To avoid confusion, this brief will refer to Ms. Alfaro as the County Clerk because respondents' supplemental opposition refers to her as such. (Supp. Opp. at 32-33.)

cannot be exercised by any other body in the absence of a constitutional provision taking it away.[3] (*Ibid.;* Cal. Const., art. VI, § 1.)

B. Respondents' Actions Also Violate The Separation Of Powers Doctrine.

Article III, section 3 of the California Constitution provides for the separation of powers. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) Because the determination of the constitutionality of a state statute is a judicial function, members of the executive branch of government may not exercise that power.

Respondents contend that the separation of powers doctrine does not apply to them. (Supp. Opp. at 22.) It is true that article III, section 3 of the California Constitution refers to the powers of "state" government, and it is also true that this Court, in *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, stated that the separation of powers doctrine does not apply to government below the state level. (*Id.* at 36.) But this Court also made clear that this is not the end of the analysis. (*Ibid.*) Local bodies derive their powers from the state Constitution (*ibid.*), and the state Constitution vests the judicial power in the state courts (Cal. Const., art. VI, § 1) and the legislative

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3. *See also Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355 [holding that one section of Proposition 115 that would have required state courts to construe certain rights of criminal defendants in accordance with the United States Constitution was invalid as a constitutional revision that could not be effected through the initiative process because it would have directly contradicted "the well established jurisprudential principle that, 'The judiciary, from the very nature of its powers and means given to it by the Constitution, must possess the right to construe the Constitution in the last resort. . . .'"]; *Frasher v. Rader* (1899) 124 Cal. 132, 134 [distinguishing the actions of a board of fire commissioner from judicial decisions because judicial decisions "declare the law and define the rights of the parties under it."].

power in the Legislature. (Cal. Const., art. IV, § 1.) Moreover, under the specific facts of this case, the separation of powers doctrine applies to respondents because, in performing their ministerial duty to administer the State's marriage laws, respondents are agents of the State. (See the discussion in Part IV, subpart A, *infra.*) Accordingly, respondents do not have the power to determine the constitutionality of state statutes, nor do they have the power to enact a new system of marriage in California.

C. The Cases Cited By Respondents Do Not Support Their Contention That Local Ministerial Officers Can Determine The Constitutionality Of State Laws.

Although judicial review is a well-settled concept, respondents nonetheless cite to a list of cases in an attempt to support their claimed authority to determine the constitutionality of California's marriage laws. Respondents suggest that a dozen cases from 1896 to 1976 support their actions. (Supp. Opp. at 2, 4.) A review of the cited cases, however, establishes that respondents are wrong.

None of the cases cited by respondents holds that a local official with purely ministerial duties to implement a statewide statute can declare the statute unconstitutional and then, without first seeking any judicial declaration of unconstitutionality, commence affirmatively to take actions that violate that statute based on that official's own opinion of what a constitutional statute would provide. In fact, eight of the twelve cases cited by respondents do not even discuss the legal issue for which they were cited. (*See California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575; *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841; *Metropolitan Water District v. Marquardt* (1963) 59 Cal.2d 159; *Paso Robles War Memorial Hospital District v. Negley* (1946) 29 Cal.2d 203; *City of Whittier v. Dixon* (1944) 24 Cal.2d 664; *Culver City v. Reese* (1938) 11 Cal.2d 441; and *Joint Highway District v. Hinman*

(1934) 220 Cal. 578.) Respondents' apparent attempt to construe judicial silence as a judicial holding violates the fundamental principle that "cases are not authority for propositions not considered therein." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

Moreover, the remaining four cases cited by respondents do not support their position. Two of the cases involve "friendly" lawsuits, in which a writ of mandate is filed by a public entity against one of its own officers in an effort to obtain a judicial determination of a constitutional question. Those cases hold only that they present an actual controversy ripe for judicial determination, because the officer being sued is under a legal duty to follow the Constitution. *(City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 694;[4] *Golden Gate Bridge and Highway District v. Felt* (1931) 214 Cal. 308, 316.) These actions apparently occurred with some frequency in the public finance arena before the advent of California's validation statutes, which allow the determination of the constitutionality of bonds, warrants, contracts, obligations, and evidences of indebtedness through the filing of an in rem action against "all persons interested" in the matter.[5] (Code Civ. Proc., §§ 864,

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4. In *City and County of San Francisco v. Boyd*, the issue presented was whether the City and County of San Francisco's controller could be compelled to pay street car operators and bus drivers in accordance with a salary ordinance. (*City and County of San Francisco v. Boyd, supra*, 22 Cal.2d at 687.) The controller claimed that the city and county's charter would be violated by such a payment. (*Id.* at 688.) That case is distinguishable from the instant case because the controller was asserting a violation of the San Francisco charter, not the Constitition or a state statute. Presumably, the controller was empowered to decide whether payments could be legally made under the laws of his city and county. By contrast, the County Clerk has only ministerial duties under the Family Code.

