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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED CIVIL JURISDICTION

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND, a California nonprofit public benefit corporation, on its 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 Mayor of San Francisco, NANCY ALFARO, in her official capacity as San Francisco County Clerk, and DOES 1 through 100,

Respondents.

Case No. 503943

CITY RESPONDENTS' OPPOSITION TO VERIFIED PETITION FOR WRIT OF MANDATE AND IMMEDIATE STAY

Hearing Date: February 17, 2004
Hearing Judge: Hon. James L. Warren
Time: 2:00 p.m.
Place: Courtroom 301

Date Action Filed: February 13, 2004
Trial Date: To Be Determined

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INTRODUCTION

For centuries, indeed millennia, homosexual persons have been subjected to extreme and humiliating forms of discrimination in all aspects of their lives. The opprobrium directed against gay men and lesbians is a hatred that is based specifically and directly on the identity and gender of the the persons they love. At the root of discrimination against homosexuals has always been the distinction between their intimate and personal relationships and the relationships of heterosexuals, which have over the same millennia been celebrated, recognized and supported in thousands of different ways.

On February 12, 2004, the Mayor of San Francisco concluded that the City could not continue to engage in the most blatant and direct aspect of this discrimination against lesbians and gay men: namely the refusal to allow them to marry. He therefore directed the Clerk to issue marriage licenses to unmarried adults regardless of their gender or sexual orientation. In doing so, he and the County Clerk did what they believed they had to do to comply with their oaths of office in which they swore to uphold the Constitution.

By doing so, they granted gay men and lesbians the same fundamental right that heterosexuals have long enjoyed: the right to celebrate and obtain public recognition of what has been described as "among life's momentous acts of self-definition." They refused to deny lesbians and gay men the right to make that "deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family" that comprises civil marriage.

Petitioners invoke California Constitution Article III, Section 3.5 to argue that the Mayor and County Clerk lacked authority to adhere to what they believed was their highest obligation as public officials: to comply with the dictates of the constitution, the highest law of the state and the country. Petitioners overlook that the separation of powers doctrine embodied in Article III of the Constitution, of which Section 3.5 is but one small part, does not apply to local government entities and officials, and that even if it did the Mayor and County Clerk are not "administrative agencies" in any event.

Further and in any event, Petitioners invoke a right to preliminary relief in the form of a stay or injunction without endeavoring to demonstrate the irreparable harm that is key to any such request. The balance of hardships here weighs entirely against entry of preliminary relief because it is the public

interest and the rights of third parties that would be harmed by the grant of such relief, rather than Petitioners suffering any harm from denial of it.

For all of these reasons, the Court must deny the request for stay or injunction.

STATEMENT OF FACTS

In 1971, the California Legislature amended what is now Family Code Section 301 to render that section gender-neutral, so that to be married an individual need only be "an unmarried person." (Stats. 1971, c. 1748,§ 26.) At the time, Family Code Section 4100 (now Section 300) did not specify that marriage must be between a man and a woman. (RJN, Ex. A.) As a result of this gender-neutrality, several gay male and lesbian couples across the state during the period 1971-1977 sought marriage licenses. (RJN, Ex. B)

In 1977 the Legislature amended Section 300 to provide that "Marriage is a personal relation arising out of a civil contract between a man and a woman," specifically "to prohibit persons of the same sex from entering lawful marriage." (*See* RJN, Exh. B) The Bill Digest prepared by the Assembly Committee on the Judiciary explained the rationale for this prohibition: "the legal benefits granted married couples were actually designed to accommodate motherhood …. Why extend the same windfall to homosexual couples…?" (RJN, Exh. C) As the Bill's sponsor, Assemblyman Bruce Nestande explained "[W]hile homosexuals have been granted certain privileges enjoyed by all, it is my contention that they should not include any of the rights set out in the marriage code." (RJN, Exh. D) Accordingly, since 1977 the Family Code has prevented an entire class of adults from marrying. To end this discrimination, on February 10, 2004, San Francisco Mayor Gavin Newsom directed the County Clerk to arrange for the issuance of marriage licenses to same-sex couples. Two days later, the County Clerks' office began issuing same-sex marriage licenses. On February 13, 2004, Petitioners filed this action.

ARGUMENT

I. PLAINTIFFS' FAILURE TO SHOW IRREPARABLE HARM IS FATAL TO THEIR REQUEST FOR A STAY.

A. A Stay May Not Be Granted Absent A Showing Of Imminent And Irreparable Harm.

Petitioners ask this Court to issue an immediate stay and/or preliminary injunction commanding Respondents to "cease and desist issuing marriage licenses to and/or solemnizing marriages of same-sex couples." (Petition at 4, ¶¶ 13-16; [Proposed] Alt. Writ at 2:10-12.) Petitioners have failed to meet the most basic requirements for issuance of such provisional relief, and this Court must therefore deny petitioners' requests.

A party seeking preliminary injunctive relief must show it is entitled to this extraordinary remedy. (*Triple A Machine Shop, Inc. v. State* (1989) 213 Cal.App.3d 131, 138.) "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should it be exercised in a doubtful case." (*Fleishman v. Superior Ct.* (2002) 102 Cal.App.4th 350, 355 [internal quotes, brackets omitted]; *San Francisco Newspaper Printing Co. v. Super. Ct.* (1985) 170 Cal.App.3d 438, 442.)

The availability of preliminary injunctive relief depends on two interrelated factors. First, "[t]o qualify for preliminary injunctive relief, plaintiffs must show irreparable injury, either existing or threatened." (*Cohen v. Board of Supervisors* (1986) 178 Cal.App.3d 447, 453.) Even if the plaintiffs satisfy this threshold burden, a court must balance that injury against the injury defendants and the public will suffer if injunctive relief is issued. (*Socialist Workers etc. Comm. v. Brown* (1975) 53 Cal.App.3d 879, 888-889.) Second, a party may not obtain preliminary injunctive relief unless it establishes a reasonable probability that it will prevail on the merits. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) These requirements apply to a request either for TRO or preliminary injunction. (Code Civ. Proc. §527; *First National Bank of Oakland v. Superior Court of Santa Clara County* (1966) 240 Cal.App.2d 109, 110.)

The showing of irreparable harm required is even greater where government action is involved. In such cases, "courts should not intervene unless the need for equitable relief is clear, not remote or speculative" (*City of Vernon v. Central Basin Municipal Water Dist.* (1999) 69 Cal.App.4th 508, 517), and the plaintiff "must make a significant showing of irreparable injury." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1473.)

Petitioners do not seriously attempt to show that they will suffer irreparable harm absent preliminary injunctive relief. They simply argue they are entitled to such relief because Code Civ. Proc.

§ 526a authorizes them to maintain an action based on the alleged illegal expenditure and waste of public funds. But Section 526a merely grants taxpayers *standing* to maintain an action and bring it to judgment permanently enjoining unlawful expenditures. (*White v. Davis* (2003) 30 Cal.4th 528, 555, citing *Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-70.) Section 526a does not excuse taxpayers from complying with the traditional requirements for preliminary injunctive relief. *See White v. Davis,* 30 Cal. 4th at 555-57 (affirming line of decisions holding taxpayers' interest in preventing unlawful expenditures cannot "'substitute for the high degree of existing or threatened injury required for [] prejudgment injunctive relief . . .'"; citing *Cohen v. Board of Sups.* (1986) 178 Cal.App.3d 447, 454; *Loder v. City of Glendale* (1989) 216 Cal.App.3th 777; and *Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648.) Accordingly, petitioners must demonstrate that they will suffer harm beyond the allegedly unlawful expenditure of public funds.

