

CASE NO. S122923

IN THE
SUPREME COURT OF CALIFORNIA

BILL LOCKYER, Attorney General of the State of California,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, GAVIN NEWSOM,
in his official capacity as Mayor of the City and County of San
Francisco; MABEL S. TENG, in her official capacity as Assessor-recorder
of the City and County of San Francisco; and NANCY ALFARO, in her
official capacity as the San Francisco County Clerk,
Respondents.

**AMICUS BRIEF IN SUPPORT OF
PETITIONER**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS.

In complete disregard of the California Constitution and California Family Code, the officials of the City and County of San Francisco are issuing same-sex “marriage” licenses and “marrying” same-sex couples. On February 10, 2004, Mayor Gavin Newsom directed the County Clerk for the City and County of San Francisco to make the necessary changes to the marriage license forms in order to allow same-sex couples to apply for marriage licenses. The County Clerk, after promising to work diligently to accomplish the Mayor’s directive, hastily created a new combined form constituting a “License and Certificate of Marriage” and began issuing “marriage licenses” to same-sex couples on February 12, 2004. That same day, reportedly over 80 same-sex couples were “married.” To date, there have been over 4,000 “marriage” licenses issued to same-sex couples. To accomplish the issuance of thousands of illegal licenses, Respondents kept City Hall open during two legal holidays and two weekend days and deputized hundreds of private citizens.

The actions of the Mayor and County Clerk are in direct violation of California marriage laws, which specifically state that marriage in California can only be entered into by one man and one woman. Respondents have no authority to singlehandedly alter marriage laws. They are completely without authority to define marriage for the State of California simply because they do not agree with the current laws. In fact, Article III, § 3.5 specifically prohibits a county agency from declaring a state law unconstitutional or from refusing to enforce a state law. In addition, Respondents lack standing to defend their conduct based on constitutional claims of private individuals.

Respondents’ actions also violate the constitutional rights of over 4 million Californians, including Randy Thomasson and the constituents of

Campaign for California Families, who voted for Proposition 22. That proposition, codified as § 308.5 in the Family Law, states that “[o]nly marriage between a man and a woman is valid or recognized in California.” The California Constitution guarantees those voters that Proposition 22 will not be amended without further vote of the people. Respondents’ actions directly contravene Proposition 22. Respondents’, therefore, are violating the constitutional rights of over 4 million Californians.

Respondents’ actions are *ultra vires*, unlawful, and constitute a violation of the State Constitution, California Family Code and the constitutional rights of over 4 million Californians. Under California law, Respondents cannot defend their actions by raising an argument that the marriage laws are unconstitutional.

II. CITY AND COUNTY OFFICIALS HAVE NO AUTHORITY TO REFUSE TO ENFORCE CALIFORNIA MARRIAGE LAWS.

The California Family Code leaves no doubts about who may marry – only an unmarried man and an unmarried woman may marry. *See* Cal. Fam. Code §§ 300 (“Only marriage between a man and a woman is valid or recognized in California.”); § 301 (those able to consent to marriage are “[a]n unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older”); § 308.5 (“Only marriage between a man and a woman is valid or recognized in California.”). In addition, a valid marriage license (which can only be issued to a man and a woman) is “a mandatory requirement for a valid marriage in California.” *Estate of DePasse*, 118 Cal. Rptr. 2d 143, 151 (Cal. Ct. App. 2002). California Family Code further provides that the forms for the application of marriage “shall be prescribed by the State Department of Health Services.” *See* Cal. Fam. Code §§ 355, 358, 422.

Despite the plain wording of the law, Mayor Newsom directed County Clerk Alfaro to alter the state-prescribed marriage forms to permit same-sex couples to obtain “marriage licenses” and to marry. Two days after the Mayor’s directive, nearly 80 same-sex couples reportedly married. By the end of the first week, nearly 3,000 same-sex couples were reportedly married. Respondents’ actions not only violate state marriage laws but also the California Constitution. Prior to this Court’s March 11 order directing Respondents to enforce the marriage laws as currently written, over 4,000 marriage licenses were issued to same-sex couples.