5. In the public finance cases, public entities seek a judgment that upholds either the validity of their proposed financing, the validity of the statutory scheme authorizing the financing, or the validity of both the transaction and the statute. Without such a judgment, investors are sometimes

861.1.) Critics characterized these writ petitions as "fictitious and collusive" because the respondents on the writs were officers of the petitioners and thus could be considered to favor entry of judgment in favor of the petitioners.[6/] (*Golden Gate Bridge and Highway District, supra*, 214 Cal. at 316.) This Court rejected those criticisms by citing the oath taken by the public officials. (*Id.* at 316; *City and County of San Francisco, supra*, 22 Cal.2d at 694.) Of course, the actions of the petitioners in such cases – to obtain a judicial declaration prior to selling bonds or taking other actions that are potentially illegal – are exactly the opposite of what San Francisco did in this case. San

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reluctant to purchase the bonds out of fear that they could be declared invalid after the bond sale, potentially leaving the buyer holding an invalid investment. Since the passage of Chapter 1479 of the Statutes of 1961, local agencies have been able to obtain validation judgments without filing friendly lawsuits against their own officers. (Code Civ. Proc., §§ 860-870.) Legislation enacted in 1994 authorized state agencies to obtain judgments under the validation statutes. (Gov. Code, § 17700.) Six of the cases cited by San Francisco appear to be "friendly" petitions for writ of mandate involving public finance issues that were filed before validation judgments were available. *(California Housing Finance Agency v. Elliott, supra*, 17 Cal.3d 575 [writ petition filed by housing finance agency against its chairperson and acting president]; *Metropolitan Water District v. Marquardt, supra*, 59 Cal.2d 159 [writ petition filed by water district against water district executive secretary]; *Paso Robles War Memorial Hospital District v. Negley, supra,* 29 Cal.2d 203 [writ petition filed by hospital district against its secretary]; *City of Whittier v. Dixon, supra,* 24 Cal.2d 664 [writ petition filed by city against its city clerk]; *Culver City v. Reese* (1938) 11 Cal.2d 441 [writ petition filed by city against its engineer and superintendent of streets]; *Joint Highway District v. Hinman* (1934) 220 Cal. 578 [writ petition filed by highway district against treasurer of the district].)

6. Justice Edmonds dissented from three of the opinions cited by San Francisco on the ground that a "friendly" lawsuit brought by a public agency against one of its officers in order to determine a constitutional question was collusive and improper. (*City and County of San Francisco v. Boyd* (1943) 22 Cal.3d 685, 707-708 (Edmonds, J., dissenting); *Paso Robles War Memorial Hospital District, supra*, 29 Cal.2d at 208 (Edmonds, J., dissenting);*City of Whittier, supra*, 24 Cal.2d at 668 (Edmonds, J., dissenting).

Francisco plunged ahead without obtaining a judicial determination of constitutionality.[7/]

In *Denman v. Broderick* (1896) 111 Cal. 96, also cited by respondents, a member of the board of election commissioners sued the auditor of the City and County of San Francisco when the auditor refused to pay his salary on the ground that payment would be unconstitutional. (*Id.* at 99.) The petitioner argued, *inter alia*, that the auditor had no interest in the question of whether the payment would be unconstitutional. (*Id.* at 105.) This Court rejected the claim that the auditor lacked an interest, citing the auditor's official duties and oath, and the possibility that the auditor could subject himself to liability and penalties if he made an unauthorized payment. (*Ibid.*) This case is distinguishable because, unlike an auditor who may be charged with a duty of deciding whether a particular payment is legally authorized, the County Clerk here had a ministerial duty to comply with the marriage laws.

The last of the dozen cases cited by respondents, *Southern Pacific Transportation Co. v. Public Utilities Commission* (1976)18 Cal.3d 308, also does not support respondents' position that they have authority to determine the constitutionality of a state statute. *Southern Pacific* only authorized administrative agencies created by the Constitution to determine if a statute is constitutional, a holding later nullified by the addition of Article III, section 3.5 to the Constitution. (*Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 619.)

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7. In an apparent attempt to protect San Francisco from liability, the County Clerk added a disclaimer to the gender-neutral application form that she had designed. It stated that "[m]arriage of lesbian and gay couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer." (Alfaro Decl., ¶ 3.)

D. San Francisco Refused To Perform Its Ministerial Duty Once Before, And This Court Issued A Writ.

In contrast to respondents' citation of inapposite legal authorities, an opinion by this Court from nearly four decades ago confirms that their position lacks merit. When *Farley v. Healey* (1967) 67 Cal.2d 325, was decided, the burning social issue of the day was the Vietnam War. In that case, when a group of anti-war activists presented the acting registrar of voters for the City and County of San Francisco with petitions to place an initiative on the ballot urging an immediate cease-fire and American withdrawal from Vietnam, the San Francisco registrar refused to determine the sufficiency of signatures to place the measure on the ballot on the advice of the city attorney. (*Id.* at 326.) The acting registrar based his decision on a constitutional belief that the electorate did not have the power to adopt such an initiative.[8/] (*Id.* at 327.) The activists filed a writ seeking to compel the acting registrar and the county clerk to determine whether the measure qualified for the ballot. (*Id.* at 326.)

