CASE NO. _____

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.

_____

VERIFIED PETITION FOR IMMEDIATE STAY AND PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE; MEMORANDUM OF POINTS AND AUTHORITIES

IMMEDIATE RELIEF REQUESTED
(*Palma* Notice Requested)

_____

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INTRODUCTION

Thousands of same-sex "marriages" have been performed in San Francisco in total disregard of state statutes. Such out-and-out defiance of the rule of law is unprecedented in this state's modern history and requires the immediate intervention by this Court.

Nancy Alfaro, County Clerk for the City and County of San Francisco, has violated and continues to violate state law; and has shown complete disregard for the legal process and her duty as a public official by 1) issuing marriage licenses to same-sex couples who, by definition, are not eligible to marry each other under Cal. Fam. Code §§ 300, 301, and 308.5; and 2) issuing these licenses on forms that do not meet state law requirements under Cal. Fam. Code § 355. California law unambiguously defines the requirements for marriage and for marriage licenses, but the Clerk continues to issue the licenses in contumacious disregard for the rule of law.

Furthermore, the Clerk has disregarded the legal process and her public duty by discharging her public duty based upon a personal interpretation of the law, rather than the statutes and case law of California. Article III, § 3.5 of the California Constitution prevents the Clerk from willfully disregarding state law unless an appellate court has ruled that law unconstitutional. No court has ruled the laws at issue unconstitutional. This section of the Constitution codifies the fundamental principle that public officials owe a duty to California citizens to follow duly established legal processes in their official actions.

Issue Presented

"Only marriage between a woman is valid or recognized in California." Cal. Fam. Code § 308.5. Violating this law, the Clerk has issued, and continues to issue, marriage licenses to same-sex couples. May

a county clerk defy state laws governing marriage requirements and the form of marriage licenses where, as here, no appellate court has ever declared those laws unconstitutional?

Necessity of Writ Relief

This is a case of first impression in this state. The Clerk has launched a frontal assault on California's strong public policy favoring marriage. No court should tolerate the Clerk's flagrant disregard for both the law and her responsibility as a public official to follow correct legal processes. This behavior, if unchecked, will send a message to officials that they may rely on their personal interpretation of the state constitution – instead of the enacted laws or the decisions of court interpreting those laws. Whether the definition of marriage expressed in existing California statutes is constitutional is an issue immaterial to this petition – the stay and writ should issue solely because of the Clerk's illegal actions and disregard for the legal process. She has usurped both the legislative and the judicial powers of California.

The Clerk's defiance of the rule of law has thrown the State of California into a furor, and the rest of the country watches to see whether California courts will restore the rule of law. In this case, the Clerk's wrongful official behavior, the important legal question involved, the irreparable injury to the orderly system of government and rule of law, and the widespread state interest in this issue present a textbook example for this Court to issue an immediate stay and, at the earliest opportunity provided by law, a peremptory writ of mandate in the first instance. Cal. Civ. P. Code § 1088; *Lewis v. Sup. Ct.,* 19 Cal. 4th 1232, 164-65 (Cal. 1999) (Baxter, J. concurring) (issuing a peremptory writ in the first instance reflects recognition that, on occasion, immediate judicial action is necessary

to prevent or correct unauthorized or erroneous action by the respondent where there is great urgency).

VERIFIED PETITION

By this verified petition for a peremptory writ of mandate and immediate stay, Petitioners allege as follows:

1. Petitioner Barbara Lewis is a resident of the City and County of San Francisco, California, who has paid taxes to the State of California during the past year.

2. Petitioner Charles McIlhenny is a resident of the City and County of San Francisco, California, who has paid taxes to the State of California during the past year.

3. Petitioner Edward Mei is a resident of the City and County of San Francisco, California, who has paid taxes to the State of California and the City and County of San Francisco during the past year.

4. As citizens of California, Petitioners have a strong beneficial interest in having state laws faithfully executed and official duties enforced.

5. Respondent Nancy Alfaro is the County Clerk of the City and County of San Francisco ("the Clerk"). Petitioners seek this writ and stay against the Clerk in her official capacity.

6. As a public official, the Clerk must follow the state constitution and state laws.

7. The laws which the Clerk must follow include the laws governing marriage and marriage licenses.

8. The Clerk's duties include issuing marriage licenses only to those who meet state law requirements and only on the forms meeting state law requirements.

