SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA LEWIS, CHARLES McILHENNY, and EDWARD MEI, Petitioners, vs. NANCY ALFARO, County Clerk of the City and County of San Francisco in her official capacity, Respondent.	)	Case No. S122865

APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN OPPOSITION TO APPLICATION FOR AN IMMEDIATE STAY AND PEREMPTORY WRIT OF MANDATE

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APPLICATION TO FILE AMICUS BRIEF

Pursuant to Rule 29.1(f) of the California Rules of Court, *amicus,* county of Santa Cruz, respectfully requests leave to file the attached brief of *amicus curia* in support of all respondents. This application is timely made pursuant to the Court's orders of March 11, 2004 permitting such briefs on or before March 25, 2004.

County

The County of Santa Cruz is a California county.

Interest of Amicus Curia

This proceeding addresses the issue of whether and in what circumstances local government agencies and officials have authority to decline to apply a state statute where compliance would violate the federal and/or state constitutions. That is the issue regarding which this Court asked the parties to the two pending cases to submit further briefing and regarding which it invited *amici* to file briefs. *Amicus* will be directly affected by this Court's ruling on that issue, since officials of the County of Santa Cruz are frequently called upon to make decisions of the type that the Petitioners argue was beyond the Mayor and County Clerk of San Francisco's power. If this Court rules against the City of San Francisco on that issue, its decision will adversely affect *amicus* and compromise its ability to carry out its functions in a lawful manner that is consistent with the oaths of office government officials take. For these reasons, *amicus* has a *substantial* interest in the outcome of this proceeding.

Need for Further Briefing

Amicus is familiar with the issues before the Court. *Amicus* believes that further briefing is necessary to address matters not fully addressed by the parties' briefs. Specifically, *amicus* will explain the history and

practice with respect to local government officials and agencies declining to enforce state statutes on constitutional grounds, including in a variety of far less controversial situations than the one at issue in this case, and will explain the negative impact that would result from any ruling the Court might make against the City on the issue of local government official's power to comply with constitutional norms.

BRIEF OF AMICUS CURIA
INTRODUCTION

Local officials and agencies have close contact with the citizenry, more so than officials or agencies at the state or federal level. Local officials and agencies also implement a wide variety of both state and local legislation, regulations, and policy directives any of which may, at times, come into conflict with the higher principles embodied in the state or federal constitution. There is no reason to believe that local agencies and officials cannot carry out their duties in applying state legislation, including determining what, if any, constitutional limitations such legislation has, any less responsibly than they do with respect to local ordinances and policy directives. As officials who are sworn to uphold and defend the state and federal constitutions, they have a duty to make certain that their actions are constitutionally appropriate. If, in carrying out their duties, local agencies and officials were forced to unquestioningly follow state law and ignore the federal constitution, they and the local government would be exposed to liability for violating the civil rights of the citizenry.

Officials' obligations to fulfill their oath of office, apply faithfully the federal and state constitutions, and avoid exposing themselves and the local government entity for which they work to liability are all powerful motivators, providing checks and balances, which permeate a democratic government. Because of these motivators, local government officials and agencies rarely act on personal whim; rather, they utilize experienced city or county counsel who advise them on relevant issues, regarding which such counsel typically have significant expertise. As a further check against idiosyncratic government acts, local officials' and agencies' actions are subject to prompt judicial review by way of writ of mandate, as this

case well demonstrates. Local decisions that are determined to be erroneous thus will cause no more chaos than any other situation in which a government, or for that matter, private, decision is challenged in the courts and the parties affected by it must await judicial rulings.

Petitioner's argument that continuation of the established practice of independent thought, consideration and action by local officials would increase governmental chaos is not rational. On Respondent's side it would be equally extreme to insist that Petitioner's desire for consistency and predictability from the law is akin to fascism. In fact, it is *amicus'* argument that the current system, which requires officials to thoughtfully consider their actions in relation to the federal and state constitutions, which keeps government accountable to the people while promoting predictability and stability across jurisdictions.

It would be easy in this case, which involves a highly charged and controversial topic (marriage between same-sex couples), to make a sweeping decision narrowing local agencies and officials' constitutional role and relegating local government officials – when it comes to state law issues – to an inferior, essentially ministerial status. In doing so, the Court would have to interpret Section 3.5 of Article III of the Constitution much more broadly than was intended by the voters based on the ballot pamphlet presented to them when they adopted that constitutional amendment. In doing so, the Court would have to assume that the voters intended to alter (in fact, exterminate) the long-held mandate that all branches of government are required to enforce constitutional norms. The court should not make that assumption without a strong statement of intent in the relevant legislative history – a statement that is absent in this case.