In granting the writ, this Court held that the acting registrar exceeded his authority in refusing to determine the sufficiency of signatures. (*Ibid.*) The Court stated:

> Under section 180 of the Charter of the City and County of San Francisco, his duty is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met. It is not his function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. *These questions may involve difficult legal issues that only a court can*

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8. The dissenting opinion in *Farley* explains that the legal question was whether an initiative regarding Vietnam fell within the powers of a charter city, granted by the California Constitution, to make and enforce laws and regulations with regard to municipal affairs. (*Farley, supra*, 67 Cal.2d at 330 (dissenting opin. of Burke, J.).)

> *determine*. The right to propose initiative measures cannot properly be impeded by a decision of a ministerial officer, even if supported by the advice of the city attorney, that the subject is not appropriate for submission to the voters. Given compliance with the formal requirements for submitting an initiative, the registrar must place it on the ballot *unless he is directed to do otherwise by a court on a compelling showing* that a proper case has been established for interfering with the initiative power.

(*Ibid.*, emphasis added.) This Court held that the voters had a right to vote on the initiative, providing that the respondents determined that sufficient signatures had been submitted to place it on the ballot.[9/]

Farley v. Healey is analogous to the current situation. Like the acting registrar in *Farley*, San Francisco's role in administering marriages is purely ministerial. The County Clerk has a ministerial duty to provide marriage licenses in accordance with state law. (Fam. Code, § 350 et seq.) Respondent Teng, as San Francisco Assessor-Recorder, has a ministerial duty under the relevant California statutes to make sure that the forms prescribed for use by the

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9. This Court followed the *Farley* holding in *Schmitz v. Younger* (1978) 21 Cal.3d 90. In that case, the Attorney General refused to prepare a title and summary for a proposed initiative measure based on his conclusion that the measure violated the single-subject limitation contained in Article II, section 8(d) of the California Constitution. (*Id.* at 92.) This Court granted a writ against the Attorney General on the ground that the duty to prepare a title and summary was ministerial. (*Id.* at 93.) " Absent judicial authorization, the Attorney General may not urge violation of the single subject requirement to justify refusal to title and prepare summary of a proposed measure." (*Ibid.*) Significantly, the two dissenting justices in *Schmitz* advanced the same argument that respondents make here: that the Attorney General's oath compelled him to declare the initiative's constitutionality in the first instance without seeking a judicial determination. (*Id.* at 94 (Manuel, J., dissenting).) That position did not persuade the majority, which granted the writ without expressing any view on the underlying issue of whether the initiative was unconstitutional. (*Id.* at 93.)

State Registrar are properly filled out in order to document marriages so that state records are maintained. (Health & Saf. Code, §§ 102200, 102225, 102295, 102310, 102355.) The Mayor, although he has authority over San Francisco government by virtue of his office, lacks any statutory role with regard to the administration of state marriage laws. Thus, respondents do not have any quasi-judicial, rule-making or other regulatory authority over the provision of marriage in the city and county. Like the acting registrar in *Farley,* San Francisco acted in excess of its authority in determining the state marriage laws unconstitutional without seeking judicial guidance through a declaratory relief action.

Respondents nonetheless contend that they are obligated by their oaths of office to refuse to enforce California's marriage laws. With impressive prescience, the late Justice Mosk anticipated and refuted respondents' current assertion that their obligation to determine the unconstitutionality of California's marriage statutes flowed from their oaths to defend the Constitution. In his concurrence and dissent in *Southern Pacific*, Justice Mosk explained why it is a mistake for government officials to use the oath as a pretext to find laws unconstitutional. (*Southern Pacific, supra*, 18 Cal.3d at 318 [concurring and dissenting].) Justice Mosk stated:

> It may be argued that the constitutional review power can be inferred from the oaths commissioners must take to obey the Constitution: if a commissioner swears to obey the Constitution, according to this argument, then he cannot be expected to enforce a law believed to be unconstitutional.
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> The contention is twice flawed. First, every public official in the state takes a similar oath to uphold the Constitution, including notaries public, city councilmen and county supervisors. Few in those categories have ever maintained the right to declaim on constitutionality. Second, and more fundamentally, the proposition erroneously equates the duty of a commissioner to uphold the Constitution with the asserted 'duty' to declare laws with which he is

> unsympathetic to be unconstitutional. A commissioner faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to the courts the decision whether those mandates are invalid. The oath of office to obey the Constitution requires obedience to the Constitution not as self-indulgently defined by the commission, but as interpreted by objective judicial tribunals.[10/]

(*Id.* at 318-319.)

Justice Mosk was correct. Respondents cannot serve as arbiters of the constitutionality of state statutes, because that power is reserved to the courts. Accordingly, a writ of mandate should issue.

