S122865

IN THE

SUPREME COURT OF CALIFORNIA

BARBARA LEWIS, CHARLES McILHENNY, and EDWARD MEI,

Petitioners,

vs.

NANCY ALFARO,

Respondent.

BRIEF ON THE MERITS OF CALIFORNIA SENATORS WILLIAM J. ("PETE") KNIGHT, *ET AL.*, CALIFORNIA ASSEMBLY MEMBERS RAY HAYNES, *ET AL.*, AND PACIFIC JUSTICE INSTITUTE, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

Cases--continued:

Constitutions:

Statutes:

TABLE OF AUTHORITIES

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I.

INTRODUCTION

On March 7, 2000, the people of California voted on Proposition 22, a proposal to enact a state Defense of Marriage Act as an initiative statute. The text of Proposition 22, which has since been codified in Family Code section 308.5, reads as follows:

"Only marriage between a man and a woman is valid or recognized in California."

Proposition 22 was ratified by an overwhelming majority of California voters, prevailing by a 23-point margin. Measured statewide, 4,618,673 votes were cast in favor of the proposition, comprising 61.4% of the total vote. Opponents garnered 2,909,370 votes, for 38.6% of the vote. Final vote counts reveal that Proposition 22 won in 52 of California's 58 counties, including all of the major metropolitan areas except San Francisco.[1]

As relevant here, Proposition 22 was adopted in response to the federal Defense of Marriage Act, which defines "*marriage"* and "*spouse"* as follows:

> "…the word '***marriage***' means only a legal union ***between one man and one woman as husband and wife***, and the word '***spouse***' refers only to a ***person of the opposite sex who is a husband or a wife***."

1 U.S.C. ' 7 (emphasis added).

Notwithstanding this clear expression of the will of California voters and an act of Congress, on February 12, 2004 respondent, Nancy Alfaro, San Francisco County Clerk, commenced issuing marriage licenses to same-sex couples. (Decl. of Alfaro, &4.)

On February 25, 2004 petitioners commenced the instant original proceedings upon filing of a verified petition for immediate stay and peremptory writ of mandate.

On March 11, 2004 this Court issued an order to respondent to show cause why a writ of mandate should not issue and an order directing respondent to refrain from issuing marriage licenses to same-sex couples in contravention of sections 300, 301, 308.5, and 355 of the California Family Code.

[1] See Election results for 2000 Primary Election: http://www.ss.ca.gov/elections/sov/2000_primary/measures.pdf (March 23, 2004).

II.

QUESTION PRESENTED

As framed by the Court's March 11, 2004 order, the question presented in this matter is: whether respondent exceeded or acted outside the scope of her authority by her refusal to enforce the provisions of Family Code sections 300, 301, 308.5, and 355 in the absence of a judicial determination that such provisions are unconstitutional.

III.

SUMMARY OF ARGUMENT

Amici are well aware that this case presents a question of first impression in this state. As such, Amici's brief will demonstrate that respondent's actions exceeded her authority in refusing to enforce Proposition 22 (i.e., Family Code ' 308.5) and the applicable sections of the Family Code relating to marriage because:

A. Respondent's actions exceeded her authority as clerk because they contravene the initiative process set forth in Article II, Section 2.8 of the California Constitution;

B. Respondent's actions exceeded her authority as clerk because they violate the Doctrine of Separation of Powers;

C. Respondent's actions exceeded her authority as clerk because they effectively declared the Federal Defense of Marriage Act unconstitutional;

D. Respondent's actions exceeded her authority as clerk because they are preempted by the Supremacy Clauses of the United States and California constitutions; and

E. Respondent's actions exceeded her authority as clerk because they are in conflict with Federal Law.

IV.

LEGAL ARGUMENT

A. Respondent's Actions Exceeded Her Authority As Clerk Because They Contravene The Initiative Process Set Forth In Article II, Sec. 2.8 Of The California Constitution

The voters of California are known as an electorate who regularly engage themselves in the political process by way of the initiative, referendum, and recall process. Keeping with this tradition, Californians recently recalled their governor.

This case raises the issue of whether a clerk of a California city and county has any constitutional authority to over-ride an initiative properly proposed and approved by the voters. The initiative process is the procedure by which the voters directly enact statutes and constitutional provisions:

> "The initiative process is a ***power*** of the ***electors*** to propose ***statutes*** and ***amendments to the Constitution*** and to ***adopt and reject them***."