Finally, and at a very minimum, Petitioners are in no way entitled in this proceeding to a declaration passing upon the validity of the hundreds of marriages that already have taken place, regardless of whether an injunction might issue to restrain the *continued* issuance of marriage licenses to same-sex couples. A declaration of that sort would be inconsistent with the due process rights of every single married couple not before this Court. Equally fundamental, however, it would *not* be an appropriate exercise of this court's mandamus powers. "Mandamus will not as a general rule issue, where the rights of third persons not parties would be injuriously affected. Where questions of grave importance concerning rights of persons who have had no opportunity to be heard are involved in mandamus proceedings, the court, in the exercise of its sound judicial discretion, may refuse the writ, although it is an appropriate remedy." *Cooper v. Gibson, County Treasurer*, 133 Cal. App. 532, 959-60 (1933) (declining to order county treasurer to distribute surplus funds from delinquency sale of real property to holders of public bonds, when intervenor-seller contested delinquency sale's validity and purchaser was not a party to mandamus proceeding). *See also Board of Educ. v. San Diego*, 128 Cal. 369, 371 (1900) ("Mandamus will not lie were its effect would be inequitable or unjust as to third persons or will introduce confusion or will not promote substantial justice"). In the days ahead, there no doubt will be other proceedings in which one or more same-sex married couples who are not

presently before this Court might litigate the legal validity of their marriage. In their absence, however, *this* is not the proper forum to determine their individual rights.

B. Plaintiffs Have Not Shown They Will Be Irreparably Harmed By The City's Grant Of Marriage Licenses To Third Parties.

The only other harm Petitioners cite is that "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 . . . [which will] multiply the workload of already overburdened courts." (Pets.' MPA at 11:18-24.) This "harm" however is sheer speculation, on which this Court may not issue the requested relief. *Volpicelli v. Jared Sydney Torrance Memorial Hosp.* (1980) 109 Cal.App.3d 242, 267. Petitioners make no effort to explain why a host of duplicative cases would be filed, much less how such litigation would harm them other than as taxpayers. Absent a showing that Petitioners will suffer real, tangible, imminent and irreparable harm, this Court must deny their request for preliminary relief, whether couched as a "stay," TRO or injunction.[1]

II. EVEN IF PLAINTIFFS HAD PROVEN SOME HARM TO THEMSELVES, THE PUBLIC INTEREST AND BALANCE OF HARDSHIPS WEIGH HEAVILY AGAINST GRANTING THE REQUESTED RELIEF.

"The public interest must be considered" before a court can enjoin public officials from performing their legal duties. (*Tahoe Keys, supra,* 23 Cal.App.4th at 1471; *Socialist Workers etc. Com., supra,* 53 Cal.App.3d at 888-89.) Petitioners ignore this requirement. In fact, while injunctive relief is unnecessary to avert any irreparable harm to Petitioners, an injunction *would* substantially injure the public interest.

Same-sex couples denied the right to marry face far greater harm than the petitioners here. Marriage confers legal and economic benefits that have been unavailable to same-sex couples because of gender and sexual-orientation discrimination. Married couples enjoy tax and Social Security benefits unavailable to same-sex couples, they can acquire property in joint tenancy, have visitation rights when a spouse is hospitalized, and can acquire community property during the marriage. Even more injurious

[1] There is no statute specifically authorizing a temporary stay in a mandamus action. Assuming a grant of such relief *pendente lite* is within the Court's equitable power, Petitioners cite no authority for the proposition that the usual requirements for preliminary relief of an injunctive nature need not be met. *White v. Davis* makes clear that they must.

than the denial of legal and economic benefits is the denial of the emotional and psychological benefits of marriage. Marriage confers a level of contentment, commitment, and dignity to a relationship unavailable through any other legal union. As the attached declarations demonstrate, although gay male and lesbian couples have the ability to unite as domestic partners, and participate in commitment ceremonies, their ability to marry since February 12, 2004 has taken their long-standing, committed relationships to a new level. They no longer have to feel as though their union is "almost" as dignified as a marriage.

III. PLAINTIFFS HAVE NOT AND CANNOT DEMONSTRATE A STRONG LIKELIHOOD THAT THEY WILL PREVAIL ON THE MERITS.

A. Article III, Section 3.5 Of The California Constitution Does Not Prohibit City Officials From Fulfilling Their Duty To Uphold The Constitution.

Petitioners' request for a temporary stay, and indeed their entire petition for writ of mandate, rests on a faulty premise: that California Constitution Article III, Section 3.5 bars the Mayor and County Clerk from fulfilling their oath of office to uphold the California Constitution and requires them to implement the literal language of the California marriage laws even if doing so is unconstitutional. Petitioners are wrong. Article III of the Constitution, including Section 3.5, does not govern *local* government entities or officials, and this alone precludes the grant of relief Petitioners seek.

1. Article III, Section 3.5 Of The California Constitution Applies Only To Agencies Of State Government And Not To Local Government Agencies Or Officials.

The California Constitution "is divided into separate Articles. Each Article treats, in the main, of a particular subject, to the exclusion of other matters, which subject is stated at the head of the Article." *People ex rel. Attorney General v. Provines* (1868) 34 Cal. 520, 534.

Article III, entitled "STATE OF CALIFORNIA,"[2] sets forth the basic structure of the state government, including the supremacy of the federal Constitution, the political boundaries of the state, and the existence of three branches of state government and separation of powers between them. *Id*.

[2] "[I]t is well established that ' "chapter and section headings [of an act] may properly be considered in determining legislative intent" [citation], and are entitled to considerable weight. ' " *Howard Jarvis Taxpayers Ass'n v. County of Orange* (2003) 110 Cal.App.4th 1375, 1385, quoting *People v. Hull* (1991) 1 Cal.4th 266, 272.

§§1-3. Articles IV through VI more specifically address the powers and responsibilities of each branch of state government: legislative, executive and judicial.

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

As the Supreme Court recognized in *Strumsky*, Article III applies only to *state* government, not to local government. *Strumsky* thus held that the separation of powers clause contained in Article III, Section 3 "is inapplicable to the government below the state level." *Id*. at p. 36, citing *People ex rel. Attorney General v. Provines* (1868) 34 Cal. 520; s*ee id.* at 534 ["the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments"] [emphasis in original].)

The Section of the Constitution on which Petitioners rely for their contention that the City of San Francisco and its Mayor and County Clerk exceeded their powers is Section 3.5 of Article III. That provision, by virtue of is placement in Article III, like Section 3 of the same article "is inapplicable to the government below the state level." The administrative agency powers Section 3.5 of the Constitution limits are powers of *state* administrative agencies, not local ones.[3] It is Article XI—not Article III—that addresses *local* government.

[3] Petitioners cite Article XI, Section 1 for the proposition that a *county* is a political subdivision of the state and contends that this means the county clerk is a "state agenc[y]" for purposes of Section 3.5 of Article III. Pets.' MPA at 4-5. Petitioners misconstrue the Constitution. That a county is a subdivision of the state does not change the basic structure of state and local government and render every county official a state official and every county agency a state agency (*see* 9B. Witkin, Cal. Proc. 4th, Admin. Proc. §§126-163 (identifying as "state agencies" seven major agencies and the board, commissions, departments and other subagencies thereof; no local agencies included)) or subject county government to the requirements and limitations of Article III of the Constitution.

