No. S122923

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BILL LOCKYER, AS ATTORNEY GENERAL,

Petitioner ,

vs.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Respondents

APPLICATION OF ROGER JON DIAMOND FOR LEAVE TO FILE BRIEF AMICUS CURIAE CHALLENGING CONSTITUTIONALITY OF ARTICLE III, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION; PROPOSED BRIEF

Attorney Roger Jon Diamond, State Bar No. 40146, respectfully asks this Honorable Court for leave to file the attached amicus brief. His purpose is to persuade this Honorable Court to hold unconstitutional that portion of Article III, Section 3.5 of the California Constitution which prohibits an administrative agency (and by implication public officials) from refusing to enforce statutes (or ordinances or regulations) on the basis of there being unconstitutional.

Attorney Diamond frequently represents litigants whose federally protected constitutional rights are being violated by local officials and local and state agencies who are enforcing invalid statutes, ordinances, and regulations.

In representing various clients before administrative agencies of a statewide and local nature, attorney Diamond is frequently met with the contention that the statute, ordinance, or regulation which he is challenging as being in violation of the federal constitution must be enforced notwithstanding the United States Constitution by virtue of Article III, Section 3.5 of the California Constitution. Although Diamond's reported cases do not deal with Article III, Section 3.5 of the California Constitution, they do reflect litigation involving federal constitutional issues that were initially heard by local or state administrative agencies or tribunals. For example, attorney Diamond handled Perrine v. Municipal Court, 5 Cal.3d 656; 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert.den. 404 U.S. 1038, 38 L.Ed.2d 779, 92 S.Ct. 710 (1972), which involved the constitutionality of a Los Angeles County bookstore licensing ordinance that was being enforced by the Los Angeles County Public Welfare Commission. In the Perrine case attorney Diamond first had to represent his client before the Los Angeles County Public Welfare Commission and then before the License Appeals Board of the County. In a writ proceeding growing out of the prosecution of Mr. Perrine for operating in violation of the County ordinance, after he lost his administrative hearing and his administrative appeal, this Court declared the County ordinance to be unconstitutional in violation of the First Amendment. It is this type of administrative proceeding that is directly affected by Article III, Section 3.5 of the California Constitution because administrative agencies typically refuse to honor the First Amendment when enforcing a

statute or ordinance even when the statute or ordinance is clearly unconstitutional.

Diamond handled Gould v. Grubb, 14 Cal.3d 661; 122 Cal.Rptr. 377, 536 P.2d 1337 (1975), where this Court ruled that a Santa Monica City ordinance placing the name of the incumbent first on the ballot followed by the other candidates in alphabetical order was unconstitutional in violation of the Equal Protection Clause. The City Clerk of Santa Monica (Mr. Grubb), had the first opportunity to decide the issue. Contrary to the Equal Protection Clause of the United States Constitution, Mr. Grubb followed the local ordinance (which incorporated the State Elections Code) and insisted that the incumbent's name be placed first on the ballot followed by the other candidates in alphabetical order. In this particular case the State Election's Code was enforced by Mr. Grubb, the City Clerk, notwithstanding the Equal Protection Clause of the United States Constitution.

Attorney Diamond handled Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, 99 Cal.App.4th 880; 121 Cal.Rptr. 753 (2002), which involved the enforcement of certain ABC regulations which allegedly violated the First Amendment, at least as applied. Although the ABC enforced the contested regulations the Alcoholic Beverage Control Appeals Board did reverse the Department in favor of the First Amendment , but the Court of Appeal reversed the Appeals Board and this Court denied review. The United States Supreme Court subsequently denied certiorari, Vicary v. ABC, 123 S.Ct. 1593 (2003).

Attorney Diamond has represented a number of clients in the federal and state courts where city officials enforce unconstitutional statutes, ordinances, and regulations, which give rise to awards of attorney's fees under Title 42, United States Code, Section 1988.

See, e.g., Gammoh v. City of Anahaeim, 73Cal.App. 4th 186 (1999) (review denied).