9. Petitioners know that, since February 12, 2004, the Clerk has issued marriage licenses to couples other than those who may legally marry in California.

10. Petitioners know that the relevant state law is clear and unambiguous – legal marriages in California can only take place between an unmarried man and an unmarried woman.

11. Petitioners know that the state-prescribed form for marriage licenses clearly and unambiguously requires that the form be completed by an unmarried man and an unmarried woman.

12. Petitioners know that, since February 12, 2004, the Clerk has issued marriage licenses on forms other than those meeting state law requirements.

13. Petitioners know that, since February 12, 2004, the Clerk has issued over 3,000 marriage licenses to couples other than those meeting state law requirements, on marriage license forms that do not meet state law requirements.

14. As a public official, the Clerk has a fiduciary duty to Petitioners as California citizens to uphold and faithfully execute the laws and the duties of her office.

15. The Clerk has breached her fiduciary duty to Petitioners and the other taxpayers and citizens of California by disregarding state law and issuing marriage licenses to couples other than those who may legally marry in California, on marriage license forms that do not meet state law requirements.

16. The Clerk has caused disorder to the civil system of government in California through her willful disregard for state law.

17. There is no adequate remedy at law because the Clerk is violating clear statutory requirements for marriage and marriage licenses on an ongoing basis, despite the constitutional and statutory statements to the contrary.

18. Petitioners' entitlement to relief is obvious in nature, because the state law is clear and unambiguous.

19. This case presents an issue of significant statewide interest that must be handled immediately, because of the importance in maintaining and securing the integrity of the system of government and officials who respect the rule of law and do not disregard it at their own personal whim.

20. It is urgent that this Court issue an order requiring the Clerk to comply with state law. Failing to stay the Clerk's actions and issue a peremptory writ in the first instance will undermine the rule of law for California's entire system of government and allow the legal chaos resulting from the Clerk's actions to continue.

21. To ensure immediate compliance with state law and to give a decisive and final answer, this Court is the appropriate tribunal to hear such an important question of law.

22. Petitioners request that an immediate stay issue from this Court as soon as possible, with the peremptory writ in the first instance to follow after the requirements for notice are met.

23. Petitioners do not seek a ruling on the constitutionality of the California marriage laws or a ruling on the validity of marriage licenses previously issued by the Clerk to couples other than those allowed to marry under state law.

24. Petitioners base the prayer for relief on this petition verified by Barbara Lewis, Charles McIlhenny and Edward Mei, and the attached memorandum of points and authorities, hereby incorporated by reference.

PRAYER FOR RELIEF

Wherefore, Petitioners pray as follows:

That this Court:

A. Issue an immediate Order commanding Respondent, her deputies, officers, agents, servants, employees, or persons acting

at her behest or direction, to cease and desist issuing marriage licenses on forms that do not comply with state law license requirements;

B. Issue an immediate Order commanding Respondent, her deputies, officers, agents, servants, employees, or persons acting at her behest or direction, to cease and desist issuing marriage licenses to couples other than those who meet state law marriage requirements;

C. Issue a peremptory writ of mandate in the first instance commanding Respondent, her deputies, officers, agents, servants, employees, or persons acting at her behest or direction, to cease and desist issuing marriage licenses on forms that do not comply with state law license requirements;

D. Issue peremptory writ of mandate in the first instance commanding Respondent, her deputies, officers, agents, servants, employees, or persons acting at her behest or direction, to cease and desist issuing marriage licenses to couples other than those who meet state law marriage requirements;

E. Award Petitioners the costs of this proceeding; and

F. Award Petitioners any other and further relief the Court considers proper.

Dated: February 25, 2004

Respectfully submitted,

Alliance Defense Fund Law Center

By _____
Robert H. Tyler
Attorney for Petitioners

VERIFICATION

I, Barbara Lewis, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition for Writ of Mandate in the First Instance and Request for Immediate Stay, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ___ day of February, 2004, in San Francisco, California.

_____

Barbara Lewis

VERIFICATION

I, Charles McIlhenny, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition for Writ of Mandate in the First Instance and Request for Immediate Stay, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ___ day of February, 2004, in San Francisco, California.