A. Pursuant to The California Constitution, City and County Officials Cannot Refuse to Enforce State Laws.

Respondents’ actions directly violate Article III, § 3.5 of the California Constitution. Article III, § 3.5 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).

Although Respondents have repeatedly argued below that they are not subject to Article III, § 3.5, the laws is clear that counties, which are political subdivisions of the state according to California Constitution art. XI, § 1, as well as their officers and clerks are “administrative agencies” of the state and

thus are subject to Article III, § 3.5. *See, e.g., Billig v. Voges*, 273 Cal. Rptr. 91, 96 (Cal. Ct. App. 1990) (counties are “administrative officials” for purposes of Art. III, § 3.5); *Westminster Mobile Home Park Owners’ Assoc. v. City of Westminster*, 213 Cal. Rptr. 640 (Cal. Ct. App. 1985) (city arbitrator subject to Art. III, § 3.5); *Schmid v. Lovette*, 154 Cal. App.3d 466 (Cal. Ct. App. 1984) (local school district and **its individual employees** subject to Art. III, § 3.5); Office of the Attorney General, State of California, Opinion No. 88-902 (1989) (RJN, Ex. 1) (listing various applications of Art. III, § 3.5, including county assessor, city employees and school district employees).¹

In *Billig*, the court explained that “[t]he 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” *Billig*, 273 Cal. Rptr. at 96. A county, as a direct political subdivision of the state, must enforce the laws of the state. *See* Cal. Const. art. XI, § 1. Thus, regardless of Respondents’ views on same-sex marriage, the California Constitution makes clear that they have no power

¹ In the related proceedings in the San Francisco Superior Court, Respondents argued that Art. III, § 3.5 does not apply to local governments and their officials. They relied on *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 36 (1974). **It bears emphasis that the case is inapplicable as it was decided four years before Art. III, § 3.5 became a part of the Constitution.** Article III, § 3.5 was added to the California Constitution in 1978. As set forth in the Attorney General’s Petition for Writ of Mandate (at 26 n.9), that case also is readily distinguishable and the quote taken out of context. As the Attorney General’s Petition pointed out, *Strumsky* addressed the different standards of review of an administrative agency’s decision under Code of Civil Procedure section 1094.5. The Court focused on the distinction between state agencies and local agencies. The Court concluded that the standard of review should be the same for state agencies and local agencies, but it did not address whether counties, as local subdivisions of the state, are administrative agencies under article III, section 3.5.

whatsoever to refuse to enforce California marriage laws as they are written.

For this reason alone, writ relief should issue directing Respondents to comply with California's marriage laws.

B. Respondents Have No Standing To Raise Constitutional Claims of Same-Sex Couples.

County officials lack standing to raise constitutional rights that are intended to protect individual citizens. In *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1, 227 Cal. Rptr. 391 (1986), this Court explained that counties, which “are ‘merely political subdivisions of the state government’ . . . cannot assert ‘constitutional rights which are intended to limit governmental action vis-a-vis individual citizens’” 42 Cal. 3d at 8, 227 Cal. Rptr. at 395; *see also City of Burbank v. Burbank Glendale Pasadena Authority*, 72 Cal. App.4th 366, 380 (1999) (same reasoning applied to state due process protections); *Santa Monica Community College Dist. v. Public Employment Relations Bd.*, 112 Cal. App.3d 684, 690, 169 Cal. Rptr. 460 (1980) (citing a long line of cases stating that a public entity is not a “person” within the meaning of the due process clause).