(continued on next page)

If, as the Court held in *Strumsky* and *Provines*, 34 Cal. at 534, local government is *not* subject to the fundamental limitation on powers embodied in the constitutional doctrine of separation of powers prescribed for state government in Section *3* of Article III, it is illogical to assume that Section *3.5* of the *same* Article, which involves a narrower and more specific aspect of that same doctrine (it prevents executive branch agencies from exercising judicial powers), *does* apply to and limit local government.[4]

Lest the structure of the Constitution and Section 3.5's placement in Article 3 leave any question, its legislative history leaves no room for doubt that it was intended to apply only to *state* agencies. Section 3.5 was adopted by referendum in 1978, in response to the California Supreme Court's decision in *So. Pac. Transp. Co. v. Public Utilities Comm'n* (1976) 18 Cal. 3d 308. *Reese v. Kizer* (1988) 46 Cal. 3d 996, 1002. In *Southern Pacific*, the Court had held that the California Public

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(footnote continued from previous page)

Even if counties agencies generally were considered state agencies, this would not be true for agencies of consolidated charter cities and counties like San Francisco, as to which the Constitution provides that charter city status prevails. Cal. Const. Art. XI, §§ 6, 8½; *see Rand v. Collins* (1931) 214 Cal. 168, 172-73 [Article XI, "section 8 1/2, which grants plenary power to provide in a charter `the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers shall be elected or appointed', amounts to a grant of power to consolidated cities and counties to determine in their charters, as San Francisco has done, how their officers shall be chosen" and to appoint, rather than elect, such officers as county clerk notwithstanding contrary state code provisions; observing "present tendency toward city government freed from general legislative control"].)

[3] The Mayor has authority over the County Clerk pursuant to San Francisco Charter Sections 18.105 (after July 1, 1997, functions, powers and duties of County Clerk shall be transferred to the City Administrator) and 3.104 (City Administrator is appointed by Mayor and has responsibility for administrative services within executive branch, as assigned by Mayor). *See also id.* §3.100 (Mayor shall have responsibility for general administration and oversight of all deparments and units in executive branch of City and County).

[4] Local government entities exercise cross-branch powers in a variety of circumstances. For example, in many counties, boards of supervisors appoint the county's chief administrative officer—an executive rather than legislative function. Further, the law treats state and local agencies differently in a variety of contexts. For example, state agencies are subject to the requirements of the state Administrative Procedure Act, Cal. Gov. Code §11380 et seq., whereas local agencies are not. *See id*. §§11500, 11501; *Allen v. Humboldt County Board of Supervisors*, 220 Cal. App. 2d 877, 883 (1963); *Boctor v. Los Angeles County Metropolitan Transit Authority*, 48 Cal. App. 4th 560, 571 (1996). Further, different laws set forth open meeting requirements for state agencies and local agencies. 9B. Witkin, Cal. Proc. 4th, Admin. Proc. §5 (2003) (meetings of state bodies governed by Bagley-Keene Open Meeting Law, Gov't Code §11120, et seq.; meetings of local agencies governed by Ralph M. Brown Act, Gov't Code §54950).

Utilities Commission, a *state* administrative agency, had the power to declare a state statute unconstitutional. *Id*., citing *Southern Pacific*, 18 Cal. 3d at p. 311, n.2.

In overturning *Southern Pacific*, the voters and the legislators who placed the proposition on the ballot were concerned with actions by *state* agencies, not local ones. Thus, the ballot pamphlet—in both the analysis prepared by the Legislative Analyst and the arguments in favor of and against the proposition—refers repeatedly to "*state* agencies" and "*state* administrative agencies."[5]

Every case that has applied Section 3.5 since its adoption has applied it to a *state* rather than local agency. *See, e.g., Delta Dental Plan v. Mendoza* (1976) 139 F.3d 1289 [Commissioner of Corporations]; *Southern Cal. Labor Mgmt. Operating Eng'rs Contract Compliance Comm.* (1997) 54 Cal. App. 4th 873 [Department of Industrial Relations]; *Leek v. Washington Unified School Dist.*

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[5] *See* RJN Ex. E at 24 (Analysis by Legislative Analyst) ["Unlike most *state administrative agencies*, the Public Utilities Commission is created in the State Constitution. California's Supreme Court has held that the Commission can determine the constitutionality of state laws which may affect its (the Commission's) authority, although any such determination would be subject to court review. In another action, a Court of Appeal held that any *state administrative agency* not created in the Constitution may not determine that a state law is unconstitutional."]; *id*. ["This constitutional amendment would forbid any *state administrative agency*, whether created in the Constitution or not, to (1) declare a state law unconstitutional or (2) refuse to enforce a state law on the basis that it is unconstitutional or that it is prohibited by federal law unless such a determination has already been made by an appellate court."]; *id*. at p. 26 (Argument in Favor of Proposition 5) ["Enactment of this constitutional amendment would prohibit *State agencies*, including any agency created by the Constitution or by initiative, from refusing to carry out its statutory duties because its members consider the statute to be unconstitutional or in conflict with federal law."]; *id*. ["Proposition 5 would prohibit the *State agency* from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid."]; *id*. at p. 27 (Argument Against Proposition 5) ["If a state administrative board must interpret one of these `suspect' statutes, what should it do?"]; *id*. ["Under present law, our *state administrative agencies* can act promptly to avoid conflicts between state and federal actions."]; *id*. ["This provision could seriously hamper state agencies which share regulation over matters with the federal government and its agencies."]; *id*. (Rebuttal to Argument Against Proposition 5) ["Under Proposition 5, the agencies themselves may challenge `suspect' statutes in the courts. Then, private citizens will save time and expense otherwise imposed on them to compel *State agencies* to perform their duties. *Such agencies* will no longer usurp the constitutional powers of the courts."]. See also *id*. at p. 26 ["Before the Governor signs or vetoes a bill, he receives analyses from the agencies which will be called upon to implement its provisions. If the Legislature has passed the bill over the objections of the agency, the Governor is not likely to ignore valid apprehensions of *his departments*, as he is the Chief Executive of the State and is responsible for most of *its* administrative functions."] [Emphases original in part, added in part].)

(1981) 124 Cal. App. 3d 43 [Public Employment Relations Board].) Petitioners rely on *Billig v. Voges* (1990) 223 Cal. App. 3d 962 for the proposition that "[c]ounties – as subdivisions of the state according to Cal. Const. Art. XI, § 1 – and their officers and clerks are `administrative agencies' of the state and thus subject to the provisions of art. III, § 3.5." Pets.' MPA at 4-5. In *Billing*, however, the court neither addressed nor decided that issue. *See id.* at 465 ("The sole issue to be decided in this case is whether appellants failed to comply with [Elections Code] section 4052 by not printing the entire text of the ordinance, including its exhibits, on their petition.") In *Billing*, appellants sought a writ of mandate to compel the City Clerk to process their referendum petition, which the clerk had rejected for failure to comply with state Election Code requirements. 223 Cal. App. 3d at 964. The court affirmed denial of the writ, holding the clerk correctly concluded that the petition did not meet the code requirements. In dicta, the *Billig* court stated that the clerk was required to enforce the procedural statute at issue, citing Section 3.5. *Id*. at p. 969. The court was not called upon, however, to actually address or decide any issue regarding a city official's *declining* to enforce a statute, since the clerk in that case had *enforced* the statute at issue. The court certainly did not decide whether Section 3.5 applies to local agencies or precludes local agencies from adhering to the constitution, no issue having arisen or argument having been made on that point. *Billig* thus fails to support Petitioner's argument. *In re Chavez* (2003) 30 Cal. 4th 643, 656 ["As is well established, a case is authority only for a proposition actually considered and decided therein."].

