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, Respondents.	Case No. S122865

SUPPLEMENTAL OPPOSITION TO APPLICATION FOR AN IMMEDIATE STAY AND A PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE

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INTRODUCTION

The Court has asked us to address whether the Mayor had the authority to direct the County Clerk to issue marriage licenses to same-sex couples and whether the County Clerk had the authority to comply with the Mayor's directive. The answer is surely "yes." Despite Petitioners' rhetoric, the Mayor's and County Clerk's actions are neither anarchistic nor unlawful. These officials' acts evince not disrespect for – but the highest allegiance to – the rule of law of our constitutional democracy. By recognizing the supremacy of the federal and state constitutions over contrary state laws, Respondents' acts may have been unpopular. But protecting the rights of minorities against the prejudices of the majority is precisely why the founders of our country adopted the constitutional form of government that has set this country apart from so many others.

Nor is it fair to characterize Respondents' acts as based on the Mayor's "personal" view or opinion of the constitution and what it requires. Every state Supreme Court that has considered the issue has held that excluding same-sex couples from the rights and benefits of marriage violates their state constitution. Courts in other countries have reached the same conclusion. As importantly, just last year the United States Supreme Court overruled the case that for 17 years had been used to justify every conceivable form of discrimination against lesbians and gay men, and Justice Scalia, dissenting from that decision, opined that the principles it embodies would *compel* a holding that depriving same-sex couples of the right to marry violates the federal Constitution. It was in light of these decisions that Mayor Newsom acted. Popular sentiment aside, San Francisco's officials honored the law; they did not ignore it.

Underscoring this point is that Mayor Newsom acted after hearing the President suggest he would support an amendment of the Federal Constitution that would enshrine the longstanding discrimination against lesbians and gay men in the law. The efforts by those who would now change the Constitution are a powerful admission of their recognition that the Constitution, as it currently stands, prohibits the discrimination society has visited on lesbians and gay men for so many decades. Now that the federal and state supreme courts have held this discrimination unconstitutional, and legislators and the President have recognized the same, it is imperative that local and state officials cease violating the constitution and depriving lesbians and gay men of their right to equal treatment.

Another misconception in Petitioners' briefs concerns the tradition and law in California regarding public officials' role in our constitutional democracy. For more than a century, this Court has recognized the right, and indeed the duty, of public officials both at the state and local levels to conform their acts to constitutional norms, even when doing so means declining to enforce a state statute. In a dozen California Supreme Court decisions spanning nearly a century – from 1896 to 1976 – the Court addressed situations in which public officials declined to enforce a state statute on constitutional grounds, despite the absence of an appellate court decision on point. In none of those cases did this Court criticize the official for so acting, and in several of them it eloquently described the state or local official's duty to put constitutional obligations above conflicting statutory law. The Attorney General likewise has, for decades, asserted its own right as a state official to do the same in countless opinions in which it has declared state statutes unconstitutional. Indeed, the Attorney General

has recognized that the 1978 initiative on which it now relies to claim local officials cannot do their constitutional duty violates the Supremacy Clause of the Federal Constitution. Its current position is a surprising about-face.

For the reasons set forth below, Article III, section 3.5 does not apply to local officials and did not overrule the century of law requiring such officials to adhere to the Constitution even at the risk of angering the State Legislature. Section 3.5 was and is a narrow exception to the time-honored rule that state and local officials and agencies must put the Constitution first.

But if for any reason this Court were to disagree, it cannot and should not decide that the Mayor and County Clerk acted unlawfully until the lower courts have adjudicated the underlying issues regarding the constitutionality of excluding same-sex couples from marriage. For before this Court can properly issue a writ enjoining the Mayor and County Clerk from acting on constitutional principle, it must first conclude that the acts it is forcing them to engage in are, indeed, constitutional. This it should not do until those issues have been decided by the lower courts and reviewed by it. If the Court issues a writ before those issues are resolved it will do so in disregard of the longstanding rule that writs will not issue to compel unlawful acts and further in disregard of the Supremacy Clause of the Federal Constitution.

Respondents respectfully request, therefore, that this Court refrain from issuing a writ and that it defer resolution of the issue before it until such time as the lower courts' decision on the constitutional merits of California's same-sex marriage exclusion is ripe for review by this Court. In the meantime, Respondents urge the Court to lift its injunction against

the marriages. The marriages harmed no one, and conferred countless benefits on same-sex couples long been denied equal treatment.

ARGUMENT

I. LOCAL OFFICIALS HAVE THE AUTHORITY TO REFUSE TO ABIDE BY UNCONSTITUTIONAL STATE LAWS.

A. For More Than A Century, California Courts Have Recognized Public Officials' Power And Duty To Decline To Enforce Unconstitutional State Legislation.

For the last century, there was little doubt in California that state and local government officials and agencies, in carrying out their various governmental functions, not only could — but indeed were required to — comply with the state and federal constitutions, even if that meant declining to enforce the terms of an unconstitutional statute. Throughout the history of this state, it has been quite common for both state and local officials to decline to enforce statutes they believed to be unconstitutional, and for the courts *thereafter* to review their actions and definitively decide the constitutional issues. (See, e.g., *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575 [chairperson and president of CHFA refused to print revenue bonds under Zenovich-Moscone-Chacon Housing and Home Finance Act on ground that Act and agency's resolutions under it were unconstitutional]; *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593 [State Treasurer refused to issue bonds authorized by California Educational Facilities Authority Act because "serious questions have been raised as to the constitutionality of the Act"]; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841 [County Assessor declined to apply statute on ground that it was unconstitutional]; *Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal. 2d 159 [secretary of water district declined to implement agreement for delivery of water on ground that state

statute authorizing contract was unconstitutional and otherwise invalid]; *Paso Robles War Memorial Hospital District v. Negley* (1946) 29 Cal. 2d 203 [secretary of hospital district declined to attest bonds authorized by resolution of hospital board of directors because he believed law pursuant to which bonds were authorized was unconstitutional]; *Whittier v. Dixon* (1944) 24 Cal. 2d 664 [city clerk refused to countersign warrant for payment of costs of publication of ordinance on ground that statute providing for publication was unconstitutional]; *Culver City v. Reese* (1938) 11 Cal.2d 441 [city's Engineer of Work and Superintendent of Streets declined to prepare diagram of property included in assessment district and make assessment on grounds that act providing therefore was unconstitutional]; *Joint Highway District v. Hinman* (1934) 220 Cal. 578 [treasurer of joint highway district refused to sign bonds for construction of highway on ground that tax method provided in statute authorizing bonds was unconstitutional]; *Golden Gate Bridge and Highway District v. Felt* (1931) 214 Cal. 308 [secretary of bridge and highway district declined to sign bonds district proposed to issue on grounds that they were invalid under constitution]; *Denman v. Broderick* (1896) 111 Cal. 96 [municipal auditor declined to issue check for commissioner's salary on ground that statute providing for commissioner's election was unconstitutional].)

Although in many of these cases this Court ultimately came to a different conclusion than the official on the constitutional issue, and granted a writ to compel performance of the official's statutory duty, *in none did the Court suggest that the official's conduct in declining to apply a law on constitutional grounds was in any way inappropriate or improper.* To the contrary, in each of these cases the Court implicitly or explicitly acknowledged that government officials interpret and apply the constitution

in the first instance, and that subsequent judicial review of their actions (or refusals to act) — including any constitutional justifications for their actions — is available by writ of mandate. As the Court stated in *Priest, supra,* 12 Cal.3d at p. 598: "At the outset we note that the writ of mandate will lie to compel a governmental official to perform a ministerial act such as the issuance of bonds; and in a proceeding brought for that purpose, the validity of the law authorizing such issuance may be determined."

In 1976, this Court described the state of the law in California with respect to administrative agencies' duties to adhere to the constitution as follows:

> In adopting its rules and regulations, an administrative agency must act within the Constitution. . . . Due process provides "the best insurance for the government itself against those blunders which leave lasting stains on a system of justice." . . . *An administrative agency's obligation to adhere to the Constitution is not limited to mere promulgation of rules, but extends to the agency's application of legislation to the facts presented. . . . Obviously, administrative agencies, like police officers . . . , must obey the Constitution and may not deprive persons of constitutional rights.* (*Southern Pacific Transp. Co. v. Public Utilities Commission* (1976) 18 Cal.3d 308, 311, fn. 2 (emphasis added).)

