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April 26, 2004

VIA HAND DELIVERY
The Honorable Chief Justice Ronald George
Honorable Associate Justices Baxter, Brown, Chin, Kennard, Moreno, and Werdegar
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Lewis, et al. v. Alfaro, Petition for Peremptory Writ of Mandate, Case No. S122865

Petitioners' Reply Letter Brief to Respondent's Letter Brief Regarding Determination of Validity of Marriages, filed pursuant to April 14, 2004 Orders

Dear Honorable Chief Justice George and Associate Justices Baxter, Brown, Chin, Kennard, Moreno, and Werdegar:

Pursuant to this Court's order of April 14, 2004, Petitioners submit the following reply brief addressing Respondent's arguments.

I. This Court may issue any orders necessary to give effect to its judgments – including an order that Respondent's unlawful actions have no legal effect.

Respondent's argument that this Court "lacks jurisdiction" to invalidate the licenses conflates jurisdiction with remedy: "A court issuing a writ of mandate has the inherent continuing power to make any orders necessary and proper for the complete enforcement of the writ." *California Lab. Fed'n v. Occupational Safety & Health Standards Bd.*, 5 Cal. App. 4th 985, 989 (1992) (and cases cited); *Kings v. Woods*, 144 Cal. App. 3d 571, 578 (1983) (same); *Prof. Eng's in Cal. Gov't v. State Personnel Bd.*, 114 Cal. App. 3d 101, 109 (1980) (same); *see also Hobbs v. Tom Reed Gold Mining Co.*, 164 Cal. 497, 501 (1913) ("Ample power to compel obedience

is conferred by section 1097 of the Code of Civil Procedure, although, doubtless, the power would exist in the absence of such express grant."). This Court may issue a writ of mandate that will have both a prospective and retroactive effect. *In re Retirement Cases*, 110 Cal. App. 4th 426, 445-46 (2003) (allowing retroactive writs of mandate against retirement boards).

Petitioners do not ask the Court to issue a separate form of declaratory relief or judgment. Instead, Petitioners request this Court to exercise its inherent power to enforce the writ, including declaring the altered licenses to be void *ab initio* because they are the fruit of *ultra vires* actions. *See, e.g, in re County of Orange*, 31 F. Supp. 2d 768, 774 (C.D. Cal. 1998) (quoting *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 353 (1930)) (contracts resulting from *ultra vires* actions were absolutely void).

Respondent attempts to recast the case as involving the constitutionality of California marriage law or the due process rights of her citizens. Instead, this case is about whether local officials may disregard the law based on their personal opinions. The "interested parties" are not the unqualified couples holding invalid licenses, the interested parties are the local officials who are asking this Court to give legal effect to their errant behavior and the citizens of California who are entitled to the rule of law. This Court may certainly issue a writ of mandate to compel Respondent to follow state law - her actions in issuing altered "licenses" to unqualified couples exceeded her authority and have no legal effect.

II. Respondent's entire argument erroneously assumes validity of the licenses already issued.

The cases cited and arguments made by Respondent all have two things in common: they only apply 1) if the requirements for a valid marriage have been met or could be met, or 2) if a valid license has already been issued. As this case presents neither scenario, Respondent's cases and arguments are inapposite and irrelevant to the resolution of the issue before this Court. Couples who cannot meet the statutory requirements for marriage are completely different from couples who can (currently or prospectively) meet the requirements. As discussed below, a legislative declaration is unnecessary for this Court to invalidate the marriages, and there is no "due process" right implicated when there is no property or liberty interest at stake.

A. Legislature need not explicitly declare same-sex "marriages" void when same-sex couples cannot meet statutory requirements for marriage.

As expected, Respondent emphasizes that the Legislature has not expressly declared that marriages between persons of the same-sex are void. Letter Brief of Respondent at 6. Respondent errs for two reasons: 1) the Legislature has defined the requirements for valid marriages and a same-sex union does not qualify as "marriage"; and 2) Respondent completely ignores the *DePasse* decision which states that the Legislature need not make an express declaration of invalidity in every instance. *Estate of DePasse*, 97 Cal. App. 4th 92, 105-06 (2002). By Respondent's rationale, had she issued a license to a man and a potted plant this Court would not be "allowed" to invalidate that license because the Legislature had not expressly declared that such a "marriage" was void *ab initio*.

Every case cited by Respondent presupposes that a colorably valid marriage had taken place, either a marriage by a couple who could (at some point) meet statutory marriage requirements, or a marriage pursuant to a license meeting statutory requirements. Such is not the case here.

A same-sex couple does not satisfy the inviolable requirements for a valid marriage in California: an unmarried man and an unmarried woman. Cal. Fam. Code § 300. All of Respondent's cases discussing California's policy favoring marriage apply only to unions that actually satisfy the requirements of marriage – each case deals with a male and female. Similarly, Respondent's authority on the recognition of valid out-of-state marriages also deals solely with male-female unions.