2. Even If It Applied To Local *Administrative Agencies*, Article III, Section 3.5 Of The California Constitution Does Not Apply To The Mayor Or The County Clerk.

The County Clerk is a public official, not an "administrative agency" subject to the limitations of Section 3.5. Even if the County Clerk's Office, and the Clerk as its head, were considered an administrative agency, it is not the County Clerk, but the Mayor, whose interpretation of the Constitution is at issue in this case.[6] *See* Verified Petition for Writ of Mandate ¶6 (Mayor requested that

[6] The Mayor has authority over the County Clerk pursuant to San Francisco Charter Sections 18.105 (after July 1, 1997, functions, powers and duties of County Clerk shall be transferred to the City Administrator) and 3.104 (City Administrator is appointed by Mayor and has responsibility for administrative services within executive branch, as assigned by Mayor). *See also id.* §3.100 (Mayor
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Clerk begin issuing marriage licenses to same sex couples). The Mayor is not an "administrative agency"; he is the Chief Executive Officer of the City and County with responsibility for "[g]eneral administration and oversight of all departments and governmental units in the executive branch of the City and County," "*enforc[ement of] all laws relating to the City and County*" and "[c]oordination of all intergovernmental activities of the City and County." RJN Ex. G (S.F. Charter §3.100). Since neither the Clerk, nor more importantly the Mayor, are "administrative agencies," even if Section 3.5 of Article III applied to local government agencies it would not be applicable here.

3. The Mayor's And County Clerk's Belief That The Federal Constitution Compelled Them To Act As They Did Is A Complete Defense To Section 3.5.

Moreover, Section 3.5 cannot operate to bar local officials and administrative agencies from ceasing practices that they conclude may violate the federal constitution.[7] *See LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1159-60. To apply Section 3.5 to require continuing violations of the federal constitution on state-law grounds would violate the federal Supremacy Clause. *Id*. Thus, to the extent that the County Clerk and Mayor Newsom took their actions in the belief that denying marriage licenses to same-sex couples would violate the federal constitution, they could not rely on Section 3.5 to shelter them from liability or to justify any continued intrusion on the federal constitutional rights of the citizenry. *See id.; see also Voinovich v. Quilter* (1993) 507 U.S. 146, 159 [finding that a state official's individual decision to disobey the Ohio Constitution when he believed it inconsistent with federal law "demonstrates obedience to the Supremacy Clause of the United States Constitution"]; *Gruenke v. Seip* (3d Cir. 2000) 225 F.3d 290, 307 ["Because public school officials are state actors, they must not lose sight of the fact that their professional association ethical codes, as well as state statutes, must yield to the [federal] Constitution"]; *Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187,

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shall have responsibility for general administration and oversight of all deparments and units in executive branch of City and County).

[7] Because the federal constitution so closely informs the courts' interpretation of the California Constitution, it is eminently reasonable for a public official concerned about the constitutionality of a given practice under the state constitution to harbor significant doubts about the federal constitutionality of the practice as well. Where federal constitutional concerns come into play, Section 3.5 can have no application. (*LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1159-60.)

1204 ["If [state] officials choose to ignore a federal law, they do so at their peril"]; *Thiel v. State Bar* (7th Cir. 1996) 94 F.3d 399, 403 ["[W]hen a state official takes actions contrary to the Constitution, he is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct"] [internal quotation marks omitted].) While we do not now seek to raise federal constitutional issues and Petitioners have not raised them, the Mayor's and County Clerk's actions are not barred by Section 3.5 at least insofar as they were acting on their belief that the federal Constitution compelled them to act.

B. Prohibiting Same-Gender—But Not Opposite-Gender—Couples From Marrying Violates The Equal Protection Clause Of The California Constitution.

Family Code Sections 300, 301 and 308.5[8], provide for marriage only between women and men, and because they thus explicitly and impermissibly discriminate on the basis of gender violate the equal protection clause of the California Constitution.

The California Constitution provides that "[a] person may not be . . . denied equal protection of the laws" and "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const. Art. I, §§7(a) & (b).) Under these provisions, classifications based on gender are "suspect" and are subjected to strict scrutiny. (*See, e.g., Koire v. Metro Car Wash* (1985) 40 Cal. 3d 24, 37; *County of Los Angeles v. Patrick* (1992) 11 Cal. App. 4th 1246, 1252.) "Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose . . . , they may be upheld only if . . . necessary for furtherance of a compelling state interest and [if] they address that interest through the least restrictive means available." *Connerly v. State Personnel Bd.,* 92 Cal. App. 4th 16, 20 (2001).

Family Code Sections 300 and 301, respectively, provide that "[m]arriage is a personal relation arising out of a civil contract between a *man* and a *woman* . . . ." and that "an unmarried *male*" and "an ummarried *female*" 18 years or older "are capable of consenting to and consummating marriage." Section 308.5 provides that "[o]nly marriage between a *man* and a *woman* is valid or recognized in California." (Emphases added.) By limiting marriage to opposite-gender couples, these statutes create a

[8]This provision was added by initiative (Proposition 22, §2 effective March 8, 2000).

distinction based upon sex that must overcome strict scrutiny under California law. *See Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. S.Ct. 1993) (Hawaiian marriage statute on its face and as applied regulated access to marital status on the basis of sex and, as such, established a sex-based classification subject to heightened scrutiny under the state equal protection clause). The Alaska Superior Court recently held that Alaska's version of Family Code Section 300 is a sex-based classification. *See, e.g., Brause v. Bureau of Vital Statistics*, 1998 WL 88743 *6 (Alaska Sup. 1998). The Court found that "a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law."

The fact that both men and women, as a class, are prevented from entering into same-sex marriages does not make Family Code Sections 300 and 308.5 gender-neutral. The California Supreme Court has long held that equal protection protects *individuals* and the constitutionality of legislation "must be tested according to whether the rights of an individual are restricted . . . ." *Perez v. Sharp*, 32 Cal. 2d 711, 716 (1948). That racial or gender groups are treated the same as a class will not immunize state action from equal protection analysis. In *Perez*, for example, the Court addressed the constitutionality of California's miscegenation laws. The miscegenation laws applied equally to all groups, no matter their race. Yet the Court held they violated equal protection.

> The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups . . . . Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry. (*Id.* at 716-17.)[9]

As with the miscegenation cases, the fact that Family Code Sections 300, 301 and 308.5 purport to prevent both men and women from entering into same-sex marriages does not alter the fact that it

[9] The United States Supreme Court reached the same conclusion nearly 20 years later. In *Loving v. Virginia* (1967) 388 U.S. 1, the Court emphasized that where a statute relies on suspect classifications such as race, the fact that it punishes all races equally does not remove it from the proscription against invidious discrimination. *Id.* at 8, 10. "The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination." *Id.* at 8.

does so based explicitly upon the sex of their chosen partners. *Cf. also Baker v. Vermont*, 744 A.2d 864, 906 (Vt.S.Ct. 1999) ("Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman . . . . This is sex discrimination.") (Johnson, J., concurring in part and dissenting in part).