Decades earlier, in *Golden Gate Bridge and Highway District* (1931) 214 Cal. 318, the Court had articulated the same principles. In that case, the Court unequivocally rejected an argument that the highway district's suit against its secretary for refusing to sign bonds he claimed were unconstitutional presented no actual controversy because the secretary, "an employee of the board, is bound to sign [the bonds] regardless of his opinions, and . . . may be discharged for his refusal to do so":

> *Respondent*, though an employee of the board and serving at its pleasure, *is a public official, holding office pursuant to the provision made by the statute, and bound by oath to support the Constitution and*

> *laws of this state.* His signature on the bonds is required by the statute. The bonds that he refused to sign recite that "provision has been made by law for the levy and collection of a direct annual tax upon all taxable property within said district sufficient to pay the principal and interest of this bond". *He contends that the legislative provisions giving such power to tax are unconstitutional, and that the recital is therefore incorrect.* This same opinion has been expressed by many persons, including lawyers of repute. . . . *If respondent's contention is sound, and he were forced to sign, he would be acting in violation of his public duty, and assisting in the deception of prospective purchasers of the bonds. He is not bound to take a step which might conceivably involve a personal liability on his part in the event of a subsequent judicial declaration of unconstitutionality of the act, or falsity of the recitals in the bonds.* (*Brandenstein v. Hoke*, 101 Cal. 131 [35 Pac. 562]; *Denman v. Broderick*, 111 Cal. 96 [43 Pac. 516]; *Hopkins v. Clemson Agr. College*, 211 U.S. 636 [35 L. R. A. (N. S.) 243, 55 L. Ed. 890, 31 Sup. Ct. Rep, 654]; see discussion in Field, Unconstitutional Statutes and Public Officers, 77 Univ. Pa. L. Rev. 155; Raspacz, Officers Acting Under Void Statutes, 11 Minn. L. Rev. 585; Crocker, Liability of Public Officers, 2 So. Cal. L. Rev. 236.) (214 Cal. at pp. 316-17 (emphases added).)[1]

Earlier still, in *1896*, this Court made the same observation in *Denman v. Broderick*, that time affirming a local official's refusal to apply an unconstitutional statute:

> The act under which petitioner claims being unconstitutional and void, there is no law authorizing respondent to draw the warrant; *and to do the act*

[1] See also *San Francisco v. Boyd* (1943) 22 Cal. 2d 685, 694 [city controller refused to audit and approve wage claims of municipal railway employees on ground that wage rate ordinance violated charter; "Respondent, as a public officer is bound by oath to faithfully perform and discharge the duties of his office. He would be acting in violation of his public duty if he authorized payment of claims that involved an illegal expenditure of public funds. Whether he could safely approve the payment of these claims depends upon the validity of the ordinances authorizing the compensation, and the determination of this question involves a construction of the charter and the application of its provisions to the facts of this case."].

> *demanded of him would be to violate his official duty and oath, and subject himself to liabilities and penalties.* (111 Cal. at p. 105 (emphasis added).)

There is no suggestion in any of these cases that officials' exercise of their power and duty to place the Constitution above conflicting statutory norms had resulted or would result in civil disorder or chaos of any kind. The sky remained overhead and civilization did not crumble. Rather, as this Court and lower courts implicitly and explicitly recognized, review of such decisions by writ of mandate with the courts ultimately deciding the constitutional issues was perfectly adequate to ensure that any errors in officials' constitutional analyses were promptly rectified. (See *Priest, supra,* 12 Cal.3d at p. 598.) So far as California's history is concerned, then, there is nothing at all remarkable – or the least bit unsettling to the so-call "rule of law" – about a public official declining to act in accordance with a statute genuinely believed to be unconstitutional.

Indeed, our State's longstanding tradition of having *each* branch of government responsible for implementing the Constitution, subject to ultimate review by the judicial branch, is consistent with the longstanding practice of our national government. As the United States Supreme Court observed in a recent case addressing the role of the legislative branch in interpreting the constitution,

> When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, *James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.*" 1 Annals of Congress 500 (1789). Were it

> otherwise, we would not afford Congress the presumption of validity its enactments now enjoy. *Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches.*" (*City of Boerne v. Flores* (1997) 521 U.S. 507, 535-536.)

B. Allowing Local Officials And Agencies To Refuse To Abide By Unconstitutional Laws Best Safeguards The Constitutional Rights Of All People.

California's historical respect for the right of public officials at all levels to make reasoned judgments about the constitutionality of laws they are called on to implement or enforce makes perfect sense. The duty and responsibility of officials to obey the constitution ensures the greatest possible protection of all citizens' constitutional rights. "I was just following orders" is no defense to an official's intrusion on citizens' constitutional rights, even when the "order" at issue is a duly-enacted state statute. (See *Grossman v. City of Portland* (9th Cir. 1994) 33 F.3d 1200, 1209 ["[A]s historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority."].)

This need for constitutional restraint on official action is particularly acute where the rights of a minority are at stake. "It is certainly true that a fundamental premise of American government is the rule of the majority. But that is not the fundamental premise of American constitutionalism. The Constitution exists not to protect majorities, which usually can take care of themselves, but to protect minorities from the excesses of the majority." (*Gannon v. Daley* (N.D. Ill. 1983) 561 F. Supp. 1377, 1389; see also *Watkins v. United States Army* (9th Cir. 1989) 875 F.2d 699, 718 ["The equal protection clause . . . protects minorities from discriminatory

treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities."]; *Rice v. Foster* (1847) 4 Del. 479, 485-488 [relating the views of the Founders on this issue and concluding that popular democracy "without constitutional control or a restraining power [affords] no security to the rights of individuals" (*id*. at p. 486)].)

This Court, in the *Southern Pacific* case, illustrated the point with an example from history:

> When the United States Supreme Court . . . repudiates the separate but equal doctrine established by the statutes of one state, should the school boards of other states continue to apply identical statutes until a court declares them invalid; should the boards, recognizing the potential denial of constitutional rights, enforce the Constitution on a case-by-case basis without considering whether the statutes may be enforced in some other case; or should the boards recognize the invalidity of the statutes? The first position will result in denial of constitutional rights; the second, although protecting constitutional rights, is wasteful, ignores reality and compels intellectual dishonesty insofar as the administrator must close his eyes to the fact that deprivation of constitutional rights will occur in all cases to which the statute may be applied. Only the third complies with the board's duty to determine and follow the law. (18 Cal.3d at p. 311.)

As Seventh Circuit Judge Frank Easterbrook observed, unless the executive branch complies with its duty to uphold the Constitution, civil rights may be denied to whole categories of people for a very long time: Many . . . disputes fester for years, decades, even centuries between enactment of the legislation and authoritative resolution by a court. The Sedition Act took 163 years [between when it was enacted and when the Court held it unconstitutional], the Tenure of Office Act 60 years, and these are not isolated examples. In the interim legislative and executive officials

must decide whether the law is constitutional or not, and act accordingly. No one doubts that Senators could vote yea or nay on the articles of impeachment laid against President Johnson on the basis of their conclusion that the Tenure of Office Act was (or was not) constitutional. President Johnson needed the same power of decision, lest the limitations in article III ensnare the political branches into enduring disregard of the Constitution. (F. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 928 (1990).)

II. LOCAL OFFICIALS NEED NOT WAIT FOR THE COURTS TO DECLARE A STATUTE UNCONSTITUTIONAL BEFORE THEY MAY ACT TO PROTECT CONSTITUTIONAL RIGHTS.

A. While Courts Are The Ultimate Arbiters Of Constitutional Questions, Public Officials Have The Power To Interpret The Constitution In The First Instance.

