SUPREME COURT OF THE STATE OF CALIFORNIA

BILL LOCKYER, as Attorney General, Petitioner, vs. CITY AND COUNTY OF SAN FRANCISCO, Respondents.	Case No. S122923
BARBARA LEWIS, Petitioner, vs. NANCY ALFARO, as County Clerk, Respondent.	Case No. S122865

BRIEF OF AMICUS CURIAE COUNTY OF SANTA CLARA IN SUPPORT OF RESPONDENTS

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INTRODUCTION

Local officials and agencies have close contact with the citizenry, more so than officials or agencies at the state or federal level. Local officials and agencies also implement a wide variety of both state and local legislation, regulations, and policy directives many of which may, at times, conflict with the higher principles embodied in the state and/or federal constitutions. If, in carrying out their duties, local agencies and officials enforce constitutionally suspect statutes or ordinances, they expose themselves and their local government to the potential for crippling damage awards and attorneys' fees liability.

There is no reason to believe that local agencies and officials cannot carry out their duties in applying state legislation, including determining the constitutional limitations, if any, on such legislation, any less responsibly than they do with respect to local ordinances and policy directives. Their obligations to fulfill their oath of office, to apply faithfully the federal and state constitutions, and to avoid exposing themselves and the local government entity for which they work to liability, all are powerful motivators. Moreover, local government officials and agencies have access to city or county counsel who advise them on such issues, regarding which such counsel typically have significant expertise. Finally, local officials' and agencies' actions are subject to prompt judicial review by way of writ of mandate, as this case well demonstrates. Local decisions that are determined to be erroneous thus will cause no more chaos than any other situation in which a government, or for that matter, private, decision is

challenged in the courts and the parties affected by it must await judicial rulings.

There is a risk in a case such as this – which involves a highly charged and controversial topic (marriage between same-sex couples) – that the Court might make a sweeping decision narrowing local agencies and officials' constitutional role and relegating local government officials, particularly when it comes to state law issues, to an inferior and essentially ministerial status. In doing so, the Court would have to interpret Section 3.5 of Article III of the Constitution much more broadly than was intended by the voters when they adopted that constitutional amendment. The Court would have to assume that the voters intended to upset the long history and tradition in this State of imbuing all branches of government with the responsibility to enforce constitutional norms. This the Court should not do.

As a practical matter, the vast majority of situations in which local officials and agencies make decisions between constitutional requirements and conflicting state or local legislation involve public issues that generate no particular public controversy. Indeed, it is precisely because this case involves a controversial constitutional question that it is a less than ideal vehicle in which to decide the issue before this Court. Nonetheless, if the Court must reach that issue at all, it should bear in mind that its decision could have wide-ranging effects far beyond the question immediately presented here. The Court should not tie the hands of local officials and agencies in the manner Petitioners suggest; doing so would be a grave mistake.

ARGUMENT

I. LOCAL OFFICIALS AND AGENCIES REGULARLY MAKE DECISIONS ABOUT WHETHER AND HOW TO APPLY STATE OR LOCAL LEGISLATION THAT IS CONSTITUTIONALLY SUSPECT OR POTENTIALLY PREEMPTED BY FEDERAL OR STATE LAW.

Local and state officials are routinely called upon to determine whether to enforce both local and state legislation that has become constitutionally suspect or may be preempted by state or federal law. Indeed, federal law in particular virtually compels local officials to consider the constitutionality of their actions, lest an incorrect decision lead to legal liability. *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 474.

In addition to cases cited by the City in its brief, it is not difficult to imagine many other circumstances in which local officials must make judgments about the constitutionality and enforceability of state or local legislation in light of higher principles. Local law enforcement officials are required to make decisions about the constitutionality of statutes, ordinances and police practices with regularity:

- If a habitual inebriates statute that prohibited selling liquor to habitual drunks was held by a trial court to be unconstitutionally vague, and the county's attorneys concluded that Supreme Court precedent made success on appeal unlikely and thus declined to pursue an appeal, the Sheriff might direct her officers not to enforce the statute — despite the lack of an appellate court decision directly holding the specific statute unconstitutional.
- Likewise law enforcement officials may decline to enforce vagrancy statutes that are similar to other states' statutes held

void for vagueness – again, even in the absence of an intervening appellate decision on point.

- Statutes regulating expressive activities protected by the first amendment, such as sales of certain sexually explicit material, assembling in protest or distributing literature at an airport could appear to be unconstitutional by virtue of case law from other jurisdictions applying the free speech clause to similar legislation from another state. The police department or other local law enforcement officials might decline to enforce such a statute based on its unconstitutionality despite the absence of controlling precedent addressing the specific California law.
- Local government agencies and officials are generally required, for example, to comply with state and local public records statutes and various laws governing the personnel records of government employees. But such agencies and officials sometimes must decline to comply if compliance would violate an employee's constitutional right to privacy. By contrast, the Supreme Court decision in *Brady v. Maryland* may compel production of exculpatory evidence that would otherwise be protected from disclosure under the state statutory scheme making peace officers' personnel records private.
- If a local official determines that a state-mandated program violates the constitutional prohibition on unfunded state mandates, he or she may decline to expend local funds to

implement the program while awaiting an appellate decision so holding.