Without question, Respondents, as creatures of the state, are duty-bound to follow state law. Courts in this State have long applied the “no standing” rule to preclude counties from raising state and federal constitutional claims to defend their breaking the law. *See, e.g., Board of Supervisors of Butte County v. McMahon*, 219 Cal. App.3d 286, 268 Cal. Rptr. 219 (Cal. Ct. App. 1990) (“It is well established that ‘political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment’”). This “no standing” rule simply reflects the fact that if state laws infringe on the rights of private individuals, those persons should bring suit challenging the

laws.² Political subdivisions cannot bring suit on their behalf.

It is black letter law that a litigant “must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.” *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991). “[T]his fundamental restriction on judicial authority admits of ‘certain, limited exceptions,’ and that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the their party, **and** that there exists some hindrance to the third party’s ability to protect his or her own interests.” *Id.* (emphasis added). *See also People v. Conley*, 10 Cal. Rptr.3d 477, 486 (Cal. Ct. App. 2004) (““One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation.”” The litigant “may not raise equal protection claims of other hypothetically disadvantaged peace officers as a basis to invalidate the statute’s application to the circumstances of this case.”); *People v. Superior Court*, 104 Cal. App.4th 915, 933, 128 Cal. Rptr.2d 794, 807 (Cal. Ct. App. 2003) (same).

Here, there can be no question that Respondents do not fall within the limited exception to the standing requirements. In particular, Respondents cannot possibly show that those who are allegedly harmed by the marriage

² For example, in this case, Respondents assert that California state laws violate constitutional rights of same-sex couples by denying them marriage licenses. The appropriate manner to address those claims would be for individuals who were denied licenses to commence suit challenging the laws. Indeed, such a suit recently was filed in Los Angeles County by several same-sex couples who were denied marriage licenses in that county. What Respondents have done, in breaking the laws before challenging them, is an end-run around the judicial process.

laws are unable to bring their own challenges to the law. That is evidenced by the fact that there are already two separate suits in California by same-sex couples who wish to marry, but cannot under current marriage laws. What is happening around the country only bolsters this point – as of March 23, 2004, same-sex couples have brought suit challenging marriage laws in California, Washington, Florida, West Virginia, New York and North Carolina.

A decision of the Louisiana Supreme Court succinctly explains the interplay between a petition for writ of mandamus and the lack of standing of public officials to raise constitutional claims as a defense in a writ proceeding.

These decisions involved mandamus actions brought against public officials to compel the official to perform a purely ministerial duty which the challenged statute required him or her to perform as a public office holder. The rationale of these decisions was that a public official could not refuse to perform a purely ministerial duty required of him or her by the challenged statute on the basis that the statute was unconstitutional. Under this rationale, the public official had no discretion to choose whether to perform or not to perform a purely ministerial duty required of his or her office, and the public official could not interpose, as a defense to the mandamus action, an allegation of unconstitutionality of the statute which mandated the performance. In effect, the decisions compelled the public official to perform the purely ministerial duties required of his or her office until the statute is declared unconstitutional. These decisions, however, did not address whether the public official (if he or she otherwise had standing) can challenge the constitutionality of a statute by means of a declaratory judgment action and, if successful, can thereby eventually relieve himself or herself of being compelled to perform the ministerial duty. Thus, the cited decisions do not govern the situation presented in this case, which is an action by a public official (who is presently performing the ministerial duties required by the statute) for a declaratory judgment to declare the statute unconstitutional, rather than a defense asserted in a mandamus action seeking to require the public

official to perform the purely ministerial duties required by the statute.

Wooden v. Louisiana Tax Commission, 650 So.2d 1157, 1159-60 (La. 1995).

Respondents are obligated to follow the marriage laws as currently written. They cannot disobey those laws simply because they do not like the laws and believe they unconstitutionally infringe someone else's rights.

For this reason alone, the writ relief should issue directing Respondents to comply with the marriage laws.

C. The State Has Preempted the Field of Marriage.

Separate and apart from the fact that the Constitution prohibits Respondents from refusing to enforce state marriage laws and that case law plainly states they have no standing to raise constitutional objections to the state marriage laws, Respondents are pre-empted by the State from altering marriage laws. Stated differently, City and County officials have absolutely no authority to redefine marriage because the State has pre-empted the field.