Petitioners do not address the constitutionality of Family Code Sections 300, 301 and 308.5, and thus do not articulate any state interest, much less an important or compelling one. The Massachusetts Supreme Court recently found a similar statute failed the much less stringent "rationality review" standard, holding that prohibiting same-sex marriage would violate the Massachusetts equal protection clause even if the Legislature established civil unions for same-sex couples carrying the same rights and responsibilities as marriage. *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. S. Ct. Feb. 3, 2004). The court rejected the argument that prohibiting same-sex marriages was rationally related to interests in procreation, child rearing, the conservation of resources, or comity.[10] *Id.* at 569, 571; *see also Goodridge v. Dep't Public Health,* 798 N.E.2d 941, 968 (Mass. S. Ct. 2003) (same). The court observed that although the state may not interfere with the criteria for religious marriages, "neither may the government, under the guise of protecting 'traditional' values, even if they be the traditional values of the majority, enshrine in law an invidious discrimination that our Constitution . . . forbids." *Opinions,* 802 N.E.2d at 570.[11]

Family Code Sections 300, 301 and 308.5 relegate same-gender couples to a status inferior to that of opposite-gender couples based on gender. This violates equal protection under the California Constitution.

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[10]The Massachusetts Supreme Court stated that "[b]ecause the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. . . . [G]roup classifications based on unsupportable distinctions . . . are invalid under the Massachusetts Constitution." *Id.* at 571.

[11] *Cf. Lawrence v. Texas*, __ U.S. __, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring) (holding law prohibiting sodomy violated equal protection, observing "[w]e have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.")

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C. Denying Same-Sex Couples The Right To Marry Violates The Substantive Due Process Guarantees Of The California Constitution.

The due process clause of the California Constitution contains a substantive due process component,[12] which like its federal counterpart ensures that the government does not impermissibly infringe individual liberties, or subject individuals to invidious and irrational legal restraints. *See Washington v. Glucksberg* (1997) 521 U.S. 702, 719-20 [federal due process clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them," and "provides heightened protection against government interference with certain fundamental rights and liberty interests"]; *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, 771 [California due process clause "prevents government from enacting legislation that is arbitrary or discriminatory or lacks a reasonable relation to a proper legislative purpose"] [internal quotes omitted].

Under substantive due process analysis, the standard a legislative enactment must meet turns on whether it infringes a fundamental right or liberty interest. If it does, it violates substantive due process unless it survives strict scrutiny; the government cannot "infringe certain fundamental liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Dawn D. v. Sup. Court* (1997) 17 Cal. 4th 932, 939-40 [emphasis original, internal quotes omitted]; *Reno v. Flores* (1993) 507 U.S. 292, 301-02. If legislation does not entrench upon a fundamental right or liberty interest, it will be upheld if it is rationally related to a legitimate governmental objective. *Washington, supra,* 521 U.S. at p. 721; *Perkey v. Dept. of Motor Vehicles* (1986) 42 Cal.3d 185, 189.

The Family Code's provisions that exclude same-sex couples from marriage run squarely afoul of the state substantive due process guarantee. Those statutes unjustifiably infringe upon protected

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[12] The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Similarly, Article I, Section 7(a) of the California Constitution states that "[a] person may not be deprived of life, liberty, or property without due process of law[.]" Cal. Const., Art. I, § 7(a); *accord, id.*, Art. I, §15. The California courts tend to interpret the California Constitution's due process guarantee in a manner similar to its federal counterpart. *See, e.g., Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367.

liberty interests, are entirely arbitrary, and lack any reasonable relation to any proper legislative purpose.

1. The Right To Marry The Person Of One's Choice Is A Fundamental Aspect Of The Liberty Protected By The California Constitution.

The decision whether to marry, and who to marry, is a choice of fundamental importance to the individual. "[M]arriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-75. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. at 12. As the Massachusetts Supreme Court recently recognized in *Goodridge v. Department of Public Health* (2003) 440 Mass. 309, 322, 798 N.E.2d 941, holding that denying same-sex couples the right to marry violates the equal protection and due process clauses of the Massachusetts Constitution, civil marriage "is a social institution of the highest importance," and "the decision whether and whom to marry is among life's momentous acts of self-definition":

> Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds …. Marriage also bestows enormous private and social consequences upon 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. (*Id.*)

The freedom of each unmarried adult to choose to marry, and to select the person he or she will marry, is a fundamental aspect of the liberty protected by the constitution. "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival," and is a "fundamental freedom" protected by substantive due process. *Loving,* 388 U.S. at 12 [internal quotes and citations omitted]. The right to marry is "of fundamental importance for all individuals" and is "part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail* (1978) 434 U.S. 374, 384; *Lawrence v. Texas*, __ U.S. __, 123 S. Ct. 2472, 2481 (2003) ["our laws and tradition afford constitutional protection to personal decisions relating to marriage"]; *Washington, supra*, 521 U.S. at 720 ["the 'liberty' specially protected by the Due Process Clause includes the right[]

to marry"]; *Cleveland Board of Education v. La Fleur* (1974) 414 U.S. 632, 639 [due process protects the "[f]reedom of personal choice in matters of marriage"].

And as the U.S. Supreme Court emphasized just last term, the Fourteenth Amendment's protections of individual liberty apply to persons in a relationship with a member of the same sex just as much as they do to members of a heterosexual couple. Decisions as to marriage and other fundamentally personal matters "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment …. *Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do*." *Lawrence, supra*, 123 S.Ct. at p. 2481-82 [emphasis added]. An unmarried adult's right to decide whom to marry is a fundamental aspect of the liberty protected by the due process clause, without regard to whether that adult chooses to marry a person of the same or the opposite gender.

The California courts have likewise recognized that "[f]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause[.]" *Boren v. Department of Employment Development* (1976) 59 Cal.App.3d 250, 259. Indeed, the California Supreme Court held more than half a century ago that marriage "is a fundamental right of free men" and is "one of the basic civil rights of men," and that "the right to marry is the right to join in marriage with the person of one's choice." *Perez v. Sharp*, 32 Cal.2d at 714-15 [prohibitions on interracial marriage violate substantive due process]. A law infringing that right "must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process." *Id*. at 715. As the Court held, a law restricting one's right to join in marriage with the person of one's choice must be more than merely rational: "[t]here can be no prohibition of marriage except for an important social objective and by reasonable means." *Id.* at 714.[13]

[13] Other settled legal principles support the conclusion that the right to choose the person one will marry without regard to gender is fundamental under the California Constitution. "[W]hen determining which rights are 'fundamental' for due process purposes, a court's attention focuses primarily on whether the right … has a disproportionate impact upon a discrete and insular minority." *Berlinghieri v. Dept. of Motor Vehicles* (1983) 33 Cal.3d 392, 397 [citing *U.S. v. Carolene Prods. Co.* (1938) 304 U.S. 144, 152-53 fn.4]. And the California courts have recognized that gay men and lesbians "share a history of persecution comparable to that of Blacks and women," and that "[o]utside
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2. Denial Of The Right To Marry To Persons In A Same Sex Relationship Cannot Withstand Substantive Due Process Scrutiny.

