

S122923
IN THE
SUPREME COURT OF CALIFORNIA

BILL LOCKYER, Attorney General
Of the State of California
Petitioner,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, Et Al.,
Respondents.

AND RELATED ACTIONS.

—————
In Response to California Supreme Court's
Order Authorizing Amici Curiae Briefs
—————

AMICI CURIAE BRIEF IN
SUPPORT OF RESPONDENTS
—————

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**AMICI CURIAE BRIEF IN SUPPORT OF CITY OF
SAN FRANCISCO OPPOSITION TO PETITION FOR WRIT OF
MANDATE, PROHIBITION, CERTIORARI AND/OR OTHER
APPROPRIATE RELIEF**

INTRODUCTION

As a preliminary matter, Alma Marie Triche-Winston and Charel Winston concur with respondents' Opposition to Petitioners Original Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief; Request for Immediate Cease and Desist Order and/or Stay of Proceedings, filed by petitioners on February 27, 2004.

In the current action and in support of this position, Alma Marie Triche Winston and Charel Winston assert that under California law, marriage between two persons is a civil contract. The Constitution of the United States ultimately

governs the obligations of contracts in the State of California, and a state may not impair the ability of parties to enter into contracts. As such, California Family Code sections 300 and 308.5, passed at the behest of special interest groups, are illegal in that they unlawfully impair the contractual ability of parties to enter into a civil contract. Public policy cannot be advanced by denying basic human rights to a segment of the population, thus creating a class apart.

Alma Marie Triche-Winston and Charel Winston further assert that in order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own. In response to petitioner's assertions that respondent does not have the authority to issue marriage licenses to same-sex couples, Alma Marie Triche-Winston and Charel Winston assert that respondents have the constitutional authority and duty to uphold and enforce laws within its jurisdiction. However, respondents have the correlative duty not to enforce laws, orders, rules, mandates which lead to the violation of not only fundamental liberty interests under the Constitution of the United States, but of basic human rights of people as well. Under international law, an individual is not bound to follow laws which lead to the violation of the human rights of others, and is not exonerated from violations of laws against basic human rights by claiming "we are following orders."

The issues presented in this case directly affect the status of the marriage of Alma Marie Triche-Winston and Charel Winston. For this reason, they have a substantial and direct interest in the present matter. In furtherance of that interest, and in the interest of equal human rights for all, they submit this brief.

WHY PETITIONERS REQUESTED RELIEF SHOULD BE DENIED

Petitioner's moving papers make three requests relating to same-sex marriage.¹

1. He asks this Court issue an immediate cease-and-desist order directing the City/County of San Francisco to stop issuing new licenses. In light of this Court's March 12, 2004 ruling to that effect, this issue is moot.

2. He also asks the Court to declare the marriages that have already been performed invalid because of the allegedly illegal actions of the mayor.

3. Finally, Petitioner requests the Court to resolve the question of whether the California Constitution prohibits discrimination against same-sex marriage. While favoring that the Court should resolve the action on its merits, alternative petitioner suggests that the Court could, if it chose, grant the cease-and-desist order and invalidate the marriages already performed, and allow the lower courts to "process the merits of the state constitutional equal protection and due process issues before these issues are addressed by the Supreme Court."²

Alma Marie Triche-Winston and Charel Winston assert that this Court must deny petitioner's requested relief in accordance with respondents' opposition papers and for the reasons stated herein.

Moreover, in support of respondents' position Alma Marie Triche-Winston and Charel Winston assert that Family Code sections 300 and 308.5 violate the Contracts Clause of Article I, section 10 of the Constitution of the United States. These laws, created by special interest groups violate federal and state rights and privileges by impairing the contractual abilities of otherwise legal parties from entering into the same civil contracts of marriage as non-same-sex couples. Therefore, the state does not have a significant interest and/or legitimate public purpose in enacting these laws, and even if it did, in this case, the adjustment of

¹ This section is based partly on Vikram David Amar "The California Constitution and Same-Sex Marriage" (March 5, 2004) in <http://writ.findlaw.com/amar/20040305.html>; accessed on March 5, 2004, 12:50 p. m., P.S.T.

² Id. at 2

rights and responsibilities of contracting parties is not of a character appropriate to the public purpose justifying the legislation's adoption, as it precludes consenting adults who are legally able to contract with one another from entering into such a contract which is not illegal, as the civil contract of marriage is not illegal in California.

Since Family Code sections 300 and 308.5 are unconstitutional in that they intolerably impair the ability of parties to enter into contracts with one another in violation of the Contracts Clause of the Constitution of the United States, respondents correctly surmised that they are not bound to enforce them. As respondents correctly point out, when faced with conflicting laws or possible conflicts of law, respondents' paramount duty is to obey federal law. (Respondent Opposition, p. 29), because under the Supremacy Clause of the United States Constitution, state and local officials have no power to disobey federal law, and a state cannot compel or empower them to do so. (Ibid).

Alma Marie Triche-Winston and Charel Winston further assert that under the strictures of international law, respondent is not bound, but, in fact, has a duty to refrain from enforcing laws which deny or violate individuals' fundamental liberty interests, and universal human rights.

As petitioner's requested relief would, in effect, result in preventing all gay couples from contracting into the civil contract of marriage, a result that is unconstitutional under Article 1, section 10 of the Constitution of the United States, such relief must be denied. Moreover, if this Court grants petitioner's requested relief, it would force respondents to enforce laws which violate the fundamental liberty interests and basic human rights of a significant segment of the population: all non-heterosexual couples. Under international law, such enforcement could subject respondents to liability for enforcing such laws. Thus, potentially all persons excluded from a "[m]arriage... arising out of a civil contract between a man and a woman" (Fam. Code § 300) could seek legal recourse against all mayors and officials for "acting" in accordance with unconstitutional

laws that impair their civil rights and privileges under constitutional and international law. It would not be a defense for respondents to claim “I was only following orders.” Therefore, on this basis, petitioner’s requested relief must be denied as well.

STATEMENT OF THE CASE

Alma Marie Triche-Winston and Charel Winston concur with respondents’ statement of the case. However, because they have a direct and vested interest in the underlying action, they add their own effect. Thanks to respondent, Mayor Gavin Newsom’s courage, dedication and commitment to the constitutional principles of human rights and freedom to contract, Alma Marie Triche-Winston and Charel Winston were happily married on Sunday, February 15, 2004 (Public Marriage License No. 4200438001782, incorporated herein as Atch A).