As a practical matter, the vast majority of situations in which local officials and agencies make decisions concerning the constitutionality of state or local legislation involve issues that are not broadly controversial. The fact that this case involves a controversial constitutional question makes it a poor case in which to address the issue. Nonetheless, if the Court must address the issue in the context of this case, it should bear in mind that its decision will have wide-ranging effects far beyond its application to the underlying issue concerning same-sex marriages. The Court should not tie local officials' and agencies' hands in the manner Petitioners suggest; doing so would be a grave mistake.

ARGUMENT

I. LOCAL OFFICIALS AND AGENCIES ARE REGULARLY CALLED UPON TO MAKE DECISIONS ABOUT WHETHER AND HOW TO APPLY STATE OR LOCAL LEGISLATION THAT IS CONSTITUTIONALLY SUSPECT OR PREEMPTED BY FEDERAL OR STATE LAW.

State and local officials carry out a wide variety of functions, many of which are relatively mundane. As set forth in the City of San Francisco's Supplemental Brief (pp. 4-9), for almost a century local and state officials have been called on to determine whether to enforce both local and state legislation that has become constitutionally suspect. The City's brief cites cases involving financial agencies' and officials' duties relating to issuance of bonds and payment of elected officials' salaries, local assessors' duties regarding taxation, water district officials' duties to implement water delivery contracts, city clerks' duties regarding publication of local ordinances and city engineers' and street superintendents' duties regarding formation of assessment districts.

There are numerous other examples of situations in which local officials or agencies must consider constitutional imperatives in carrying out their duties. For instance:

► Local law enforcement officials are required to make decisions about the constitutionality of statutes, ordinances and police practices with regularity.

- If a habitual inebriates statute that prohibited selling liquor to habitual drunks was held by a trial court to be unconstitutionally vague, and the county's attorneys concluded that Supreme Court precedent made success on appeal unlikely and thus declined to pursue an appeal, the Sheriff must decide whether to direct her officers not to enforce the statute, despite the lack of an appellate court decision directly holding the specific statute unconstitutional.
- Likewise, law enforcement officials must decide whether to enforce vagrancy statutes that are similar to other states' statutes held void for vagueness.
- Statutes regulating expressive activities that have been held protected by the first amendment, such as sales of certain sexually explicit material, assembling in protest or distributing literature at an airport could appear to be unconstitutional by virtue of case law from other jurisdictions applying the free speech clause to similar legislation from another state. The police department or other local law enforcement officials might must decide whether to enforce such a statute based on its unconstitutionality despite the absence of controlling precedent addressing the specific California law.

► Local government agencies and officials are required to comply with state and local public records statutes and various laws governing the personnel records of government employees.

- Such agencies and officials must in some instances decide whether to comply with the statute if compliance would violate an employee's constitutional right to privacy.

- In contrast, where the Supreme Court decision in *Brady v. United States* (1970) 397 U.S. 742) compels production of exculpatory evidence that would otherwise be protected from disclosure under the statutory scheme regulating disclosure of peace officer personnel records, local law enforcement officials may need to decide whether to violate the latter so as not to deprive a criminal defendant of his or her constitutional right to a fair trial.

► Local officials who determine that a state mandated program violates the constitutional prohibition on unfunded state mandates must decide whether to expend local funds to implement the program while awaiting an appellate decision so holding.

► School boards, who are aware that a state-mandated busing program comparable to theirs has been held by federal courts to violate students' right to equal protection, or that a state-mandated curriculum comparable to theirs violates the constitutional prohibition on government establishment of religion, may have to decide whether to apply that state program without waiting for a state appellate court's ruling on the issue. Local school officials also must decide whether charging for certain services violates the free school guarantee or the equal protection clause of the constitution.

► A local government controller or treasurer may have good reason to believe that a state program for issuing local government bonds is in

violation of Proposition 13, and may decline to issue bonds pursuant to that program.

► A local elections director may understand that a state statute regarding qualifications of persons permitted to vote in elections is substantially similar to laws in other states held unconstitutional by federal circuit courts of appeals because they violate constitutionally mandated aspects of the Voting Rights Act, and the elections director may have to decide whether to impose the constitutionally suspect qualifications.

