

CASE NO. S122865

**IN THE
SUPREME COURT OF CALIFORNIA**

**BARBARA LEWIS, CHARLES MCILHENNY, and EDWARD MEI,
Petitioners,**

vs.

**NANCY ALFARO, County Clerk of the City and County of
San Francisco in her official capacity,
Respondent.**

**PETITIONERS' REPLY BRIEF TO RESPONDENT'S
SUPPLEMENTAL OPPOSITION TO APPLICATION FOR AN
IMMEDIATE STAY AND A PEREMPTORY WRIT OF MANDATE
IN THE FIRST INSTANCE**

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INTRODUCTION

If every local official has unfettered discretion to interpret and apply the state and federal constitutions according to the dictates of his or her own conscience (or the beliefs of special interest groups), there is no uniform system of law. A pro-life mayor would have the right to order local prosecutors to charge every physician that performs an abortion with a crime because of his belief that unborn babies have a constitutional right to life; a mayor that believes the Second Amendment prohibits state restrictions on carrying concealed weapons could issue gun permits to all applicants, regardless of qualifications; a mayor that believes state environmental laws violate developers' property rights would have the ability to grant building permits prohibited by law. In short, our uniform system of laws would be reduced to a patchwork of disparate rights and obligations based upon the beliefs of local officials.

In addition to the absurdity of assuming that every local official has the right to interpret the Constitution according to the dictates of his or her own conscience, Respondent is wrong on the law. The United States Supreme Court and all other courts that have considered the issue have ruled that there is no federal constitutional right to same-sex "marriage." Every state supreme court that has considered the issue, except for Massachusetts, has rejected claims of a state constitutional right to same-sex "marriage." If there were an established constitutional right to same-sex "marriage," such marriages would be legal somewhere in the United States. They are not.

Because there is no clearly established right of same-sex "marriage," Respondent's "necessity" defense is without merit.¹ Regardless of whether

¹ Respondent's reasoning parallels the same "necessity defense" argued by some abortion protesters breaking the law at abortion clinics. Such a defense has been soundly rejected in this state. *See, e.g., Zal v. Steppe*, 968

the California or United States Constitution should be interpreted to require same-sex “marriage,” neither has been. Local officials have no authority to adopt a radical interpretation of the current state of the law promoted by special interest groups, and rely upon that extremist position to justify deliberate defiance of laws, the validity of which have never been subjected to a legal challenge. Respondent’s actions in issuing marriage licenses were *ultra vires* whether viewed as a separation of powers issue or a violation of the mandate that public officials in California obey duly enacted laws until a Court of Appeal has deemed them invalid.

I. RESPONDENT’S JUSTIFICATION IS BASED UPON A NON-EXISTENT CONSTITUTIONAL FOUNDATION.

Respondent’s entire justification for her actions is premised upon the assumption that there is a clearly established constitutional right to same-sex “marriage.” Nothing could be further from the truth. There is no trend toward legalizing same-sex “marriage” legislatively or judicially. To date, no state in the Union has authorized marriages between same-sex couples.²

This Court need not rule on the constitutionality of California’s marriage laws to grant Petitioners’ requested relief because the only question before the Court is whether issuing marriage licenses to same-sex couples was *ultra vires*. However, the Court may take note of the lack of an established constitutional right to same-sex “marriage” in rejecting the specious assertion that “Respondents had no choice but to stop violating the rights of same-sex couples to equal protection and due process under the United States Constitution – and to do so immediately.” (Resp. Supp. Opp. at 38.)

F.2d 924, 929 (9th Cir. 1992); *People v. Garziano*, 230 Cal. App. 3d 241, 244 (1991), *review denied*.

² The Massachusetts Supreme Judicial Court stayed its decision in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), until May 17, 2004.

A. There Is No Federal Constitutional Right to Same-Sex “Marriage.”

In *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972), the United States Supreme Court considered and rejected the claims by two men that Minnesota’s exclusion of same-sex couples from marriage violated the Ninth and Fourteenth Amendments to the United States Constitution. The Court upheld the Minnesota Supreme Court’s ruling that there is no fundamental right to same-sex “marriage” under the Ninth Amendment or the Due Process Clause of the Fourteenth Amendment, and that excluding same-sex couples from marriage does not constitute irrational or invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment. *See Baker*, 191 N.W.2d at 186-87. The Minnesota Supreme Court had ruled that the state’s definition of marriage “does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.” *Id.* at 187.