_____

Charles McIlhenny

VERIFICATION

I, Edward Mei, a citizen of the United States and a resident of the State of California, have read the foregoing Verified Petition for Writ of Mandate in the First Instance and Request for Immediate Stay, I have personal knowledge of the facts alleged herein, and I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ___ day of February, 2004, in San Francisco, California.

_____

Edward Mei

MEMORANDUM OF POINTS AND AUTHORITIES

In support of Petitioners' Request for a Peremptory Writ of Mandate and Immediate Stay, Petitioner presents the following discussion:

DISCUSSION

I. THIS PETITION MERITS THIS COURT'S ORIGINAL JURISDICTION.

This Court has original jurisdiction to issue a writ of mandate. Cal. Const. art VI, § 10. Moreover, this Court will exercise its original jurisdiction in "cases in which the issues presented are of great public importance and must be resolved promptly." *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 944 (1971) (quotation omitted) (original jurisdiction accepted for petition raising the validity of California Education Code section dealing with student transportation); *see*, *e.g.*, *Bramberg v. Jones*, 20 Cal. 4th 1045, 1054 (1999) (jurisdiction accepted of challenge to initiative relating to congressional term limits); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 812 (1989) (jurisdiction accepted of challenge to initiative making fundamental changes to automobile insurance regulation); *Brosnahan v. Eu*, 31 Cal. 3d 1, 3 (1982) (jurisdiction accepted of action to prevent the Secretary of State from placing initiative measure on primary election ballot); *Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal. 3d 801, 808 (1974) (jurisdiction accepted of challenge to administrative agency's delay of statewide pollution control program). Certainly, a public official's blatant disregard of state law and the proper legal process presents a similar question of great public importance.

Since February 12, 2004, the Clerk has been openly flouting state law governing both marriage and the forms for marriage licenses, as discussed *supra*. This willful and ongoing violation of state law and disregard for the legal process by a public official is unprecedented in

California and should be stopped immediately. For the following reasons, Petitioners urge this Court to end this errant behavior.

II. THE COUNTY CLERK HAS NO AUTHORITY TO *SUA SPONTE* REDEFINE MARRIAGE.

A. The Clerk Has Violated Article III § 3.5 Of The State Constitution By Ignoring State Marriage Law Requirements.

The Clerk's refusal to enforce a state statute violates Article III, § 3.5 of the California Constitution, which states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> (b) To declare a statute unconstitutional;
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Cal. Const. art. III, § 3.5 (emphasis added).

Counties – 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. *See Billig v. Voges*, 223 Cal. App. 3d 962, 969 (1990). In the *Billig* case, plaintiffs sought to compel a city clerk to process and submit a referendum petition to the city council. *Id.* at 963. The clerk refused the petition because it failed to comply with clear state law requirements for referendums. *Id.* In upholding the clerk's action, the court said:

> The very existence of the statute means it is there to be enforced. Administrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.)

> Section 4052 has not been declared unconstitutional by an appellate court in this state. Consequently, the offices of city clerks throughout the state are mandated by the constitution to implement and enforce the statute's procedural requirements. In the instant case, respondent had the clear and present ministerial duty to refuse to process appellants' petition because it did not comply with the procedural requirements of section 4052.

Id. at 969 (emphasis added).

The instant case involves a county clerk – a public office created and controlled directly by the legislature. Cal. Gov't Code § 24000; *see also Nussbaum v. Weeks*, 214 Cal. App. 3d 1589, 1596 (1989), *review den.* (1990) ("[A] public duty is delegated and entrusted to [the public officer], as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting"). Unlike cities, counties are direct political subdivisions of the state. Cal. Const. art. XI, § 1. County clerk offices – with duties mandated by the legislature – are "administrative agencies" within the meaning of art. III, § 3.5. *See Billig*, 223 Cal. App. 3d at 969. As such, county clerks may not refuse to enforce the clear directives of state law. Cal. Const. art. III, § 3.5.

In this case, the Clerk has ignored the law – an improper action regardless of motives or reasons.[1] As noted above, the legislature and voters have already stated that only a couple consisting of one man and one woman may obtain a marriage license in California. *See* Cal. Fam. Code §§ 300 ("Marriage is a personal relation arising out of a civil contract between a man and a woman. . . ."); and 308.5 ("Only marriage between a man and a

[1] The Clerk may raise the constitutionality of the state marriage laws in response to this Petition. Such a defense hides the real and only issue in this Petition: public officials must follow the laws – even laws with which they disagree. The constitutionality of the marriage laws is an issue best left to full development in the lower courts. *See Bramberg*, 20 Cal. 4th at 1048 (considering only the facial validity of a initiative proposition and not the "desirability or wisdom" of its subject matter).

woman is valid or recognized in California") (codifying initiative measure Proposition 22).