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10. "No one would suggest that all those who swear to uphold the law and must apply it – whether they be police officers, low level administrators, or notaries public – are required by the Constitution to pass upon the validity of legislative enactments. On the contrary, courts have generally held that legislative enactments are presumptively valid and that officials should act accordingly, notwithstanding oaths of office or law-interpreting responsibilities. Exceptions to this proposition are appropriate where a judicial ruling has squarely refuted the presumption of validity, or where a statute is so flagrantly unconstitutional as to defy any presumption to the contrary. But such exceptions in no way suggest a broader constitutional requirement that all officials evaluate the statutes under which they labor." (Note, *The Authority Of Administrative Agencies To Consider The Constitutionality Of Statutes* (1977) 90 Harv. L.Rev. 1682, 1693.)

II.

RESPONDENTS HAVE A MINISTERIAL DUTY TO COMPLY WITH CALIFORNIA'S MARRIAGE LAWS BECAUSE NO COURT HAS DETERMINED THOSE LAWS TO BE UNCONSTITUTIONAL

The California Family Code governs the issuance and validity of marriage licenses in California. Family Code section 300 defines marriage as "a personal relation arising out of a civil contract between a man and a woman . . . ." (*See also Welch v. State of California* (2000) 83 Cal.App.4th 1374, 1378 ["[i]n California, a lawful marriage requires the consent of a man and a woman"].)

No California court has determined California's current marriage laws to be unconstitutional or unenforceable. And no federal court has made any such determination. Absent such a determination by an appropriate court with jurisdiction over the issue, respondents have a ministerial duty to comply with the law as promulgated by the Legislature.

In fact, the most recent expression of federal law on the subject runs counter to respondents' position. It is the Defense of Marriage Act, passed by Congress and signed into law in 1996. (P.L. No. 104-199 (Sept. 21, 1996), 110 Stat. 2419.) The federal Defense of Marriage Act provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

(28 U.S.C. § 1738C; *see also* 1 U.S.C. § 7 [for purposes of federal law, marriage is defined as a legal union between a man and a woman].)

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In *Lawrence v. Texas* (2003) 123 S.Ct. 2472, the Supreme Court made clear that it was not making any determination on the constitutionality of same-sex marriage. The Court in *Lawrence* invalidated a Texas criminal sodomy law, holding that the right to liberty under the Due Process Clause of the Fourteenth Amendment permitted individuals to engage in consensual intimate sexual activity in the home without criminalization by the state. In response to Justice Scalia's claim in dissent that *Lawrence* opened the door for same-sex marriage, the Court expressly stated that "the present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Id.* at p. 2484.) Subsequent courts have recognized that *Lawrence v. Texas* does not require finding a federal constitutional right to same-sex marriage. (*Standhardt v. Superior Court* (Ariz.Ct.App. 2003) 77 P.3d 451, 457 [the *Lawrence* court did not "intend by its comments to address same-sex marriages," and "we reject [the] contention that *Lawrence* establishes entry in same-sex marriages as a fundamental right."].)

Moreover, a review of other state court decisions addressing the issue establishes that there is no consensus. It appears, however, that the majority of jurisdictions have declined to recognize same-sex marriage. (*See e.g. Burns v. Burns* (Ga.Ct.App. 2002) 560 S.E.2d 47 [Georgia does not recognize Vermont civil union as marriage because marriage in Georgia is limited to a man and woman]; *Rosengarten v. Downes* (Conn.Ct.App. 2002) 802 A.2d 170 [Connecticut is not required to recognize Vermont civil union where it contradicts state laws limiting marriage to a man and woman]; *In re Estate of Gardiner* (Kan. 2002) 42 P.3d 120 [Kansas does not recognize marriage between a man and a post-operative male-to-female transsexual because it is not a marriage between a biological man and woman]; *Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588 [definition of marriage does not include same-sex couples and failure to extend marriage license to such couples did not

violate constitutional rights]; *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185 [limiting state marriage statute to opposite-sex marriages does not violate equal protection or due process guarantees of the Fourteenth Amendment, the First Amendment, the Eight Amendment, or the Ninth Amendment of the U.S. Constitution]; *Dean v. District of Columbia* (D.C. Ct.App. 1995) 653 A.2d 307 [limiting marriage to opposite-sex couples does not violate the U.S. Constitution].)

In *Baker v. State, supra,* 744 A.2d 864, the Vermont Supreme Court held that under the unique Common Benefits Clause of the Vermont Constitution, same-sex couples were required to be given the same legal protections that flowed from marriage to a man and woman under Vermont law. The court, however, did not require the state to perform same-sex marriages, stating that it was a decision for the Legislature whether legal protections for same-sex couples should be provided by marriage, by a domestic partnership system, or by some equivalent statutory scheme. (*Baker, supra,* 744 A.2d at p. 867.)

Of course, respondents rely principally on the Supreme Judicial Court of Massachusetts' decision in *Goodridge v. Department of Public Health,* (Mass. 2004) 802 N.E.2d 565. But the *Goodridge* analysis is not controlling here. It was based solely on the Massachusetts Constitution. And even in Massachusetts the issue was divisive. The court in that case split 4 to 3 on whether same-sex marriage was required by Massachusetts state law. The court later split 4 to 3 on whether it was constitutional under the Massachusetts Constitution to authorize civil unions with the same rights as marriage. (*Opinions of the Justices to the Senate* (Mass. 2004) 802 N.E.2d 565.)

