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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND, a California nonprofit public benefit corporation, on it own behalf and on behalf of the people of California, Petitioner, vs. CITY AND COUNTY OF SAN FRANCISCO, a charter city and county, GAVIN NEWSOM, in his official capacity as Major of San Francisco, NANCY ALFARO, in her official capacity as the San Francisco County Clerk, and DOES 1 through 100, Respondents.	Case No. JLW 04-03943 Complaint Filed: February 13, 2004 MEMORANDUM OF POINTS AND AUTHORITIES OF INTERVENOR-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF MANDATE AND IMMEDIATE STAY Date: February 17, 2004 Time: 2:00 p.m.
PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND, Petitioner, vs. DEL MARTIN AND PHYLLIS LYON, SARAH CONNER AND GILLIAN SMITH, MARGOT MCSHANE AND ALEXANDRA D'AMARIO, DAVID SCOTT CHANDLER AND JEFFERY WAYNE CHANDLER, AND THERESA MICHELLE PETRY AND CRISTAL RIVERA-MITCHEL, Intervenor-Respondents.	

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I. INTRODUCTION

On February 10, 2004, San Francisco Mayor Gavin Newsom ("Mayor Newsom") issued a public statement indicating that, based on his analysis of the California Constitution and of recent court decisions from Massachusetts and other jurisdictions, he believed that excluding same-sex couples from the right to marry violates the equality guarantees of the California Constitution. See Mayor's Statement of Feb. 10, 2004. Mayor Newsom directed the San Francisco County Clerk to determine what changes would need to be made to the marriage license forms to make them equally applicable to same-sex couples. See Mayor's Directive of Feb. 10, 2004. Over the next two days, the County Clerk made the necessary changes, pursuant to the Mayor's directive. On February 12, 2004, Mayor Newson directed the County Clerk to begin using the amended forms and to issue marriage licenses without regard to gender or sexual orientation. As a result of the Mayor's directive, California is now the first jurisdiction in the United States in which same-sex couples are able enter civil marriages on an equal basis with different-sex couples.[1]

Since February 12th, more than 2000 lesbian and gay couples have obtained marriage licenses in San Francisco, including four of the Intervenor couples in this case. Many more same-sex couples are expected to join in doing so in the future, including the fifth of the Intervenor couples now before the Court.

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[1] On November 18, 2003, the Massachusetts Supreme Judicial Court held that excluding same-sex couples from the right to marry violated the Massachusetts Constitution and gave the state 180 days, until May 17, 2004, to implement the decision. Goodridge v. Dep't of Public Health (Mass. 2003) 440 Mass. 309; see also In re Opinions of the Justices to the Senate (2004) 2004 Mass. LEXIS 35. Same-sex couples are also able to marry in the Netherlands, Belgium, and the Canadian provinces of Ontario and British Columbia. See Act on the Opening Up of Marriage, Stb. N.R. 9 (2001) (Neth.) *available at* http://ruljis.leidenuniv.nl/user/ cwaaldij/www; See Loi ouvrant le mariage a des personnes de meme sexe et modifiant certaines dispositions du Code civil (Feb. 13, 2003) (Belg.), Moniteur Belge, Feb. 28, 2003, at 9880-82; Halpern v. Toronto (City) (2003) 60 O.R. (3d) 321 [172 O.A.C. 276]; EGALE Canada, Inc. v. Canada (Attorney Gen.) (2003) 13 B.C.L.R. (4th) 1; see generally Developments in the Law II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-sex Marriage in the United States and Europe (May 2003) 116 Harv. L. Rev. 2004.

The Petitioner in this action, which claims to represent "all Californians," is represented by the Alliance Defense Fund, based in Scottsdale, Arizona, and by the Center for Marriage Law, based in New Milford, Connecticut. On February 13, 2004, the Petitioner filed a petition for a writ of mandate and requested an immediate stay ordering Mayor Newsom and the County Clerk to cease and desist issuing marriage licenses to and/or solemnizing marriages of same-sex couples pending an Order to Show Cause hearing before this Court. The Petitioner seeks the issuance of an alternative writ of mandate and immediate stay and a temporary and permanent injunction against Respondents the City and County of San Francisco ("the City"), Mayor Newsom or the County Clerk expending public funds by issuing certain marriage licenses or solemnizing certain marriages. In addition, the writ petition ultimately seeks "a judicial declaration that any and all marriage licenses issued, and any all marriages solemnized, for couples other than those constituting only an unmarried male and an unmarried female, are invalid."[2]

[2] See Petition Prayer, par. 4, at p. 5; *see also* Memorandum of Points and Authorities in Support of Petition ("Petitioner's Ps & As") at pp. 1, 13. Nonetheless, at this stage of the proceedings, the validity of marriage licenses already issued to same-sex couples and marriages already entered by them is not at issue. See [Proposed] Alternative Writ of Mandate and Immediate Stay, which only seeks an order that Respondents "cease and desist issuing marriage licenses and/or solemnizing marriages of same-sex couples."