Prior to 1988, plaintiffs like those in *Baker* had an automatic right to Supreme Court review “[b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.” 28 U.S.C. § 1257(2) (as amended July 29, 1970, Pub. L. 91-358, 84 Stat. 590). On direct appeal, the Supreme Court “dismissed for want of a substantial federal question.” *Baker*, 409 U.S. at 810.

The United States Supreme Court’s dismissal of the *Baker* appeal for want of a substantial federal question was a decision on the merits that is binding on all other courts considering the same issues:

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower

courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added).³ The Supreme Court ruled that the three-judge district court panel erred in assuming that a summary affirmance by the Court necessarily adopts the reasoning of the opinion below. *Id.* at 176. However, the Court reiterated its prior holding “that lower courts are bound by summary actions on the merits by this Court,” (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)), and clarified that the precedential value is limited to “the precise issues presented and necessarily decided” *Mandel*, 432 U.S. at 176.⁴

The Jurisdictional Statement in the appeal from the Minnesota Supreme Court’s rejection of the claims of a right to same-sex “marriage” raised the issues of whether excluding same-sex couples from marriage:

deprives appellants of liberty and property in violation of the due process and equal protection clauses [and] . . . constitutes an unwarranted invasion of the privacy in violation of the Ninth and Fourteenth Amendments.

³ The elimination of the Court’s appellate jurisdiction in 1988 does not change the applicability of this rule to current cases. 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4014 (2003) (“Abolition of the appeal jurisdiction does not change this rule. Lower courts must continue to honor it”).

⁴ In *Hicks*, the Court ruled that “(v)otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case” *Hicks*, 422 U.S. at 344 (quoting Justice Brennan in *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); also citing R. Stern & E. Gressman, *Supreme Court Practice* 197 (4th ed. 1969) (“The Court is, however, deciding a case on the merits, when it dismisses for want of a substantial question”); C. Wright, *Law of Federal Courts* 495 (2d ed. 1970) (“Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits”).

Appellants' Jurisdictional Statement at 11, 18, *Baker v. Nelson* (Feb. 11, 1972), attached as Exhibit A. The appellants directly raised a claim of a fundamental right to marry "fully protected by the due process and equal protection clauses of the Fourteenth Amendment." *Id.* at 11 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 535 (1923)). Their right-to-privacy argument relied upon *Griswold*, *Loving*, and *Boddie*. *Id.* at 18-19. The Supreme Court's dismissal of the appeal for want of a substantial federal question was a rejection of the merits of these claims. There is no federal due process, equal protection, or privacy right to same-sex marriage in the Ninth or Fourteenth Amendments to the U.S. Constitution. Courts are "not free to disregard this pronouncement." *Hicks*, 422 U.S. at 344.

The courts that have discussed the nature of the dismissal in *Baker* have recognized that it was a decision on the merits and binding on other courts. *See McConnell v. Nooner*, 547 F.2d 54, 56 (8th Cir. 1976) ("the Supreme Court's dismissal of the appeal for want of a substantial federal question constitutes an adjudication of the merits which is binding on lower federal courts"); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (Supreme Court's dismissal of *Baker* appeal was "an important adjudication on the merits"), *aff'd on other grounds*, 673 F.2d 1036, 1039 n.2 (9th Cir.) (noting that the Supreme Court's dismissal of the *Baker* appeal "operates as a decision on the merits"), *cert. denied*, 458 U.S. 1111 (1982); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. 1993) (dismissal in *Baker* "is a holding that the constitutional challenge was considered and rejected") (quoting trial court opinion with approval).