Respondent discusses a "trend" towards approval of homosexuality in California as support for flouting state law. Letter Brief of Respondent at 12. Respondent then cites legislative (not executive or judicial) action as evidence of this "trend." *Id.*[1] Of course this is a red herring. The Legislature has expressly affirmed the traditional definition of marriage (e.g., Family Code § 300), and the people of California have reaffirmed it by voter initiative (Family Code § 308.5). There is no legislative "trend" in California favoring the issuance of marriage licenses to same-sex couples.

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[1] Respondent also cites A.B. 205 as evidence of this "trend"; that bill is being challenged as an implicit repeal of Family Code Section 308.5 in *Knight v. Schwarzenegger*, No. 03AS05824 (Super. Ct. filed Sept. 22, 2003). Regardless of A.B. 205's questionable viability, the bill does not change the statutory requirements for a valid marriage license.

Furthermore, relying on the supposed "trend" simply highlights the question presented in this lawsuit: may local officials ignore unambiguous state law based on their own personal opinions or perceived "trends"? The answer is "no."

B. This Court may issue a writ without joining same-sex couples because "due process" is irrelevant where there is no interest to be protected.

Respondent's "due process" argument is similarly unavailing. Respondent argues that the same-sex couples who received Respondent's "licenses" are "indispensable parties" whose "due process" rights will be violated if the Court holds the licenses are invalid. This is nonsense. There is no "interest" in an invalid license, regardless of how emotionally-charged the facts may be.

Each due process case cited by Respondent presumes that the permit or license at issue was originally valid. Where the qualifications for such a permit or license were never met, there is no "interest" protected by due process. Respondent turned a blind eye to the legal qualifications for marriage and the requirements for marriage license forms. Had Respondent issued driver's licenses to twelve-year-olds in violation of state law, would it seriously be contended that each twelve-year-old must be afforded a hearing on the validity of his "license" else his due process rights be violated? Obviously not; for due process to be implicated, there must be something of actual value or legitimacy at issue:

> A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution. A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law. . . . [P]rocedural requirements ordinarily do not transform a unilateral expectation into a protected property interest.

Stiesberg v. State of California, 80 F.3d 353, 356 (9th Cir. 1996).

There is no legal interest in the fruits of *ultra vires* actions. *See, e.g, in re County of Orange*, 31 F. Supp. 2d at 774. Numerous cases around the country have held that there is no "interest" protected by due process if the applicant fails to qualify for a license or if the licenses fail to meet state law

requirements. *See Mellin v. Flood Brook Union Sch. Dist.*, 790 A.2d 408, 421 (Vt. 2001) (teacher had no protected interest in license where she did not qualify); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 792 (Minn. 1989) (no protected interest where state officer issued license contrary to applicable regulations); *Gunkel v. City of Emporia, Kansas*, 835 F.2d 1302, 1304 & n. 7 (10th Cir. 1987) (building permit issued by mistake or in violation of the law created no protected interest in the licensee); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985) (no legitimate claim of entitlement to a license unless the applicant qualifies for the license). This Court should reach the same conclusion to provide guidance to Respondent and any others who would ignore state law.

In this case, Respondent has not shown that unqualified couples have a protected interest in licenses that fail to meet state law standards. A piece of paper does not gain "license" status because it has passed through Respondent's hands; it only receives value when it meets statutory requirements and is signed by an unmarried man and woman. Cal. Fam. Code §§ 300, 301, 308.5 & 355. Altered forms sold to disqualified couples do not fit the bill – they are void *ab initio*.

CONCLUSION

Respondent has not met her burden of demonstrating why her *ultra vires* actions should be ratified by this Court. This Court should issue the peremptory writ and nullify the invalid licenses to give full effect to its writ. After this Court renders a decision in this matter, Petitioners also respectfully request that the Court lift its stay of *Proposition 22 Legal Def. and Educ. Fund v. City and County of San Francisco*, No. 428794 (consolidated with *Thomasson v. Newsom*, No. 503943) (Super. Ct. filed February 13, 2004) in order that the case may proceed to conclusion in accordance with this Court's decision.

Respectfully submitted,

By _____
Terry L. Thompson
Attorney for Petitioners

CASE NO. S122865

IN THE
SUPREME COURT OF CALIFORNIA

BARBARA LEWIS, CHARLES MCILHENNY, and EDWARD MEI,
Petitioners,
vs.
NANCY ALFARO, County Clerk of the City and County of San Francisco in her official capacity,
Respondent.

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On the date set forth below, I served the document(s) described as:

(1) Petitioners' Reply Letter Brief to Respondent's Letter Brief Regarding Determination of Validity of Marriages, filed pursuant to April 14, 2004 Orders

on the interested parties in this action by serving: [ ] originals [x] true copies thereof as follows:

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I declare under penalty of perjury under the laws of the state of Arizona and the United States of America that the above is true and correct. Executed at Scottsdale, Arizona.

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Michele L. Magnaghi

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