San Francisco is a home rule charter city. *See Rivero v. Superior Court*, 54 Cal.App.4th 1048, 1053, 63 Cal.Rptr.2d 213, 216 (Cal. Ct. App. 1997). As a "home rule charter" city, San Francisco has limited power 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*"). 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 Berkely*, 178 Cal. App.3d 90, 100 (1986); *see also Bishop v. City of San Jose*, 1 Cal.3d 56, 61-62, 81 Cal.Rptr. 465, (1969) ("As to matters which are of statewide concern, however, home

rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation.”).

An act by a city or county is void if it contradicts or duplicates state law, intrudes upon a matter of state-wide concern, or goes beyond the limits of the City or County Charter. *Northern Cal. Psychiatric Society*, 178 Cal. App.3d at 100; *see also People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984). “Whether the Legislature intended to preempt the particular field to preclude local regulation is answered by looking to the purpose and scope of the legislative scheme. *See Cox Cable San Diego, Inc., v. San Diego*, 188 Cal.App.3d 952, 961, 233 Cal.Rptr 735, 738 (Cal.Ct.App. 1987).

In California, there is no question that the state has expressly preempted the field of marriage. *See Stokes v. County Clerk of Los Angeles County*, 122 Cal.App.2d 229, 232 (1954)(“It is within the legislative power to regulate and require a certain procedure and form in the celebration of marriages ... The matter is not one of local concern only, but it is of general public importance.”); *Jurcoane v. Superior Court*, 93 Cal.App.4th 886, 896, 113 Cal.Rptr.2d 483, 490 (2001)(“Unquestionably, the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated, as well as the effect of an attempted creation of that status.”)(quoting *McCure v. Donovan*, 33 Cal.2d 717, 728 (1949)); *DePasse v. Harris*, 97 Cal.App.4th 92, 99 118 Cal.Rptr.2d 143, 148 (2002)(“The state has a vital interest in the institution of marriage and plenary power to fix the conditions under which the marital status may be created or terminated. The regulation of marriage is solely within the province

of the Legislature.”). Thus, local actions, like that of Respondents, which directly conflict with state marriage laws are void.

More specifically, state law has expressly pre-empted the area of **who** can marry. On March 7, 2000, California voters approved Proposition 22, a ballot initiative, with 61.4% voter approval. Proposition 22 was chaptered as Family Code § 308.5 (hereafter “Proposition 22”). That section states that “[o]nly marriage between a man and a woman is valid or recognized in California.” Consequently, the issue of who can marry has been explicitly pre-empted by state law, and cannot be changed by any other means other than a vote by the entire electorate. *See* Article 2, § 10(c) of the California Constitution (stating that the Legislature can amend an initiative statute by another statute *only* by vote of the electors, unless the initiative statute permits amendment or repeal without their approval”).

State law has also expressly preempted the **form** of marriage license and license application. First, Cal. Fam. Code § 355 specifically states that “[t]he forms for the application for a marriage license and the marriage license shall be prescribed by the State Department of Health Services” (Emphasis added). Acts of county officials that contradict state law on this issue are void. Here, there is no question that Respondents have altered the marriage licenses – they have deleted references to “bride” and “groom” and replaced them with “applicant.” Second, Family Code Sections 420-425 make clear that any person solemnizing a marriage must be presented with the marriage license as prescribed by the State Department of Health Services. Respondents have been solemnizing marriages without presentation of the prescribed marriage license.

Respondents actions directly conflict with state marriage laws, and therefore are void. For this reason alone, writ relief should issue directing

Respondents to comply with the marriage laws.

D. Respondents' Actions In Granting "Marriage Licenses" To Same-Sex Couples Violates the Constitutional Rights of Over Four Million Californians.