Alma Marie Triche-Winston has been disabled since 1990. Charel Winston has been disabled since 1999. Their disabilities are covered under the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.) Alma Marie Triche-Winston has been under direct medical care since March 29, 2001. Throughout the summer 2003, due to medical complications and illness, Alma Marie Triche-Winston was confined to her bed. During this time, she was forced to represent herself in a meritorious construction defect case, when her previous attorneys dropped her case to pursue a more financially lucrative class-action suit. Due to her illness, Alma Marie Triche-Winston had difficulties actively prosecuting her case.

Alma Marie Triche-Winston’s domestic partner since 1996, Charel Winston, despite her own recent cancer surgery, attempted to speak on Alma Marie Triche-Winston’s behalf, as she was medically unable to do so. Despite the fact that they had lived together for seven years, both financially contributing to their home and community assets, because they were not legally married, the

judge refused to allow Charel Winston to speak on her behalf. Thereafter, Alma Marie Triche-Winston's meritorious case (the same judge having previously denied the defendants' motions for summary adjudication) was dismissed. Had they been legally married, her spouse would have been able to speak on her behalf, in an effort to prevent such injustice. She is currently appealing the decision.

If their marriage is voided, then it again places them in second-class citizenship status, a status clearly unconstitutional under the Equal Protection Clause of the 14th Amendment of the Constitution of the United States and Article 1 section 7(a) of the Constitution of the State of California.

Further, if the marriage is voided, they would lose important rights and privileges, including protections that are crucial for couples in caring for each other, particularly for couples who are disabled under the ADA and who suffer potentially chronic and/or terminal medical problems. They would be denied marriage benefits³ (which "civil union" laws cannot make up for) such as: social security benefits; insurance benefits (auto, home, accident, medical); tax benefits (state and federal income taxes, property taxes); bank loan benefits (home, auto); rights to make medical and life-threatening decisions, adoption and parenting rights, rights with respect to extended family issues including inheritances and property dispositions, to name a few of the total 1034 estimated rights and privileges to married couples. Their marriage legitimizes contractual commitments between two parties as fiduciaries, both individually and as a family unit. Finally, the marriage provides equal rights between, and for both parties in legal actions in fiduciary stead, without both parties necessarily having to be present (a very important consideration given their individual medical conditions and disabilities under the ADA), i.e., plaintiffs or respondents, in pro per status, where one is unavailable and/or immobile. This is not merely a theoretical supposition, but reality as Alma Marie Triche-Winston and Charel Winston have

³ There are approximately 1034 federal rights and privileges which could be impacted on. The actual number of these vary according to individual circumstances.

multiple meritorious cases pending, in which either one or the other, or both are parties thereto. These cases involve the loss of their homes due to toxic mold as a result of construction defects, employment discrimination, and personal injury. As unmarried persons, a given status to all non-heterosexual couples (previously challenged in the late 1970s), Alma Marie Triche-Winston and Charel Winston had to file separate individual cases, placing undue burdens on the courts by creating additional costs, expenses, and causing a waste of precious judicial resources. Currently, Charel Winston's case is in danger of being dismissed, because she is not considered a party to the original purchase agreement of their home, despite her financial contributions to said property.

Finally, Alma Marie Triche-Winston's 74 year-old mother lives with them and has lived with them for the past seven years, under their care. As Alma Marie Triche-Winston suffers from chronic medical conditions, she is gravely concerned that if their marriage license is voided, and something happens to her, her spouse, Charel Winston, will not be able to legally care for her mother's medical, financial, property, testamentary and other needs without further legal burdens and hardships. Alma Marie Triche-Winston's mother loves and trusts Charel Winston as fiduciary to handle her affairs and those of the family. Their marriage greatly facilitates such responsibilities and ensures the proper continuity of their affairs upon the sudden demise of either party.

LEGAL DISCUSSION

I

UNDER CALIFORNIA LAW, MARRIAGE BETWEEN TWO PERSONS IS A CIVIL CONTRACT AND A STATE MAY NOT MAKE LAWS WHICH INTERFERE WITH THE RIGHTS OF PARTIES TO ENTER FREELY INTO CONTRACTS

Article 1, section 10 of the Constitution of the United States provides that “No State shall ... pass any ... Law impairing the Obligation of Contracts.”

Article 1, section 9 of the Constitution of the State of California provides: ”A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.”

California Family Code section 300 provides:

Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division.

California Family Code section 308.5 provides: “Only marriage between a man and a woman is valid or recognized in California.” This provision impairs the ability of parties to enter into contracts in California and as such is unconstitutional under both the State and Federal Constitution.

Alma Marie Triche-Winston and Charel Winston assert that former Civil Code section 4100 should be reinstated as it is gender-neutral, thus does not impair otherwise legal parties from entering into the contract of marriage regardless of gender or sexual orientation.

a. The Constitution of the United States and the Constitution of California both govern obligations of contracts in the State of California⁴

The term “law” comprises statutes, constitutional provisions (*Dodge v. Woolsey* (1856) 59 U.S. (18 How.) 331; *Ohio & M. R. Co. v. McClure* (1871) 77 U.S. (10 Wall.) 511; *New Orleans Gas Co. v. Louisiana Light Co.* (1885) 115 U.S. 650; *Bier v. McGehee* (1893) 148 U.S. 137, 140) municipal ordinances (*New Orleans Water-Works Co. v. Rivers* (1885) 115 U.S. 674; *City of Walla Walla v. Walla Walla Water Co.* (1898) 172 U.S. 1; *City of Vicksburg v. Waterworks Co.* (1906) 202 U.S. 453; *Atlantic Coast Line v. City of Goldsboro* (1914) 232 U.S. 548; *Cuyahoga Power Co. v. City of Akron* (1916) 240 U.S. 462) and administrative regulations having the force and operation of statutes. (*Ibid.*; see also *Grand Trunk Ry. v. Indiana R.R. Comm.* (1911) 221 U.S. 400; *Appleby v. Delaney* (1926) 271 U.S. 403.

The term "contracts" is used in the contracts clause in its popular sense of an agreement of minds.⁵ The California Supreme Court usually has final authority in determining the construction, as well as the validity, of contracts entered into under the state and local laws of California. The national courts will be bound by the decision of the state on such matters. However, for reasons that are fairly obvious, this rule does not hold when the contract is one whose obligation is alleged to have been impaired by state law. (*Jefferson Branch Bank v. Skelly* (1862) 66 U.S. (1 Bl.) 436, 443 ; *Bridge Proprietors v. Hoboken Co.* (1863) 68 U.S. (1 Wall.) 116, 145; *Wright v. Nagle* (1880) 101 U.S. 791, 793; *McGahey v. Virginia* (1890) 135 U.S. 662, 667 ; *Scott v. McNeal* (1894) 154 U.S. 34, 35; *Stearns v. Minnesota* (1900) 179 U.S. 223, 232 -233; *Coombes v. Getz* (1932) 285 U.S. 434, 441; *Atlantic Coast Line R. Co. v. Phillips* (1947) 332 U.S. 168, 170.)