While the courts are often in the vanguard on questions of individual rights, they have no monopoly on the authority to interpret and apply the Constitution in the first instance.[2] The power to interpret the Constitution is a shared one that is ancillary to the functions of *all three* branches of government within their respective spheres.

> The interpretation of the law is a principal function of judges, but it is also an important function of other branches of government. Each branch of the government interprets the law, with equal authority,

[2] Of course, the judiciary plays a special role in protecting individual rights from the "tyranny of the majority" or mob rule. (See, e.g., *In re Lynch* (1972) 8 Cal.3d 410, 415 ["'[T]he courts can often prevent the will of the majority from unfairly interfering with the rights of individuals who, even when acting as a group, may be unable to protect themselves through the political process'"] [quoting Wright, *The Role of the Judiciary: From Marbury to Anderson* (1972) 60 Cal. L. Rev. 1262, 1268].)

> when necessary for resolution of the problem at hand – adjudication in the case of judges, implementation in the case of executive officials. (*Huggins v. Isenbarger* (7th Cir. 1986) 798 F.2d 203, 208 [Easterbrook, J., concurring].)

(See also *City of Boerne v. Flores, supra,* 521 U.S. at p. 535 ["When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and the force of the Constitution"]; *United States v. Nixon* (1974) 418 U.S. 683, 703 [explaining that each branch must "initially interpret the Constitution" in carrying out its duties]; *Bowsher v. Synar* (1986) 478 U.S. 714, 733 [“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law”]; *Marbury v. Madison* (1803) 5 U.S. 137, 177 [“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule”]; James Madison, *The Federalist No. 44* at p. 230 [noting that both the executive and judicial departments must “expound and give effect to the legislative acts”]; Erwin Chemerinsky, *The Court Should Have Remained Silent* (2000) 149 U. Pa. L. Rev. 287, 293 ["[U]ntil there is a judicial interpretation to follow, government officials must interpret the Constitution. . . . Executives must do so in deciding whether to veto bills and whether and how to enforce laws."]; Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. (1987) 979, 985-86 ["Each of the three coordinate branches of government created and empowered by the Constitution – the executive and legislative no less than the judicial – has a duty to interpret the Constitution in the performance of its official functions."].)

The power of non-judicial officials to interpret the constitution in no way reduces the concomitant power of the judiciary to settle constitutional questions for all branches of government. As *Marbury v. Madison* teaches, the interpretation given to the Constitution by the judicial branch, once made, is binding on all non-judicial officials within the jurisdiction of the deciding court. (5 U.S. at p. 177.) But the judiciary's power of review presupposes that other government officials have interpreted the Constitution themselves in the first instance:

> Long familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for the courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently. (*Cooper v. Eugene School Dist. No. 4J* (Or. 1986) 723 P.2d 298, 303.)

Thus, it is the legislature's interpretation of the Constitution in passing a law (if a facial challenge) or that of the executive branch in enforcing it (if an as-applied challenge) that the judiciary reviews.

B. Public Officials Have The Duty To Conform Their Actions To The Constitution, Even In The Absence Of Controlling Judicial Authority, And Even In The Face Of Contrary State Laws.

It follows ineluctably from these constitutional first principles – constitutional supremacy and the separation of powers – that public officials have the power to consider the constitutionality of their official actions and to refuse to enforce laws that, in their judgment, are unconstitutional. That officials at all levels of government also have the affirmative duty to do so is such a settled question that courts will impose liability when officials breach that duty.

The failure of a government official to ensure that his or her official conduct comports with the Constitution gives rise to an action for civil damages under both federal and state law. (See 42 U.S.C. § 1983; Cal. Civ. Code §§ 50-52.) And although both legislators and judges enjoy unqualified immunity for their official acts, officials who execute the laws have only a limited protection: qualified immunity.

The doctrine of qualified immunity sets the floor below which official conduct may not fall, but it does not describe the limits of official power to comply with the constitution. (See *Hope v. Pelzer* (2002) 536 U.S. 730, 739 ["Despite their participation in this constitutionally impermissible conduct, the respondents may nevertheless be shielded from liability"].)[3] Yet even under the qualified immunity analysis, officials must exercise their own independent judgment prior to a binding judicial determination of the constitutional right at issue. A public official who intrudes upon a "clearly established" constitutional right is not entitled to qualified immunity (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818), and courts have routinely held that a constitutional right may be "clearly established" even in the absence of controlling judicial authority.

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [v. *Forsyth,* 472 U.S. 511,] 535,

[3] Immunity springs not from any supposed duty of the public official to violate the constitution until subjected to a court order, but instead from the concept of notice. (See *Hope v. Pelzer, supra,* 536 U.S. at p. 740, fn.10 ["[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."].)

> n. 12 . . ., but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). (*Hope v. Pelzer* (2002) 536 U.S. 730, 739.)

Thus, a right can be clearly established notwithstanding the absence of "specific binding precedent." (*Bardy v. Gebbie* (9th Cir. 1988) 859 F.2d 1543, 1557.) Courts thus have denied officials qualified immunity for constitutional violations in the absence of controlling caselaw on point. (See, e.g., *Rivero v. City and County of San Francisco* (9th Cir. 2002) 316 F.3d 857, 863-865 [no qualified immunity despite relevant circuit split that United States Supreme Court did not resolve until three years after events at issue]; *Ostlund v. Bobb* (9th Cir. 1987) 825 F.2d 1371, 1374 [no qualified immunity despite that "no court in this Circuit and no California court had, in a reported decision, specifically held that a police officer in Ostlund's position had a due process right to a hearing on the denial of disability retirement."].)

Courts have likewise imposed liability on public officials even when a duly enacted state statute purported to authorize their actions, and even though that statute had not first been declared unconstitutional by the judiciary. (See, e.g., *Carey v. Nevada Gaming Control Board* (9th Cir. 2002) 279 F.3d 873, 881 [denying qualified immunity to agent of Nevada Gaming Board who acted in accordance with state statutes because "reasonable officer" would have known that the Nevada statutes at issue violated Fourth Amendment]; *Gorromeo v. Zachares* (9th Cir. 2001) 15 Fed. Appx. 555, 557 (9th Cir. 2001) [no qualified immunity despite reliance on duly-enacted state statutes "that had been in existence for a number of years, and whose constitutionality had never been questioned" because conduct alleged was violative of fundamental constitutional rights];

see also *Roska v. Peterson* (10th Cir. 2003) 328 F.3d 1230, 1253 ["In considering the relevance of a statute under a qualified-immunity analysis, the appropriate inquiry is not whether a reasonable state officer could have concluded that the statute authorized the unconstitutional conduct in question. Rather, a court must consider whether reliance on the statute rendered the officer's conduct 'objectively reasonable,' considering such factors as . . . whether the officer could have reasonably concluded that the statute was constitutional"].)

It is impossible to make sense of this body of civil rights law and the doctrine of qualified immunity unless public officials have a duty – and the concomitant power to effectuate that duty – to conform their actions to the Constitution, even in the absence of controlling judicial authority, and even when a state statute would require otherwise.

C. Allowing Local Officials To Protect Constitutional Rights Will Not Lead To Chaos.

Local officials may not refuse to enforce a statute based solely on personal or political objections. Their paramount duty is always to abide by the federal and State constitutions. (See Cal. Const., art. XX, § 3 [all "members of the Legislature, and all public officers and employees, executive, legislative, and judicial" must swear upon taking office that they will "support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; . . . bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; . . . [and will] well and faithfully discharge" these sworn duties].) History shows that officials have not taken lightly their authority to refuse to enforce state law, and executive branch refusals have been the exception rather than the rule.

Unlike judges, non-judicial officials who refuse to enforce popularly enacted laws on the basis of their unconstitutionality face potentially severe consequences, such as the threat of judicial compulsion, the possibility of removal from office, and the certainty of widespread public opprobrium, regardless of whether they are right or wrong.