The United States Supreme Court's recent decision in *Lawrence v. Texas* clearly stated that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons

seek to enter.” *Lawrence v. Texas*, 539 U.S. ___, 123 S. Ct. 2472, 2484 (2003). Justice Scalia’s dissenting opinion, which suggested that the majority’s rationale could lead to same-sex “marriage,” does not overrule *Baker*.⁵ (See Resp. Supp. Opp. at 1.) Indeed, no court has held that *Lawrence* requires same-sex “marriage,” and two post-*Lawrence* decisions have rejected same-sex “marriage.” See *Standhardt v. Super. Ct.*, 77 P.3d 451, 460 & n.14 (Ariz. Ct. App. 2003) (rejecting claim that *Lawrence* requires same-sex “marriage”); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super., Nov. 5, 2003). Federal law and the laws of every state in the Union currently retain the definition of marriage that “is as old as the book of Genesis.” *Baker*, 191 N.W.2d at 186. Respondent cannot claim in good faith that the United States Supreme Court has held this definition to be unconstitutional. (Cf. Resp. Supp. Opp. at 2.)

B. Almost Every High Court Considering the Issue Has Rejected the Claim of a Right to Same-Sex “Marriage.”

Respondent contends that “[e]very state Supreme Court that has considered the issue has held that excluding same-sex couples from the rights and benefits of marriage violates their state constitution.” (Resp. Supp. Opp. at 1.) Respondent conveniently ignored Minnesota’s *Baker* decision and a decision of the highest court in the District of Columbia. Moreover, no state high court except Massachusetts has ruled that same-sex couples have a constitutional right to marry.⁶ It remains to be seen whether the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Dep’t*

⁵ In fact, no one cited *Baker* in the *Lawrence* briefing because the case did not raise a question about marriage.

⁶ Respondent did not purport to give same-sex couples the “rights and benefits of marriage,” she purported to give them marriage itself. The recently enacted bill, AB 205, will give same-sex couples all of the rights and benefits of marriage without the name if it is not overturned for being in conflict with Proposition 22.

of Pub. Health, 798 N.E.2d 941 (Mass. 2003), will result in same-sex “marriage” in Massachusetts.

Prior to *Goodridge*, “every court but one that ha[d] considered recognizing a fundamental right to same-sex marriage ha[d] declined to do so. The one exception was the Alaska Superior Court, which relied on that State’s Constitution’s express and broadly construed right to privacy.” *Goodridge*, 798 N.E.2d at 991 & n.11 (Cordy, J., dissenting).⁷ The Vermont Supreme Court did not create a right to same-sex “marriage” in *Baker v. State*, 744 A.2d 864 (Vt. 1999):

[The dissent] appears to assume that we hold plaintiffs are entitled to a marriage license. We do not. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.

Id. at 887 (emphasis added).⁸ Thus, the Vermont Supreme Court merely held that under the Vermont Common Benefits Clause, same-sex couples are entitled to the benefits and protections extended to couples who are married. Same-sex couples in Vermont cannot marry. Thus, *Baker v. State* does not support Respondent’s claim that she must issue “marriage” licenses to same-sex couples.

The Hawaii Supreme Court likewise rejected the claim of a fundamental right to same-sex “marriage”:

[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice

⁷ The Alaska decision was overturned by a constitutional amendment.

⁸ The *Baker* court based its decision on the Vermont Constitution’s “Common Benefits Clause,” which “differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development.” *Id.* at 870.

would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.

Baehr v. Lewin, 852 P.2d 44, 57 (1993) (emphasis added). Neither did the court find an equal protection right to same-sex “marriage.” The court remanded that issue, based upon the explicit prohibition of sex discrimination in the Hawaii Constitution. *Id.* at 60. But as pointed out by the Vermont Supreme Court in rejecting the sex discrimination argument, “most appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex.” *Baker v. State*, 744 A.2d at 880 n.13.

The highest court in the District of Columbia is the Court of Appeals, so its decision in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Cir. 1995), is also relevant for discussions of decisions by high courts. In *Dean*, after reviewing the U.S. Supreme Court’s fundamental right-to-marry cases, the court observed:

The question, then, is whether there is a constitutional basis under the due process clause for saying that this recognized, fundamental right of heterosexual couples to marry also extends to gay and lesbian couples. The answer, very simply, is “No.” . . . Accordingly, same-sex marriage cannot be called a fundamental right protected by the due process clause.