⁴ This section is based on the annotation found in <http://caselaw.lp.findlaw.com/data/constitution/article01/54.html#9>; accessed on March 4, 2004, 9:00 a. m. P.S.T.

⁵ *Id.*

Similarly, California's Supreme Court has final authority in construing state statutes and determining their validity in relation to the California Constitution. But this rule too has had to bend to some extent to the United States Supreme Court's interpretation of the obligation of contracts clause. (*McCullough v. Virginia* (1898) 172 U.S. 102; *Houston & Texas Central R. Co. v. Texas* (1900) 177 U.S. 66, 76, 77; *Hubert v. New Orleans* (1909) 215 U.S. 170, 175; *Carondelet Canal Co. v. Louisiana* (1914) 233 U.S. 362, 376; *Louisiana Ry. & Nav. Co. v. New Orleans* (1914) 235 U.S. 164, 171.)

(1) A state may not impair the ability of parties to enter into contract

"The obligations of a contract," says Chief Justice Hughes for the Court in *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398 "are impaired by a law which renders them invalid, or releases or extinguishes them . . . , and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights." (Id. 431.) But he adds: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,--a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." (Id., 435. And see *City of El Paso v. Simmons* (1965) 379 U.S. 497.) In short, the law from

which the obligation stems must be understood to include constitutional law and, moreover a "progressive" constitutional law.⁶

In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400 [103 S. Ct. 697], the United States Supreme Court formulated the following steps in Contracts Clause analysis:

1. Has a state law, in fact, operated as a substantial impairment of a contractual relationship. (459 U.S. at 411 [103 S. Ct. at 704]).
2. If so, the state must have a significant and legitimate public purpose. (459 U.S. at 411 [103 S. Ct. at 704]).
3. If that is shown, the next inquiry is whether the adjustment or rights and responsibilities of contracting parties is of a character appropriate to the public purpose justifying the legislation's adoption. (459 U.S. at 412 [103 S. Ct. at 705]).

The *Energy Reserves* decision constitutes a level of review more exacting than the minimal rational basis analysis still used for substantive due process analysis or equal protection review of economic laws.

b. Under California law, marriage is a civil contract

California Family Code section 300 provides:

Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division.

This is a structural and governmental impairment as to who may contract to marry, only a man and a woman. Since California law holds marriage to be a civil contract, as such it falls within the ambit of Article 1, section 10 of the

⁶ "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency." Justice Black, in *Wood v. Lovett* (1941) 313 U.S. 362 , 383 .

Constitution of the United States, and Article 1, section 9 of the Constitution of California. California Family Code section 308.5 provides: “Only marriage between a man and a woman is valid or recognized in California.” Therefore, in order to determine whether California Family Code sections 300 and 308.5 violate the Contracts Clause of the Constitution of the United States, they must be evaluated by ascending the steps of *Energy Reserves*’ analytical ladder.

c. California Family Code sections 300 and 308.5 significantly impair the contractual ability of parties to enter into a civil contract

Alma Marie Triche-Winston and Charel Winston assert that current California laws significantly impair the contractual abilities to enter into the civil contract of marriage. Consequently, such laws violate the Contracts Clause of Article 1, section 10 of the Constitution of the United States and Article 1, section 9 of the Constitution of the State of California.

(1) Significantly impairs contracts under Article 1, section 10 of the Constitution of the United States

Under the first step of the *Energy Reserves* analysis, whether a state law, in fact, operated as a substantial impairment of a contractual relationship (459 U.S. at 411 [103 S. Ct. at 704]), Alma Marie Triche-Winston and Charel Winston assert that California Family Code sections 300 and 308.5, by restricting the parties from entering into a civil contract of marriage to only members of the opposite sex, these sections substantially impair the contractual abilities of a significant segment of the population, including all non-heterosexual couples, i.e., same-sex couples. The individuals, who are so restricted, are otherwise legally entitled to enter into such contract if only they were of the opposite sex to another. With respect to California Family Code sections 300 and 308.5, for the designation of opposite sexes, who shall determine one’s sex? Who shall determine a “man” or a “woman?” Courts may separate “birth parent” from “natural parent.” As such,

should the same distinction apply here: “Birth gender?” or “Natural gender?” as in transgender cases? Moreover, there is no reason other than the sameness of their sex that precludes same-sex couples from entering into the marriage contract. Clearly, the purpose of them entering into the marriage contract is not illegal or illicit (under California law, the civil contract of marriage is not an illegal activity) and is founded on the basis of the mutual consent of both parties. In this case, if petitioners prevail, same-sex couples who wish to marry would again be precluded from doing so. In fact, to carry this analysis to its conclusion, if every same-sex couple who wanted to marry, swapped opposite sex partners with other couples, they would be allowed to marry, even if they had only met while standing in line waiting for a marriage certificate. On the other hand, couples such as Alma Marie Triche-Winston and Charel Winston, who are committed to each other and have lived together as a family unit since 1996 would be denied their constitutional rights under the law to be wedded by the State of California to be recognized as a legitimate married couple. This clearly would impact their contractual abilities to enter into said contract that they were both eager to partake of, and did partake of on February 15, 2004. As such, under the first step of *Energy Reserves*, it is clear that Family Code sections 300 and 308.5 impair the ability of otherwise eligible parties to enter into civil contracts in California.

(2) Significantly impairs contracts under Article 1, section 9 of the Constitution of the State of California

In interpreting Article 1, section 9 of the California Constitution, California courts have held that marital rights and obligations are not contractual rights and obligations within prohibition of this section against impairment of contract rights. (*In re Walton's Marriage* (1972) 28 Cal.App.3d 108 [104 Cal.Rptr. 472]; see *Chiyoko Ikuta v. Shunji K. Ikuta* (1950) 97 Cal.App.2d 787 [218 P.2d 854].)

In re Walton, a husband sought dissolution of marriage on the ground of irreconcilable differences. His wife responded, seeking legal separation on the same ground. The court granted the dissolution, awarding custody of the minor children to the wife, dividing the marital property, and providing for spousal and child support. The Court of Appeal affirmed, holding that the Family Law Act does not violate constitutional guarantees against impairment of contractual obligations, that it did not unconstitutionally deprive the wife of any vested right to marriage status once so attained. (Id.)

Wife's contention that dissolution of her marriage on the ground of irreconcilable differences as prescribed in The Family Law Act constitutes an unconstitutional impairment of her contract rights is untenable. In the first place, marital rights and obligations are not contractual rights and obligations within the meaning of article I, section 10 of the United States Constitution or article I, section 16 of the California Constitution. [Former Article 16 was replaced by Article 9; Internal citations omitted.] Marriage is much more than a civil contract; it is a relationship that may be created and terminated only with consent of the state and in which the state has a vital interest. (Civ.Code, s 4100 (formerly Civ.Code, s 55. [Internal citations omitted. Former Civ. Code § 4100 was replaced by Fam. Code § 300.]