Another state case decided around the same time as *Goodridge*, however, arrived at a different conclusion. In *Standhardt v. Superior Court, supra,* 77 P.3d 451, a unanimous panel of the Arizona Court of Appeals held

that prohibiting same-sex marriage did not violate the due process protections of the federal or Arizona Constitutions or the state constitution's right to privacy.

Because no California or federal court has held California's marriage laws to be unconstitutional, respondents have a ministerial duty to comply with state law. And given that the majority of jurisdictions have declined to recognize same-sex marriage, it is at best hyperbole for respondents to maintain that California's marriage laws are clearly unconstitutional.

III.

IN CLAIMING THE AUTHORITY TO DECLARE STATE STATUTES UNCONSTITUTIONAL IN THEIR JURISDICTION AND TO ENFORCE THE LAWS THAT THEY BELIEVE TO BE CONSTITUTIONAL, RESPONDENTS VIOLATE THE SEPARATION OF POWERS DOCTRINE

Article III, section 3.5 of the California Constitution was enacted by voters in 1978 in apparent 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 [reviewing the circumstances leading to the enactment of Article III, section 3.5].) In *Southern Pacific*, a railroad challenged certain decisions by the Public Utilities Commission ("PUC"). The PUC declined to apply a state statute limiting the railroad's liability for improvement of railroad crossings, because the PUC determined that the statute was unconstitutional. (*Southern Pacific, supra,* 18 Cal.3d at 310-311.) This Court annulled the PUC's decisions, holding that the statute was indeed constitutional. Nonetheless, in an extensive footnote, the Court stated that the PUC had the authority to determine the constitutionality of statutes. (*Id.* at 311, fn. 2.)

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The *Southern Pacific* Court acknowledged that, in cases involving whether a litigant can raise constitutional issues in court without first exhausting those issues before an administrative agency, "it has been indicated that administrative agencies may not determine the validity of statutes, invalidating the legislative will." (*Id.* at 311, fn. 2.) The Court observed that this line of cases was "difficult to reconcile" with legal authority holding that administrative agencies must obey the Constitution. (*Ibid.*) Instead of reconciling these principles, the Court held that the PUC could determine the validity of statutes in light of the broad constitutional and statutory authority granted to it, as well as the Legislature's decision that PUC orders could only be reviewed by the Supreme Court on a restricted basis. (*Ibid.*)

Before the passage of Article III, section 3.5 in 1978, the holding of *Southern Pacific* was narrowly interpreted. In *Hand v. Board of Examiners, supra,* 66 Cal.App.3d 605, the question was whether a veterinarian waived his right to challenge the constitutionality of a statute at an administrative hearing. (*Id.* at 617.) The Court of Appeal harmonized *Southern Pacific* with the holding in *State of California v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237. In *Veta Co.*, this Court held that the real party in interest was entitled to challenge the constitutionality of a statute in the trial court without raising it first in an administrative proceeding. (*Id.* at 251.) This Court stated that "since an administrative proceeding is not the appropriate forum to challenge the constitutionality of the basic statute under which it operates, there seems little reason to require a litigant to raise the constitutional issue in proceedings before the agency as a condition of raising that issue in the courts." (*Ibid.*)

The Court of Appeal in *Hand* reasoned that, since this Court did not mention *Veta Co.* in *Southern Pacific*, the ruling in *Veta Co.* remained good law. (*Hand, supra*, 66 Cal.App.3d at 619.) Thus, it concluded that *Southern Pacific* "allows only the Public Utilities Commission and other administrative

agencies which are of constitutional origin to determine whether a statute enacted by the Legislature is constitutional." (*Ibid.*) By contrast, the Board of Examiners in Veterinary Medicine was not an administrative agency of constitutional origin and therefore could not hold a statute unconstitutional due to the doctrine of separation of powers. (*Ibid.*) "To hold that an administrative agency created by the Legislature can declare a statute created by the Legislature unconstitutional would offend the doctrine of separation of powers as provided in article III, section 3 of the California Constitution . . . ."[11/] (*Ibid.*) The appellate court concluded that the veterinarian had not waived his right to argue the constitutionality of a statute. (*Ibid.*)

In passing Article III, section 3.5 , the voters nullified the footnote in *Southern Pacific* by providing that no state agency, even an agency created by the Constitution, has the power to declare a statute unconstitutional. (Cal. Const., art. III, § 3.5 (b).) But the foregoing history leading up to the enactment of section 3.5 establishes that although respondents seek to escape the reach of Article III, section 3.5, they cannot escape as agents of the state, the broader constitutional doctrine upon which section 3.5 is based: that under the doctrine of separation of powers, the authority to determine the constitutionality of a state statute is reserved to the courts, and the authority to enact appropriate laws is reserved to the Legislature.