Because the right to marry the person of one's choice is a fundamental aspect of the liberty protected by the state procedural due process guarantee, the California Family Code provisions that limit marriage to a man and a woman must be analyzed under strict scrutiny, and may be enforced only if they are necessary to promote a compelling government interest. The Family Code provisions that the Petitioners seek to enforce do not come close; they cannot withstand even the considerably more deferential review of the rational basis test. *Goodridge,* 440 Mass. at 331; *see also Lawrence,* 123 S.Ct. at 2484 [Texas statute prohibiting sodomy between members of the same sex violates substantive due process and "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"]. The Massachusetts Supreme Court's detailed holding in *Goodridge,* as to why the prohibition against same-sex marriage is arbitrary and irrational, is fully applicable here.

- First, the prohibition cannot be justified under the rationale that it serves the state's interest in promoting procreation. "Fertility is not a condition of marriage, nor is it grounds for divorce …. it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." (440 Mass. at 331-32.)
- Restricting marriage to opposite-sex couples also "cannot plausibly further" the policy of protecting the welfare of children. Because there is no evidence that barring same sex couples from marrying will increase the number of opposite sex couples who marry in order to raise children, there "is no rational relationship between the [state's] proffered goal of protecting the 'optimal' child rearing unit." (*Id*. at 334-35.) Indeed, because prohibiting same-sex couples from marrying ensures that such couples' children will lack the financial security and stability created by the marriage relationship, the prohibition against same-sex marriage actually *harms* the welfare of children, by "prevent[ing] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." (*Id*. at 335.)
- Prohibiting same-sex marriage bears no rational relationship to the interest in conserving scarce public financial resources, because there is no evidence that members of same-sex couples are more financially independent from each other than members of opposite-sex couples. (*Id*. at 336.) In any event, the financial benefits of marriage are not dependent

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of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility … and such immediate and severe opprobrium … as homosexuals." *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276, 1279; *see also Children's Hospital v. Belshe* (2002) 97 Cal.App.4th 740, 769 [sexual orientation is "suspect classification" for purposes of equal protection].

on any showing that the members of a married couple are financially dependent upon each other. (*Id*. at 337.)[14]

As the Massachusetts high court held, "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason," and exists only because of historically prevalent anti-homosexual prejudice. *Goodridge,* 440 Mass. at 341. That dubious historical pedigree does not entitle the prohibition to judicial approval. "[T]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id*. at p. 342; *Palmore v. Sidoti* (1984) 466 U.S. 429, 433. As "a status-based enactment" based on anti-homosexual animus that does not rationally promote any legitimate interest, the prohibition against same-sex marriage "is a classification of persons undertaken for its own sake." *Romer v. Evans* (1996) 517 U.S. 620, 635 [state constitutional prohibition against local legislation protecting homosexuals violates equal protection clause].

3. Denying Same-Sex Couples The Right To Marry Violates The California Constitution's Right To Privacy

The California Constitution explicitly guarantees the individual right to privacy, which may be "broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts."[15] *Amer. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326. This guarantee includes "autonomy privacy," which protects an individual's "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference." *Id*. at 332; *Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 35. The California Constitution's privacy clause protects an individual's "right of privacy or liberty in matters related to marriage[.]" *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 [Article I, Section 1 protects "right to marriage"].

[14] The ban on same-sex marriage also cannot be justified on the ground that such unions are immoral. Interpreting the contours of due process, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence,* 123 S.Ct. at 2480. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Id*. at 2483.

[15] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal.Const., Art. I, §1.)

When legislation infringes on a right protected by the California Constitution's privacy guarantee, the enactment is subject to strict scrutiny. *American Academy of Pediatrics,* 16 Cal.4th at 329; *Hill,* 7 Cal.4th at 34. For the same reasons the Family Code's provisions excluding same-sex couples from marriage violate substantive due process, they also violate the constitutional right of privacy. ***See* pp. , *supra*.**

D. Family Code Section 308.5 Is Irrelevant In Any Event Because It Addresses Only Out-Of-State Marriages.

Petitioner dramatically overreaches when it argues that Respondents' decision to stop denying marriage licenses to same-sex couples in San Francisco somehow violates Proposition 22, now codified as Family Code section 308.5. The historical context in which Proposition 22 was introduced, the language of the ballot pamphlet, and the codification of the initiative in relation to the section of the Family Code extending recognition to out-of-state marriages all demonstrate that Proposition 22 was intended to apply only to out-of-state marriages.

A voter initiative may not be interpreted in such a way that it is contrary to the intent of the voters. *In re Delong* (2001) 93 Cal.App.4th 562, 569. Thus, the reach of an initiative is limited by the materials presented to the voters in the ballot pamphlet, even when the language of the initiative would arguably support a broader meaning. *See Hodges v. Superior Court* (1999) 21 Cal. 4th 109, 114 [where neither language nor ballot materials of initiative limiting automobile insurance claims by uninsured motorists explicitly mentioned product liability claims, electorate could not be presumed to have intended initiative to affect them]; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1113-14. Voters were informed that the purpose of Proposition 22 was solely to prevent California from having to recognize certain marriages from other jurisdictions. It is impermissible to give a broader meaning to Proposition 22 than was presented to the people at the time they enacted it.

1. The Ballot Pamphlet, Viewed in its Historical Context, Makes Clear That Family Code Section 308.5 Applies Only to Marriages Performed Outside California.

Proposition 22 qualified for the ballot in 1999 and was passed on March 7, 2000. Three months earlier, on December 20, 1999, the Vermont Supreme Court had held that excluding same-sex couples from the rights and benefits given to married couples under Vermont law violated the Vermont

Constitution. *Baker v. State* (Vt. 1999) 170 Vt. 194. The Hawaii Supreme Court had issued a similar ruling a few years earlier, holding the state could not exclude same-sex couples from marriage unless it could show a compelling reason for doing so. *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44. On May 20, 1999, the Canadian Supreme Court held that for the purposes of family law, same-sex partners must be considered "spouses." *M. v. H.* (1999) 2 SCR 3. Also in 1999, the Netherlands had announced its intention to permit same-sex couples to marry, and several other European countries were considering similar proposals.[16]

Thus, Proposition 22 was passed in the midst of an unprecedented national and international debate over marriage equality for same-sex couples, at a time when the prospect of a state or country ending such discrimination seemed to many to be imminent and inevitable. California already had a law providing that only different-sex couples could marry in California. (*See* Family Code § 300; *Hinman v. Dep't. of Personnel Administration* (1985) 167 Cal.App.3d 516, 524 [relating the history of Section 300, amended in 1977 to add gender requirements].) But in the absence of some affirmative legislation, the law was clear that same-sex couples who married in another jurisdiction would be entitled to have their marriage recognized and treated as valid under Family Code Section 308, as well as possibly under the Full Faith and Credit Clause of the United States Constitution.