Secondly, even if marital obligations were treated as contractual obligations protected by the constitutional prohibitions, a statutory change in the grounds for divorce would not constitute an unconstitutional impairment thereof. 'Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. *That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.*' [emphasis added; internal citations omitted.] (*In re Walton's Marriage*, supra, 28 Cal.App.3d at 112 [104 Cal. Rptr. at 475-476].)

In the present matter, the issue is not one of age, procedure or form, duties and obligations, property rights of both, present and prospective, and which acts

may constitute grounds for dissolution. Same-sex unions meet all of these requirements. The issue here is most basic: whether individuals of the same sex may contract matrimonially. In light of the policy considerations addressed in *As the In re Walton's* marriage, the court conceded, that it could conceive of marriage relations being contractual. (Id.) In that case, however, a statutory change within the grounds for divorce would not constitute an unconstitutional impairment. (Id.)

Moreover, in interpreting the civil contract of marriage within Article 1, section 9 (section 16 at the time) another court held earlier:

"When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. (*In re Estate of Gregorson* (1916) 160 Cal. 21, 24 [116 P. 60]; cited in *Chiyoko Ikuta v. Shunji K. Ikuta*, supra, 97 Cal.App.2d at 790 [218 P.2d at 856].)⁷

As in *In re Walton*, supra, the issue here is one of rights, duties, and obligations within the marriage contract. Whether referred to as a "new relation," "marriage" or simply a contract, the fact remains that marriage is a civil contract, between two legal and consenting parties outlining their respective rights, duties and obligations. As such, it must ultimately be interpreted within a contractual foundation.

In the present matter, if marital obligations are treated as contractual, as they should be, then there is nothing to preclude parties, who would otherwise be free to contract, to enter into the civil contract of marriage. Therefore, if current California law (Fam. Code §§ 300, 308.5) impairs same-sex couples from marrying one another, Alma Marie Triche-Winston and Charel Winston assert that these laws impair the same right of parties to contract as other non-same-sex couples, thereby violating Article 1, section 9 of the California Constitution.

⁷ In *Ikuta v. Ikuta*, the court was dealing with the issue of the constitutionality of a statute abolishing the right of action for alienation of affections. The *Ikuta* court held that such statute was constitutional and precluded plaintiff's recovery.

d. A significant and legitimate public purpose cannot exist by denying basic human rights to a segment of the population, creating a class apart

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.⁸

Alma Marie Triche-Winston and Charel Winston agree with respondents' assertions, that the right to marry the person of one's choice is a fundamental right; moreover, that the California Family Code unconstitutionally denies this fundamental right; and to deny the fundamental right to marry cannot be justified under any level of scrutiny. (Respondent Opposition, p. 42).

Under the second step of the *Energy Reserves Contract Clause* analysis, if a state law has, in fact, operated as a substantial impairment of a contractual relationship, then in doing so, the state must have a significant and legitimate public purpose. (459 U.S. at 411 [103 S. Ct. at 704].) As respondents have so eloquently emphasized in their opposition papers, the Family Code unconstitutionally denies gay people their fundamental liberty right to marry. The right to marry the person of one's choice is a fundamental right, and the Family Code denies this fundamental right in that it violates the Equal Protection and Due Process guaranteed under the Constitution of the United States and the Constitution of California, and denying the fundamental right to marry cannot be justified under any level of scrutiny. (Respondents Opposition, pp. 32-44). Moreover, in this particular instance, such denial may also violate the Americans with Disabilities Act by failing to make reasonable accommodations, which if the parties were allowed to marry, they would be entitled to such accommodations.

More directly to the point of substantial interest and legitimate public purpose in the present action, respondents incisively point out that "Notably, this

⁸ James Madison, *Federalist Papers* Mentor Books Edition (1961), No. 51., at 323.

section [Fam. Code § 300] did not always specify that marriage must be between a man and a woman. (See former Civ. Code § 4100.)” (Respondents Opposition, p. 9) Respondents correctly point out that the former statute was gender neutral between 1971 and 1977. Only after several same-sex couples attempted to marry, did the Legislature change the law, for the specific reason of excluding “homosexuals” from reaping “legal benefits designed to accommodate motherhood.” (Ibid.) Unstated is the consideration that denying such status to same-sex couples benefits insurance companies, who would otherwise have to pay such benefits. Hence, it was economics considerations and insurance interests that drove Assemblyman Peter Knight’s decision to change Family Code section 300. Given that no legitimate purpose can be said to exist in denying fundamental liberty interests to a group of people on the basis of their sexual orientation, for the benefit of the insurance industry, clearly such purpose cannot be said to be of legitimate purpose or significant interest for state action. The sole purpose behind Family Code section 300 was to discriminate against same-sex couples by preventing them from entering into the civil contract of marriage, based on religious biases and for the economic gain of corporate and insurance interests.

Moreover, respondents’ opposition papers correctly point out that the institution of marriage will not collapse or otherwise change if same-sex unions are legally condoned under California law. If the gist of California Family Code section 300 is to protect the “institution of marriage,” no significant interest can be said to exist by denying same-sex couples legal marriage status, because they are of no danger to marriage as an institution. Moreover, under the strictures of separation of church and state, religious beliefs cannot be interjected into civil marriage because such impositions would violate the Freedom of Religion clause of the 1st Amendment to the Constitution. Such religious beliefs may be more appropriately the subject of canon law within a particular religious jurisdiction, but not in this instance; canon law is not civil law.

Under the final step of the *Energy Reserves Contract Clause* analysis, if a state law has, in fact, operated as a substantial impairment to contractual relationships, then the state must have a significant and legitimate public purpose. If that is shown, the next inquiry is whether the adjustment or rights and responsibilities of contracting parties is of a character appropriate to the public purpose justifying the legislation's adoption. (459 U.S. at 412 [103 S. Ct. at 705].) In this case, it is not necessary to analyze this final step to determine whether Family Code sections 300 and 308.5 impair the contractual abilities of parties because there is no significant interest or legitimate public purpose. However, even if there was a significant interest or legitimate public purpose, Alma Marie Triche-Winston and Charel Winston assert that such an adjustment of rights and responsibilities of the contracting parties is not of a character appropriate to the public purpose sufficient to justify the adoption of Family Code sections 300 and 308.5. A review of California decisions clearly give effect to this assertion.