This Court appointed attorney Diamond to represent Petitioner Frank Hayes in the case of Hayes v. Superior Court, 6 Cal.3d 216; 98 Cal.Rptr. 449, 490 P.2d 1137, cert.den. 406 U.S. 940, 32 L.Ed.2d 328, 92 S.Ct. 2048 (1972), which involved the constitutionality of a portion of California Penal Code Section 1203.2a, which allowed California prisoners to obtain certain relief with respect to outstanding charges but which did not provide any remedies for out of state prisoners. A county agency, the San Bernardino Probation Department, apparently determined that Penal Code Section 1203.2a's limitation to California prisoners was valid. This Court came to the opposite conclusion and ruled that Petitioner Hayes, who was then incarcerated in a Nevada prison, was nevertheless entitled to the same relief that Penal Code Section 1203.2a only provided to California prisoners.

Attorney Diamond handled Randell v. Allison, 5 Cal.3d 565; 96 Cal.Rptr. 697, 488 P.2d (1971) (companion cases to Jolicoeur v. Mihaly, same citation), where local county registrars followed state statutes determining the domicile of recently enfranchised 18 to 20 year olds rather than enforcing the recently ratified 26th Amendment, which lowered the voting age to 18 in federal and state elections.

In summary, attorney Diamond has handled and continues to handle numerous cases involving federal constitutional issues where local officials disregard the federal constitution.

Attorney Diamond is familiar with the question involved in this case and believes that his input may be of some assistance to this Court in deciding the effect of Article III, Section 3.5 of the California Constitution.

Attorney Diamond has handled a number of cases in the Court including Cartwright v. Board of Chiropractic Examiners, 16 Cal.3d 762; 129 Cal.Rptr. 462. 48 P.2d 1134 (1976); Diamond v. Bland, 3 Cal.3d 653,91 Cal.Rptr. 501, 407 P.2d 733 (1970) ; Diamond v. Bland, 11 Cal.3d 331, 113 Cal.Rptr. 468, 521 P.2d 460, (1974); Diamond v. Allison, 8 C.3d 736, 106 Cal.Rptr. 13 505 P.2d 205 (1973); Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal.Rptr.375 556 P.2d 737 (1976); Haas v. County of San Bernardino, 69 Cal.App.4th 1019, 81 Cal.Rptr. 2d 900 (1999), 27 Cal. 4th 1017, 119 Cal.Rptr.2d 341, 45 P.3d 280 (2002);

He has also filed amicus briefs in this Court in the following cases:

(1) Vasquez v. Superior Court, 4 Cal.3d 800 (1971);

(2) Robins v. Pruneyard Shopping Center, 23 Cal.3d 899 (1978);

(3) Fair Political Practices Commission v. Superior Court, 25 Cal.3d 33 (1979);

(4) Chumley v. Santa Anita Consolidated, 93 Cal.Rptr. 77 (1971) California Supreme Court Nos. LA29874 and LA 29875 (review granted from 15 Cal.App.3d 452, and then dismissed by this Court pursuant to stipulation after Diamond filed amicus brief that challenged both sides).

Respectfully submitted,

ROGER JON DIAMOND
Amicus Curiae

No. S122923

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BILL LOCKYER, AS ATTORNEY GENERAL,

Petitioner ,

vs.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Respondents

AMICUS CURIAE BRIEF OF ATTORNEY ROGER JON DIAMOND REGARDING CONSTITUTIONALITY OF ARTICLE III, SECTION 3.5 OF CALIFORNIA CONSTITUTION.

If a statute, ordinance, or regulation violates the federal constitution, state and local administrative agencies and officials must be permitted to decline to enforce such provisions notwithstanding Article III, Section 3.5 of the California Constitution.

Statewide and local administrative agencies and officials are frequently called upon to enforce statutes, ordinances, and regulations which are unconstitutional under the federal constitution. As this court well knows, there are hard cases and there are easy cases. Sometimes the defect in a statute is obvious and a Supreme Court or a Court of Appeal will unanimously condemn the statute as being invalid. Other statues may be more difficult to assess. It is well known that sometimes the United States Supreme Court and this Court

split five to four or four to three with respect to certain statutes. This is a fact of life where Justices of the United States Supreme Court and the California Supreme Court have differing philosophical views regarding the Constitution.

Obviously no one wants some half baked local official refusing to enforce an obviously constitutional statute for political reasons. There is a remedy, however, if a local official refuses to obey a clearly valid state statute or local ordinance. The aggrieved party may seek a writ of mandate to compel the local official to act in conformity with the statute. The official may be removed from office. If the public official is not an elected official the appointing power in most cases can remove such official. If the official is an elected official he or she may be removed by the recall process or simply not be reelected. Other remedies may be invoked.