Moreover, because local officials' exercise of their authority in this regard is subject to prompt court review via writ of mandate, there is no danger that locating this power in the executive branch will lead to chaos. Judge Easterbrook of the Seventh Circuit Court of Appeals aptly put this notion to rest:

> Often we are told that chaos would break out if everyone made his own decision about which legal rules are enforceable. Let us leave difficult questions to the courts, the refrain goes, so that we may have order. . . . [T]he proposition that there must be a chain of command takes us only so far. Public officials owe their allegiance to the Constitution first, federal laws second, and state laws third. Even a command from the President of the United States does not relieve public employees of their duty to follow the Constitution. . . .
>
> Perhaps functionaries are entitled to follow the orders of their superiors, unless clearly unlawful, so that there may be efficient and consistent administration. [But a state official] is no functionary. (*Alleghany Corp. v. Haase* (7th Cir. 1990) 896 F.2d 1046, 1054-55 [Easterbrook, J., concurring], overruled on other grounds by *Dillon v. Alleghany Corp.* (Mem. 1991) 499 U.S. 933.)

As Judge Easterbrook pointed out in an article addressing the same subject, "[s]omeone desiring chaos could do no better than to delegate constitutional questions to more than 20,000 state judges, or 600 federal district judges, whose work is reviewed by more than 150 circuit judges sitting in panels of three! That way lies babble – and we have fulfilled all expectations." (F.

Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 918 (1990).)

III. SECTION 3.5 OF ARTICLE III OF THE CALIFORNIA CONSTITUTION DOES NOT STRIP LOCAL OFFICIALS OF THEIR AUTHORITY TO REFUSE TO ABIDE BY UNCONSTITUTIONAL LAWS.

A. Section 3.5 Was Enacted In Response To A Decision Of This Court Permitting A State Administrative Agency To Decide A Constitutional Issue In A Quasi-Judicial Proceeding In A Way That Arrogated Power To Itself To The Detriment Of Affected Citizens.

As explained above, before the voters passed section 3.5, the line of authority authorizing, and indeed compelling, public officials to place the constitution above contrary state statutes was unbroken. But there also had developed a separate line of authority, both in California and other jurisdictions, suggesting that *administrative* agencies, when making *quasi-judicial determinations*, could not adjudicate constitutional challenges. (See *Southern Pacific Transportation Co. v. Public Utilities Com., supra,* 18 Cal.3d at p. 311, fn. 2 ["In a few cases involving the question whether a litigant may raise constitutional issues in court when he has not exhausted administrative remedies, it has been indicated that administrative agencies may not determine the validity of statutes, invalidating the legislative will."][4]; see also *Duffy v. State Board of Equalization* (1984) 152 Cal.App.3d 1156, 1164, fn. 3 ["Different points of view are available on the question whether a litigant must tender a claim of unconstitutionality of a

[4] See also *id*. at pp. 315-316 (Mosk, J., dissenting) (comparing *Walker v. Munro* (1960) 178 Cal. App. 2d 67 (party to administrative proceeding who wishes to challenge constitutionality of statute must first raise issue before agency in order to raise it later on judicial review of agency action) with *State v. Superior Court* (1974) 12 Cal. 3d 237 (party need not raise constitutionality of statute creating agency's power before agency itself in order to raise it on judicial review of agency decision).

statute to an administrative agency."].) In connection with judicial review of such quasi-judicial agency decisions, agencies sometimes raised the defense of failure to exhaust remedies. Where the constitutional challenge went to the statute or provisions that established the agency's existence and powers, this Court held exhaustion was not required because the agency could not be expected to adjudicate its own right to exist. (*State v. Superior Court* (1974) 12 Cal. 3d 237, 251 ["It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions"].[5] Even in those cases, the Court held that other constitutional issues could be considered and decided in the first instances by such agencies, subject of course to judicial review. (See, e.g., *id.* at pp. 249-250 [commission could decide in first instance if developer had vested right to develop its property; " the mere fact that the concept of vested rights is rooted in the Constitution does not deprive the Commission of the power to make the initial determination whether a developer qualifies for an exemption, so long as appropriate judicial review of the Commission's determination is provided").[6] Apart from this narrow exception in the

[5] See also *Subriar v. City of Bakersfield* (1976) 59 Cal.App.3d 175, 193 ("The mere fact that a statute is challenged on constitutional grounds does not excuse a failure to exhaust administrative remedies."); *id*. at p. 194 (exception to rule requiring exhaustion of administrative remedies in agency proceedings applies to situations in which the plaintiff is "attacking the very validity of the existence of the agency itself," not where plaintiff is "merely attacking the constitutionality of a specific provision of the act" that does not go to the existence or authority of the agency to act).

[6] See also *People v. West Publishing Co*. (1950) 35 Cal 2d 80, 88 (plaintiff failed to exhaust administrative remedies because it failed to present its commerce clause challenge to Use Tax first to State Board of

(continued on next page)

context of administrative agencies engaged in quasi-judicial decisionmaking, the consistent rule has always been that government officials do have the power and, indeed, the duty to interpret and apply the laws, including the Constitution, and to decline to enforce unconstitutional laws.

Into this relatively coherent and tranquil legal landscape in 1978 came the initiative that became Article III, section 3.5 of the California Constitution. That initiative was preceded by, and was adopted by the Legislature and referred to the voters in direct response to, this Court's decision in the *Southern Pacific* case, which dealt specifically with an *administrative* agency engaged in a *quasi-judicial* function (i.e., investigating and regulating the safety, maintenance, operation and use of a particular railroad crossing after an accident had occurred). (See 18 Cal.3d at pp. 310-311.) Moreover, section 3.5 was adopted at a time when legislative delegation of powers to administrative agencies was at its peak and citizens had become distrustful of these new, quasi-adjudicatory bodies that had acquired vast powers over a broad array of important individual rights. (See generally M. Foy, The Authority of an Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry, 17 J. NAALJ 173, 173-74 (1997) [view that administrative agencies could not interpret constitution was "fueled by apprehensions that special interest groups might use agency powers to further their own goals,

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(footnote continued from previous page)
Equalization); *Southern California Gas Co. v. Public Utilities Commission* (1979) 24 Cal. 3d 653, 656 n.3 (gas company's failure to raise argument that commission program violated federal constitution's commerce clause barred by failure to exhaust administrative remedies).

suspicions of the administrative agencies' competence in adjudicating such claims, and general mistrust of government. [¶] Mistrust of agency power may reflect the broad scope of agency authority. Administrative agencies can increase your taxes; restrict your business, take your land, terminate your employment, force you to take drugs, or prohibit you from writing movie reviews in your school newspaper."].)

The decision at issue in *Southern Pacific* was not one made by the agency out of concern for citizens' constitutional rights. Instead, it was a decision by the Public Utilities Commission that was designed to preserve its own power — and to do so at the expense of citizen input into agency decisionmaking. Specifically, the Commission held that a statute that required affected landowners' to consent before the Commission could make certain decisions about a railroad crossing unconstitutionally delegated the Commission's power to private citizens. (18 Cal.3d at p. 313.) Although it held the Commission had the power to make this determination in the first instance (*id*. at p. 311, fn. 2), the Court disagreed with the Commission's constitutional analysis. (*Id*. at pp. 313-315.) It is perhaps unsurprising that the former decision — involving what was in effect a power-grab by the PUC — led to a legislative referendum designed to reduce administrative agencies' prerogative to prefer the constitution to a statute claimed to be contrary to it.

Although section 3.5 did legislatively overturn the holding of *Southern Pacific* that administrative agencies engaged in quasi-judicial decisionmaking could refuse to enforce a state statute on constitutional grounds, that provision cannot fairly be read as a sweeping reversal of the century of precedent requiring public officials generally, in the exercise of their regulatory and executive functions, to place the Constitution above

contrary state legislation. Rather, in light of this history and the following, section 3.5 can only logically be read as applying to state administrative agencies and not to local agencies or to state or local government officials.