California courts have held that the marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the "marriage relation." (*Hendricks v. Hendricks* (1954) 125 Cal.App.2d 239 [270 P.2d 80].) However, the subject of what falls within the ambience of the public interest and the resulting judicial policies, that have evolved in support of the public interest, clearly do not fall within the scope of denying a segment of the population the fundamental constitutional liberty interest, and basic human right, of choosing with whom to contract.

The *Hendricks* court pointed out, such policy is to be applied where specific dangers to the individuals concerned and their families are affected:

It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. The 'paramount interests of the community at large' ... is a matter of primary concern. The instant case presents a picture of long continued strife not merely between husband and wife but as well involving the two children in the marital quarrels... Public policy cannot well be served by denying a divorce to both parties. Since both parties are, under

the evidence, entitled to a divorce on the ground of cruelty, they should be granted that relief without further litigation. (Id. 125 Cal.App.2d at 242 [270 P.2d at 82].)

The *Hendricks* opinion was cited favorably in *In re Peeler* (1968) 266 Cal.App.2d 483 [72 Cal.Rptr. 254]. *In re Peeler* dealt with the issue of drug abuse in evaluating the reasonableness of additional conditions for probation for a felon who had recently married. Thus the issue was one of separating newly married spouses vis-à-vis public interest in preventing and stopping further drug abuse.

The court held:

'Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival. *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [86 L.Ed. 1655, 1660, 62 S.Ct. 1110]. See also *Maynard v. Hill* (1888) 125 U.S. 190 [31 L.Ed. 654, 8 S.Ct. 723].' (*Loving v. Virginia* (1967) 388 U.S. 1, 12 [18 L.Ed.2d 1010, 1017, 87 S.Ct. 1817]; Cf. *Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L.Ed.2d 510, 85 S.Ct. 1678].) There is a definite and vital public interest in the marriage relation (*Hendricks v. Hendricks* (1954) 125 Cal.App.2d 239, 242 [270 P.2d 80].) *Loving v. Virginia*, supra, as noted, cites the early case of *Maynard v. Hill*, 125 U.S. 190 [31 L.Ed. 654, 8 S.Ct. 723] from which we quote (at page 211 [31 L.Ed. at p. 658]); 'It [marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.' We think it unnecessary to multiply authority for the public policy involved in maintaining the integrity of marriage as an institution. (266 Cal.App.2d at 491-492 [72 Cal.Rptr. at 260]).⁹

Thus, prevention of drug abuse is within the ambit of public policy intrusion into marital relations. Other California courts who have examined Family Code section 300 within the context of public policy have held that lawful marriage requires the consent of a man and a woman to a personal relationship

⁹ Non-standard citation format as taken from Westlaw.

arising out of a civil contract. (*Welch v. State* (2000) 83 Cal.App.4th 1374 [100 Cal.Rptr.2d 430].)

The *Welch* case involved a wrongful death action against the State and the Department of Transportation by the putative spouse of a driver, who was killed, when a tree hit his truck. The lower court granted defendants' motion for summary adjudication. The putative spouse appealed. The Court of Appeal held that the putative spouse's claim, that her common law vows with the driver who was killed established a valid marriage, was unreasonable.

In light of the holdings of these cases, it can be said that California courts have held that the public interest with respect to marriage is involved in preventing continued drug abuse by parolees to the point of impacting the parties' ability to consummate the marriage on an ongoing basis by imposing restrictions on one of the spouses, not forcing people who hate each other to remain married; and invalidating the underlying strictures of common law marriage as it pertains to civil marriage. California courts have not held that public policy requires preventing parties, who are otherwise legally entitled, to enter into the marriage contract from entering into marriage.

In this action, it is a far different situation where public policy is being advanced to exclude a group of individuals, who have the legal capacity to enter into the civil contract of marriage, but who are of the same sex. Such policy sets such group of the population as a class apart, something that is repugnant to the principles of equal rights under the 13th, 14th, and 15th Amendments to the Constitution of the United States.

Alma Marie Triche-Winston and Charel Winston assert that California Family Code sections 300 and 308.5, by restricting the parties from entering into a civil contract of marriage to only members of the opposite sex, substantially impair the contractual ability of parties, who are otherwise legally entitled to enter into such contract, whose purpose is neither illegal nor illicit (under California law, marriage is not an illegal activity) and which is founded on the basis of the

mutual consent of both parties. In fact, these laws should be nullified and voided, thus reverting back to former Civil Code section 4100, which as previously discussed, are gender neutral and do not thereby violate the constitutional rights of those individuals, who wish to marry each other and are of the same sex.

Alma Marie Triche-Winston and Charel Winston do not sympathize with the view advocated by some, that because one of the statutes challenged (Proposition 22) “took the form of a recent voter initiative favored by 61 percent of the electorate may make it analytically difficult to say that this measure violates the California Constitution.”¹⁰ The fact that a majority of the electorate wishes to impose rules and regulations that impact the fundamental liberty interests of another segment of the population is clearly unconstitutional. Such tyranny of the majority does not always justice make. It is certain to suppose that during the period preceding the American Civil War, the majority of the voting population (white males only) of the thirteen southern states that ultimately seceded from the Union would have voted for a proposition favoring continued slavery. Such proposition, however legal, would still be unjust, immoral, and unconstitutional. The rationality of the law is in the mathematical precision of its propositions. In this case, such calculus is simple enough: Equal rights must be that, equal; without qualifications, variations, approximations, or any differential or integral functions thereof. *Equal rights cannot be said to be equal when inequalities exist.* Even among classes of human beings, equality under the law must exist. Equal rights cannot be said to exist in a situation, where one class is *primus inter pares*: heterosexual marriage partners vis-à-vis homosexual marriage partners.

¹⁰ Vikram David Amar supra, at 4.

II

RESPONDENTS PROPERLY GRANTED MARRIAGE LICENSE TO APPLICANTS WHO ARE DISABLED, BECAUSE OF RESPONDENTS' OFFICIAL DUTY TO ENSURE THAT DISABLED INDIVIDUALS ARE PLACED ON EQUAL FOOTING AND NOT DENIED BENEFITS

Alma Marie Triche-Winston and Charel Winston are disabled under the Americans with Disabilities Act (ADA) of 1990. (42 U.S.C.A. §§ 12101 et seq.) They contend that respondents had no other choice, but to issue the marriage license to them. Government and other public officials, pursuant to the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, are required to make accommodations to individuals disabled under the ADA. As such, they assert that respondents acted in accordance with their duties by providing the necessary accommodations. In this case, the accommodation was the marriage license.

In formulating the ADA, the Congress of the United States found (among others):

...

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

....