Additionally, a valid marriage "license is a mandatory requirement for a valid marriage in California." *Estate of DePasse*, 97 Cal. App. 4th 92, 102 (2002). The legislature has delegated the responsibility for issuing marriage licenses to county clerks. Cal. Fam. Code § 350. The legislature has delegated responsibility for the form of those licenses to the State Department of Health Services. Cal. Fam. Code § 355. The legislature and voters have not given county clerks the discretion to redefine marriage or issue marriage licenses that fail to meet state law requirements. Furthermore, no appellate court has held these provisions to be unconstitutional. Official recognition of same-sex "marriage" is therefore unlawful and void. Even the courts "cannot by construction confer upon any officer an authority that the legislature has seen fit to withhold." *Bear River Sand & Gravel Corp. v. Placer County*, 258 P.2d 543, 546 (1953). Certainly the Clerk may not arrogate to herself the authority to ignore the enacted requirements for marriage licenses. In this case, the Clerk has ignored the law and issued marriage licenses to same-sex couples in clear violation of art. III, § 3.5 of the California Constitution. To date, the Clerk has issued over three thousand nonconforming marriage licenses – with more being issued every day.

B. The Clerk's Actions Are *Ultra Vires* Of Her Authority.

It is well-established that California cities and counties have limited powers to control only matters of local policy. *See* Cal. Const. art. XI, § 7 ("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"); *see also* Cal. Const. art. XI, § 5 (emphasis added). "In short, if [a local law] does not deal strictly with 'municipal affairs,' it is a matter subject to the general laws, and must be declared unconstitutional and

preempted either if it contradicts state law or if it enters a field fully occupied by state law." *Northern Cal. Psychiatric Society v. City of Berkeley*, 178 Cal. App. 3d 90, 100 (1986). Local action that is in conflict with general law is simply void. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984) (*citing* Chavez v. Sargent, 52 Cal. 2d 162, 176 (1959)).

Specifically, an act by a California city or county is void if it: 1) it contradicts or duplicates state law; 2) intrudes on a matter of state-wide concern; or 3) goes beyond the limits of the City or County Charter. *Northern Cal. Psychiatric Society*, 178 Cal. App. 3d at 100 (recognizing that county or city cannot conflict or limit, or intrude on a matter of state law); *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) (an act in violation of charter is void). If a city and county exceeds its authority in any one of these ways, the action is void. The Clerk flagrantly exceeded her authority in all three ways by issuing marriage licenses to same-sex couples.

1. The Clerk's actions contradict state law.

"Local legislation is 'contradictory' to general law when it is inimical thereto." *Smith v. Los Angeles County Bd. of Supervisors*, 104 Cal. App. 4th 1104, 1116 (2002) (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897-98 (1993)). A local law is inimical to state law when it authorizes something that the state prohibits. *Id*. The state prohibits same-sex marriages. *See, e.g,* Cal. Fam. Code § 308.5. Therefore, as discussed *infra,* the Clerk's actions are clearly inimical to California law.

2. The Clerk's actions intrude into a matter that is fully occupied by the legislature.

Any doubt as to whether an issue is a matter of municipal or state-wide concern is to be resolved in favor of the legislative authority of the

state. *Northern Cal. Psychiatric Society*, 178 Cal. App. 3d at 100-01 ("ordinances affecting the local use of static property might reasonably prevail, while ordinances purporting to proscribe social behavior of individuals should normally be held invalid if state statutes cover the areas of principal concern with reasonable accuracy"). Certainly this case leaves no room for doubt – no county official has ever defied California law by attempting to regulate marriage in contravention of express state statutes. "A local law enters an area that is fully occupied by a general law when the Legislature has expressly manifested its intent to fully occupy the area." *Sherwin-Williams*, 4 Cal. App. 4th at 898. The legislature may "fully occupy" an area of state-wide concern by either expressly or impliedly preempting the field. *Northern Cal. Psychiatric Society*, 178 Cal. App. 3d at 106.