Cal. Const. art. II**,** ' 2.8(a) (emphasis added).

Once enacted by way of the initiative process, a statute is presumed to be valid and may not be amended or repealed except by:

1. passing of a subsequent initiative (Cal. Const. art II, ' 2.8);
2. passing of legislation by the California Legislature, which is approved by the voters (Cal. Const. art. II, ' 2.10(c)); or
3. declaring of a statute void by a state or federal court.

As is clear from Article II of the California Constitution, the ***power*** to amend or repeal a statute enacted through the initiative process resides ***exclusively*** with the voters, the legislature,

and the state and federal judiciaries. Consequently, ***executive*** power, whether at the state or local level, does ***not*** include amending or repealing a statute adopted through the initiative process. Cal. Const. art. II, '' 2.8 and 2.10(c).

Counties are subdivisions of the state, and, therefore, their officers and ***clerks*** are vested with ***executive*** powers. Cal. Const. art. XI, ' 11.1. As explained above, they are ***not*** vested with the power to amend or repeal a statute enacted by the initiative process. In fact, clerks are expressly prohibited by the California Constitution and decisions of the state judiciary from refusing to enforce a duly enacted statute. Specifically, in the absence of an ***appellate*** court decision declaring a statute unconstitutional, clerks are expressly ***prohibited*** from refusing to enforce a statute because he or she believes the statute to be unconstitutional. Cal. Const. art. III, ' 3.3.5; *Billig v. Vogues* (1990) 223 Cal.App.3d 962, 969 ("The very existence of the statute that it is there ***to be enforced***. Administrative agencies, including [the city clerk], are ***expressly forbidden*** from declaring statutes unenforceable unless an ***appellate*** court has determined that particular statute is unconstitutional.").

The rules regarding the manner in which courts interpret the meaning of the state Constitution or statutory provisions are well settled. First, it is fundamental that the reviewing court's "*primary task is to determine the lawmakers' intent*." *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724 ("*Brown*"). Second, in the situation where (as here) the voters adopt a statutory or constitutional provision, the voters' intent governs. *Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538; *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 618. Third, to determine the intent of the voters', *"[t]he court turns first to the words themselves for the answer*." *Brown*, *supra*, 48 Cal.3d at 724 (quoting *Moyer v. Workmen's Comp. Appeals Board* (1973) 10 Cal.3d 222, 230). Finally, if the language in the constitution provision or statute "*is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia*

of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *see, also, Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.

Applying the foregoing rules of interpretation to the instant matter, the Court can come to but one conclusion: that the definition of the term "marriage" as a legal union between one man and one woman could not have been more clearly expressed by the voters. Furthermore, the meanings of the words utilized in Proposition 22 are common, clear, and unambiguous and, therefore, should be given effect. *Id*.

When the respondent took it upon herself to apply her own definition to the term "marriage" and issue marriage licenses in direct contravention of Proposition 22 (i.e., Family Code ' 308.5), she by-passed the constitutional procedures outlined above by effectively ***repealing*** Proposition 22 (i.e., declaring it void because she believes it to be unconstitutional) or by effectively ***amending*** the definition of "marriage" in that provision (i.e., by expanding the term "marriage" to include same-sex couples). Clearly, this is not what is contemplated by the California Constitution. The procedure invoked by respondent is especially pernicious to the democratic process because it was a raw exercise of ***executive*** power by one individual, which served to nullify an election and the votes of millions of Californians who voted for Proposition 22. Constitutionally speaking, it is this Court's constitutional mandate to correct respondent's actions, which are a flagrant violation of the California Constitution. Cal. Const. art. II, '' 2.8 and 2.10(c).

B. Respondent's Actions Exceeded Her Authority As Clerk Because They Violate The Doctrine Of Separation Of Powers

It is a fundamental principle of constitutional law that the powers reposed in government by the people should not be vested in any one person or small group of persons. This, of course, is the Doctrine of Separation of Powers. Montesquieu articulates this principle by contrasting liberty in the face of the concentration of governmental powers in any one person or persons. More specifically, the threat to liberty arises when combinations of legislative, executive, and judicial powers are joined and concentrated in one person or group of persons. As Montesquieu explains:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, ***there can be no liberty***; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Spirit of Laws, p. 70, ' 6 (emphasis added).[2]