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11. *See also In re S.H.* (2003) 111 Cal.App.4th 310, 318, fn. 11 [under the separation of powers doctrine, judicial powers may not be completely delegated to, or exercised by, non-judicial officers or private parties].

IV.

JUST AS JUDICIAL REVIEW IS RESERVED TO THE JUDICIARY, THE REGULATION OF MARRIAGE IN CALIFORNIA IS SOLELY WITHIN THE PROVINCE OF THE LEGISLATURE; AND BECAUSE THE STATE HAS OCCUPIED THE FIELD OF MARRIAGE REGULATION, ARTICLE III, SECTION 3.5 APPLIES TO THE ADMINISTRATION OF MARRIAGE

A. State Law Controls Every Aspect Of Marriage In California, And Local Officials Perform Their Ministerial Functions As State Agents.

It is settled that "[t]he regulation of marriage is solely within the province of the Legislature." (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 99.) This Court has long recognized that marriage is a question of public policy largely within the State's discretion. (See *Kelsey v. Miller* (1928) 203 Cal. 61, 91.) "Unquestionably, the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated, as well as the effect of an attempted creation of that status." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 728.)

State law controls every aspect of marriage, leaving nothing to the discretion of local government. State law defines marriage and determines the validity of marriage in California. (Fam. Code, §§ 300, 308.5, 2200, 2201.) State law also determines the age that individuals can consent to marriage. (Fam. Code, §§ 300-304.) In addition, state law directs how marriage is created and terminated. (Fam. Code, §§ 350-425, 2300 et seq.) Under this statutory scheme, the County Clerk for the City and County of San Francisco has a ministerial duty to issue marriage licenses and certificates of registry of marriage. (Fam. Code, § 350 et seq.)

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Family Code section 350 requires that "[b]efore entering a marriage, or declaring a marriage pursuant to Section 425, the parties shall first obtain a marriage license from a county clerk." The statewide forms issued by county clerks for marriage applications and licenses are prescribed by the State Department of Health Services. (Fam. Code, § 355.) A county clerk has no discretion to alter the statewide forms. (*Ibid.*)

Applicants for a marriage license must also obtain a certificate of registry of marriage from the county clerk. (Fam. Code, § 359.) The Legislature has specified the mandatory contents of the certificate of registry in Health and Safety Code section 102100 et seq. (Fam. Code, § 359, subd. (b).) Again, a county clerk has no discretion to alter the required contents of the certificate of registry.

In addition to the state-imposed ministerial duties of the county clerk, the Legislature has directed that the "county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages." (Health & Saf. Code, § 102285.) Each local registrar of marriages is charged with enforcement of the statewide laws governing the collection and reporting of vital records regarding marriage. (Health & Saf. Code, § 102295.) This delegated authority is exercised under the "supervision and direction of the State Registrar." (*Ibid.*)

In *City of Sacramento v. Simmons* (1924) 66 Cal. App. 18, the court held that the state law governing vital statistics "makes different officers in different localities local state registrars of vital statistics, and, to the extent that they are discharging such duties, they are acting as state officers. They are state officers performing state functions, and are under the exclusive jurisdiction of the state registrar of vital statistics." *(City of Sacramento v. Simmons, supra,* (1924) 66 Cal. App. at 24-25.) "The power of the state to utilize different officers in different localities and make them state officers for this purpose" is

well established. (*Ibid.*, citing *Boss v. Lewis* (1917) 33 Cal. App. 792, 794 ["[i]t is conceded that the collection of vital statistics is a state function, and that the local registrars are state officers . . . ."].)

Moreover, when the City and County of San Francisco administers marriages, it is acting as an arm of the State. As this Court held, "the functions performed in the particular case determine whether San Francisco is to be viewed as a city or a county." (*City and County of San Francisco v. Collins* (1932) 216 Cal. 187, 191-192.) When San Francisco performs its ministerial duties regarding marriage, it "acts as a county" and "an agent of the state." (*Ibid.*)

> The term "state officers" is not limited to officers whose jurisdiction is co-extensive with the state, but applies generally to persons clothed with functions affecting the public and assigned to them by state law. [] Moreover, the legislature, under appropriate conditions and in the exercise of its police power, may direct the performance of prescribed state functions through local officers within the several counties, and to the extent that local officers discharge such duties they act as state officers.

(52 Cal. Jur. 3d Public officers and Employees § 16 [internal citations omitted]; see also *Danielle W. v. Los Angeles County Department of Children's Services* (1989) 207 Cal.App.3d 1227, 1235-1236 [holding that the separation of powers doctrine was implicated in the delegation of power to a county department because the county, in supervising visitation, was performing the powers of the State's executive branch].)

Furthermore, the state Constitution provides that counties are political subdivisions of state government, exercising only the powers of the State that are granted by the State "for the purpose of advancing the policy of the State at large . . . ." (Cal. Const., art. XI, § 1, subd. (b); *PG&E v. County of Stanislaus* (1997) 16 Cal. 4th 1143, 1158, quoting *Marin County v. Superior Court of*

Marin County (1960) 53 Cal. 2d 633, 638-39.) "The counties, as legal subdivisions of the state, derive their power from the power delegated by the People to the state, and specifically delegated to the Legislature . . . ." (*Pipkin v. Board of Supervisors* (1978) 82 Cal. App. 3d 652, 662.)