Express preemption

Here, state law has expressly preempted local authorization of same-sex "marriage." *See* Cal. Fam. Code §§ 300; 301; and 308.5. When the law states that *only* marriages between an unmarried man and an unmarried woman are valid in California, the law does not contemplate San Francisco or its public officials declaring an "exception zone" to California family law. Thus, the Clerk's actions are expressly preempted by state law.

Implicit preemption

By regulating marriage the Clerk enters a field of law that is implicitly occupied by the state. Indicia that imply that the Legislature has fully occupied a field of law include:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse

> effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles, 54 Cal. App. 4th 53, 60 (1997) (citations omitted). As set forth below, the state has provided ample evidence of its intent to occupy fully the field of marriage and family relationships.

State-wide concern

A matter is of state-wide concern if it is affected by state legislation and deals with matters beyond the exclusive control of the county or city. *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 446-47 (1946). "[I]n an area of statewide concern a local legislative body may act only if the state has not revealed an intention to occupy the field to the exclusion of all local regulation." *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509 (1983) (citations omitted). If marriage is not considered an area of statewide concern then it is doubtful any area could be considered so. Certainly there is a need for uniform rules as to what constitute recognized family relationships from one end of California to the other:

> The preemption doctrine serves to ensure uniformity of law. "The denial of power to a local body when the state has preempted the field is not based solely upon the superior authority of the state. <u>It is a rule of necessity, based upon the need to prevent dual regulations which could result in uncertainty and confusion.</u>" The preemption doctrine thus is critical to the orderly administration of justice on matters of statewide concern.

Big Creek Lumber Co. v. County of Santa Cruz, 2004 WL 293041 *19 (Cal. Ct. App. Feb. 17, 2004) (quoting *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 682 (Cal. 1960)) (emphasis added).

The state legislature has controlled every area of marriage and has not left any substantial aspect to the discretion of local government. Thus, the state has clearly indicated that it is exclusively a matter of state-wide concern.

Partial regulation

Even if the state only partially regulated the field of marriage, the Clerk's actions are *ultra vires* because the state has indicated a paramount interest in regulating marriage. Indeed, the state itself is "an interested party" in the marital relationship. *Deyoe v. Sup. Ct. of Mendocino County*, 140 Cal. 476, 482 (1903). "The laws relating to marriage and divorce . . . have been enacted because of the profound concern of our organized society for the dignity and stability of the marriage relationship." *Sapp v. Sup. Ct. of Los Angeles County*, 119 Cal. App. 2d 645, 650 (1953). The state's interest is to protect "the morals of the community, to see that neither by collusion nor connivance the status of marriage will be reduced to a matter of temporary convenience." *Kegley v. Kegley*, 16 Cal. App. 2d 216, 219-20 (1936). The state's strong interest in marriage has been re-emphasized: "We reaffirm our recognition of a strong public policy favoring marriage. No similar policy favors the maintenance of nonmarital relationships." *Norman v. Unemployment Ins. Appeals Bd.*, 34 Cal. 3d 1, 9 (1983).

The state has legislated heavily in the area of family law, and specifically with regard to marriage. It has explicitly excluded not only same-sex marriage, but also incestuous and bigamous marriages. *See* Cal. Penal Code §§ 283, 285 (criminalizing bigamous, polygamous, and incestuous marriages); Cal. Fam. Code §§ 2200, 2201 (voiding bigamous, polygamous, and incestuous marriages; *see also* Cal. Fam. Code § 400 (listing persons authorized to solemnize marriages). Thus, even if this field were only partially regulated by the state, the legislature has indicated that marriage is a paramount concern that will not tolerate local regulation.

Adverse effect

The Clerk's disregard for the rule of law in issuing these marriage licenses is so disruptive of an orderly system of government that it can have

nothing but an adverse effect on both the local community and the state as a whole. Marriage is an area of state-wide concern, it has been exclusively regulated by the state, and the Clerk's usurpation of regulatory authority outweighs any possible benefit to San Francisco.

3. The Clerk has exceeded her authority under the charter of the City and County of San Francisco.

In California, any act of a charter city or county "that is violative of or not in compliance with the charter is void." *Domar Electric, Inc.*, 9 Cal. 4th at 171. City and county charters operate "not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess. . . ." *City and County of San Francisco v. Callanan*, 169 Cal. App. 3d 643, 647 (1985) (quotations omitted).