Even if Petitioner had asked the Court to rule on the validity of existing marriages between same-sex couples at the Tuesday, February 17, 2004 hearing, there is no legal basis for doing so in this action. Third parties cannot challenge the validity of a marriage unless it is void, as opposed to merely voidable. See Estate of Gregorson (1911) 160 Cal. 21, 25. Family Code §§ 2200-01 are the only sections to address "void marriages" and establish that only incestuous marriages and bigamous or polygamous marriages are void. Family Code § 300, which limits marriage to different-sex couples, Family Code § 301, which limits who has capacity to consent to and consummate marriages, and Family Code § 308.5, which restricts recognition of out-of-state marriages to different-sex couples, do not define marriages between members of the same sex as either "void" or voidable."

Moreover, even attacks on "voidable marriages" by a party with a direct personal interest in the outcome have been uniformly unsuccessful. See Stark v. Bower (1941) 48 Cal. App. 2d 209 (effort by heirs to invalidate marriage failed); Greene v. Williams (1970) 9 Cal. App. 3d 559 (effort by mother of deceased husband to invalidate marriage failed).

II. SUMMARY OF ARGUMENT

As explained below, the Petitioner has failed to meet the heavy burden required to justify its extraordinary request for a stay or other preliminary relief to prevent the ongoing implementation of the Mayor's directive and to require the City to resume the prior practice of discriminatorily denying marriage licenses to same-sex couples. The Petitioner has failed to identify any cognizable harm -- much less any irreparable harm -- that will result if their request for a stay, or other interim relief, is not granted. The Petitioner also has failed to show that it has a likelihood of success on the merits. In contrast, granting the relief sought by the Petitioner would cause severe harm to the Intervenors and the more than 2000 other same-sex couples who are now married, as well as to many other California same-sex couples who wish to marry. It also would cause harm to all lesbian and gay people in this state, regardless of whether they wish to marry at this time, who will be injured by the resumption of discrimination that marks them with a badge of inferiority and excludes them from one of our society's most cherished and fundamental rights. Granting the relief sought by the petitioner additionally would undermine the state's strong interest in supporting marriage.

Moreover, the merits of this case strongly favor the Respondents. In declining to enforce what he correctly believed to be an unconstitutional restriction in the state's marriage law, Mayor Newsom properly and appropriately exercised his duties as the chief executive of the city and properly and appropriately complied with his sworn duty to uphold the California Constitution. As a result, the immediate stay requested by Petitioner must be denied and the Petition for Writ of Mandate and claims in the Complaint ultimately must be rejected by this Court.

III. PETITIONER IS NOT ENTITLED TO A STAY OR OTHER IMMEDIATE RELIEF.

In this Writ of Mandate proceeding brought under California Code of Civil Procedure Sections 1085 and 1086, Petitioner states that it is seeking an "immediate stay of the Clerk's activities." Petitioner's Ps & As at pp. 10-11. That request for an immediate stay is what is before the Court on Tuesday, February 17, 2004. In support of this request for an immediate stay, Petitioner cites only to an irrelevant section of the California Rules of Court (Rule 56(c)(4)) which applies to petitions for an immediate stay of a trial court's decision. Contrary to Petitioner's claims, there is no provision in Sections 1085 and 1086 for an immediate stay. Moreover, given that other provisions for administrative writs of mandate do allow for stays, such relief appears not to be authorized in a writ proceeding under Sections 1085 and 1086. Cf., e.g., Cal. Code Civ. Proc. §1094.5(g)-(h) (authorizing trial court to stay operation of a "final administrative order" pending judgment of the court on a petition for writ of administrative mandamus challenging the administrative order).

A. Even Under the Standard Governing Other Forms of Preliminary Relief Against the Government, Petitioner Has Not Demonstrated, and Cannot Establish, a Significant Showing of Irreparable Injury Between Now and the Hearing of an Order to Show Cause.