On the other hand, no administrative agency or public official should enforce a statute, ordinance, or regulation that is unconstitutional. We have had extreme cases where no one could reasonably believe that the statute in question was constitutional. Such an example is Schmid v. Lovette, 154 Cal.App.3d 66; 201 Cal.Rptr. 424 (1984), where a local school district complied with a previous provision of the state Education Code requiring employees of school and community college districts to subscribe to an oath stating that they were not knowing members of the Communist Party. While this particular provision had not been declared unconstitutional, the United States Supreme Court and this Court had previously declared similar statutes to be unconstitutional. Indeed, in Schmid v. Lovette, the Court of Appeal noted that there were an "overwhelming number of school districts in California" which refused to enforce the statutes in question. Schmid v. Lovette, 154

Cal.App.3d at 474.

While the issue of gay marriage is a hot political and legal issue and may eventually come before this Court for its resolution, one can certainly imagine statutes which no reasonable public official would enforce. For example, if the State of California were to pass a statute declaring that no Moslem could have a driver's license the Department of Motor Vehicles would properly or should properly refuse to enforce the statute. One should not have to wait for a state appellate court to make a ruling before following the United States Constitution. Other examples of invalid statutes can be imagined. Indeed, the statute in Schmid v. Lovette was an example of a ridiculous statute.

One might argue in opposition that in a democratic society it is not likely that extreme, clearly invalid measures will be adopted but only measures that arguably might be invalid, where reasonable minds could differ. Unfortunately, that is not the lesson of history.

Democracies do pass unconstitutional laws from time-to-time and, indeed, immoral laws. After World War II judges of the Third Reich were put on trial for enforcing duly adopted statutes.

There are practical reasons for not enforcing Article III, Section 3.5 of the California Constitution. The major one is the existence of Title 42, United States Code, Section 1988, which authorizes an award of attorney's fees to the successful plaintiff who challenges the enforcement of unconstitutional laws. That is exactly what occurred in Schmid v. Lovette, supra, where the public agency contended that it had no choice but to enforce the invalid law and therefore should not be liable for attorney's fees. The Court of Appeal disagreed and

directed the trial court to award the fees. The taxpayers of the City and County of San Francisco do not want to be on the hook for millions of dollars in attorney's fees if it is ultimately determined that the public officials were correct in their assessment of the constitutionality of certain provisions of the Family Code. Again, it is not the purpose of this Amicus Brief to express an opinion, one way or the other, as to the validity of the Family Code's provision regarding heterosexual marriage. That is a matter for later resolution.

It is no answer to say that it is very easy to get appellate review quickly to determine the constitutionality of various measures. For example, writ review in the Court of Appeal or in this Court with respect to decisions by the Alcoholic Beverage Control Appeals Board or the Public Utilities Commission is discretionary. The Court of Appeal and this Court regularly summarily deny petitions brought to obtain judicial review of decisions of these agencies as well as others. Article III, Section 3.5 of the California Constitution makes the job even more difficult because when one attempts to develop an adequate record for the Court of Appeal or this Court to review which raises constitutional issues. Typically one is faced with the refusal of the administrative agency to even allow the evidence to be presented on the ground that Article III, Section 3.5 of the California Constitution would preclude a decision on the constitutional question in any event. Therefore an inadequate record is made before the administrative agency, thereby making the task of the Court of Appeal or this Court more difficult (and maybe impossible). Frequently one gets shut down by the administrative agency when a constitutional attack is presented because the agency claims it has no authority under Article III, Section 3.5 of the California Constitution to

afford any relief and then the Court of Appeal or this Court denies relief summarily probably because the record has not been adequately developed.

For the foregoing reasons, it is respectfully requested that this Court determine that Article III, Section 3.5 of the California Constitution is invalid and violates the Supremacy Clause of the United States Constitution to the extent it precludes local officials and administrative agencies from using it to enforce laws that are unconstitutional. While it is true Article VI (2) of the United States Constitution binds "judges in every state" the word "judges" should be read broadly to include local public officials and statewide officials. At a minimum, an Administrative Law Judge should be considered to be a judge within the meaning of Article VI (2) of the United States Constitution.

Even without administrative judges, local officials should be free to follow the United States Constitution irrespective of Article III, Section 3.5 of the California Constitution.

Respectfully submitted,

ROGER JON DIAMOND
Amicus Curiae