Consistent with the principles articulated by Montesquieu, on June 13, 1787 the first draft of the U.S. Constitution's provisions that establish the federal government was introduced at the Constitutional Convention. This draft specifically created the three branches of government

[2] Montesquieu, Charles De, *The Spirit of Laws*, (1952) Great Books of the Western World (Vol. 38), Chicago: Encyclopaedia Britannica, Inc. ("*Spirit of Laws*").

contemplated by Montesquieu, which had their constitutional powers clearly circumscribed and separated. *Madison's Journal* at pp. 160-61.[3]

In response to those who opposed ratification of the Constitution during the ratification debates, James Madison, echoing Montesquieu, addressed the issue of separation of powers in Federalist #47[4]:

> "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Federalist Papers, supra, at 301.

This bedrock principle was incorporated into the California Constitution:

> "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, ' 3.3 (emphasis added).

As articulated by the Chief Justice in the unanimous decision in *Carmel Valley Fire Protect District v. State of California* (2001) 25 Cal.4th 287 ("*Carmel Valley*"), the following is a summary of the applicable separation of powers decisions relevant to the case at Bar.

It is well settled that counties (such as the County of San Francisco), as administrative agencies of the state, are part of the ***executive*** branch. As such, they are subject to the constitutional restraints of the Doctrine of Separation of Powers. *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 870

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[3] Madison, James, *Journal of the Constitutional Convention (kept by James Madison)*, (1840 Ed.) reprinted 1893, Chicago: Scott, Foresman and Company (*"Madison's Journal"*).

[4] Hamilton, Alexander, Madison, James, Jay, John, *The Federalist Papers*, (1961), New York: NAL Penguin, Inc. ("*Federalist Papers*").

("*California Radioactive Materials*") (disapproved on a different point in *Carmel Valley*, *supra*, at 305, fn. 5). It is beyond dispute that as the Clerk for San Francisco City and County[5], respondent is a member of the ***executive*** branch of California's government, thereby subjecting her actions to the scrutiny of the Doctrine of Separation of Powers.

Of course, the Doctrine of Separation of Powers is not only applicable to the situation where the legislature may attempt to encroach upon the executive branch's powers, but also where (as in the instant case) the executive branch seeks to exercise legislative and/or judicial powers. *See, e.g., Younger v. Superior Court* (1978) 21 Cal.3d 102, 155-117 (*"Younger"*). As stated in *Younger*:

> "The purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another…"

Id. at 117.

It is axiomatic that in California's form of government, the Legislature is vested with constitutional authority to ***make public policy through the enactment of laws***, whereas the executive branch's power is limited to ***carrying out and enforcing the policies established by the Legislature***. *See, e.g., California Radioactive Materials, supra*, 25 Cal.App.4th at 870. As stated by this Court in *Butt v. State of California* (1992) 4 Cal.4th 668 ("*Butt*"):

> "Essentials of the legislative function include the ***determination*** *and* ***formulation*** *of legislative policy*."

Id. at 698 (emphasis added).

While it is true that on occasion, and as it sees fit, the Legislature may constitutionally delegate rule-making authority to the executive branch to implement the policy expressed in statutes, executive branch officials should not misinterpret these grants of authority as

[5] Respondent is empowered to issue marriage licenses by statute, to wit: Family Code section 401(a).

constituting ***law****-making* powers. In circumscribing this power so as to not constitute a violation of the Doctrine of Separation of Powers, the U.S. Supreme Court decision in *Loving v. United States* (1996) 517 U.S. 748 ("*Loving*") provides guidance:

> "*The true distinction…is between the delegation of power to* ***make*** *the law, which necessarily involves a discretion as to* ***what it shall be****, and conferring authority or discretion as to its* ***execution****, to be exercised* ***under*** *and* ***in pursuance*** *of the law. The first cannot be done; to the latter no valid objection can be made*."

Id. at 758-759 (emphasis added).

Thus, where the Legislature delegates some rule-making authority to the executive branch, the executive branch "*has only as much rulemaking power as is invested in it by statute*." *Carmel Valley*, *supra*, 25 Cal.4th at 299. Consequently, the executive branch is ***not*** conferred with "discretion to promulgate a regulation which is ***inconsistent*** with the governing statute." *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720, 750-752 ("*Honig*")(emphasis added). Moreover, an executive official's action "that is ***not authorized*** by, or is ***inconsistent*** with, acts of the Legislature is ***void***." *Association of Retarded Citizens v. Department of Development Services* (1985) 38 Cal.3d 384, 391 ("*Association of Retarded Citizens*")(emphasis added).