- A school board might conclude that a state-mandated busing program, or a state-mandated curriculum, should not be followed because similar programs in other jurisdictions have been deemed unconstitutional, rather than to implement the program and wait for the inevitable legal challenge.
- If a local elections director is advised by counsel that a state statute regarding qualifications of persons permitted to vote in elections is substantially similar to laws in other states held unconstitutional by federal circuit courts of appeals because they violate constitutionally mandated aspects of the Voting Rights Act, the elections director may decline to impose the constitutionally suspect qualifications.
- Leaving aside direct constitutional considerations, local officials regularly engage in analyses of state and federal statutes and regulations to determine whether they preempt similar or competing local or state law. In matters of health care, social welfare, education and law enforcement, just to name a few, a host of federal laws impose requirements that may preempt state or local law and which local officials must consider when deciding whether and how to implement the state or local law.

The practical consequences of forcing local governments and their officials to violate the constitution for years while awaiting an appellate court decision could be severe. Besides the strain on local budgets from

being enforced to expend funds that need not be expended, local governments' violation of individual employees' or citizens' rights could both be devastating to the individuals involved and expose the local fisc to damages and attorneys' fee liability. *See Rosenfeld v. Southern Pacific Co*. (9th Cir. 1975) 519 F.2d 527, 530; *Schmid v. Lovette, supra,* 154 Cal.App.3d at 474; *Committee to Defend Reproductive Rights v. Cory* (1982) 132 Cal.App.3d 852. Significantly, therefore, courts have rejected arguments that local officials' compliance with state or local law in light of Article III, Section 3.5 protected those officials from liability for violation of federal constitutional rights. *Schmid, supra*, 154 Cal.App.3d at 474. Simply put, *requiring* local officials to apply state law without regard to whether that state law is constitutional or enforceable in light of the state or federal constitutions threatens the very operation of local government and may expose local officials and local governments to unnecessary and crippling legal liability.

Local officials do not, cannot – and should not be encouraged to – blindly apply state or local law without regard to the overarching requirements of the state and federal constitutions. As the few examples listed above suggest, a blanket decision that local officials must await an appellate court decision before deciding that the federal or state constitution precludes enforcement of a state law could effectively bring local government to a grinding halt.[1]

[1] Further, forcing local government officials to violate the constitution until a court specifically orders them to cease doing so, notwithstanding the existence of significant authority showing their acts to be unconstitutional, would relegate local elected officials to a ministerial

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II. LOCAL OFFICIALS CAN BE COUNTED ON TO MAKE SUCH DECISIONS RESPONSIBLY BASED ON LEGAL AUTHORITY AND ADVICE OF COUNSEL, AND WHEN THEY ARE WRONG THEIR DECISIONS ARE SUBJECT TO PROMPT JUDICIAL REVIEW.

Local governments and their officials rarely make legal decisions in a vacuum or without obtaining advice and counsel. Since local government entities routinely make decisions about whether local ordinances are preempted by new state or federal laws, whether agency policies and practices are consistent with statutes or the constitution, and whether steps the government is contemplating in response to citizen requests are authorized by law, local government officials and bodies are accustomed to seeking and evaluating legal advice and making decisions based on that advice.

There is no reason to suppose that a local agency would lightly conclude that a state statute violates the state or federal constitution and thus decline to enforce it on that basis. On the contrary, only when there is a more than colorable constitutional concern based on legal precedent or authority of a substantial nature would most local officials and agencies even consider such a course of action.

And to the extent an official errs, or makes an entirely baseless decision, there should be little cause for concern about how to remedy that situation. Prompt judicial review is available. As the cases cited in the City's brief demonstrate, local and state officials' constitutional decisions

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role that would demean their stature and force them to disregard the rights of their citizenry.

can be challenged by writ of mandate, promptly addressed and, where incorrect, reversed by the California courts. The availability of prompt judicial review of local agency and official decisions should quell any concern that their constitutional decisions may, if incorrect, lead to uncertainty or chaos.

In short, decisions made by local officials and agencies involving conflicts between state law and the constitution are no different than the thousands of decisions that involve other legal determinations that agencies and officials must make daily in carrying out their functions. As with all such decisions, these agencies and officials have access to counsel, generally make their decisions thoughtfully and with respect for the law, and are subject to prompt judicial reversal if their actions are erroneous.

III. ARTICLE III, SECTION 3.5 WAS NEVER INTENDED TO PREVENT LOCAL OFFICIALS OR AGENCIES FROM ADHERING TO THE CONSTITUTION.

We note with respect to this issue that all three branches of state and local government have historically played a role in interpreting and enforcing the state and federal constitutions. Accordingly, this Court should not read Article III, Section 3.5 expansively. This is particularly so since, as the City has argued, the legislative history of Section 3.5 demonstrates a narrower purpose – *i.e.*, a limitation solely upon the ability of *state* administrative agencies to make constitutional decisions.

CONCLUSION

The County of Santa Clara respectfully requests that the Court does not rule that Article III, Section 3.5 of the California Constitution is a bar to local officials or agencies making legal decisions in the course of carrying

out their duties, including decisions about the constitutionality of state legislation that they are asked to implement.

Dated: March 25, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,053 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 25, 2004.

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