The Charter of the City and County of San Francisco does not authorize the Clerk to issue marriage licenses to same-sex couples or change the state law requirements for the marriage forms. Indeed, the Charter does not even address the topic of marriage or family law. Therefore, even if marriage could be considered a matter of local policy, the Charter of the City and County of San Francisco does not grant the Clerk the authority to regulate it.

III. PETITIONERS HAVE DEMONSTRATED THE NEED FOR AN IMMEDIATE ORDER REQUIRING THE CLERK TO STOP ISSUING MARRIAGE LICENSES TO SAME-SEX COUPLES IN VIOLATION OF STATE LAW.

Petitioners have demonstrated the need for an immediate stay in this case. Unlike a peremptory writ, this Court has authority to issue an immediate stay without notice to the Respondent. *See* Cal. Civ. P. Code § 1107; *Jones v. Sup. Ct.*, 26 Cal. App. 4th 92, 100-01 (Cal. Ct. App. 1994) ("We can stay proceedings immediately without getting a response. . .the stay operates as a de facto grant of relief"). The inherent *ex parte* nature of

a stay is clearly contemplated by statute: "The court in which the application [for any prerogative writ] is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided." Cal. Civ. P. Code § 1107.

The *Jones* court noted that an immediate stay allows the court to "bring a serious problem to a halt until [it] can get to the bottom of things." 26 Cal. App. 4th at 101. In this case, an immediate stay of the Clerk's activities is appropriate because she is in obvious violation of unambiguous state law and because the Clerk will continue to violate state law until forced to stop. *Cf.* Cal. Rules of Court § 56(c)(4) (petitioner shall explain the urgency requiring immediate stay).

IV. A PEREMPTORY WRIT OF MANDATE IN THE FIRST INSTANCE SHOULD BE ISSUED.

A writ of mandate is appropriate for challenging the constitutionality or validity of official acts. *Bramberg v. Jones*, 20 Cal. 4th 1045, 1055 (1999) (quoting *Wenke v. Hitchcock*, 6 Cal. 3d 746, 751 (1972)). Further, a writ of mandate is proper to compel a governmental official to perform a ministerial act. *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 598 (1974).

The requirements for a writ are: (1) respondent must have clear duty; (2) petitioner must have beneficial interest in respondent's performance of that duty; (3) respondent must have the ability to perform the duty; (4) respondent must have failed to perform duty or have abused his or her discretion in performing the duty; and (5) petitioner must have no other plain, speedy or adequate remedy. *Agricultural Labor Relations Bd. v. Exeter Packers, Inc.*, 229 Cal. Rptr. 87 (1986); Cal. Civ. P. Code § 1086. Furthermore, the respondent must have notice of the relief sought. *Palma v. U.S. Industrial Fasteners, Inc.,* 36 Cal. 3d 171, 180 (1984). Here, all of these conditions are met.

A. Clear Duty

California courts have long held that county clerks are "public officers." *See, e.g., Union Bank & Trust Co. of Los Angeles v. Los Angeles County*, 11 Cal.2d 675, 678 (Cal. 1938); *People v. Hamilton*, 103 Cal. 488, 493 (Cal. 1894) (". . .it becomes the duty of the county clerk, in common with other public officers . . ."). "[A] public office is a public trust." *Nussbaum*, 214 Cal. App. 3d at 1597 (and cases cited), *review denied.* As such they act as "agents" fulfilling a "public duty." *See Coulter v. Pool*, 187 Cal. 181, 186-87 (Cal. 1921). The Clerk has a clear duty to issue only marriage licenses authorized by statute. Where there is no ambiguity in the statute, the courts "presume the Legislature meant what it said and the plain meaning of the statute governs." *People v. Snook*, 16 Cal. 4th 1210, 1215 (Cal. 1997). Here the law is clear; thus, the Clerk's duty is clear as well.

B. Beneficial Interest

As a general rule, a petitioner for writ of mandate must be beneficially interested in the subject matter. Cal. Code Civ. Proc. § 1086. However:

> [W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.… [Citations.]

Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 439 (1989). The question in this case involves a public right – enforcement of the state laws governing the issuance of marriage licenses and the validity and recognition of the marriage relationship. Thus, Petitioners have standing to "seek its vindication." *Id.*

C. Ability to Perform Duty

There can be no doubt that the Clerk is capable of complying with state law. As discussed *infra* at § II.A, the Clerk may not constitutionally

disregard clear state law. There has been no change in circumstances that would impair her ability to comply with state law.

D. Failure to Perform Duty

As discussed throughout this memorandum, the Clerk has violated state law, thus failing to perform her duty as a public official.

E. No Adequate Remedy at Law

The nature of the Clerk's errant behavior is such that no adequate remedy at law exists. "[M]andamus may be invoked in those cases where remedy by any other form of action or proceeding would not be equally as convenient, beneficial, and effective." *Ross v. Bd. of Educ.*, 18 Cal. App. 222, 225 (Cal. Ct. App. 1912); *see also Harbach v. El Pueblo De Los Angeles State Historical Monument Comm'n*, 14 Cal. App. 3d 828, 837 (Cal. Ct. App. 1971) (Mandamus "will ordinarily be issued where a legal duty is established and no other adequate means exist for enforcing that duty"). Because Petitioners request that the Clerk be compelled to fulfill her non-discretionary duties of public office, the writ of mandate is the most "convenient, beneficial, and effective" relief available. Indeed, this case is precisely the sort that the writ of mandate is designed to remedy: reigning in public officials who are ignoring a statutory mandate and disregarding the rule of law. The Clerk's repeated and ongoing violation of the law must be stopped immediately, and this Court may provide remedy most expediently under the extraordinary writ and immediate stay procedures.

F. The Writ Should Be Issued In The First Instance

Under Cal. Civ. P. Code § 1088 and other applicable law, this Court should issue a peremptory writ in the first instance. A court may issue a peremptory writ in the first instance where

> petitioner's entitlement to relief is so obvious that no purpose could reasonable be served by plenary consideration of the issue – for

> example, when . . . there has been clear error under well-settled principles of law and undisputed facts – or where there is an unusual urgency requiring acceleration of the normal process. . . .

Lewis, 19 Cal. 4th at 1234; *see also Alexander v. Superior Court*, 5 Cal. 4th 1218 (1993); *Ng v. Sup. Ct.*, 4 Cal. 4th 29, 35 (Cal. 1992) (clear error under established law and unusual urgency are factors for *Palma* procedure).

This Petition presents a textbook case for issuing the writ in the first instance. The entitled relief is obvious: require the Clerk to follow the law. The law is unambiguous: same-sex marriage does not exist under California law. Moreover, as explained earlier, there is unusual urgency – there is almost Municipal secession on the steps of City Hall – requiring acceleration of the normal process.

Because Petitioners have effected personal service of this petition and a notice of an application for a writ of mandate in the first instance on the Clerk on this date and seek an immediate stay and peremptory writ of mandate in the first instance, Petitioners respectfully request this Court to give *Palma* notice to Respondent. *Palma*, 36 Cal. 3d at 178; *see also Ng*, 4 Cal. 4th at 35 (*Palma* procedure proper when "there has been clear error under well-settled principles of law and undisputed facts . . . or when there is an unusual urgency").

A peremptory writ may issue in the first instance when at least ten days is given and each party has sufficient opportunity to be heard. Cal. Civ. P. Code § 1088. *Palma,* 36 Cal. 3d at 180 (1984). In this case, ten days notice is being given to allow the party sufficient time to be heard. Additionally, as noted *infra*, unusual urgency exists. Thousands of marriage licenses have been issued, and licenses continue to be issued, that are directly in violation of clear state law. The Clerk's continuing disregard for state law is causing irreparable harm to the rule of law in California and the rest of the Country. She is also creating a substantial likelihood that

waves of needless litigation will follow, and is giving false hope to those who have been issued marriage licenses that are void *ab initio*. Her illegal action must be stopped immediately before further harm is done.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant the relief sought in the Verified Petition for a Peremptory Writ of Mandate in the First Instance and Request for Immediate Stay.

CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this brief, certify that the above document contains 6,041 words.

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Robert H. Tyler

CERTIFICATE OF SERVICE

I, the undersigned counsel for Petitioners, certify that I caused the foregoing document along with Petitioners' Notice of Application for a Peremptory Writ in the First Instance to be served by personal service on Nancy Alfaro at City Hall, Room 168, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4678, on February 25, 2004.

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Robert H. Tyler