Finally, executive actions "that ***alter*** or ***amend*** the statute or ***enlarge*** or impair its scope are ***void***." *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982 ("*Physicians & Surgeons*")(emphasis added).

Applying the foregoing principles to the case at Bar, the Court can reach but one conclusion: the respondent's actions constitute a clear violation of the Doctrine of Separation of Powers.

First, by refusing to enforce Proposition 22 (i.e., Family Code ' 308.5) as enacted, respondent has violated the Doctrine of Separation of Powers in three ways. One, by making a

policy determination that the term "marriage" includes same-sex couples, respondent has effectively ***repealed*** or ***amended*** Proposition 22 to conform to ***her policy*** determination (i.e., that she believed Proposition 22 is unconstitutional and that the term "marriage" should include same-sex couples), which is ***not*** permitted by the ***executive*** branch. Cal. Const. art. III, ' 3.3; *Butt*, *supra*, 4 Cal.4th at 698; *California Radioactive Materials*, *supra*, 25 Cal.App.4th at 870. Two, by effectively ***amending*** or ***repealing*** Proposition 22, respondent exercised ***law****-making* power in a way that overruled the voters insofar as she by-passed the initiative process. Cal. Const. art. II, '' 2.8, *et seq.* (initiative process) and III, ' 3.3 (Doctrine of Separation of Powers). *Younger*, *supra*, 21 Cal.3d at 117; *see, also, Physicians & Surgeons, supra*, 6 Cal.App.4th at 982. Three, by refusing to enforce Proposition 22 because she believed that it is unconstitutional, respondent has exercised ***judicial*** powers (i.e., declaring Proposition 22 unconstitutional). Cal. Const. III, ' 3.3; *Younger*, *supra*, 21 Cal.3d at 117.

Second, respondent's actions of not enforcing Proposition 22 and Family Code sections 300, 301, and 355 (because she believes the proposition and those code sections are unconstitutional) contravene the California Constitution. Specifically, in its relevant part, Article III, section 3.3.5 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***."

Cal. Const. art. III, ' 3.3.5 (emphasis added).

Respondent has provided the Court with the basis for striking down her actions of refusing to enforce Proposition 22 and Family Code sections 300, 301, and 355 because it is unconstitutional. Cal. Const. art. III, ' 3.3.5.

Third, by refusing to enforce Family Code sections 300, 301, and 355, respondent has violated the Doctrine of Separation of Powers in two ways. One, by effectively ***repealing, amending, or enlarging*** those sections, respondent has exercised ***law****-making* power. Cal. Const. art. III, ' 3.3; *Younger, supra,* 21 Cal.3d at 117. Two, by refusing to enforce those code sections because she believes them to be unconstitutional, respondent has exercised ***judicial*** power, Cal. Const. art. III, ' 3.3, *Younger, supra,* 21 Cal.3d at 117, and violated the California Constitution, Cal. Const. art. III, ' 3.3.5.

Imagine the chaos that would ensue if every state official were permitted to decide which laws he or she believed should be enforced. The result would be obvious: there would be no law! If respondent (or any other state official) has a problem with a particular law, that person has two legal alternatives. One, the official (in his or her official capacity) should file an action in state or federal court requesting declaratory relief. Two, the official can take steps to have the law repealed through the procedures outlined in the California Constitution (i.e., through the legislative and/or initiative processes). To do otherwise, is to act contrary to the clear dictates of the California Constitution, which is precisely what respondent has done.

Fourth, by refusing to enforce Proposition 22 and Family Code sections 300, 301, and 355, respondent acted in a manner that was wholly inconsistent with and in direct contravention of the clear dictates of the proposition and statutes. Consequently, her actions are ***void***. *Loving, supra,* 517 U.S. at 758-759; *Association of Retarded Citizens, supra,* 38 Cal.3d at 391; *Honig, supra,* 13 Cal.App.4th at 750-752.