► Local land use officials are continually required to consider whether enforcement of ordinances would constitute a "taking" of private property under a wide variety of circumstances.

All of these are examples of situations in which local government officials, in carrying out their routine functions, make decisions implicating constitutional principles on a daily basis.

II. LOCAL OFFICIALS ARE OBLIGED TO MAKE RESPONSIBLE DECISIONS BASED ON LEGAL AUTHORITY, AND WHEN THEY ARE WRONG THEIR DECISIONS ARE SUBJECT TO PROMPT JUDICIAL REVIEW.

As to elected officials, the first bulwark against frivolous or poor decision-making is the ballot box. In order to meet the obligations they have to their oaths of office and to their constituents, local government officials do not, as a rule, make legal decisions in a vacuum or without obtaining advice and counsel. The majority of local governments, including their constituent agencies and officials, are served by a city attorney's office, county counsel's office and/or are permitted to retain outside counsel. While conflicts between the constitution and a state statute do not arise every day, other legal issues do. Thus, local government entities must routinely make decisions about whether local ordinances are

preempted by new state or federal laws, whether agency policies and practices are consistent with statutes or the constitution, whether some steps the government is contemplating taking in response to citizen requests are authorized and legal. Local government officials and bodies are thus accustomed to seeking and evaluating legal advice and making decisions based on that advice.

There is no reason to suppose that a local agency would lightly conclude that a state statute violates the state or federal constitution and thus decline to enforce it on that basis. On the contrary, only when there is a colorable constitutional concern based on legal precedent or authority of a substantial nature would most local officials and agencies even consider such a course of action. In the case before this Court, the San Francisco Mayor's decision on the issue of whether the current statute defining marriage violates the state and/or federal constitution (which happens to follow every state high court that has addressed the issue and a recent substantial change in federal law in a U.S. Supreme Court opinion) falls within that realm of acceptable behavior.

Even if an official's act has both local popular support and some legal precedent (e.g. anti-miscegenation statutes which were enforced until the nineteen sixties), an official can err in regards to the validity of their acts as they relate to the federal or state constitutions. To the extent an official errs, or even makes an entirely baseless decision, there is no cause for concern about how to remedy that situation. The courts become the final arbiter of whether the statute at issue is constitutional. In the cases cited by the San Francisco City Attorney in the City's brief at pages 4-10, local and state officials' constitutional decisions were challenged by writ of mandate by affected parties, and promptly addressed and, where incorrect,

reversed by the California courts. The availability of prompt judicial review of local agency and official decisions should quell any concern that their constitutional decisions may, if incorrect, lead to uncertainty or chaos.

In short, decisions made by local officials and agencies involving conflicts between state law and the constitution are no different than the thousands of decisions that involve other legal determinations that agencies and officials must make daily in carrying out their functions. As with all such decisions, these agencies and officials have access to counsel, generally make their decisions thoughtfully and with respect for the law, and are subject to prompt judicial reversal if their actions are erroneous.

III. IF LOCAL OFFICIALS WERE PREVENTED FROM MAKING DECISIONS UNTIL AND UNLESS A CALIFORNIA APPELLATE COURT HAD ADDRESSED THE CONSTITUTIONALITY OF THE SPECIFIC STATUTE AT ISSUE, IT WOULD DEMEAN THE ROLE OF CITY AND COUNTY OFFICIALS, EXPOSE LOCAL AGENCIES TO CIVIL LIABILITY, AND WOULD EXPOSE THE CITIZENRY TO CONTINUED EXPOSURE TO THE GOVERNMENT'S UNCONSTITUTIONAL CONDUCT.

The practical consequences of forcing local governments and their officials to violate the constitution for years while awaiting a judicial decision at the appellate level could be severe. Besides the strain on local budgets from being forced to expend funds that should not have to be expended, local governments' violation of an individual employee's or citizen's rights could be devastating to the individuals involved and expose the local fisc to damages and attorneys' fee liability. See *Mt. Healthy City School District Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 280; *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 474. In essence, if the Court rules that local officials do not have the power, duty or right to determine the constitutionality of a state law, it would put local government in the

position of paying for the state legislature's constitutional mistakes; if the local government is found to have violated the federal constitution because it enforced an unconstitutional state law, the local government would be liable for damages, *not the state.* Local governments currently carry a wide array of duties, are given new responsibilities each year by the state government, and are recently given less financial support to do so. Removing local officials' ability to refuse to follow an unconstitutional state law would severely impede local government's ability to adequately serve its constituency in the multitude of other areas for which it is currently responsible by removing local officials' ability to choose to act in a manner that reduces the likelihood of costly litigation.