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and ...(42 U.S.C.A. § 12101(a))

In order to address the findings, Congress passed the ADA. The specific purpose behind the ADA is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Courts have held that the purpose of the ADA is to prevent “old-fashioned and unfounded prejudices” against disabled persons from interfering with those individuals' rights to enjoy same privileges and duties afforded to all United States citizens. (*Galloway v. Superior Court of District of Columbia* (D.D.C., 1993) 816

F.Supp. 12; *E.E.O.C. v. Kinney Shoe Corp.* (W.D.Va.1996) 917 F.Supp. 419, affirmed 104 F.3d 683, 146 A.L.R. Fed. 683, purpose of ADA, like that of similar statute such as the Rehabilitation Act, is to ensure that handicap individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.)

Alma Marie Triche-Winston and Charel Winston are both disabled under the ADA. As such, they are the type and class of individuals that the ADA was written to protect. They have unique and distinct requirements and rights under the ADA. While Alma Marie Triche-Winston and Charel Winston generally concur with respondents' equal process challenges to petitioners' complaint, they assert that with respect to them, such equal protection analysis does not go far enough.

ADA provides that accommodations must be made for individuals such as Alma Marie Triche-Winston and Charel Winston. The United States Congress has determined that the Equal Protection Clause of the 14th Amendment to the Constitution of the United States protects all Americans with disabilities from discriminatory and unfair practices. Congress may act to remedy such discrimination under its enforcement power, for example, by enacting additional ADA legislation. (*Martin v. State of Kan.*, (D.Kan.1997) 978 F.Supp. 992.)

In this case, respondents properly determined that under the ADA, Alma Marie Triche-Winston and Charel Winston required accommodations to place them on equal footing with all other similarly situated members of the public at large.

For example, during the process of being issued a marriage license on February 15, 2004, the Mayor's office made numerous accommodations for Alma Marie Triche-Winston and Charel Winston per the ADA, to include assigning Mabel S. Teng, San Francisco City Assessor-Recorder, and Minna Tao, Deputy Assessor-Recorder, to personally escort the couple through the marriage process.

The courts have held that the central purpose of the ADA is to place those Americans with disabilities on equal footing with others. (*Petition of Rubenstein* (Del.Supr.1994) 637 A.2d 1131.) This purpose furthers the mandate established by the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, i.e., to provide all parties with equal protection under the law. Alma Marie Triche-Winston and Charel Winston assert that only by issuing their marriage license were respondents able to place them on an equal footing with other similarly situated members of the public.

In fact, Alma Marie Triche-Winston and Charel Winston assert that even if the marriage licenses issued by respondents between February 12, 2004 and March 12, 2004 when this Court mandated that they cease issuing said licenses, may ultimately be voided, theirs may not be due to their unique circumstances and disabilities.

It must be restated that the purpose of the ADA is to place those with disabilities on equal footing with others. (*Petition of Rubenstein*, supra, 637 A.2d 1131.) In this case, through their marriage, Alma Marie Triche-Winston and Charel Winston are placed on equal footing with other individuals, which is the objective of the ADA. Thus, in addition to concerns for equality under the law, their marriage furthers the objectives of the ADA by placing them on equal status with individuals who are not disabled.

On the other hand, if their marriage is voided, Alma Marie Triche-Winston and Charel Winston assert that they would lose important rights and protections that are crucial for couples, in particular disabled couples under the ADA, to protect themselves, and care for each other. As stated supra, during the marriage license issuance process, they required special accommodations and treatment. Moreover, they would be denied marriage benefits such as: social security benefits; insurance benefits (auto, home, accident, medical); tax benefits (state and federal income taxes, property taxes); bank loan benefits (home, auto); and more critically, the right to make medical and life-threatening decisions, as well as

important legal decisions, the least of which include inheritances and property dispositions. Moreover, their marriage legitimizes a contractual commitment between the two parties as fiduciaries, both individually and as a family unit. Finally, their marriage provides them equal rights between, and for, both parties in legal actions in fiduciary stead, without both parties necessarily present. This is in harmony with the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, and is a very important consideration given their individual medical conditions and disabilities under the Americans with Disabilities Act.

As stated supra, in enacting the ADA, Congress' purpose was:

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

In this case, respondents properly determined it necessary to issue Alma Marie Triche-Winston and Charel Winston their marriage license as reasonable accommodations for them required by the ADA. Consequently, even if all other licenses are ultimately deemed void, theirs may not be, because it provides them with accommodations that place them on equal footing with others, which is the purpose and objective of the ADA.

III

IN ORDER TO LAY A DUE FOUNDATION FOR THAT SEPARATE AND DISTINCT EXERCISE OF THE DIFFERENT POWERS OF GOVERNMENT, WHICH TO A CERTAIN EXTENT IS ADMITTED ON ALL HANDS TO BE ESSENTIAL TO THE PRESERVATION OF LIBERTY, IT IS EVIDENT THAT EACH DEPARTMENT SHOULD HAVE A WILL OF ITS OWN¹¹

Respondents will argue that Article III, section 3.5 of the California Constitution does not prohibit respondents from fulfilling their duty to uphold the Federal and State Constitutions, by noting that though a county is a political subdivision of a state, this does not make it a state administrative agency. (Respondent Opposition, p. 26). Because it is a political subdivision, respondent is bound and directly responsible for their own actions under the law. When faced with conflicting laws or possible conflicts of law, respondents' paramount duty is to obey federal law. (Respondent Opposition, p. 29). Under the Supremacy Clause of the United States Constitution, state and local officials have no power to disobey federal law. A state cannot compel or empower them to do so. (Ibid). As James Madison most properly observed: "The interest of the man must be connected with the constitutional rights of the place."¹²

In this case, respondents do have a will of their own and have properly deemed that Family Code sections 300 and 308.5 violate the fundamental liberty interests and basic human rights of a segment of the population, gay people. Alma Marie Triche-Winston and Charel Winston assert that in addition to the authorities cited by respondents, there is precedential authority under international law, which

¹¹ Federalist Papers, No. 51.

¹² Federalist Papers, No. 51 at 322.

further strengthens respondents' that they are not bound to impose laws which violate basic human rights, and if they do, they may be held responsible for the resultant wrongs, and any defense that says "I was just following orders" will not exonerate them.

a. Respondent has the authority and responsibility not to implement laws within its jurisdiction that violate the federal constitution and basic human rights

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments...

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.¹³

Respondent well argues that if this Court agrees with petitioner's reading of Section 3.5, this could "unfairly expose local governments to monetary liability." (Respondents Opposition, p. 28.) Moreover, "to force a local government against its will to comply with unconstitutional state legislation while simultaneously exposing the local government to substantial liability for that forced unconstitutional conduct is inherently unfair." (Ibid.)