Fifth, as neither the voters nor the Legislature vested respondent with any discretion as to determining the definition of "marriage," she violated the Doctrine of Separation of Powers by ignoring and redefining the clear language of Proposition 22 and Family Code sections 300, 301, and 355. In fact, it was the voters (in Proposition 22) and Legislature (in Family Code sections 300, 301, and 355) who ***specifically defined*** the term "*marriage*," which was the very ***purpose*** of that proposition and those statutes. Consequently, respondent had but one duty relative to the proposition and statutes: ***enforce*** them as directed by the voters and Legislature. By failing to do so, respondent's actions are ***void***. Cal. Const. art. III, '' 3.3 and 3.3.5; *Carmel Valley, supra,* 25 Cal.4th at 299; *Association of Retarded Citizens, supra,* 38 Cal.3d at 391; *Honig, supra,* 13 Cal.App.4th at 750-752.

Sixth, as she was not vested with any rule-making powers by the voters or the Legislature, respondent ***enlarged*** the definition of "marriage" to include same-sex couples, which is in direct conflict with Proposition 22 and Family Code sections 300, 301, and 355. This constitutes an exercise of ***law****-making* power in direct contravention of the Doctrine of Separation of Powers. Cal. Const. art. III, ' 3.3; *Physicians & Surgeons, supra,* 6 Cal.App.4th at 982.

Finally, respondent's failure to enforce Proposition 22 and Family Code sections 300, 301, and 355 is void because it was not done in ***pursuance*** of the law as passed by the voters and enacted by the Legislature. *Loving, supra,* 517 U.S. at 758-759.

As is abundantly clear from the foregoing, respondent has acted in a manner that is in direct contravention of the Doctrine of Separation of Powers. Accordingly, the Court should declare respondent's actions unconstitutional.

C. Respondent's Actions Exceeded Her Authority As Clerk Because They Effectively Declared The Federal Defense Of Marriage Act Unconstitutional

Congress and the President saw fit to make a policy determination at the national level to permit the states (not county clerks) to determine the definition of "marriage" by enacting the federal Defense of Marriage Act ("Federal DOMA"). Essentially, the Federal DOMA did two things. First, it defined the terms "*marriage*" and "*spouse*" to mean:

> *"[T]he word 'marriage' means only a legal union between* ***one man*** and ***one woman as husband and wife****, and the word* ***'spouse'*** *refers to a person of the* ***opposite sex*** *who is a* ***husband or wife.***"

1 U.S.C. ' 7 (emphasis added).

Second, it provided that each state has sovereignty to decide how their state would define the term "marriage." However, under the Federal DOMA a ***state*** (not a county clerk) may define a marriage to include ***same-sex couples***, but the other states are ***not*** required to recognize or give effect to that state's definition:

> "***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 (emphasis added).

Clearly, Congress' intent of enacting the Federal DOMA was to make the issue of marriage a matter of ***state***, rather than local law. Consistent with the Federal DOMA, the voters of California passed Proposition 22, which defines "*marriage*" as: *"**Only** marriage between a*

man *and a* ***woman*** *is* ***valid*** *or* ***recognized*** *in California."* Family Code, ' 308.5 (emphasis added). By adopting Proposition 22 the voters of California clearly and unambiguously made the policy of California to define "marriage" as to ***exclude*** same-sex couples, which was done consistent with the Federal DOMA. Consequently, by refusing to enforce Proposition 22 (because she believes it to be unconstitutional), respondent has effectively declared the Federal DOMA unconstitutional. How? Congress enacted federal law that empowered the ***states*** (not county clerks) to determine the definition of "*marriage*," thereby excluding any other sub-division of the state from making that determination. This, of course, is consistent with the principles of Federalism. Respondent, on the other hand, determined that Proposition 22 should ***not*** be enforced because it is unconstitutional, which, by extension, served to declare the Federal DOMA act unconstitutional. Once again, respondent was exercising ***judicial*** power in a clearly unconstitutional manner, which makes her actions ***void***. Cal. Const. art. III, ' 3.3; *Loving, supra,* 517 U.S. at 758-759; *Younger, supra,* 21 Cal.3d at 117; *Association of Retarded Citizens, supra,* 38 Cal.3d at 391; *Honig, supra,* 13 Cal.App.4th at 750-752.

D. <u>Respondent's Actions Exceeded Her Authority As Clerk Because They Are Preempted By The Supremacy Clause Of The United States Constitution And California's Supremacy Clause</u>

The Federal DOMA preempts the actions of respondent because federal law is supreme to the actions of local officials such as respondent:

> "*This Constitution, and the* ***laws of the United States*** *which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the*

authority of the United States, shall be the ***supreme law of the land****…****laws of any state to the contrary notwithstanding****."*

U.S. Const., art. VI, cl. 2 (the "*Supremacy Clause*")(emphasis added).