Proposition 22 was introduced to prevent California from being required to defer to other jurisdictions on this question. The official ballot materials presented to voters focused on the alleged need to close a "legal loophole" permitting out-of-state judges to define California marriages. *See* RJN, Ex. F at 50, 52 (Cal. Ballot Pamphlet: Primary Election 50, 52 [argument in Favor of Proposition 22, referring to constitutional mandate that each state give full faith and credit to the laws of other states as

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[16] Same-sex marriages became legal in the Netherlands on April 1, 2001. Staatsblad 2001, nr. 9. Many other countries were granting significant recognition to same-sex couples at this time. "In 1989, Denmark became the first country to offer registered partnerships to same-sex couples. Norway, Sweden, Iceland, and Finland all followed suit, and in 1995, the Scandinavian countries signed a treaty to recognize each other's registered partnerships. In 1995, Hungary extended recognition of "common-law" marriages to same-sex partners. Since then, Croatia, France, Germany, and Portugal have created forms of registration for same-sex relationships." Human Rights Watch Briefing Paper, Non-Discrimination in Civil Marriage: Perspectives from International Human Rights Law and Practice, available at http://www.hrw.org/backgrounder/lgbt/civil-marriage.htm.

"legal loophole"].) Similarly, in the official ballot measure summary, the analysis by the legislative analyst explained: "Under current California law, "marriage" is based on a civil contract between a man and a woman. Current law also provides that a legal marriage that took place outside of California is generally considered valid in California." (Voter Information Guide at 51 [March 7, 2000 Primary Election].) Supporters of the measure stated:

> When people ask, "why is this necessary?" I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages. (RJN, Ex. F at 52 (Voter Information Guide))

See also id. ["It's our state. It should be our choice"]. The Rebuttal to Argument Against Proposition 22 continued to stress this point: "THE TRUTH IS, *UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES.*" *Id*. at 53 [capitalization and italics in original].

2. Its Placement in the Family Code Also Demonstrates That Section 308.5 Qualifies Section 308, Which Recognizes Marriages From Foreign Jurisdictions, Rather Than Section 300, Which Treats Domestic Marriages.

Another strong indication that Proposition 22 concerns only out-of-state marriages and has no effect on who may marry in California is its location in the Family Code. California, like other states, has long embraced the rule that a marriage, valid where celebrated, is valid everywhere. *See*, *e.g.*, *In re Marriage of Smyklo* (1986) 180 Cal. App.3d 1095, 1097. California had codified this rule in Family Code Section 308. That section, titled "Validity of Foreign Marriages," states: "A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state." Fam. Code § 308. Proposition 22 was codified as Family Code Section 308.5, a placement that signals its purpose to limit California's broad recognition of out-of-state marriages.

Construing Section 308.5 as though it related to domestic marriages is also impermissible because such an interpretation would create legislative surplusage. (*See Lungren v. Superior Court* (1996) 14 Cal.4th 294, 302 ["Statutes, whether enacted by the people or the Legislature, will be construed so as to eliminate surplusage"].) When Proposition 22 went before the voters, California Family Code Section 300 already provided that "marriage is a personal relation arising out of a civil

contract between a man and a woman." Fam. Code § 300.[17] If Section 308.5 applies to domestic marriages, it adds nothing new. Only by reading Section 308.5 as a limitation on the recognition of out-of-state, rather than in-state, marriages does Proposition 22 take on an independent function in the Family Code.

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[17] If Petitioner is correct and Proposition 22 was truly intended to reinforce Family Code Section 300 and its existing restriction of domestic marriage to opposite-sex couples, it would have been codified in relation to that code section instead. Indeed, Senator Pete Knight, author of Proposition 22, has twice sought to introduce just such a proposed "Family Code Section 300.5" on the topic of *domestic* same-sex marriages.

In 1996, then-Assemblyman Pete Knight attempted to pass AB 3227, which specifically sought to reiterate and strengthen the existing limitation in Family Code Section 300 by adding Section 300.5, which would have stated: "The Legislature finds and declares the following: (a) California's marriage laws were originally, and are presently, intended to apply only to male-female couples, not same-gender couples. This determination is one of policy. Any changes in these laws must come from either the Legislature or by constitutional amendment, not the judiciary." (*See* Legislative Counsel, AB 3227 Assembly Bill – INTRODUCED (last modified Mar. 19, 1997) http:///www.leginfo.ca.gov/pub/bill/asm/ab 3201-3250/ab 3227 bill 960223 introduced.html.) Further subsections then sought to define California's policy goals in enacting the bill. (*Id.*) The bill was not enacted.

In 1997, Assemblyman Knight and others introduced a similar bill, A.B. 800, entitled the "California Defense of Marriage Act," which in addition to prohibiting the recognition of marriages between same-sex couples from other jurisdictions also included several provisions relating to the definition of marriage under state law. (See Legislative Counsel, AB 800 Assembly Bill – INTRODUCED (last modified Nov. 8, 1998) http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab 0751-0800/ab 800 bill 199700226 introduced.html.) A.B. 800 would have amended Section 11 of the Family Code to read: "For the purpose of determining the meaning of any act of the Legislature, or of any ruling, regulation, or interpretation of any state agency, a reference to 'husband' and 'wife,' 'spouses', or 'married persons,' or a comparable term, means only one man and one woman who are lawfully married to each other." (*Id.*) A.B. 800 would also have added Family Code Section 300.5, stating:

> The Legislature finds that the state's marriage license laws reinforce, carry forward, and make explicit the strongly held and long-standing public policy of this state to recognize and foster the marital union of only one man and one woman.
>
> The Legislature further finds that several compelling interests support the statutory recognition of marriage only between one man and one woman, whether contracted in this state or a foreign jurisdiction. (*Id.*)

AB 800 also was not enacted.

As these failed attempts to enact a "Family Code Section 300.5" reveal, even the author of Proposition 22 could not seriously have believed that it addressed domestic marriage. Respondents note that Senator Knight has nonetheless personally verified the complaint and petition in this case.

In sum, in the absence of any evidence that Family Code Section 308.5 reaches domestic marriages or that the voters intended it to do so, it is simply irrelevant to the domestic marriages now before this Court. Petitioner's attempt to invoke Section 308.5 to attack the decision of the Clerk to stop denying marriage licenses on the basis of unconstitutional considerations must be rejected.

E. Plaintiff Is Unlikely To Prevail On State Preemption Grounds, Because This Case Does Not Present A Conflict Between State And Local Laws.

Petitioners claim they are likely to prevail against the City because the City's recognition of same-sex marriage is supposedly "preempted" by Family Code section 300, which defines marriage as "a civil contract between a man and a woman." The state preemption doctrine does not apply to this case, which does not present a conflict between state and local law.

The state preemption doctrine is grounded in article 11, section 7 of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." A "conflict with general laws" only exists where a local entity has *enacted legislation* that duplicates, contradicts or enters an area fully occupied by state law. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993); *see also S.D. Myers v. City and County of San Francisco*, 336 F.3d 1174, 1176-77 (9th Cir. 2003) (applying *Sherwin-Williams* to uphold San Francisco ordinance requiring city contractors to provide equal benefits to domestic partners).

Here, the City has not enacted any legislation, let alone legislation that could be argued to conflict with state law. Rather, the City has (rightly) declined to enforce a state statute that is inconsistent with state constitutional requirements. Plaintiff's preemption argument thus fails.

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F. Plaintiff Is Unlikely To Prevail In The Face Of The City's State And Federal Equal Protection Defenses, Because California Family Code Section 300 Violates Federal And State Equal Protection Principles.

