

CASE NO. S122865

SUPREME COURT
FILED

MAR - 5 2004

IN THE
SUPREME COURT OF CALIFORNIA

Frederick N. Ohtsuka, Clerk

DEPUTY

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.

CASE NO. S122923

BILL LOCKYER, Attorney General of the State of California,

Petitioner,

vs.

**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.

**MOTION TO CONSOLIDATE
AND REQUEST FOR EXPEDITED CONSIDERATION;
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT IN SUPPORT THEREOF; DECLARATION OF
ROBERT TYLER**

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**Attorneys for Petitioners Barbara Lewis, Charles McIlhenny, and
Edward Mei**

*Pro Hac Vice Motions pending.

MOTION TO CONSOLIDATE

Petitioners, through their counsel, respectfully move this Court for an order consolidating Case No. S122923 with Case No. S122865 for the purpose of obtaining an immediate stay and peremptory writ of mandate in the first instance against Respondents.

Consolidation is proper where pending actions present the Court with a common question of fact or law. Cal. Civ. Proc. Code § 1048 (West 2004). Here, Case Nos. S122865 and S122923 involve common questions of law, since both actions seek to prohibit the same government officials from issuing marriage licenses to persons who are incapable of establishing a valid marriage under the laws of California. Both actions request writ relief to remedy this repeated and ongoing violation of the law.

This motion is supported by Petitioners' concurrently filed Memorandum of Points and Authorities in Support of Petitioners' Motion to Consolidate. Petitioners have served this motion and supporting memorandum via facsimile upon the Respondents and potential intervenors on Thursday, March 4, 2004.


The Court has requested briefing from Respondents on the merits presented by this writ petition on Friday, March 5, 2004. Therefore, Petitioners can only adequately protect their interests in this lawsuit by proceeding *ex parte*, rather than by noticed motion, in seeking to consolidate the pending actions.

Petitioners' counsel attempted to obtain consent to consolidation as set forth in the declaration below. However, consent to consolidation has not been obtained at the time of the execution of this document.

Due to these circumstances, Petitioners respectfully request that the Court grant their Motion to Consolidate and Request for Expedited Consideration.

Dated: March 5, 2004

Alliance Defense Fund Law Center

By 
Robert H. Tyler
Attorney for Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners request by motion that the Court consolidate Case No. S122923 with Case No. S122865.

II. STATEMENT OF FACTS

Case No. S122923 and Case No. S122865 arose from a common operation of facts, involve the same Respondents, and involve common questions of law.

Petitioners in Case No. S122865 filed a Verified Petition for Immediate Stay and Peremptory Writ of Mandate in the First Instance (“Petition”) with this Court on February 25, 2004 against Nancy Alfaro, County Clerk of the City and County of San Francisco (“Clerk”), in her official capacity. The Petition asserts that the Clerk has violated, and continues to violate, state law 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. (Petition at 1.) Petitioner requests a stay and writ of mandate in the first instance commanding Respondent “to cease and desist issuing marriage licenses on forms that do not comply with state law license requirements” . . . “to couples other than those who meet state law requirements.” (Petition at 6, ¶¶C,D.)

Petitioner in Case No. S122923 filed an Original Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief; Request for Immediate Cease and Desist Order and/or Stay of Proceedings with this Court on February 27, 2004 against the 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. Petitioner Attorney General Lockyer requests the Court to direct “respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California.” (Lockyer Petition at 5, ¶1.) Also, the Petition requests the Court to direct “respondents to perform their ministerial duties in full compliance with California law, to cease and desist from issuing or registering License and Certificate of Marriage forms other than those approve by the State of California.” (*Id.* at 5, ¶2.)

III. CONSOLIDATION

Consolidation is proper where pending actions present the Court with a common question of fact or law. Cal. Civ. Proc. Code § 1048 (West 2004). Section 1048 is based on Federal Rule of Civil Procedure 42, which allows consolidation of cases involving a common question of fact or law. *See Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 408 (Cal. 1974).

The United States Supreme Court frequently consolidates cases under the Federal Rule. *See, e.g., Crawford, Int. Field Office Dir. v. Sergio*, No. 03-878, 2004 WL 368111 (Mar. 1, 2004) (consolidating two cases); *Sloan v. Lemon*, 410 U.S. 907 (1973) (consolidating four cases); *United Gas Improvement Co. v. Callery Props., Inc.*, 380 U.S. 931 (1965) (consolidating cases).