To the extent that Petitioner's request for an "immediate stay" is actually an application for a temporary restraining order against the Respondents, Petitioner cannot meet the standard governing such applications.[3] In general, applications for preliminary injunctive relief require a showing both (1) that the moving party will suffer irreparable harm absent the requested interim court order that outweighs any harms that may be caused by such an order; and (2) that the moving

[3] In its papers, Petitioner does not provide the standard that applies to their request for preliminary relief. Rather, Petitioner cites only to the standard for a writ. See Petitioner's Ps & As at p. 10.

party is likely to succeed on the merits of its claims. White v. Davis (2003) 30 Cal.4th 528, 554. In considering a temporary restraining order, the focus should be on what danger may exist to the rights of the parties between that hearing and the date of the hearing on the application for a preliminary injunction. Hon. Robert I. Weil & Hon. Ira A. Brown, Jr., California Civil Practice Guide: Civil Procedure Before Trial (2001) ¶ 9:601, p. 9(II)-22.2. "*The ultimate goal* of any test to be used in deciding whether a preliminary injunction should issue *is to minimize the harm which an erroneous interim decision may cause.*" White v. Davis, 30 Cal.4th at 554 (citing IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 73 (emphasis in original); Robbins v. Superior Court (1985) 38 Cal. 3d 199, 205 (the court must exercise its discretion "in favor of the party most likely to be injured.").

Moreover, where, as here, a public officer or entity is sought to be enjoined, there must be a "significant" showing of irreparable injury because there is a "general rule against enjoining public officers or agencies from performing their duties." Tahoe Keys Prop. Owners Ass'n v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471. See also King v. Meese (1987) 43 Cal 3d 1217, 1226 (when the government is a respondent, a court must also examine whether or not the harms faced by the people outweigh the harms faced by the party seeking the preliminary relief). As explained below, Petitioner has not met, and cannot meet, these standards. Indeed, Petitioner has failed to identify any cognizable harm -- much less any irreparable harm -- that will result if its request for a stay, or other interim relief, is not granted. By contrast, granting the relief sought by Petitioner would cause severe harm to the Intervenors and the more than 2000 other same-sex couples who are now married, as well as to many other California same-sex couples who wish to marry. It also would cause harm to all lesbian and gay people in this state, regardless of whether they wish to marry at this time, who will be injured by the resumption of discrimination that marks them with a badge of inferiority and excludes them from one of our

society's most cherished and fundamental rights. Granting the relief sought by Petitioner also would undermine the state's strong interest in supporting marriage.

1. Petitioner Has Failed To Allege – Much Less Demonstrate – Either Interim or Irreparable Harm.

In Petitioner's Ps & A's, Petitioner fails even to allege, must less demonstrate any interim or irreparable harm.

Petitioner identifies only three reasons why the Court should grant the relief requested, but does not even argue that any of these reasons constitute irreparable injury. First, Petitioner argues that an immediate stay is appropriate because the Respondents are violating state law. Petitioner's Ps & As at p. 11. Second, Petitioner argues that: "[i]f this court does not issue an immediate stay, the Clerk is likely to issue thousands of marriage licenses to same-sex couples, who will in turn use those marriage licenses to initiate litigation throughout the state and the country. Such litigation, based on illegal marriage licenses, can serve only to multiply the workload of already overburdened courts." Petitioner's Ps & As at p. 11. Third, Petitioner contends that "Respondents have illegally expended and wasted, and threaten and will continue to illegally expend and waste, the public funds of the City and County of San Francisco by issuing marriage licenses to, and solemnizing marriages of, persons other than couples constituting an unmarried male and an unmarried female within the City and County of San Francisco in violation of law." Petitioner's Ps & As at p. 12. None of these constitute irreparable interim injury.

(a) A violation of state law does not constitute an irreparable injury.

It is well settled that a violation of state law does not constitute a grounds upon which to grant preliminary relief. See, e.g., White v. Davis, 30 Cal.4th at p. 557 (reversing grant of preliminary injunction and noting that plaintiffs had "failed to cite any authority to support the contention that a taxpayer's interest in forestalling an alleged continuing violation of the state Constitution constitutes the type of irreparable injury that will support granting a preliminary

injunction, and that prior Court of Appeals cases had rejected that contention) (citing Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648; Loder v. City of Glendale (1989) 216 Cal.App.3d 777; Cohen v. Board of Supervisors (1986) 178 Cal. App. 3d 447).

(b) The fact that thousands of marriage licenses already have been granted militates against preliminary relief.