Petitioners Lewis, et al., rely heavily on the dissent issued by Justice Mosk in the *Southern Pacific* case, which they suggest became the law when section 3.5 was adopted. Justice Mosk articulated the rather sweeping view that allowing administrative agencies to decide constitutional issues violated separation of powers. But as explained below, the separation of powers provision contained in Article III does not apply to local government. Moreover, subsequent courts have stated, "[w]hile the adoption of Proposition 5 had the effect of reversing the result in *Southern Pac. Transportation Co. v. Public Utilities Com.*, it did not have the effect of validating Justice Mosk's minority view that allowing the PUC to refuse to enforce an unconstitutional statute violated the separation of powers doctrine." (*Burlington Northern & Santa Fe Ry. Co. v. Public Util. Com.* (2003) 112 Cal. App. 4th 881, 888.) Indeed, if Justice Mosk's view were correct, agencies could not decide which of two conflicting statutes to enforce, which would likewise constitute exercise of judicial powers and therefore a violation of separation of powers. That is not the law. (*Id*. at pp. 888-889 ["the separation of powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of the other branch. . . . Allowing the PUC to choose between two inconsistent statutes, both of which it is required by law to enforce, does not defeat or materially impair the inherent function of the judicial branch."].)

B. Section 3.5 Applies Only To Administrative Agencies Of *State* Government And Not To Local Government Agencies or Officials.

1. Section 3.5's placement in Article III shows that it applies only to state administrative agencies.

Section 3.5 provides that "[a]n administrative agency" has no power to declare a statute unenforceable or unconstitutional, or to refuse to enforce a statute on the basis of its unconstitutionality. The Section is part of Article III, which is headed "STATE OF CALIFORNIA," and sets forth the structure of the state government, including the political boundaries of the state, and the existence of three branches of state government and separation of powers between them. (Cal. Const., art. III, §§ 1-3.)[7] Articles IV through VI more specifically address the powers and responsibilities of each branch of state government: legislative, executive and judicial.

The subject of "LOCAL GOVERNMENT" is addressed by Article XI. "Article XI of the Constitution [is] the conduit through which the Legislature vested in 'local agencies' whatever powers it [is] entitled to vest in them. . . . [I]t was and is . . . the instrument by and through which the Legislature takes the powers it is constitutionally entitled to bestow and in turn bestows them at least in part on governmental units below the state level." (*Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 41; see also *id*. at p. 43, fn. 16.)

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[7] "'[C]hapter and section headings [of an act] may properly be considered in determining legislative intent" [citation], and are entitled to considerable weight.'" (*Howard Jarvis Taxpayers Assn. v. County of Orange* (2003) 110 Cal.App.4th 1375, 1385, quoting *People v. Hull* (1991) 1 Cal.4th 266, 272.)

As this Court has recognized, Article III applies to State, not local, government. In *Holley v. County of Orange* (1895) 106 Cal. 420, this Court held that "Article III of the constitution relates to the state government, and has no application to the local governments provided by article XI of the constitution." (*Id*. at p. 424 [citing *People ex rel. Atty. Gen. v. Provines, supra,* 34 Cal. 520, 533-34].) In *Strumsky*, similarly, this Court reaffirmed that the separation of powers clause contained in Article III, Section 3 "is inapplicable to government below the state level." (*Strumsky v. San Diego County Employees Ret. Assn., supra*, 11 Cal.3d 28, 36.)

Because section 3.5 is also in Article III, it likewise "is inapplicable to government below the state level." Therefore, section 3.5 limits the powers of *state* administrative agencies, not local ones.

2. Section 3.5's legislative history shows that it applies only to state administrative agencies.

The legislative history of section 3.5 confirms that section 3.5 was intended to apply only to *state* agencies. As explained above, the voters acted the initiative in 1978, in response to this Court's decision in *Southern Pacific Transportation Co. v. Public Utilities Com., supra,* 18 Cal.3d 308.

A measure enacted by popular vote may not be interpreted in such a way that it is contrary to the intent of the voters. (*In re DeLong* (2001) 93 Cal.App.4th 562, 569.) Thus, the reach of section 3.5 is limited by the materials presented to the voters in the ballot pamphlet, even if the language of section 3.5, standing alone, might arguably support a broader meaning. (See *Hodges v. Super. Ct.* (1999) 21 Cal.4th 109, 114.)

Here, the ballot pamphlet – in both the analysis prepared by the Legislative Analyst and the arguments in favor of and against the

proposition – refers consistently and repeatedly to "*state* agencies" and "*state* administrative agencies. " (See RJN, Ex. L (Analysis by Legislative Analyst) ["Unlike most *state administrative agencies*, the Public Utilities Commission is created in the State Constitution. California's Supreme Court has held that the Commission can determine the constitutionality of state laws which may affect its (the Commission's) authority, although any such determination would be subject to court review. In another action, a Court of Appeal held that any *state administrative agency* not created in the Constitution may not determine that a state law is unconstitutional."]; *id*. ["This constitutional amendment would forbid any *state administrative agency*, whether created in the Constitution or not, to (1) declare a state law unconstitutional or (2) refuse to enforce a state law on the basis that it is unconstitutional or that it is prohibited by federal law unless such a determination has already been made by an appellate court."]; *id*. at p. 26 (Argument in Favor of Proposition 5) ["Enactment of this constitutional amendment would prohibit *State agencies*, including any agency created by the Constitution or by initiative, from refusing to carry out its statutory duties because its members consider the statute to be unconstitutional or in conflict with federal law."]; *id*. ["Proposition 5 would prohibit the *State agency* from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid."]; *id*. at p. 27 (Argument Against Proposition 5) ["If a state administrative board must interpret one of these `suspect' statutes, what should it do?"]; *id*. ["Under present law, our *state administrative agencies* can act promptly to avoid conflicts between state and federal actions."]; *id*. ["This provision could seriously hamper state agencies which share regulation over matters with the federal government and its agencies."]; *id*. (Rebuttal to Argument Against Proposition 5)

["Under Proposition 5, the agencies themselves may challenge 'suspect' statutes in the courts. Then, private citizens will save time and expense otherwise imposed on them to compel *State agencies* to perform their duties. *Such agencies* will no longer usurp the constitutional powers of the courts."]; see also *id*. at p. 26 ["Before the Governor signs or vetoes a bill, he receives analyses from the agencies which will be called upon to implement its provisions. If the Legislature has passed the bill over the objections of the agency, the Governor is not likely to ignore valid apprehensions of *his departments*, as he is the Chief Executive of the State and is responsible for most of *its* administrative functions."] [Emphases in original in part, added in part].)

Because the ballot pamphlet did not ask voters to consider local agencies, and did not suggest that the initiative might affect local agencies, section 3.5 cannot be read to address them.

3. The Legislature's contemporaneous understanding of section 3.5 shows that it was intended to apply only to state administrative agencies.

When the voters approve a legislative initiative amending the Constitution, the Legislature's contemporaneous understanding of the amendment's meaning is persuasive evidence as to how the amendment must be interpreted. (See *Cal. Apartment Assoc. v. City of Stockton* (2000) 80 Cal.App.4th 699, 708-709 [interpreting article XII of California Constitution according to contemporaneous understanding of Legislature that placed legislative initiative on ballot].)

Here, the actions of the Legislature in 1978 show that it did not understand section 3.5 to apply to local public officials. Just months after the voters adopted 3.5, the Legislature enacted Revenue and Taxation Code Section 538, which provides that a local "assessor who believes a tax

measure to be unconstitutional or otherwise invalid to seek declaratory relief to that effect, instead of simply imposing an assessment contrary to the questioned law." (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 10.) If section 3.5 was intended to prohibit *local* agencies from "refus[ing] to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional," it would have been wholly unnecessary for the Legislature, just a few months later, to forbid a local assessor from imposing an assessment contrary to a law the assessor believed was "unconstitutional." The fact that the Legislature perceived a need to adopt Revenue and Taxation Code Section 538 demonstrates its belief that section 3.5 did not apply to local officials. (See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 478 [statutes should be construed to avoid redundancy or surplusage].)