In March 2000, California voters passed Proposition 22. As a result, Californians were vested with the Constitutional right to have Proposition 22 implemented and given the full effect of law, until such time, **by further vote of the people**, the law was changed. The action of the Mayor and the County Clerk in issuing "marriage licenses" and performing "marriages" of same-sex couples improperly amends Proposition 22 and therefore deprives nearly 4.5 million voters who passed Proposition 22 of their constitutional right to have their vote given effect. In *Proposition 103 Enforcement Project* the court explained that

In determining whether a particular action constitutes an amendment, we keep in mind that 'it is the duty of the courts to jealously guard the people's initiative and referendum power. It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right to local initiative or referendum be not improperly annulled.' Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise.

Proposition 103 Enforcement Project v. Quackenbush, 64 Cal. App.4th 1473 (1998) 64 Cal. App. 4th at 1485-87. "Amendment" is broadly defined under California law.

[C]onflict with existing law is neither an essential, nor even a normal attribute of an amendment. An amendment is "any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise or supplement, or by an act independent

and original in form.” A statute which adds to or takes away from an existing statute is considered an amendment.

Franchise Tax Board v. Kenneth Cory, 80 Cal. App.3d 772, 776 (1978) (quoting Sutherland, *Statutory Construction* (4th ed. 1972) § 22.01, p. 105; *Robbins v. O.R.R. Co.*, 32 Cal. 472 (Cal. 1867)). See also *MobilePark West Homeowners Assoc. v. Escondido MobilePark West, et al.*, 35 Cal. App.4th 32, 40 (1995) (“One does not determine whether an act amends existing law solely by the title, or by statements in the new act that it amends existing law. Rather, one must examine and compare the provisions of the new law with existing law.”). Here, there is no question that Respondents’ actions are in direct conflict with Proposition 22 – they are “marrying” same-sex couples while Proposition 22 says that only a marriage between a man and a woman is valid or recognized in the State. Respondents’ actions unconstitutionally infringe upon the rights of the over 4 million Californians who voted in favor of Proposition 22.

III. A WRIT OF MANDATE IN THE FIRST INSTANCE SHOULD ISSUE.

A writ of mandate is appropriate for challenging the constitutionality or validity of official acts. *Bramberg v. Jones*, 20 Cal. 4th 1045, 1055 (1999). A writ of mandate is particularly appropriate to compel a government official to perform a ministerial act. *California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 598 (1974).

For a writ to issue, the respondent must have a clear duty, the petitioner must have a beneficial interest in respondent’s performance of that duty, respondent must have the present ability to perform, respondent must have failed to perform a duty or have abused his discretion in performing the duty, and 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. In addition, respondent must have notice of the relief sought. *Palma v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171, 180 (1984). Here, all conditions are satisfied for issuance of writ relief.

A. Respondents Have a Clear Duty to Follow State Marriage Laws.

A county clerk is a public officer who has a clear duty to uphold state laws. *See, e.g., People v. Hamilton*, 103 Cal. 488, 493 (1984). California law could not be clearer. Only an unmarried man and unmarried woman may marry. Before a county clerk can issue marriage license to a couple, the individuals must complete the state mandated marriage license. That license plainly states that it can only be completed by a “bride” and a “groom.” The county clerk has no discretion that can be exercised to decide to marry two people of the same sex. As such, the county clerk’s duty is clear. Respondents cannot issue marriage licenses to same-sex couples.

B. Petitioner Has a Beneficial Interest in the Subject Matter in Dispute.

A petitioner for writ of mandate must be beneficially interested in the subject matter in dispute. Cal. Code Civ. Pro. § 1086. This Court has explained, however, “where 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.” *Common Cause v. Board of Supervisors*, 49 Cal. 3d 432, 439 (1989). Petitioner, the Office of the Attorney General, as the state officer charged with ensuring compliance with state laws, plainly has an interest in seeing the state laws enforced.