Id. at 333.

In addition, every appellate decision to date has rejected constitutional claims of a right to same-sex “marriage.” *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1975); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). Respondent is left with a single decision consistent with her position, *Goodridge* – and *Goodridge*, which was decided by a 4-3 vote, is inconsistent with every other American decision

by an appellate or high court.⁹ Respondent has simply acted on her subjective belief in what the law ought to be, not an objective belief in what the law is. There is no clearly established constitutional right to same-sex “marriage” to justify Respondent’s defiance of California’s marriage laws.

II. RESPONDENT HAS NO DISCRETION TO RE-WRITE STATE LAW TO CONFORM TO HER PERSONAL VIEWS OF WHAT THE LAW OUGHT TO BE.

As Respondent concedes, a writ of mandate is the proper remedy to compel a public official to fulfill a non-discretionary, ministerial duty. (Resp. Supp. Opp. at 6); *Morris v. Harper*, 94 Cal. App. 4th 52, 58 (2001) (citing *City and County of San Francisco v. Callanan*, 169 Cal. App. 3d 643, 647 (1985)). California statutes unambiguously prescribe the requirements for marriage (Cal. Fam. Code §§ 300, 301, 308.5, et. al.), and even the form in which marriages shall be recorded (Cal. Fam. Code § 355). Respondent fails to establish any authority under which she can declare these statutes unconstitutional and replace them with “law” that conforms to her personal interpretation of the California and United States Constitutions.

This Court has specifically held that a clerk is subject to a writ of mandate when she refuses to perform a ministerial function and, instead, injects her own view of the law. *Farley v. Healey*, 67 Cal. 2d 325, 327 (1976). At issue in *Farley* was a county clerk’s and a registrar of voter’s refusal to determine the sufficiency of signatures on an initiative measure

⁹ No Supreme Court of a foreign country has mandated same-sex “marriage.” Belgium and the Netherlands extended marriage rights to same-sex couples legislatively. And while provincial courts in Canada have ruled that the Canadian Charter of Rights and Freedoms mandates same-sex “marriage,” the Canadian Supreme Court has not yet decided the issue. Regardless, decisions based upon the Canadian Charter of Rights and Freedoms, which differs significantly from the California and United States constitutions, have no bearing on the rights of same-sex couples in California.

that urged immediate American withdrawal from Vietnam because they personally believed the initiative violated the law. This Court was clear that it is beyond the ministerial duties of a city clerk to pass judgment on the validity of a measure.

It is not [the city clerk's] function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. These questions may involve difficult legal issues that only a court can determine. The right to propose initiative measures cannot properly be impeded by a decision of a ministerial officer. . . .

Id. at 327.

The *Farley* Court accordingly held that a writ of mandate was proper to compel the clerk to fulfill his ministerial duty.¹⁰ *See also Yost v. Thomas*, 36 Cal. 3d 561, 564 n.2 (1984) (affirming that a city clerk may not reject a referendum because of her personal view that it was invalid); *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal. App. 4th 123, 127 (2003) (writ of mandate issued to compel city clerk to fulfill ministerial duties regardless of personal view that petition violated state law).

Similarly, it is improper for Respondent to re-write California's marriage laws based on her personal view of the law's validity, despite any corroborating advice she may have received from the Mayor or City Attorney's office. Her non-discretionary, ministerial duty is simply to discern whether a marriage application conforms to state law and to either approve it or deny it on that basis. *See* Cal. Fam. Code § 355. California's well-established and long-standing marriage laws should not be impeded by

¹⁰ "A ministerial duty is an act that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exist." *Alliance for a Better Downtown Millbrae*, 108 Cal. App. 4th at 129. Certainly a duty to issue marriage licenses on prescribed forms when a given state of facts exist (e.g., couple is of the proper age, male and female, not related by blood) is ministerial.

the personal views and judgments of ministerial officers such as the San Francisco County Clerk.

A. The Limited Exception Where An Official May Refuse To Perform A Ministerial Duty That Would Expose The Official To Liability Does Not Apply Here.