This conclusion is underscored by Revenue and Taxation Code Section 538's legislative history. That legislative history shows that as of late August 1978 – three months after section 3.5 had been voted into law – the Legislature believed "current law" *required* an assessor who believed that a specific provision of the California tax laws was "unconstitutional" to "assess the property *contrary* to such provision," with the result of forcing a taxpayer suit to resolve the issue. (RJN, Exs. M, N, emphasis added.) In other words, the Legislature believed the assessor had the ability (and that her "*only option*" was) to refuse to enforce the provision she believed was unconstitutional or invalid. (*Ibid.*) Obviously, that would not have been so if section 3.5 was intended to apply to local government officials. This contemporaneous construction by the Legislature must be accorded great weight. (See *Riley v. Thompson* (1924) 193 Cal. 773, 778.)

4. Judicial interpretations of section 3.5 show that it applies only to state administrative agencies.

The cases that have applied section 3.5 since its adoption have applied it to *state* rather than local agencies. (See, e.g., *Delta Dental Plan v. Mendoza* (1998) 139 F.3d 1289 [Commissioner of Corporations]; *Southern Cal. Labor Mgmt. Operating Eng'rs Contract Compliance Com. v. Aubry* (1997) 54 Cal.App.4th 873 [Department of Industrial Relations]; *Leek v. Washington Unified School Dist*. (1981) 124 Cal.App.3d 43 [Public Employment Relations Board].)

And courts have been reluctant to broadly construe section 3.5. In *Reese v. Kizer* (1988) 46 Cal.3d 996, for example, this Court determined that an uncodified portion of an enactment that allowed the State Department of Health Services to refuse to enforce provisions of a state statute that was in conflict with federal law "implicated none of the restraints contained in article III, section 3.5." (*Id.* at p. 1002.) Instead, the Court construed the uncodified enactment "as directing the agency to effectuate the statute to the maximum extent allowed under federal law . . .." (*Ibid.*) As a result, DHS did not enforce a state statute because it had determined that it conflicted with federal law.

Similarly, in *Lentz v. McMahon* (1989) 49 Cal.3d 393, 407, fn. 11, this Court found section 3.5 inapplicable to the State Department of Social Services' fair hearing process seeking recoupment of overpayments from welfare recipients. Consistent with federal law, Welfare and Institutions Code Section 11004 provided that DSS could reduce current grants because of prior overpayments. In 1983, DSS announced a policy prohibiting recipients from asserting equitable estoppel as a defense in administrative

hearings. This Court determined that section 3.5 was inapplicable because "applying equitable estoppel in appropriate circumstances DSS would not be 'refusing to enforce' the recoupment statute, but would instead be acting consistently with the Legislature's intent that DSS be permitted, in certain case, to apply equitable estoppel in 'fair hearings.'" (49 Cal.3d at p. 406, fn. 11.) As a result, DSS did not enforce a state statute when it determined it would be acting consistent with the Legislature's intent.

Petitioners mistakenly rely on dicta in *Billig v. Voges* (1990) 223 Cal.App.3d 962 to argue that section 3.5 applies to "the state's representatives at the local level." But *Billig* neither addressed nor decided that issue. In that case, appellants sought a writ of mandate to compel the City Clerk to process their referendum petition, which the clerk had rejected for failing to comply with state Election Code requirements. (*Billig, supra,* 223 Cal.App.3d at p. 964.) The sole issue was "whether appellants failed to comply with [Elections Code] section 4052 by not printing the entire text of the ordinance, including its exhibits, on their petition." (*Id*. at p. 965.) The power of the clerk to enforce state law was never at issue, much less the clerk's power to *decline* to enforce a statute on constitutional grounds; the clerk in that case had *enforced* the statute at issue. The court's passing comment that section 3.5 somehow required the clerk to enforce state law is dicta, devoid of any analysis or reasoning. (See *In re Chavez* (2003) 30 Cal.4th 643, 656 ["[A] case is authority only for a proposition actually considered and decided therein."].)

5. The Attorney General's own acts demonstrate that section 3.5 does not apply to officials.

The Attorney-General argues that *all* state officers— in all circumstances— are forbidden to "declare a statute unenforceable" on

constitutional grounds. (Pet. at p. 25.) But his prior actions speak louder than his current words.

The Attorney-General is unquestionably a State official, indeed the "chief law officer of the State." (Cal. Const., art. V, § 13.) He has the power and duty to bring any action necessary to enforce state law. (*Ibid.*; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) His prior conduct demonstrates his office's interpretation of section 3.5 as inapplicable to government officials, as opposed to administrative agencies.

At the request of other state agencies, the Attorney General's opinions routinely determine the constitutionality of state laws well *before* any judicial consideration of constitutionality. This has been so even since the adoption of Article III, section 3.5 in 1978. (See, e.g., *Deukmejian v. Brown* (1981) 29 Cal. 3d 150,159 [Attorney General opinion that the State Employer-Employee Relations Act was unconstitutional].) Section 3.5 has proved no impediment whatsoever to the Attorney General declaring state laws— including section 3.5 itself — unconstitutional notwithstanding what the Attorney now argues is the true meaning of section 3.5. (See, e.g., 68 Ops. Cal. Atty. Gen. 209 (Op. No. 84-1104), issued July 30, 1985. [notwithstanding lack of applicable appellate court decisions, the County Assessor must "act in accordance with the federal law and disregard conflicting state constitutional and statutory provisions" despite section 3.5]; 71 Ops. Cal. Atty. Gen. 362 (Op. No. 88-802), issued December 21, 1988 [the Hague Convention, because it is a treaty, takes precedence over art. III, § 6 (declaring English the official language of California) and Art. III, § 3.5 even prior to an appellate court's consideration of the issue].)

6. Because San Francisco is not a state administrative agency, section 3.5 does not apply to it.

Counties are not mere administrative appendages of the state. Far from being limited to simply administering state policies, counties exercise significant autonomy, and many of their actions reflect local policy. Counties are authorized to make and enforce local laws and regulations, consistent with state law. (Cal. Const., art. XI, §7.) Counties also are authorized to adopt home rule charters that address the structure and operation of local county government, the provisions of which supersede state law in those areas. (*Id*., art. XI, §§ 3, 4; see *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1206-07.) And courts have held in other contexts that counties are part of local, not state, government. (See *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1814-15 [for purposes of subvention of costs of state-mandated programs, county is not administrative arm of state; "it is clear that counties and cities were intended to be treated alike as part of 'local government'"].) Far from merely implementing state policy, counties – including San Francisco – also formulate and administer their own policies.

Moreover, even to the extent that a county is viewed as a political subdivision of the state rather than as a distinct governmental entity, the county is not a state "administrative agency." As Respondents previously have pointed out, if counties were state administrative agencies for all purposes, then they would be required to comply with the requirements of the state Administrative Procedures Act, Government Code Section 11500 *et seq*. (But see *Allen v. Humboldt County Bd. of Supervisors* (1963) 220 Cal.App.2d 877, 883; *Hansen v. Civil Service Bd.* (1957) 147 Cal.App.2d 732, 734; *Mahoney v. San Francisco City and County Employees' Retirement Bd.* (1973) 30 Cal.App.3d 1, 4 ["local administrative agencies

are not necessarily held to the higher standards of others, or of courts"].) They also would be required to comply with other Government Code provisions addressing many aspects of state agencies' conduct, ranging from leasing property to office hours to reimbursement of travel expenses. (Gov. Code, §§ 11000-11146.4.) The fact that counties are instead authorized, by charter and ordinance, to regulate their own departments, divisions and agencies (Cal. Const. art. XI, §§ 3-5, 7) further demonstrates that counties are not state administrative agencies.[8] The fact that San Francisco is a county as well as a city does not bring it within section 3.5.

7. Because Respondent Alfaro is a local, rather than state, official, section 3.5 does not apply to her.

The Attorney General argues that section 3.5 applies to respondent Alfaro because "when local officers of a city act as local registrars of vital statistics, they are acting as state officers." (Petition at p. 25.) But this proceeding primarily concerns not the *registration* of marriage licenses by a local registrar (here the Assessor-Recorder), but rather the *issuance* of marriage licenses by the Office of the County Clerk, at the direction of the City's Mayor. In all of the actions challenged here, the County Clerk acted as a local, not state, official.