It is important to note that the California Constitution affirmatively recognizes and adopts the Supremacy Clause:

"*The State of California is an inseparable part of the United States of America, and the* ***United States Constitution is the supreme law of the land***."

Cal. Const. art. III, ' 3.1 (emphasis added).

As demonstrated in the preceding section, respondent's refusal to enforce Proposition 22 conflicts with the Federal DOMA. Accordingly, the Court must enforce the Supremacy Clause by declaring respondent's actions ***void***. U.S. Const., art. VI, cl. 2; Cal. Const. art. III, ' 3.1; *see, e.g., McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 427 ("*McCulloch*"); *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 ("*Cipollone*")("*state law that conflicts with federal law is 'without effect'* ").

E. Respondent's Actions Exceeded Her Authority As Clerk Because They Are In Conflict With Federal Law

As discussed in the preceding section, the Supremacy Clause serves to preempt respondent's actions if they come in conflict with the *"****laws of the United States***." U.S. Const., art. VI, cl. 2. As an initial matter, respondent's actions of redefining "marriage" to include ***same-sex*** couples come in direct conflict with the federal definitions of "marriage" and "spouse":

> *"In determining the meaning of any Act of Congress…the word '****marriage****' means* ***only*** *a legal union between* ***one man*** *and* ***one woman*** *as* ***husband*** *and* ***wife****, and the word '****spouse****' refers only to a person of the* ***opposite sex*** *who is a* ***husband*** *and* ***wife****."*

1 U.S.C. ' 7 (emphasis added).

There can be no dispute that respondent's refusal to enforce Proposition 22 and Family Code sections 30, 301, and 355 consistent with the definition of "*marriage*" in those sections, places her actions in direct conflict with the federal definition set forth in 1 U.S.C. section 7. Consequently, respondent's redefinition of "*marriage*" to include same-sex couples violates not only 1 U.S.C. section 7, but also, for example, the following federal laws dealing with spouses and former spouses of married persons:

a. 26 U.S.C. section 2516 (federal gift tax);

b. 26 U.S.C. section 6013(a) (filing of joint returns of husband and wife);

c. 42 U.S.C. section 402 (old-age and survivor benefits to spouses under Social Security);

d. 22 U.S.C. section 4069a (eligibility retirement benefits to spouses and former spouses for employees of the Foreign Service department of the federal government);

e. 22 U.S.C. section 4069b (annuity benefits to spouses and former spouses for employees of the Foreign Service department of the federal government);

f. 22 U.S.C. section 4069c-1 (health benefits to spouses and former spouses for employees of the Foreign Service department of the federal government);

g. 45 U.S.C. section 231a (annuity benefits to spouses of railroad employees); and

h. 50 U.S.C. section 2154 (retirement benefits to spouses of employees of the Central Intelligence Agency).

The foregoing examples are just a small number relative to the broad scope of federal legislation relating to married persons and former spouses. As there have already been a significant number of marriages of same-sex couples performed in San Francisco, those marriages are already

in conflict with federal law (e.g., joint tax returns of spouses, Social Security benefits). Thus, pursuant to the Supremacy Clause, the marriages of same-sex couples are void for purposes of federal law. U.S. Const., art. VI, cl. 2; Cal. Const. art. III, ' 3.1; *McCulloch, supra,* 17 U.S. (4 Wheat.) at 427; *Cipollone, supra,* 505 U.S. at 516.

V.

CONCLUSION

Based on the foregoing and the record in this matter, Amici respectfully request the Court to issue a peremptory writ of mandate ordering the respondent to:

a. refrain from issuing marriage licenses in contravention of sections 300, 301, 308.5, and 355 of the California Family Code;

b. void all marriage licenses issued to same-sex couples that were issued on or after February 12, 2004; and

c. strike from all records, ledgers, journals, and other documents of the City and County of San Francisco all marriages solemnized between same-sex couples that were issued on or after February 12, 2004.

VI.

CERTIFICATE OF WORD COUNT

The undersigned counsel of record hereby certifies that under the word count function of the Microsoft Word computer program this brief on the merits contains **4,810** words.

Dated: March 24, 2004

Respectfully Submitted,

LAW OFFICES OF PETER D. LEPISCOPO

/s/

By: _____
Peter D. Lepiscopo, Esq.

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