Second, Petitioner argues that, if the Clerk is not enjoined, thousands of marriage licenses will be granted, and people "will in turn use those marriage licenses to initiate litigation throughout the state and the country" and this will increase the "workload of already overburdened courts." Petitioner's Ps & As at p. 11. Contrary to Petitioner's contention, the fact that thousands of marriage licenses already have been granted strongly militates against any form of preliminary relief. Whether these licenses are valid is of profound important to the couples themselves, as well as to all of the government and private entities with which they may come in contact. This question should not be taken lightly, and certainly should not be resolved until the issue has been fully briefed, argued, and considered by the Court. Moreover, because so many marriage licenses already have been granted, there is no significant increase in harm (if any) by the issuance of further licenses pending proper consideration of these issues.

Petitioner's argument concerning an alleged flood of litigation is based solely on hypothetical speculation and fear rather than on any concrete evidence. In addition, regardless of whether the Court grants Petitioner's request for an immediate stay, there is likely to be litigation concerning the rights of same-sex couples who have married in California, Canada, Belguim, or the Netherlands, or who marry in Massachusetts when the Goodridge decision is implemented beginning May 17, 2004.

Most fundamentally, Petitioner's argument rests on the fatally flawed premise that limiting litigation is a proper or legitimate consideration in judicial decisions concerning constitutional rights. Contrary to Petitioner's argument, courts presented with constitutional issues must decide

those issues on the merits, not based on whether a particular decision will increase or decease future litigation. The Massachusetts Supreme Judicial Court rejected a similar argument in Goodridge, stating that, "We also reject the argument . . . that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. . . . considerations of comity [cannot] prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution." 440 Mass. at p. 340.

(c) Alleged waste of funds also is not grounds for interim injunctive relief.

With regard to Petitioner's third argument – that this Court should grant preliminary relief because, according to Petitioner, the City and County of San Francisco is wasting public funds – it is clear that this type of injury also is not a sufficient ground upon which to grant preliminary relief. The California Supreme Court expressly has held that fiscal injury to the interest of taxpayers is almost never sufficient to justify preliminary relief:

> "[A] taxpayer's general interest in not having public funds spent unlawfully (including not having such funds spent in alleged contravention of fundamental constitutional restrictions) while sufficient to afford standing to bring a taxpayer action . . . and to obtain a permanent injunction after a full adjudication on the merits, ordinarily does not in itself constitute the type of irreparable harm that warrants the granting of preliminary injunctive relief."

White v. Davis, 30 Cal.4th at pp. 554-57. The fiscal injury claimed by Petitioner is not a type of injury that permits preliminary relief to be granted, and no other type of injury is or could be claimed by Petitioner. Since no irreparable interim injury exists, Petitioner's request for preliminary relief, however styled, must be denied.

2. There is No Harm to the Proposed Intervenors or to Californians Generally by Not Granting the Requested Immediate Stay.

At the hearing on Friday, February 13, 2004, Petitioner claimed that they were requesting the immediate stay in order to protect same-sex couples. Petitioner argued that getting married would terminate the couple's domestic partnership and, therefore, granting an immediate stay

would help protect the couples who were or wanted to get married. This argument is completely disingenuous. This construction of the existing family code provisions – that marrying one's domestic partner terminates their domestic partnership – is not a reasonable reading of the provision. See Cal. Fam. Code § 299(a)(3) (a domestic partnership is terminated when "One of the domestic partners marries"). It is clear that this provision was intended to prevent one domestic partner from marrying someone other than the person with whom they had registered a domestic partnership, in order to prevent something akin to bigamy. A.B. 205 deletes this provision and generally clarifies this meaning of existing Family Code. See new Fam. Code § 297(b)(2) (effective Jan. 1. 2005) ("Neither person is married *to someone else*").

In any event, even if marrying one's domestic partner did terminate one's domestic partnership, it could only be because one was in a valid marriage. If that was the case, the couple would be even more protected than they would be in a domestic partnership. If the marriage were not valid, however, it would not terminate the domestic partnership.

Moreover, there is no harm to other Californians by maintaining what is the existing situation and not granting the request for an immediate stay. As the Massachusetts Supreme Judicial Court explained in Goodridge, allowing same-sex couples to marry:

> "will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit." 440 Mass. at p. 337

3. Granting the Immediate Stay Will Cause Serious and Irreparable Harm to the Proposed Intervenors; To All Same-Sex Couples Who Have Married; to All Same-Sex Couples Who Want to Marry; To All Lesbian, Gay, and Bisexual People; and to All Californians.