Likewise, in *In re Ashley M.* (2003) 114 Cal. App. 4th 1, the court recognized that when a county administers state law, it acts as an agency of the State. "In providing child welfare services, the county's social services agency acts as an administrative agency of the executive branch, subject to the supervision of the State Department of Social Services." (*Id.* at 7; accord *City and County of San Francisco v. Collins*, supra, 216 Cal. 187, 191-192.)

Thus, because the State has occupied the field of marriage regulation and administration, and because respondents' role, as agents of the State, is solely ministerial, Article III, section 3.5 applies to respondents' administration of marriage in California. Section 3.5 provides: An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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Respondents argue that Article III, section 3.5 does not apply to them because they are not state administrative agencies. (Supp. Opp., at pp. 18-32.) Certainly, however, San Francisco officials can act as an administrative agency. (*Gowanlock v. Turner* (1954) 42 Cal. 2d 296, 310, disapproved on other grounds in *People v. McGee* (1977) 19 Cal.3d 948, 962 [the San Francisco Board of Supervisors is "the highest administrative agency of the city and county".) Moreover, in *Billig v. Voges* (1990) 223 Cal. App. 3d 962, 969, the court held that a city clerk, as an administrative agency, had no authority to refuse to enforce a provision of the state Elections Code:

> Administrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.) Section 4052 has not been declared unconstitutional by an appellate court in this state. Consequently, the offices of city clerks throughout the state are mandated by the constitution to implement and enforce the statute's procedural requirements.

(*Billig, supra*, 223 Cal. App. 3d at 969.)

Thus, California law recognizes that when local government officials act as agents of the State in exercising their ministerial duties imposed by state law, Article III, section 3.5 applies to them.

B. The Applicability Of Section 3.5 Is Not Limited By Its Placement In Article III Of The California Constitution Where Respondents Are Performing A Ministerial Function For The State.

Respondents also argue that because section 3.5 appears in Article III of the Constitution, it applies only to the State, and not local governments. (Supp. Opp., at pp. 23-24.) This argument fails because respondents serve as state agents in administering California's marriage laws, and because San Francisco County is a political subdivision of the State.

If placement of a provision within Article III operated to limit application to respondents, then the City and County of San Francisco would be unable claim the protection of the Tort Claims Act. Yet, in *Smith v. City and County of San Francisco* (1977) 68 Cal. App. 3d 227, San Francisco did just that. *Smith* involved Section 5, another provision within Article III of the California Constitution. In that case, the City and County of San Francisco rejected a tort claim filed by the plaintiff. Six months and one day after written notice of rejection was placed in the mail, plaintiff filed suit. The trial court granted San Francisco's motion for summary judgment on the ground that plaintiff missed the filing deadline under the Tort Claims Act, which was adopted by the Legislature under the authority of Article III, section 5. (*Id.*, at p. 229.) On appeal, the Court of Appeal affirmed the judgment. "Although reference [in Article III, section 5] is only to the state, the provision includes its political subdivisions." (*Id.*, at p. 230; *see also Stanley v. City and County of San Francisco* (1975) 48 Cal. App. 3d 575; *Lewis v. City and County of San Francisco* (1972) 21 Cal. App. 3d 339.)

Accordingly, the placement of a provision within Article III does not limit its application to local officials when they are employed by a political subdivision of the state and they are performing ministerial duties as agents of the State.

C. The Attorney General's Role In Issuing Formal Legal Opinions Is Not Comparable To The Actions Of The Mayor In Authorizing Same-Sex Marriages.

Respondents contend that the Attorney General's role in issuing formal opinions construing the constitutionality of statutes is comparable to the Mayor's directive ordering the County Clerk to provide for same-sex marriages. (Supp. Opp. at 2-3, 30.) But the Attorney General's responsibilities as chief

law officer of the State (Cal. Const., art. V, §13) cannot be compared to the Mayor's directive to his Clerk.

The Government Code provides that the Attorney General "shall give his or her opinion in writing" to members of the Legislature, certain statewide constitutional officers, state agencies, county counsels, district attorneys and sheriffs upon their request and relating to "questions of law" related to their respective offices. (Gov. Code, § 12519.) This Court has stated that Attorney General opinions are not binding precedent but are entitled to great weight. (*California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) Hence, Attorney General opinions are not orders akin to the Mayor's directive to the County Clerk. (Newsom Decl., Exh. A (Letter from Mayor to N. Alfaro, Feb. 10, 2004).) Even if the Attorney General opines that a law is unconstitutional, he does not direct the party who requested the opinion to disregard the law in the absence of a binding judicial determination.