A host of factors demonstrate that the County Clerk is a local, rather than a state, official.

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[8] Even if counties generally were considered state agencies, this would not be true for agencies of consolidated charter cities and counties like San Francisco, as to which charter city status prevails. (Cal. Const., art. XI, § 6.)

First, the clerk's local status is statutorily prescribed. The Legislature has designated the county clerk as one of the "officers of a county." (Gov. Code, § 24000(c).)

Second, the county clerk is supervised and controlled by local, not state, authorities. The county's local legislative body – the board of supervisors – supervises the county clerk in the performance of all of her official duties, without qualification. (Gov. Code, § 25303.) In contrast, no state official or agency controls or supervises the county clerk with respect to the issuance of marriage licenses or for that matter in respect to any other of her duties.

Third, the qualifications necessary to become a county clerk underscore the local nature of the office. The county clerk is typically elected by the county voters (*id*., § 24009(a)), and ordinarily must be a registered voter within the county at the time she is nominated for office or is appointed. (*Id*., § 24001.)

Fourth, the county clerk possesses what this Court has termed "the essential attributes of county officers." (*Dibb, supra*, 8 Cal.4th at pp. 1212-1213.) The clerk serves a fixed term of office, and is delegated a public duty to exercise a part of the county's governmental functions – namely, the issuance of marriage licenses. (*Id*. [holding that members of county review board authorized to hear complaints concerning sheriff and probation department are county officers because they possess such attributes].)

Significantly, while the courts have held that some other county officers may serve as state officers when they perform specific tasks or functions, the factors on which those holdings were based do not apply to a county clerk. For example, this Court has held that a county district

attorney acts as a state official, for purposes of damage claims under 42 U.S.C. § 1983, in prosecuting or preparing to prosecute violations of state law, because the Attorney General directly supervises each district attorney in matters of criminal prosecution, while the county board of supervisors is statutorily barred from obstructing the district attorney's prosecutorial functions. (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 357-362; see also *County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1174-1177 [reaching same conclusion, based on same factors, as to county sheriff's operation of county jail].) But as noted above, no state official or agency exercises any comparable direct supervision or control over the county clerk in the issuance of marriage licenses or otherwise. In issuing marriage licenses, the county clerk is simply a local official complying with the requirements of state law.

In any event, Alfaro was not the decisionmaker with respect to San Francisco's issuance of marriage licenses to same-sex couples. She and the other employees within the County Clerk's Office issued marriage licenses to such couples because Mayor Newsom told them to do so. Therefore, even if Alfaro generally acts as a state official when issuing marriage licenses, she was not acting in this role when merely following the directive of Mayor Newsom – who is indisputably a local official.

C. Section 3.5 Should Not Be Extended To Apply To Local Agencies And Officials.

Just as principles of federalism dictate that states retain authority over those concerns of greatest relevance and importance to the people (The Federalist No. 17, pp. 106-108 (J. Cooke ed. 1961), there are good public policy reasons why local officials would continue to retain the authority to question unconstitutional state laws. Local officials are of course closer to

the people than state government officials. As such, they are more responsive to the concerns of the citizenry. Thus, when the State enacts a law that denies citizens' equal protection, it is local officials who see firsthand the effects of such a law and who are better positioned to perceive the injustices it works.

To illustrate this principle, the Court need only to have looked across the street at San Francisco City Hall on March 11 at 3:00 p.m. It was San Francisco officials, not any state agency or official, who licensed and wed joyous opposite-sex couples as same-sex couples who had gathered their children, families and friends with the expectation of equal treatment stood in the City Hall rotunda in tears and disbelief. Section 3.5 may tie the hands of state agencies to rectify this discrimination. But local officials cannot close their eyes to that deprivation of constitutional rights right before them. (See *Southern Pacific Transportation Co. v. Public Utilities Comm., supra,* 18 Cal.3d 308 at p. 311, fn. 2.)

Moreover, while the State and its employees are insulated from liability in federal court under the Eleventh Amendment from violations of the federal Constitution or laws – even in enforcing a state statute not previously held to be unconstitutional – the same is not true of local agencies and officials. In *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 474, the court held that school officials who had claimed that under section 3.5 they had no choice but to enforce particular provisions of the Education Code were liable for attorney fees incurred by a teacher who successfully challenged the constitutionality of those provisions. Local officials also face exposure for damages under 42 U.S.C. Section 1983. (See *Mt. Healthy City School District Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 280.) And even if the state can be held liable in state courts for its

constitutional violations, at least the damages assessed against it result from the state's *own* decisions to adopt and enforce unconstitutional legislation. Further, any damages would be paid from its own fisc, rather than from the limited resources of a local government that was unwilling to violate its citizens' constitutional rights in the first place.

These distinctions militate against expanding section 3.5 to apply to local governments, particularly when the voters gave no indication that they intended it to apply so broadly.

D. To The Extent It Would Require Any Government Officials To Violate The Federal Constitution, Section 3.5 Is Unconstitutional.

Even if the Court disagrees and finds section 3.5 applies to Respondents, section 3.5 still could not compel them to act in violation of federal law.[9]

Under the Supremacy Clause of the United States Constitution, state and local officials have no power to disobey federal law, and a state cannot

[9] Petitioners Lewis, et al. may argue, as their counsel did while representing other parties in the Superior Court proceedings, that the rule barring subordinate political entities from challenging state action on federal constitutional grounds prevents Respondents from raising their supremacy clause defense. But the "no standing" rule applies only where a public entity seeks to defend its own rights under the federal Constitution. (See *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 8.) Here, Respondents seek to invoke the supremacy clause to protect the rights of others. Respondents may do so under the "established exception" to the no standing rule. (See *id.* at p. 7.) As this Court stated: "State action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed." (*Id.* at p. 9.) If Petitioners do raise this issue and the Court decides to address it, the City respectfully requests an opportunity for further briefing on the issue, which Petitioners did not raise in their opening brief in this matter.

empower them to do so. (U.S. Const., art. VI, cl. 2.). As the Court explained in *Ex parte Young*, its seminal decision on the matter:

> It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (*Ex parte Young* (1908) 209 U.S. 123, 159-160.)

Thus, regardless of state law, and regardless of any decision or lack of decision by an appellate court, a state official's paramount duty is always to obey federal law. (See, e.g., *Voinovich v. Quilter* (1993) 507 U.S. 146, 159 [finding that a state official's individual decision to disobey the Ohio Constitution when he believed it inconsistent with federal law "demonstrates obedience to the Supremacy Clause of the United States Constitution"].)

Relying on the Supremacy Clause, the Ninth Circuit has squarely rejected California officials' attempts to seek shelter behind section 3.5 to justify actions that violate the federal constitution. (See *LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1159-60.) In *Stroh*, state officials from the California Department of Alcoholic Beverage Control sought to prevent a display of sexually explicit artwork at a convention where alcohol would be served, citing state-law restrictions on liquor licenses. (*Id*. at p. 1150.) The Ninth Circuit concluded that such licensing restrictions unconstitutionally intruded upon the plaintiff's First Amendment rights to engage in protected speech. (*Id*. at p. 1159.) It then soundly rejected the state officials'

arguments that section 3.5 had required them to enforce the unconstitutional state-law licensing restrictions until an appellate court declared them unconstitutional. As the Ninth Circuit explained, "[t]his argument . . . takes no account of the Supremacy Clause of the United States Constitution. It is a long-standing principle that a state may not immunize its officials from the requirements of federal law." (*Id.* at pp. 1159 -1160, citing *Martinez v. California* (1980) 444 U.S. 277, 284.)

Indeed, in a published opinion of his office, the California Attorney General has *conceded* this point:

> [I]t is the obligation of the county assessor to act in accordance with the federal law and to disregard conflicting state constitutional and statutory provisions. . . . Article III, Section 3.5 of the state constitution, on the contrary, would by its express terms interpose a material condition precedent to compliance with the supreme law, i.e., an appellate court determination which may require years to transpire. The Constitution of the United States permits no such impediment. Hence, in our view, section 3.5 falls, to the extent of inconsistency, upon the bedrock of federal supremacy. (68 Ops. Cal. Atty. Gen. 209, at p. 31 (Op. No. 84-1104) (issued July 30, 1985).)