On the other hand, granting the request for preliminary relief will irreparably and seriously harm hundreds of same-sex couples who have gotten married. Even if the Court does not rule on

the validity of their marriages – which is not before the Court at this hearing – granting a stay prohibiting Respondents from continuing to grant marriage licenses to same-sex couples would raise questions about the validity of the marriage licenses that already have been granted. It might call into question the entitlement of these couples to important rights and responsibilities – rights including matters such as the right to control disposition of a spouse's remains. In addition, granting the immediate relief would cause serious emotional harm to couples who have gotten married. It would call into question whether same-sex couples are worthy of marriage and suggest that these couples are inferior and should not be allowed to participate in an institution that is open to other couples. See Declarations of Intervenors submitted in support of Ex Parte Application for Leave to Intervene.

Granting the immediate stay also will cause serious and irreparable harm to same-sex couples who would like to marry, but have not yet been able to marry. Only a limited number of same-sex couples have been able to marry since Respondents began issuing licenses to same-sex couples. Many couples waited in line for hours and may not be able to get married if the immediate stay is granted. The harm of not being able to marry is immeasurable. Hundreds of state-conferred rights and responsibilities are accorded to couples by virtue of being married[4] – including matters such as the responsibility to support each other during the marriage and the right to make medical decisions for a spouse.[5] In addition, over 1,000 rights and responsibilities are conferred to a married couple by the federal government – including the right to social security

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[4] "With no attempt to be comprehensive," the Goodridge court provides a summary of some of the "'hundreds of statutes' related to marriage and marital benefits" in Massachusetts. See Goodridge, 440 Mass. at pp. 323-325.

[5] While many of the state-conferred rights and responsibilities accorded to married spouses will be granted by the California Domestic Partner Rights and Responsibilities Act of 2003 (A.B. 205), the principal substantive provisions of that law do not go into effect for more than another 10 months, on January 1, 2005. In addition, even after they go into effect, registered domestic partners have no security that the rights afforded by the legislation will be respected outside of California. Moreover, the Petitioner in the instant case has filed another lawsuit challenging the validity of A.B. 205. That litigation is still pending.

survivor benefits and the right to sponsor a partner for immigration purposes. In addition, marriage is a unique, universally recognized symbol to others of a couple's love and commitment. As the Massachusetts SJC explained in Goodridge, "[m]arriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." Goodridge, 440 Mass. at p. 322. "Without the right to marry – or more properly, the right to choose to marry – one is excluded from the full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'" Id. at p. 326 (quoting Baker v. State (Vt. 1999) 170 Vt. 194, 229 (holding that excluding same-sex couples from the rights and responsibilities of marriage violated the Vermont Constitution)). Being excluded from this institution labels all lesbian, gay, and bisexual people – even ones who are not currently in serious relationships or who do not currently want to marry -- as inferior and unworthy. As the Massachusetts Supreme Judicial Court explained in Goodridge, "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason." 440 Mass. at p. 341.

Granting an immediate stay additionally will harm all Californians – regardless of their sexual orientation. California has a strong policy presumption in favor of marriage. See, e.g., Vargas v. Superior Court (1970) 9 Cal. App. 3d 470, 474. There is a "presumption and a very strong one, in favor of the legality of a marriage regularly solemnized." Leslie v. Leslie (1966) 244 Cal. App. 2d 516, 519.

Proposed Intervenors are acting to defend the validity of these hundreds of marriages and there is a strong presumption in favor of their validity.

B. PETITIONER LIKEWISE HAS NOT SHOWN A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

A preliminary injunction also must not issue unless it is "reasonably probably that the moving party will prevail on the merits." San Francisco Newspaper Printing Co., Inc. v. Sup. Ct. (Miller) (1985) 170 Cal.App.3d 438, 422. As explained below, in the present case, in order to show likelihood of success on the merits, Petitioner must establish *both* its contention that Respondents were precluded by Article III, Section 3.5 of the California Constitution from issuing marriage licenses to same-sex couples and solemnizing their marriages *and* that the gender-based restrictions in the Family Code do not violate the equality and due process guarantees of the California Constitution.

1. Petitioner is Not Reasonably Likely to Prevail on the Merits Because Petitioner Has Not Shown That Respondents' Issuance Of Marriage Licenses To Same-Sex Couples And Solemnization Of Their Marriages In Compliance With Those Couples' State Constitutional Rights Violates Article III, Section 3.5 Of The Constitution.

Intervenors join in the arguments of Respondents that Petitioner is not reasonably likely to prevail on its argument that Section 3.5 of Article III bars the issuance of marriage licenses to same–sex couples or the solemnization of their marriages. Article III of the California Constitution governs the "State of California" and the provisions of Section 3.5 of Article III relate to administrative agencies of the State of California, not local governments like the City or local public officials like Mayor Newsom. Indeed, Section 3.5 expressly refers *only* to "an administrative agency, including an administrative agency created by the Constitution or an initiative statute," which does not describe the City or the Mayor's office. Local governments and local government officials instead are governed by Article XI of the California Constitution, which has no cognate provision to Section 3.5.