C. Respondents Have the Ability to Perform.

There is no question that Respondents have the ability to perform. Prior to February 10, 2004, the county had complied with the state marriage laws. Respondents have also been able to comply with this Court's March 11, 2004 order directing them to follow California's marriage laws. As discussed supra, Respondents are constitutionally obligated to enforce the state marriage laws.

D. Respondents Have Failed to Perform Their Clear Duties.

All parties agree that Respondents have failed to enforce state marriage laws. Thus, Respondents have failed to perform their clear duties, which prohibit marrying same-sex couples.

E. There is No Adequate Remedy at Law.

Respondents' ongoing flagrant violation of state law must be stopped. There is no adequate remedy at law that can put an immediate stop to Respondents' conduct. In fact, in the proceedings below, Respondents argue that they are above the state laws that prescribe their conduct on this issue. There is no other adequate means, other than issuance of writ relief, to enforce Respondents' duty to follow state marriage laws.

V. CONCLUSION

Respondents have no authority to refuse to enforce California marriage laws, which define marriage as a union between a man and a woman. Respondents' blatant disregard for the law and for the constitutional rights of the California people cannot be condoned. Petitioner's request that this Court issue an order to cease and desist should be granted.

Dated: March 24, 2004

Mathew D. Staver, Esq.
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CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Randy Thomasson and Campaign for California Families, relying on the word count function of WordPerfect, the computer program used to prepare this brief, certify that the above document contains 4400 words.

Rena M. Lindevaldsen

DECLARATION OF SERVICE BY FEDERAL EXPRESS

I, Rena M. Lindevaldsen, declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My business address is 210 East Palmetto Avenue, Longwood, Florida and I am employed in Seminole County, California where the express service carrier deposit occurred.

I served the Application for Permission to file an Amicus Brief, together with the Amicus Brief in Support of Petitioners on March 24, 2004 by depositing a copy of the document in a box or other facility regularly maintained by Federal Express, as express service carrier, in an envelope or package designated by Federal Express with delivery fees paid or provide for, addressed to:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 24, 2004

RENA M. LINDEVALDSEN

TABLE OF CONTENTS

I. INTRODUCTION AND STATEMENT OF FACTS 1

II. CITY AND COUNTY OFFICIALS HAVE NO AUTHORITY
TO REFUSE TO ENFORCE CALIFORNIA MARRIAGE
LAWS 2

 A. Pursuant to the California Constitution, City and County
 Officials Cannot Refuse to Enforce State Law 3

 B. Respondents Have No Standing To Raise Constitutional
 Claims of Same-Sex Couples 5

 C. The State Has Preempted the Field of Marriage 8

 D. Respondents’ Actions In Granting “Marriage Licenses”
 To Same-Sex Couples Violates the Constitutional
 Rights of Over Four Million Californians 11