California Family Code section 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman..." and Family Code section 308.5 provides: "Only marriage between a man and a woman is valid or recognized in California" these provisions impair the ability of parties to enter into contracts in California and as such are unconstitutional. Since Family Code sections 300 and 308.5 are unconstitutional, an official is not bound and, in fact, has a duty not to enforce such laws.

¹³ Federalist Papers No. 51, at 323.

Alma Marie Triche-Winston and Charel Winston assert that respondents' position is buttressed by international law, which holds that an official is not bound by laws or orders, which go against the basic interests of humanity, and whose implementation would result in the gross violations of human rights to a class of individuals.

Such precedent was clearly established during the trials of the war criminals in the aftermath of World War II, particularly at the International Military Tribunal (IMT) at Nuremberg.¹⁴ At Nuremberg, twenty-two high ranking members of the Nazi Third Reich were tried for crimes against humanity, with fourteen of those officials being indicted and convicted of crimes connected to the extermination of Jews. (M. Lippman Years After Auschwitz: Prosecutions Of Nazi Death Camp Defendants (1986) 11 Conn. J. Int'l L. 199, 277.)

In addressing the precedential authority and legitimacy of the military tribunals, "a clear position was taken by the American military tribunal" in a trial case of SS guards at Dachau, one of the more infamous of the death camps:

"The Court once again repeats that although it was appointed by a victorious country as a court of military administration in the defeated country, it nevertheless rests its decisions on international law and those laws of humanity and customs of human conduct which are universally recognized among civilized peoples."¹⁵

b. Under international law, an official is not bound to follow laws, which lead to the violation of the human rights of others

"[The] Nuremberg Charter provided in Article 7 that "[t]he official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from

¹⁴ It goes without saying that Alma Marie Triche-Winston and Charel Winston are not suggesting that Family Code sections 300 or 308.5 equate to Nazi laws which allowed the killing of Jews and other "undesirables." The precedent is cited for purposes of comparative analysis purposes only.

¹⁵ The Nuremberg Trial, Collection..., Vol 3., p.445; directly quoted in Clark at 270-271.

responsibility or mitigating punishment.”¹⁶ Article 7 IMT maintains its viability most recently in the trials in the Former Yugoslavia.¹⁷ The Commentary by UN Bodies provides:

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates¹⁸

Therefore, under international law an individual is held responsible for giving unlawful orders or for failing to prevent the unlawful behavior on the part of subordinates. Moreover, a person may not claim, “I was only following orders” as a viable defense to the violation of the basic human rights of others.

Respondents’ opposition papers properly addresses the dilemma they face, where they are being compelled to violate federal law (Respondents Opposition, p. 29), to enforce unconstitutional state legislation which violates fundamental liberty interests and basic human rights of gay people, thereby exposing them, as a local government entity, to monetary liability. (Respondents Opposition, p. 28.)

In this case, respondents, as local executive officials, could be held responsible for enforcing such laws. “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.” (Respondents Opposition, p. 31.)

c. Under international law, an official is not exonerated from violations of laws against humanity by claiming, “We were following orders”

¹⁶ Roger S. Clark. Codification of the Principles of the Nuremberg Trial and the Subsequent Development of International Law, in George Ginsburgs and V.N. Kudriavtsev, eds. The Nuremberg Trial and International Law. Martinus Nijhoff Publishers, 1990, p. 261

¹⁷ M. Cherif Bassiouni and Peter Manikas. The Law of the International Criminal Tribunal for the Former Yugoslavia. Transnational Publishers, 1996, p. 340.

¹⁸ Report of the Secretary General, id. p.341

Respondent properly argues, “This constitutional restraint on all official action is a bedrock principle on which our democracy depends. ‘We were just following orders’ is not defense to our government’s intrusion on its citizens’ constitutional rights.” (Respondent Opposition, p.20). Article 8 IMT provided “[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.”¹⁹ Article 8 of the IMT was given special consideration in the case of *The Government of Israel v. Adolph Eichmann* (Isr. Dist. Ct. 1961-1962) 36 I.L.R. 5; *aff’d* in 36 I.L.R. 277 (Isr. Sup. Ct. 1962); See Law of ICT, p. 399.) Eichmann, SS Lieutenant-Colonel was Chief of the Jewish Office of the Gestapo [Nazi Secret Police] during World War II and implemented the 'Final Solution' which aimed at the total extermination of European Jewry. At the end of the war he fled Germany and eventually settled in Argentina. He was tracked down by Israeli secret agents on May 2, 1960, living under an assumed name in a suburb of Buenos Aires. Nine days later he was secretly abducted to Israel, to be publicly tried in Jerusalem. The trial, which aroused enormous international interest and some controversy, took place between April 2 and August 14, 1961. On December 2, 1961 Eichmann was sentenced to death for crimes against the Jewish people and crimes against humanity. On May 31, 1962 he was executed in Ramleh prison.²⁰

At his trial, Eichmann consistently stated that everything he did was in response to superior orders. The District Court of Jerusalem rejected this defense, stating:

““We reject absolutely the accused’s version that ... [i]n fulfilling this task [the extermination of Jews], the accused acted in accordance with general directives from his superiors, but there still

¹⁹ International Conference of Military Trials. London, 1945. Report of Robert H. Jackson United States Representative

²⁰ Jewish Virtual Library, Adolph Eichmann, in <http://www.us-israel.org/jsource/Holocaust/eichmann.html>. Accessed March 7, 2004, 9:22 p.m. PST.

remained to him wide powers of discretion which extended also to the planning of operations on his own initiative.”²¹

The Israeli Supreme Court also dismissed Eichmann's defense of necessity. There was no evidence that he had acted under fear or threat. He was intent on cleansing Europe of Jews and opposed the emigration of even a few thousand Hungarians. Eichmann also could have avoided being an accessory in genocide; the slightest remonstrance or remorse would have resulted in his transfer to another post. (Eichmann, 36 I.L.R. at 340-41.)

Articles 7 and 8 of the International Military Tribunal, Nuremberg (IMT) continue to be relevant, providing precedential and moral authority and guidance to the world community. In 1993 the Security Council of the United Nations, Resolution 808,²² established an international tribunal for the purpose of prosecuting persons for violations of international humanitarian law in the former Yugoslavia. Thereafter the Security Council adopted a Statute of the International Tribunal via Security Council Resolution 827 (1993).²³ Article 7(4) of the Statute provides: “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation...”²⁴ Moreover, the International Law Commission in Article 11 of the 1991 Draft Law of Crimes provides:

“The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if.... it was possible for him not to comply with that order.”²⁵

²¹ *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5, (First Instance) Judgment, § 180; cited in Law of ICT, p. 399.