Section 3.5 of Article III was adopted in response to separation of powers concerns at the state level, not in response to concerns about local governments and local officials (particularly elected local officials like the Mayor) following the mandates of the state constitution. See Reese

v. Kizer, 46 Cal.3d 996, 1002 n. 7 (1988) (quoting from proponents' ballot materials that the measure would "insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts.... [Passage] of [the amendment] will help preserve the concept of the separation of powers so wisely adopted by our founding fathers.").

Indeed, nearly every case addressing Section 3.5 of Article III concerns an administrative agency that functions at the state, as opposed to, local level. See Smith v. Fair Employment & Housing Comm. (1996) 12 Cal.4th 1143, 1154 n. 4. (State Fair Employment and Housing Commission); Greener v. Workers Comp. App. Bd. (1993) 6 Cal.4th 1028, 1038 (State Workers Compensation Appeals Board); Rhiner v. Workers Comp. App. Bd. (1993) 4 Cal.4th 1213, 1226 (same); Lentz v. McMahon (1993) 49 Cal.3d 393 (State Department of Social Services); Reese v. Kizer, supra (State Department of Health Services); Olson v. Cory (1983) 35 Cal.3d 390 (State Controller); Burlington Northern & Santa Fe Rwy. Co. (2003) 112 Cal.App.4th 881 (State Public Utilities Commission); Westley v. Board of Administration (2003) 105 Cal.App.4th 1095 (Board of Administration of California Public Employees Retirement System); Barlow v. Davis (1999) 72 Cal.App.4th 1258 (Governor and State agencies and departments); Southern California Labor Management Operating Engineers Contract Compliance Comm. v. Aubry (1997) 54 Cal.App.4th 873 (State Dept. of Industrial Relations); Native American Heritage Com. v. Board of Trustees (1996) 51 Cal.App.4th 775 (state university); Hoogasian Flowers v. State Board of Equalization (1994) 23 Cal.App.4th 1264 (State Board of Equalization); Shisheido Cosmetics (America) Ltd. v. Franchise Tax Board (1991) 235 Cal.App.3d 478 (State Franchise Tax Board); Watson v. Fair Political Practices Com. (1990) 217 Cal.App.3d 1059 (State Political Practices Commission); Cowan v. Myers (1986) 187 Cal.App.3d 968 (state agencies enforcing Medi-Cal plan); County of Contra Costa v. California (1986) 177 Cal.App.3d 62 (State Board of Control).

This is hardly surprising. For example, in the California Government Code, the term phrase "administrative agency" occurs repeatedly in Title 2 (Government of the State), but does not appear at all in Titles 3 (Government of Counties) or 4 (Government of Cities).

The sole case relied on by Petitioner that Article III, Section 3.5 applies to Respondents is Billig v. Voges (1990) 223 Cal.App.3d 962. That case did *not* hold that a County Clerk violates Section 3.5 when the clerk refuses to enforce a statute on the basis of it being unconstitutional prior to an appellate determination of the statute's constitutionality. Rather, that case upheld a County Clerk's refusal to process a referendum petition that failed to comply with state law. The language from the opinion that is quoted by Petitioner in Petitioner's Ps& As was a passing comment that was the last of a litany of reasons why the opinion rejected appellants' argument that the clerk had authority to refuse the petition; this language was not the result of significant attention or cogent analysis, did not consider the structure of the state Constitution or the history of Section 3.5's enactment, and is incorrect.

Moreover, in the present case, it was not the County Clerk who determined that the restrictions on same-sex couples obtaining marriage licenses in the Family Code were unenforceable or refused to enforce those unconstitutional restrictions; it was the Mayor. Under Section 3.100 of the San Francisco City Charter, the Mayor has power to "enforce all laws relating to the City and County." This comports with traditional separation of powers doctrine, under which an elected official in the executive branch of government has an independent duty to say what the law is and to determine whether laws are constitutional. See Carmel Valley Fire Protection Dept. (2001) 25 Cal.4th 287, and In re Rosenkrantz (2003) 29 Cal.4th 616. The County Clerk simply followed the directive of her ultimate supervisor, the Mayor.