Petitioners' Motion to Consolidate is also proper because California appellate courts will consolidate original proceedings requesting writs of mandate, prohibition, or other relief where there is a common question of law. *See Guardian N. Bay, Inc. v. Superior Court*, 114 Cal. Rptr. 748, 750 (Cal. Ct. App. 2002) (Original proceedings were consolidated because writ petitions raised same question of law.); *Joseph v. Superior Court*, 11 Cal. Rptr. 2d 757 (Cal. Ct. App. 1992) (Writ petitions were consolidated.); *Cuesta v. Superior Court*, 200 Cal. Rptr. 1, 2 (Cal. Ct. App. 1984) (Original proceedings in mandate were consolidated.).

Similarly, California appellate courts consolidate appeals involving common questions of law. *See Blue Chip Prop. v. Permanent Rent Control Bd.*, 216 Cal. Rptr. 492, 495 (Cal. Ct. App. 1985) (Cases consolidated "[b]ecause common questions of law are involved in each appeal."); *Commonwealth Land Title Co. v. Kornbluth*, 220 Cal. Rptr. 774, 776 (Cal. Ct. App. 1985) ("[S]eparate appeals were consolidated in view of the common questions of law and facts they presented."); *Hazon-Iny Dev., Inc.*

v. City of Santa Monica, 179 Cal. Rptr. 860, 861 (Cal. Ct. App. 1982) (Four separate appeals were consolidated because common questions of law were involved in each appeal.).

Here, Case Nos. S122865 and S122923 involve common questions of law, since both actions seek to prohibit government officials from issuing marriage licenses on improper forms to persons who are incapable of establishing a valid marriage under the laws of California. Both actions request writ relief to remedy this repeated and ongoing violation of the law. Consolidation would allow this Court to more efficiently respond to the need for a stay requested in both cases and resolve the common questions of law.

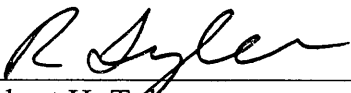
The two cases differ in one respect: Petitioners do not seek a ruling on the constitutionality of the California marriage laws or a ruling on the validity of marriage licenses previously issued by the Clerk to couples other than those allowed to marry under state law. In contrast, Petitioner Attorney General Lockyer requests a “definitive resolution by this Court of the fundamental constitutional questions involved.” (Lockyer Pet. at 4.)

Consolidation is nonetheless appropriate. If the Court reaches the constitutional issues, combining the cases will simplify briefing, eliminate duplicate hearings, and greatly conserve the Court’s resources. If this Court does not reach the constitutional issues, consolidation will not have a significant positive or negative effect on the Court’s workload.

Petitioners therefore request consolidation for trial only of Case No.
S122923 with Case No. S122865.

Dated: March 5, 2004

Alliance Defense Fund Law Center

By 
Robert H. Tyler
Attorney for Petitioners

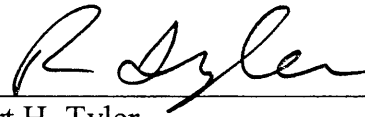
DECLARATION

I, Robert H. Tyler, am an attorney admitted and licensed to practice before all courts of the State of California. I spoke with Therese Stewart, counsel for Respondents in Case No. S122923, on the morning of March 4, 2004. Ms. Stewart advised me that the Respondent City and County would not take a position on the consolidation at that time. Shortly thereafter, I also left a telephone message with Christopher E. Krueger, Deputy Attorney General, counsel for Petitioner in Case No. S122923, but had not obtained a response as of the morning of March 4, 2004. I then spoke with Deputy Attorney General Kathleen A. Lynch, with whom I discussed consolidation of the cases, but Ms. Lynch was not authorized to make a decision on the matter. Accordingly, at the time this document was submitted, the parties have been unable to agree as to consolidation of the cases.

I have read and know the contents of the foregoing Motion to Consolidate and Request for Expedited Consideration as well as the Memorandum of Points and Authorities in Support Thereof. In addition, I have personal knowledge of the facts alleged therein and certify that the facts alleged are true and correct. I declare under penalty of perjury that the foregoing is true and correct.

///

Executed this 5th of March, 2004.

A handwritten signature in cursive script, appearing to read "R. Tyler", written above a horizontal line.

Robert H. Tyler
Attorney for Petitioners

Proof of Service

I am over the age of 18 years and not a party to the within action. My business address is 43460 ridge park drive, suite 220, Temecula, California 92590.

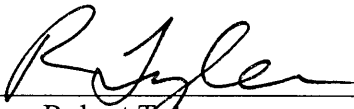
On the date set forth below, I personally served the document(s) described as:

MOTION TO CONSOLIDATE AND REQUEST FOR EXPEDITED CONSIDERATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF ROBERT TYLER

I personally delivered said document by hand to the office of Therese Stewart at the City Attorney's Office as identified in the service list attached hereto.

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

Date: March 5, 2004


Robert Tyler