²² S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. Doc. S/RES/808 (22 Feb 1993). See Special Task Force of the ABA Section of International Law and Practice. Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia. (1993), pp. 59-71.

²³ Law of ICT, p. 257.

²⁴ ABA Task Force ABA, p.37.

²⁵ 1991 Report of the ILC, at 242; cited in Law of ICT, at 404.

In further rejecting the defense of acting under superior orders to justify the commission of a crime, the ABA Special Task Force observed that other courts have established a standard of facial illegality, when dealing with crimes under international law. For example, in *Public Prosecutor v. Leopold* (47 I.L.R. 464 (Austria Sup. Ct., 1974) cited in ABA Task Force, at 39.), the defendant was convicted of the murder of Poles and Jews, who were inmates of a labor camp in Poland during World War II. The defendant who was a German S.S. deputy troop leader at the labor camp, claimed to have acted pursuant to superior orders. In rejecting this defense, the court said:

“[I]t must be said that orders to kill... inmates of this labour [sic] camp... were therefore straightaway recognizable as illegal. Furthermore, the fact must be considered that orders to kill inmates of the labour camp, irrespective of their form and extent, which were clearly recognizable by anybody as illegal, could never have justified the person executing such orders.”²⁶

While the underlying facts giving rise to culpability differ by a degree of magnitude, they are of useful value for comparative analysis. Nazi laws which authorized and condoned the extermination of whole peoples are clearly illegal, recognizable by anyone as illegal, and could not serve as justification for anyone to follow them. On the other hand, California Family Code section 300 provides: “Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary.” California Family Code section 308.5 provides: “Only marriage between a man and a woman is valid or recognized in California.” As was discussed supra, these provisions significantly impair the ability of parties to enter into the marriage contract in California. As such, clearly California Family Code sections 300 and 308.5 are unconstitutional. Moreover, they are unconstitutional, because they impair the fundamental liberty interests of a segment of the population. Because Family Code sections 300 and 308.5 are recognizable as

²⁶ 47 I.L.R., supra, at 466 (emphasis added). Cited in ABA Task Force, at 39.

unconstitutional, the enforcement of such laws, irrespective of their form and extent, which were clearly recognizable by respondents (or anyone for that matter) as illegal, could never have justified to enforce such statutes. Thus, respondents have properly determined that an official is not bound and, in fact, has a duty not to enforce such laws.

Alma Marie Triche-Winston and Charel Winston assert respondents' position is buttressed by international law, which holds that an official is not bound by laws or orders which go against the basic interests of humanity, and whose implementation would result in the gross violation of human rights to a class of individuals. Respondents have met these duties and obligations in the manner so required.

CONCLUSION

Finally, Alma Marie Triche-Winston and Charel Winston would like to remind the Court of the fundamental doctrines, upon which our country was founded. People have been coming to America, since the Mayflower landed in 1620, seeking freedom from oppression and tyranny, in order to build a better life for themselves and their families. It has been said that America is a melting pot of people from all over the world. Irrespective of race, ethnicity, religion, political beliefs, or economic distinction, we are a country, whose ideals are the basis of our humanity, civility, tolerance, and respect for others. Our founding forefathers wisely and courageously provided us with the fundamental doctrines from which our country was born. By our diligence and dedication to create a free America, free from discrimination and the bondage of inequality, we remind ourselves of the eloquence and poignancy in the words of our Declaration of Independence:

We hold these *Truths* to be self-evident, that *all Men are created equal*, that they are endowed by their Creator with certain

unalienable Rights, that among these are *Life, Liberty, and the Pursuit of Happiness*. [emphasis added]

These, our most basic and fundamental doctrines, whence all of our laws derive, established the foundation for equal human rights for each and every American. These doctrines are the conscience, the soul and the lifeblood of our country. As such, they provide a basis of right and wrong, to establish a standard of law by which to gauge all other laws, while providing a moral and inchoate compass of humanity for all Americans to follow.

No law must take away from these fundamental rights. Any law which infringes or impairs these rights, even in the most tangential of circumstances, violates the fundamental rights of every American. Moreover, it is for this reason that religious considerations must not be permitted to enter the realm of law. This country was founded on the basis of freedom of religion and the separation of church and state. This issue was most recently addressed in Alabama, when a statue representing the Ten Commandments was ordered removed from the Alabama Supreme Court. Laws that infringe on the fundamental freedoms enjoyed by all Americans must not be tolerated. Equal rights cannot be said to exist, where any class is *primus inter pares*. In the case of heterosexual marriage partners vis-à-vis homosexual marriage partners, the distinction of one class over the other violates the fundamental laws of equality that govern our country.

Moreover, an official, at any level of government, who encounters such laws, has a legal and moral duty under the Constitution of the United States and the strictures of international law not to enforce such laws. In this case, respondents had no choice, but to act as they did, because these laws violated basic principles of equality among Americans on the basis of their sexual orientation.

Our duty as a free society is to uphold the freedoms and equalities as espoused in our Declaration of Independence. Any laws that seek to deny these

fundamental rights of life, liberty, and the pursuit of happiness are unconstitutional and as such violate the fundamental rights of every human being in this country.

WHEREFORE, Alma Marie Triche-Winston and Charel Winston assert that for these reasons the California Supreme Court must deny petitioner's request, and any requests, that violates these self-evident Truths that all men are created equal.

Dated: March 19, 2004

Very Respectfully Submitted,

By: _____
Alma Marie Triche-Winston
In Pro Per

By: _____
Charel Winston
In Pro Per

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1))

The text of this petition consists of 11,840 words as counted by the Word 2000 word processing program used to generate this brief. This word count includes the proof of service.

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In Propria Persona

IN THE
SUPREME COURT OF CALIFORNIA

Bill Lockyer,
Petitioner,
vs.
City of San Francisco, et al.,
Respondents.

Case No.: S122923

PROOF OF SERVICE APPLICATION
FOR LEAVE TO FILE AMICI CURIAE
BRIEF IN SUPPORT OF RESPONDENT

I am a citizen of the United States and a resident of the County of El Dorado. I am over the age of 18 years and am party to the within above-entitled action. My business address is _____.

On _____ I served the within document entitled:

1. APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT
2. AMICUS BRIEF

by personally serving the documents to:

Document 1: Supreme Court of California (Original plus 2 copies) 350 McAllister Street San Francisco, CA 94102	Document 2: Supreme Court of California (Original plus 13 copies) 350 McAllister Street San Francisco, CA 94102
Dennis Herrera (1 Copy of each) City Attorney 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102	

By personally placing the document in an envelope and sending said envelope with the document via overnight mail, tracking number _____, to :

Bill Lockyer (1 Copy of each) Attorney General 1300 I Street Sacramento, CA 95814	
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on _____, at _____, California.

Declarant