No case involving Article III, Section 3.5 has applied it to a mayor or a city. Mayors and cities are not "administrative agencies." Accordingly, Petitioner's argument that Article III,

Section 3.5 was violated by the Mayor issuing his Directive is unsupported and unsupportable. Petitioner therefore is not reasonably likely to prevail on the merits and Petitioner's application for an immediate stay or other extraordinary relief should be denied.

2. Petitioner Is Not Reasonably Likely To Prevail On The Merits Because, Regardless Of The Mayor's Authority To Determine That Excluding Same-Sex Couples From The Right To Marry Is Unconstitutional, The Mayor's Determination Was Correct.

As explained above, the Mayor had the authority and the responsibility, pursuant to his duties as the chief executive of the City of San Francisco, to uphold the state constitution and to refuse to enforce an unconstitutional provision. Nonetheless, even assuming, arguendo, that he did not have this authority, this Court must determine whether the Mayor's assessment of the marriage statutes was correct. It is well settled that when a petitioner files a writ of mandate seeking to compel an official to enforce a statute, and the constitutionality of the statute is challenged, the court must determine whether the statute is valid – not simply whether the official had the authority to refuse to enforce it. See, e.g., Citizens for Responsible Behavior v. Superior Court of Riverside County (1991) 1 Cal.App.4th 1013, 1021 ("In deBottari v. City Council (1985) 171 Cal. App. 3d 1204, we recognized that once an initiative measure has qualified for the ballot, the responsible entity or official has a mandatory duty to place it on the ballot.... However, if the entity or official refuses to do so, this refusal -- improper as it is -- may be retroactively validated by a judicial declaration that the measure should not be submitted to the voters."). See also Citizens for Responsible Behavior, 1 Cal. App.4th at 1021 (holding that "even if the local entity usurps the judicial power in this respect, it remains appropriate for the courts to determine whether the result was correct").

In this case, the Mayor properly exercise his authority to determine that the marriage statutes are unconstitutional and to direct the County Clerk to issue marriage licenses without

discriminating on the basis of gender or sexual orientation; however, even if he did not, this court must determine whether the result was correct.

3. Petitioner Is Not Reasonably Likely To Prevail On The Merits Because Excluding Same-Sex Couples From The Right To Marry Violates The Equal Protection And Due Process Provisions Of The California Constitution.

It is clear that Petitioner cannot demonstrate a likelihood of success on the issue of whether excluding same-sex couples from marriage violates the California Constitution. Every state supreme court in the last decade has reached the conclusion that such exclusion violates their respective constitutions. See Goodridge v. Department of Public Health (Mass. 2003) 440 Mass. 309; Baker v. State (Vt. 1999) 170 Vt. 194; Baehr v. Lewin (Haw. 1993) 74 Haw. 530.

Under settled California law, classifications based on gender are considered suspect for purposes of equal protection analysis under the California Constitution. Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 37 ("classifications based on sex are considered 'suspect' for purposes of equal protection under the California Constitution"); Boren v. Department of Employment Development (1976) 59 Cal. App. 3d 250, 256 (noting that "a sex-based classification is treated as suspect"). Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose, they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available. Weber v. City Council (1973) 9 Cal. 3d 950, 958.

Although the case law concerning classifications based on sexual orientation is less clear, it appears that such classifications are also considered suspect under our state constitution. See Children's Hospital and Medical Center v. Belshe (2003) 97 Cal. App. 4th 740 (identifying race and sexual orientation as examples of suspect classifications under the California Constitution); Holmes v. California National Guard (2001) 90 Cal. App. 4th 297 (affirming trial court decision

holding that sexual orientation classifications are subject to heightened scrutiny); People v. Garcia (2000) 77 Cal. App. 4th 1269 (holding that excluding lesbians and gay men from juries on the basis of their sexual orientation violates the California Constitution). At a minimum, the courts have long looked upon such classifications with suspicion. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458.

Based on this settled law, the gender- and sexual orientation-based restrictions in Family Code sections 300 and 301 are inherently suspect and may only be upheld if they are shown to be necessary for furtherance of a compelling state interest. The Petitioner in this case has not identified any compelling state interest in excluding all same-sex couples from the right to marry, nor could it, because none exists.

To the contrary, as courts in other jurisdictions have recently concluded, there is no *legitimate public interest* in excluding lesbian and gay couples from the right marry -- *much less a compelling justification* for such blatant and destructive discrimination. In Goodridge v. Dept. of Public Health, for example, the Massachusetts Supreme Judicial Court concluded that excluding same-sex couples from the protections, benefits and obligations of civil marriage to individuals lacked any rational basis, and therefore failed the *rational basis test*. See id. at 331 ("Because the [marriage] statute does not survive rational basis review, we do not consider plaintiffs' argument that this case merits strict judicial scrutiny.").