1. Section 300 Violates The State Constitution's Guarantee Of Equal Protection Of The Laws.

Family Code Sections 300, 301 and 308.5 violate the Equal Protection Clause of the California Constitution (Cal. Const., art. I, § 17), and thus cannot lawfully be applied to prevent same-sex couples from marrying.[18]

"One century ago, the first Justice Harlan admonished [the Supreme Court] that the Constitution 'neither knows nor tolerates classes among citizens.' *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citations omitted). Thus began the Supreme Court's opinion in *Romer*, in which it reaffirmed once and for all that under the Fourteenth Amendment's Equal Protection Clause, the state may neither grant nor withhold favorable treatment on the basis of sexual orientation absent a demonstrably rational basis for doing so. *Id.* at 633 (applying Fourteenth Amendment's equal protection clause). The equal protection principles articulated in *Romer* have been applied to strike

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[18] We cite both federal and state precedent in this section to support our state constitutional argument. It is well established that the State Constitution's equal protection guarantee is even stronger than the federal one, including in the context of sexual orientation discrimination. The California courts have long recognized that the State Equal Protection Clause is sufficiently broad to prohibit discrimination on the basis of sexual orientation. *See Gay Law Students Ass'n v. Pacific Tel. & Tel. Co. et al*, 156 Cal. Rptr. 14, 21 (1979) ("arbitrary exclusion of qualified individuals from employment opportunities by a state-protected public utility does, indeed, violate the state constitutional rights of the victims of such discrimination."). Moreover, in striking down a blanket ban on hiring gays and lesbians, the *Gay Law Students* court applied a standard that is significantly more searching than the heightened rational basis test applied under the federal Equal Protection Clause. *See id.* at 24 ("The [State] equal protection clause *prohibits* . . . arbitrary discrimination on grounds unrelated to a worker's qualifications."). Indeed, the court's discussion suggests that in California, sexual orientation is a "suspect classification"; thus, blanket discrimination on the basis of sexual orientation is automatically suspect and subject to heightened scrutiny. *See also Holmes v. California Nat'l Guard et al.* (2001) 90 Cal. App. 4th 297, 302 (implying discrimination permissible under federal equal protection standards may violate the California constitution). Since the California Constitutional equal protection guarantee protects sexual minorities to a greater degree than federal equal protection, *a fortiori* federal precedents that hold a law violates equal protection also support the proposition that such laws violate the California Equal Protection clause.

down state-sponsored discrimination on the basis of sexual orientation under the federal Equal Protection Clause.[19]

The state laws at issue in this case define marriage exclusively as "a civil contract between a man and a woman." ***See* p. , *supra***. They operate to prevent same-sex couples from entering into legal marriage in California, and thus create a classification based on sexual orientation. Under the Equal Protection Clause, a legislative classification that neither burdens a fundamental right nor targets a so-called "suspect class" will be upheld only if it bears a rational relationship to a legitimate governmental purpose. *Romer*, 116 S.Ct. at 1627. As we explained above, section 300 *does* burden a fundamental right—namely, the right to marry the person of one's choice—and should therefore be examined (and ultimately invalidated) using "strict scrutiny" analysis. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Perez v. Sharp*, 32 Cal. 2d 711, 741 (1948) (invalidating California ban on interracial marriage as impermissible burden on fundamental right to select one's spouse).

Even if section 300 is evaluated under the more deferential "rational basis" test, it still violates the Equal Protection Clause because it lacks a rational relationship to any legitimate state interest. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 116 S.Ct. at 1627-28. In the absence of any legitimate state interest to justify a law such as section 300, the "inevitable inference [is] that the disadvantage imposed is born of

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[19] *See, e.g., Flores v. Morgan Hill Unified School Dist.* **(9th Cir. 200_)** 324 F.3d 1130, 1137 (holding school's differential treatment of gay students suffering peer harassment violated Equal Protection Clause of Fourteenth Amendment, broadly commenting that Ninth Circuit had established "[a]s early as 1990" that states actors "who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection"); *Whitmire v. Arizona* **(9th Cir. 200_)** 298 F.3d 1134, 1136-1137 (reversing and remanding for consideration on merits equal protection challenge to prison regulation prohibiting same-sex kissing and hugging among non-family members during prison visits). *See also Lawrence v. Texas* (2003) 123 S.Ct. 2472, 2482 (strongly implying Texas' criminalization of certain sex acts by same-sex couples but not opposite-sex couples violated not only Due Process but also Equal Protection Clause of the Fourteenth Amendment); *id.* at 2484 (O'Connor, J., concurring) (arguing that the *Lawrence* majority should have invalidated Texas statute under Equal Protection Clause).

animosity toward the class of persons affected. [I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id.* at 1628 (citation and internal quotation marks omitted). The Supreme Court has been "most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." *Lawrence*, 123 S.Ct. at 2485 (O'Connor, J., concurring in the decision to strike down a Texas law criminalizing private sexual conduct engaged in by a same-sex couple).

Prior to the passage of section 300, the California statute defining marriage made no reference to gender. Section 300 was specifically introduced before the State Legislature in order to alter the status quo by affirmatively prohibiting same-sex marriage. According to its legislative history, proponents of section 300 supported its passage with the following argument: "the legal institution of marriage was designed for purposes of procreation, and for protecting the interests of offspring born to the marriage. Thus special benefits, such as tax breaks, inheritance rights and government pensions, are accorded married persons, in order to encourage the establishment and maintenance of the state-sanctioned relationship of marriage." RJN Ex. F.

The "procreation" rationale obviously does not provide a rational basis for excluding same-sex couples from marrying. Same-sex couples in California, like opposite sex couples, often procreate through insemination and surrogacy, and routinely adopt children. By the same token, opposite sex married couples routinely choose not to have or adopt children. And "while it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Goodridge v. Dep't of Public Health*, 798 N.E. 2d 941, 961 (2003) (rejecting procreation rationale as applied to the Massachusetts equal protection clause). Section 300's "procreation" rationale—already irrational when the bill was considered in 1977—is even less rational today.

Section 300's legislative history makes clear that its supporters were well aware that married couples enjoy "special benefits" not enjoyed by unmarried couples. The ability to marry in California brings with it state-sanctioned financial and operational benefits, as well as psychological and social

benefits. Perhaps recognizing that fact, the State Legislature has over time taken steps to grant certain "domestic partner" benefits to same-sex couples. *See* Family Code §§ 297 *et seq.* These provisions extend some, but not all, of the rights enjoyed by married couples to same-sex couples who register with the State. Ironically, the very presence of domestic partner provisions in California serves to expose the overall legal scheme for what it is: state-sponsored heterosexual supremacy. Such a system can serve no legitimate governmental purpose, and thus cannot withstand rational basis scrutiny under the Equal Protection Clause.

As even the bitterest critics of the leading and concurring opinions in *Lawrence* concede, after *Lawrence* state laws prohibiting same-sex couples from marrying are not only "called into question" but on "shaky ground." *Lawrence*, 123 S.Ct. at 2490, 2496 (Scalia, J., dissenting to the majority and concurring opinions, respectively). The City not only agrees with this assessment, but has actually concluded that section 300 violates the state Equal Protection Clause and thus cannot lawfully be applied to prevent same-sex couples from marrying in California. Because Petitioners are unlikely to overcome the City's state constitutional equal protection defense, they are unlikely to prevail on the merits.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' request for a stay or other preliminary relief.

Dated: February 16, 2004

DENNIS J. HERRERA
City Attorney

By:________________________________
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