Respondents observe that the Attorney General sometimes opines on the constitutionality of state laws prior to judicial consideration of those laws, despite the enactment of Article III, section 3.5 (Supp. Opp. at 30.) Section 3.5, however, does not function as a "gag order" on the Attorney General or anyone else. It simply prevents a binding declaration that a law is unconstitutional except by an appropriate court.

Respondents further contend that the Attorney General declared Proposition 5 (which added Article III, section 3.5 to the Constitution in 1978) to violate the Supremacy Clause of the United States Constitution. (Supp. Opp. at 2-3, 38.) This contention is incorrect. In one Attorney General opinion cited by respondents, the Attorney General opined that the county assessor had to comply with a subpoena from the Internal Revenue Service to produce tax records made confidential by state statutes where the federal interest in disclosure outweighed the state interest in confidentiality. (68

Ops.Cal.Atty.Gen. 209 (1985).) The Attorney General observed that, where state law conflicted with federal statutes, the assessor had to obey the federal statutes, and that section 3.5 provided no barrier to compliance with federal law. (*Id.* at 220-221.) But finding section 3.5 inapplicable when there is a clear conflict with federal law is *not* the same as finding section 3.5 unconstitutional (or finding the conflicting state law unconstitutional). And it is not the same as this case, where there is no conflicting federal law.

Another Attorney General opinion cited by respondents involved a Hague Convention provision regarding the recording of documents. (71 Ops.Cal.Atty.Gen. 362.) The Attorney General opinion observed that the Convention, as a treaty entered into by the United States, would take precedence over conflicting state statutes and section 3.5. (*Id.* at 375, fn. 9.) Of course, that opinion also did not hold that section 3.5, or the state statutes, were unconstitutional.

D. Moreover, Revenue And Taxation Code Section 538 Does Not Support Respondents' Position.

Respondents also argue that because the Legislature enacted Revenue and Taxation Code section 538 after section 3.5 was enacted, the Legislature must have understood that section 3.5 only applies to state administrative agencies. (Supp. Opp., at pp. 26-27.) Respondents are incorrect.

Revenue and Taxation Code section 538 provides that if an assessor believes a "specific provision of the Constitution of the State of California" or a "rule or regulation of the board is unconstitutional or invalid," the assessor must bring an action for declaratory relief. (Rev. & Tax. Code, § 538, subd. (a).) Section 538 is not in conflict with Article III, section 3.5, but instead broadens the rule to encompass constitutional provisions and rules and regulations of the Franchise Tax Board. By enacting Revenue and Taxation Code section 538, the Legislature simply articulated additional matters requiring

an action for declaratory relief. Nothing in section 538 limits the applicability of section 3.5 to respondents.

E. The Federal Supremacy Clause Is Not Implicated In This Case.

Finally, respondents argue that section 3.5 violates the supremacy clause of the United States Constitution to the extent it prohibits them from refusing to enforce marriage laws that allegedly violate federal law. (Supp. Opp., pp. 36-38.) This argument fails for the simple reason that no federal statute requires the state to recognize same-sex marriage, and no federal court has held that California's marriage laws violate federal law. The supremacy clause is not implicated in this case.

The ruling in *LSO, LTD. v. Stroh* (9th Cir., 2000) 205 F.3d 1146, does not assist respondents. In *Stroh*, the Ninth Circuit Court of Appeals held that Section 3.5 could not be applied to prevent the Department of Alcoholic Beverage Control from refusing to enforce a state liquor statute because enforcement of the statute would run directly contrary to existing, clearly established, federal law. (*Id.*, pp. at 1159-60.) The *Stroh* court held that, given an existing opinion of United States Supreme Court, "it was clearly established that liquor regulations could not be used to impose restrictions on speech that would otherwise be prohibited under the First Amendment." (*Id.*, at p. 1159.) The *Stroh* court stated that "in 1997 no reasonable official could have believed that [the state law at issue] could constitutionally be employed" given the fact that the Supreme Court "made clear that state liquor regulations are subject to the First Amendment just like any other state enactments." (*Ibid.*)

Stroh does not apply to the circumstances presented in this case, because there is no controlling federal decision applicable to the constitutionality of California's marriage laws.

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Certainly, if a state law clearly violated existing, well-settled federal law, section 3.5 would not apply. (68 Ops. Cal. Atty. Gen. 209 (1985) [to the extent state statutes "would clearly conflict with" federal statutes, section 3.5 cannot prohibit compliance with federal law].) But absent a clear judicial determination from the federal courts that California's marriage laws are unconstitutional, respondents cannot rely on the supremacy clause to justify their actions.

CONCLUSION

Respondents' actions violated the settled doctrines of judicial review and separation of powers. Accordingly, a writ of mandate should issue (1) directing respondents to apply and abide by the provisions of the California Family Code, absent a judicial determination to the contrary, (2) clarifying that the same-sex marriage certificates and licenses issued by respondents have no

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legal force or effect, and (3) ordering respondents to return the fees paid for said certificates and licenses.

Dated: March 25, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(California Rules of Court, Rule 14(c))

I certify that the attached brief contains 8,640 words.

Dated: March 25, 2004

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