In Goodridge, the court concluded:

> Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under the law.

Id. at 313.

Similarly, in *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003), the Ontario Court of Appeals found there was no justification for denying same-sex couples the opportunity to marry. The court explained that the Attorney General's task was "not to show how marriage has benefited society as a whole, which we agree is self-evident, but to demonstrate that maintaining marriage as an exclusively heterosexual institution is rationally connected to the objectives of marriage, which in our view is *not* self-evident." *Id.* at ¶ 129. Recognizing that "[e]xclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships . . . [and thereby] offends the dignity of persons in same-sex relationships, *id.* at ¶ 107, the court held the Attorney General had not shown that such discrimination advanced any rational basis, *id.* at ¶ 132.

The gender- and sexual orientation-based restrictions in Family Code Sections 300 and 301 also are subject to strict scrutiny under the California Constitution because they impinge upon the fundamental right to marry. Perez v. Sharp (1948) 32 Cal. 2d 711, 714 (holding that the right to marry is fundamental); People v. Pointer (1984) 151 Cal. App. 3d 1128, 1139 (same). As the Massachusetts Supreme Judicial Court held in Goodridge: “Whether and when to marry, how to express sexual intimacy, and whether and how to establish a family -- these are the most basic of every individual’s liberty and due process interests.” Goodridge, 440 Mass. at p. 329.

As was true in the other recent state supreme court cases addressing this question, Petition will be unlikely to demonstrate a legitimate state interest, much less a compelling on for denying same-sex couples the right to marry. Moreover, making this demonstration would be particularly difficult for Petitioner given that the state of California, within the last year, has provided by statute (A.B. 205 (2003)), that, as of January 1, 2005, same-sex couples may obtain almost every right and responsibility of marriage conferred by the state of California. In enacting this statute, the legislature made specific findings about the need to provide these rights and responsibilities to

same-sex couples. The legislature found and declared: "That despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex" and that gay and lesbian "couples share lives together, participate in their communities together, and many raise children and care for other dependent families members together." The legislature also declared that California has an interest in "promoting family relationships" and in "reduc[ing] discrimination on the bases of sex and sexual orientation." Given these findings, it is inconceivable that there is a legitimate government interest – much less a compelling one – in excluding same-sex couples from marriage.[6]

The only conceivable purpose in excluding same-sex couples from marriage is based on a desire to draw a distinction for its own sake, and this cannot be tolerated by the California Constitution. Lawrence v. Texas (2003) 123 S. Ct. 2472, 2486 ("the Equal Protection Clause prevents a State from creating 'a classification of persons undertaken for its own sake.") (quoting Romer v. Evans (1996) 517 U.S. 620, 635). See also In re Opinions of the Justices to the Senate (Mass. 2004) 802 N.E.2d 565, 571 ("Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* the constitutional infirmity at issue.").

[6] And, as the Massachusetts Supreme Judicial Court explained in In re Opinions of the Justices to the Senate, the fact that California has a system for providing many of the state-conferred rights, benefits, and responsibilities of marriage to same-sex couples, does not eliminate the constitutional infirmity of the exclusion from marriage. The Court explained:

> But the question the court considered in *Goodridge* was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* the constitutional infirmity at issue.

In re Opinions of the Justices to the Senate (Mass. 2004) 802 N.E.2d 565, 571.

Thus, both as a matter of equal protection and due process, excluding all same-sex couples from the right to marry is inherently suspect under the state constitution.

IV. CONCLUSION

Petitioner's assault on Respondents' acts and on the marriages of thousands of same-sex couples rings with echoes of past attempts to hold back civil rights. As the Massachusetts Supreme Court recently noted,

> "For decades, indeed centuries, in much of this country ... no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 [nineteen years before the U.S. Supreme Court finally acted in Loving v. Virginia (1967) 388 U.S.1] that a legislative prohibition against interracial marriage violated the due process and equality guarantee of the Fourteenth Amendment."

Goodridge, 440 Mass. at 327 (citing Perez v. Sharpe (1948) 32 Cal.2d 711).

Fifty-six years after Perez, California again holds the beacon light for marriage equality, for liberty, and for protecting human dignity. Petitioner has failed to show that Mayor Newsom's leadership in enforcing these cherished constitutional guarantees is wrong. Even more so, Petitioner has failed to establish its entitlement to an immediate stay or any other form of extraordinary relief. Petitioner's *ex parte* application accordingly should be denied.

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