Further, forcing local government officials to violate the constitution until a court specifically orders them to cease doing so, notwithstanding the existence of significant authority showing their acts to be unconstitutional, would relegate Mayors, Sheriffs, School Boards, and other elected officials to a ministerial role that would demean their stature and force them to disregard the rights of their citizenry.

Finally, local officials are in a unique position to gauge and mitigate the effects of unconstitutional laws on the citizenry. In the recent U.S. Supreme Court case of *Lawrence v. Texas* (2003) 123 S.Ct. 2472, the high Court overturned its decision in *Bowers v. Hardwick* (1986) 478 U.S. 186, finding what some local officials and many citizens had known since *Bowers* was decided: the high Court had asked the wrong question. In the intervening seventeen years, the *Bowers* decision caused some governmental officials to act in a manner that caused immeasurable grief and disruption in people's lives, while other officials chose not to enforce such laws. Although the state of California had changed its laws in this

regard in nineteen seventy-five, had California passed laws which *Bowers* would have supported, it would have been proper, given the *Lawrence* decision, for local governments to refuse to enforce it. Likewise, it would have been appropriate for local officials to refuse to enforce any laws barring interracial marriages, even before *Loving v. Virginia* (1967) 87 S. Ct. 1817) was decided by the federal Supreme Court.

IV. ARTICLE III, SECTION 3.5 WAS NEVER INTENDED TO PREVENT LOCAL OFFICIALS OR AGENCIES FROM ADHERING TO THE CONSTITUTION.

The City of San Francisco's brief addresses this issue in depth and we will not repeat what it says except to say that in deference to California's constitutional history, pursuant to which all three branches of state and local government played a role in interpreting and enforcing the state and federal constitutions, this Court should not read Section 3.5 expansively to apply to local agencies (especially where local agencies are addressed in a completely separate part of the Constitution [Article XI]). This is particularly so where, as San Francisco has demonstrated in its brief, the legislative history demonstrates a narrower purpose – one limiting solely *state* administrative agencies ability to make constitutional decisions.

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that the Court determine that there is no rule, law, or controlling rationale, including Section 3.5 of Article III of the California Constitution, which would bar local officials or agencies, in the course of carrying out their duties, from considering the constitutionality of their actions in determining whether to enforce a specific statute.

Dated: March 25, 2004

DANA McRAE, COUNTY COUNSEL

By:_____
SHANNON M. SULLIVAN
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Attorneys for Amicus Curia
County of Santa Cruz

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 13 point Times New Roman typeface. According to the "Word Count" feature in Microsoft Word for Windows software, this brief contains 4410 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 25, 2004.

SHANNON M. SULLIVAN

PROOF OF SERVICE BY MAIL

I, the undersigned, state that I am a citizen of the United States and employed in the County of Santa Cruz, State of California; that I am over the age of eighteen years and not a party to the within action; that my business address is 701 Ocean Street, Santa Cruz, California 95060; that on the date set out below, I served a true copy of the following documents:

APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN OPPOSITION TO APPLICATION FOR AN IMMEDIATE STAY AND PEREMPTORY WRIT OF MANDATE

by enclosing them in an envelope and

_____ Depositing the sealed envelope with the United States Post Office with the postage fully prepaid.

_____ Placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

addressed as follows:

See attached list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25h day of March, 2004, at Santa Cruz, California.

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March 25, 2004

Supreme Court of the State Of California
Attn: Clerk of the Court
350 McCallister Ave.
San Francisco, CA _____

Re: *Barbara Lewis, et al., v. Nancy Alfaro*

California Su

Dear Clerk of Court:

Pursuant to the conversation this afternoon between your office and my legal assistant Geraldine Foucheaux, please accept this **NOTICE OF ERRATA** with reference to amici curia County of Santa Cruz's **APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN OPPOSITION TO APPLICATION FOR AN IMMEDIATE STAY AND PEREMPTORY WRIT OF MANDATE**. Specifically, the Table of Contents that is currently a part of the brief is incorrect. Please substitute the enclosed Table of Contents for the one that is currently a part of the brief.

Thank you for your attention to this matter and we apologize for any resulting confusion.

Sincerely,

DANA McRAE, COUNTY COUNSEL

By:

_____

JASON M. HEATH
Assistant County Counsel

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