Thus, by plain operation of the Supremacy Clause, section 3.5 does not – indeed cannot – bar state and local officials from conforming their conduct to federal law. To the contrary, under the Supremacy Clause, Respondents had no choice but to stop violating the rights of same-sex couples to equal protection and due process under the United States Constitution – and to do so immediately.

IV. THE COURT SHOULD DEFER RULING ON THE RESPONDENTS' AUTHORITY TO ISSUE MARRIAGE LICENSES TO SAME-SEX COUPLES UNTIL THE LOWER COURTS HAVE RULED ON THE CONSTITUTIONAL QUESTIONS.

A. This Court Cannot Decide Whether Respondents Abused Their Authority Until The Lower Courts Adjudicate The Constitutionality Of California's Statutory Ban On Marriage Between Same-Sex Couples.

For three reasons, this Court cannot ultimately resolve the issue of whether the Respondents acted lawfully until the courts have adjudicated the underlying issue of the constitutionality of the marriage statutes' exclusion of same-sex couples. First, as discussed above, section 3.5 does not bar local officials' acts and therefore those acts were unlawful only if the marriage statutes are constitutional and thus Respondents were bound to apply them as written. Second, even if this Court disagrees with that proposition and concludes that section 3.5 did apply to local officials engaged in non-adjudicative functions, it could not constitutionally apply section 3.5 to bar local officials from complying with the federal constitution and would thus have to address the constitutionality of the marriage laws under at least the federal constitution. Third, and finally, regardless of whether the Court agrees with either such proposition, to adhere to the well-established rule that a writ will not issue to compel an unlawful act, the Court must necessarily decide whether excluding same-sex couples from marrying in obeisance to the state marriage statutes violates either the state or federal constitution. (See *Cook v. Noble* (1919) 181 Cal. 720, 721.)

B. The Underlying Constitutional Questions Involve Factual Determinations That Should First Be Decided By The Lower Courts.

No court will be able to rule on the constitutional questions without addressing two broad legal issues: (1) whether persons in same-sex relationships comprise a "suspect" or "quasi-suspect" class entitled to "strict" or "intermediate" scrutiny of the State's discrimination against them; and (2) whether the State can articulate a governmental interest sufficient to justify denying same-sex couples the right to marry.

Resolution of these two legal issues will depend almost entirely on the consideration of a great deal of evidence, expert and otherwise, dealing with deeply complex subject-matter areas. Because the trial courts are by design the only appropriate forum in which to present and test evidence, and ultimately resolve disputed factual questions, the Equal Protection and Due Process questions presented by this case should be addressed in the first instance by the Superior Court.

"[T]he equal protection clause is forward-looking; it is intended to invalidate traditions, however longstanding, that become invidiously discriminatory as times change and disadvantaged groups call attention to their treatment." (*Dean v. District of Columbia* (1995) 653 A.2d 307, 342 [Ferren, J., concurring and dissenting, citing Cass R. Sunstein, *Sexual Orientation And The Constitution: A Note On The Relationship Between Due Process And Equal Protection* (1988) 55 U. Chi. L. Rev. 1161].) Because evolving social mores play a prominent role in equal protection analysis, evidence plays an equally prominent role.

The threshold question in any equal protection case is whether the class suffering discrimination comprises a "suspect" or "quasi-suspect" class entitled to "strict" or "intermediate" scrutiny of the State's

discrimination against them, or whether the state need only satisfy the "rational basis" test. Factors considered in deciding whether to apply heightened scrutiny include: whether the class has suffered a history of purposeful discrimination (see *Loving v. Virginia* (1967) 388 U.S. 1, 11-12); whether the class is the object of deep-seated prejudice based on inaccurate stereotypes (see *Mississippi University For Women v. Hogan* (1982) 458 U.S. 718, 725); whether the class is characterized by a trait that is immutable or generally beyond the individual's control (see *Plyler v. Doe* (1982) 457 U.S. 202, 220); whether that trait bears any relation to the individual's ability to contribute to society (see *Frontiero v. Richardson* (1973) 411 U.S. 677, 686 [plurality opinion]); and whether the class lacks sufficient political power to defend itself against hostile treatment by the majority, via the State. (See *Plyler*, 457 U.S. at pp. 216-217, 218, fn. 14.)

These questions are best resolved through the presentation of expert testimony and other evidence, not through abstract legal analysis. "[T]he question whether the state invidiously discriminates against homosexuals by withholding from same-sex couples the right to marry inevitably presents sub-questions about the nature and causes of homosexuality and, as a result, confronts this court with issues of legislative fact-finding." (*Dean, supra*, 653 A.2d at p. 323 [Ferren, J., concurring and dissenting].) "Legislative facts [in the sexual orientation discrimination context] may include "social" facts, "political" facts, "economic" facts, and "scientific" facts, "most of which no longer fall within the classification of irrefutable." (*Id.* at p. 325 [citations omitted].)

A trial will also be necessary to determine whether any governmental interests the State may proffer are sufficient to justify denying same-sex couples the right to marry. These issues too inevitably

give rise to numerous, deeply complex factual questions that are properly resolved through the presentation of expert witnesses and other evidence. The trial approach offers the parties an opportunity to "present the range of informed opinion on the subject, and both identify and critique the most probative literature," and generally test evidence through cross-examination. In short, the court . . . would achieve a sharpened, presumably reliable insight into complicated matters that, without such help, would be much more difficult for the judge to achieve." (*Id.* at pp. 327-328.)

C. The Court Should Lift Its Injunction Barring Same-Sex Marriages During The Pendency Of This Action.

Respondents should be allowed to resume issuing marriage licenses to same-sex couples for the time it takes to resolve the constitutional questions in the lower courts. The Court may dissolve its injunction if the "ends of justice will be served." (Code Civ. Proc., § 533.) Because "the decree is a continuing one of a preventive nature, it is, under familiar equitable principles, always subject to modification upon application . . . if its continued enforcement in the future in its present form would effect an injustice." (*Woods v. Corsey* (1948) 89 Cal.App.2d 105, 113.)

Here, continuing the injunction *would* effect an injustice. As Respondents argued in their initial briefs, no irreparable harm would flow from the continued issuance of marriage licenses and certificates to same-sex couples. Indeed, all of the legal "uncertainties" and "practical difficulties" that the Attorney General pointed to as a reason for this Court to have issued the cease and desist order in fact point in precisely the opposite direction: they underscore that California's statutory marriage ban works deep and lasting hardship on gay men and lesbians in virtually every

quarter of life, and in ways too numerous to catalogue. The State also has made it clear that it will not recognize same-sex marriages pending the outcome of litigation, and Respondents have warned applicants that the legal status of the marriages is uncertain.

On the other hand, the issuance of marriage licenses and certificates to same-sex couples confers substantial symbolic benefits. Marriage confers a level of contentment, commitment, and dignity to a relationship unavailable through any other legal union. (See RA, Tabs 4-12.) And the denial of the emotional and psychological benefits of marriage defy quantification. In short, as a very real practical matter, the actions of which Petitioners complain have done nothing more – and nothing less – than enable loving, committed couples to take a marriage license home, perhaps frame it on the wall, celebrate their life-long commitment with children, parents and friends, and then go about business as usual.

Respondents should not be required to await final judicial determination of the constitutionality of the marriage ban before resuming issuing marriage licenses to same-sex couples. "[T]he exercise of viable constitutional rights should not be made to depend upon a slowly evolving test of their correctness; the Constitution is a live document which persists in full strength at all times, and when there is a clear breach of a constitutional right, timely attention to its enforcement is essential." (*United Farm Workers Organizing Comm., AFL-CIO v. Super. Ct.* (1967) 254 Cal.App.2d 768, 769.) The Court should lift the injunction.

CONCLUSION

Respondents respectfully request that the Court defer its ruling on the merits of the petitions and lift the injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 12,944 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 18, 2004.

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