III. A WRIT OF MANDATE IN THE FIRST INSTANCE SHOULD
ISSUE 12

 A. Respondents Have a Clear Duty to Follow State
 Marriage Laws 13

 B. Petitioner Has a Beneficial Interest
 in the Subject Matter in Dispute 13

 C. Respondents Have the Ability to Perform 14

 D. Respondents Have Failed to Perform Their Clear
 Duties 14

 E. There is No Adequate Remedy at Law 14

IV. CONCLUSION 15

TABLE OF AUTHORITIES

CASE LAW

<i>Agricultural Labor Relations Bd. v. Exeter Packers, Inc.</i> , 229 Cal. Rptr. 87 (1986)	12
<i>Billig v. Voges</i> , 273 Cal. Rptr. 91 (Cal. Ct. App. 1990)	4
<i>Bishop v. City of San Jose</i> , 1 Cal.3d 56 (1969)	8
<i>Bramberg v. Jones</i> , 20 Cal.4th 1045 (1999)	12
<i>Board of Supervisors of Butte County v. McMahon</i> , 219 Cal. App.3d 286, 268 Cal. Rptr. 219 (Cal. Ct. App. 1990)	5
<i>California Educational Facilities Auth. v. Priest</i> , 12 Cal.3d 593 (1974)	12
<i>City of Burbank v. Burbank Glendale Pasadena Authority</i> , 72 Cal. App.4th 366 (1999)	5
<i>Common Cause v. Board of Supervisors</i> , 49 Cal.3d 432 (1989)	12
<i>Cox Cable San Diego, Inc. v. San Diego</i> , 188 Cal. App.3d 952, 233 Cal. Rptr. 735 (Cal. Ct. App. 1987)	9
<i>DePasse v. Harris</i> , 97 Cal. App.4th 92, 118 Cal. Rptr.2d (2002)	9
<i>Edmonson v. Leesville Concrete Co., Inc.</i> , 500 U.S. 614 (1991)	6
<i>Estate of DePasse</i> , 118 Cal. Rptr.2d 143 (Cal. Ct. App. 2002)	2
<i>Franchise Tax Board v. Kenneth Cory</i> , 80 Cal. App.3d 772 (1978)	12
<i>Jurcoane v. Superior Court</i> , 93 Cal. App.4th 886, 113 Cal. Rptr.2d 483 (2001)	9
<i>McCure v. Donovan</i> , 33 Cal.2d 717 (1949)	9

<i>MobilePark West Homeowners Assoc. v. Escondido MobilePark West</i> , 35 Cal. App.4th 32 (1995)	12
<i>Northern Cal. Psychiatric Society v. City of Berkely</i> , 178 Cal. App.3d 90 (1986)	8, 9
<i>Palma v. U.S. Industrial Fasteners, Inc.</i> , 36 Cal.3d 171 (1984)	12
<i>People v. Conley</i> , 10 Cal. Rptr.3d 477 (Cal. Ct. App. 2004)	6
<i>People ex rel. Deukmejian v. County of Mendocino</i> , 36 Cal.3d 476 (1984)	9
<i>People v. Hamilton</i> , 103 Cal. 488 (1984)	13
<i>People v. Superior Court</i> , 104 Cal. App.4th 915, 128 Cal. Rptr.2d 794 (Cal. Ct. App. 2003)	6
<i>Proposition 103 Enforcement Project</i> , 64 Cal. App.4th 1473 (1998)	11
<i>Rivero v. Superior Court</i> , 54 Cal.App.4th 1048 (Cal. Ct. App. 1997)	8
<i>Santa Monica Community College Dist. v. Public Employment Relations Bd.</i> , 112 Cal. App.3d 684, 169 Cal. Rptr. 460 (1980)	5
<i>Schmid v. Lovette</i> , 154 Cal. App.3d 466 (Cal. Ct. App. 1984)	4
<i>Star-Kist Foods, Inc. v. County of Los Angeles</i> , 42 Cal.3d 1, 227 Cal. Rptr. 391 (1986)	5
<i>Stokes v. County Clerk of Los Angeles County</i> , 122 Cal. App.2d 229 (1954)	9
<i>Strumsky v. San Diego County Employees Retirement Assn.</i> , 11 Cal.3d 28 (1974)	4
<i>Westminster Mobile Home Park Owners' Assoc. v. City of Westminster</i> , 213 Cal. Rptr. 640 (Cal. Ct. App. 1985)	4

Wooden v. Louisiana Tax Commission,
650 So.2d 1157 (La. 1995) 8

STATUTES

Cal. Civ. Code § 1086 10
Cal. Const. Art. II, § 10 10
Cal. Const. Art. III, § 3 *passim*
Cal. Const. Art. XI, § 1 3
Cal. Const. Art. XI, § 7 8
Cal. Fam. Code § 300 2
Cal. Fam. Code § 301 2
Cal. Fam. Code § 308.5 2
Cal. Fam. Code § 355 10
Cal. Fam. Code §§ 420-425 10

MISCELLANEOUS

Sutherland, *Statutory Construction* (4th ed. 1972), § 22.01 12