Respondent attempts to dignify her illegal acts by citing a string of cases that allegedly support her ability to willfully disregard well-established state law based on her personal view of the state and federal constitutions. (Resp. Supp. Opp. at 4-7.) These cases, however, are readily distinguishable from the case at bar.

All the cases cited by Respondent reveal that it may be proper for a local official to refuse to perform a ministerial duty where the official faces personal liability by taking positive action within the narrow area of bonds, contracts, and tax assessments. This Court has noted these limits: “Mandamus is available to compel an official to perform a ministerial duty, and in a proceeding brought for that purpose courts may determine the validity of governmental contracts and laws authorizing prospective bond issues.” *Metro. Water Dist. v. Marquardt*, 59 Cal. 2d 159, 170-71 (1963) (emphasis added); *see also California Hous. Fin. Agency v. Elliot*, 17 Cal. 3d 575, 579-80 (1976) (same); *California Educ. Facilities Auth. v. Priest*, 12 Cal. 3d 593, 598 (1976) (same).

There is good reason for this limited exception. When a clerk or other local official signs a bond or city contract, or assesses a tax, he or she is attesting to the validity of the instrument being signed. And once signed, city bonds, contracts, or tax assessments are not easily repealed or revoked. If the clerk were forced to attest to a potentially invalid instrument, she would be complicit in perpetrating a fraud on the public. If the instruments themselves are invalid or contrary to state statutes or the

constitution, the official could be subject to significant personal liability to persons harmed by the invalid instruments.

If respondent . . . were forced to sign [the bonds], he would be acting in violation of his public duty, and assisting in the deception of prospective purchasers of the bonds. He is not bound to take a step which might conceivably involve personal liability on his part in the event of a subsequent declaration of unconstitutionality of the act, or falsity of the recitals in the bonds.”

Golden Gate Bridge & Highway Dist. v. Felt, 214 Cal. 308, 317 (1931). *See also County of Sacramento v. Kickman*, 66 Cal. 2d 841, 845 (1967) (“There can be no doubt that respondent’s duty to assess in accordance with the law, for violation of which she may be civilly or criminally liable is . . . mandatory”) (citation omitted).

No reasonable argument supports the notion that Respondent would be personally liable for following law that has been unchanged since the nation’s founding. Such an argument is simply an attempt to shoehorn Respondent’s clear ministerial duty under the law into the narrow exception outlined above.

But no matter how Respondent attempts to contort this exception to fit the present facts, the most that can be gleaned from the case law is that she cannot be required to take some positive action that would violate the law and subject her to personal liability. The cases cited by Respondent, stretched even to their outermost limits, would only support the Clerk’s refusal to take the positive action of issuing any marriage licenses until the constitutionality of California’s marriage statutes is determined by a court of law.¹¹

¹¹ This is the precise course of action recently taken by local officials in Benton County, Oregon. *Marriages Off In Benton Oregon*, 365Gay.com (March 23, 2004), at <<http://www.365gay.com/newscon04/03/032304weddingsOff.htm>>.

Here, the Clerk is confusing her duty to obey the Constitution with the Legislature's power to make laws. As noted previously, the City and County of San Francisco is preempted from creating new marriage laws – that power is solely within the purview of the legislature. See Petitioners' Memorandum of Points and Authorities in Support of the Verified Petition at Section II.B; 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”) (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)).

So Respondent's best argument only supports the possibility that she could refuse to enforce the existing law - not re-write it.¹² In this case, the Clerk has usurped the role of judge, legislator, and executive: she has declared the law unconstitutional, re-written the law to conform to her personal view of what the law ought to be, and has executed that new “law” by issuing marriage licenses to same-sex couples. Unsurprisingly, Respondent cites no case that vests such authority in a ministerial official. A writ of mandate should compel the Clerk to perform her ministerial duty in accord with state law.

¹² As noted below, even Respondent's best argument fails because there is no good faith argument to be made that the Clerk would be subject to personal liability. Therefore, in either case Respondent would be subject to a writ of mandate because the act is ministerial and non-discretionary.

B. Respondent’s Separation of Powers Argument Lacks Merit.

Respondent argues that her authority to interpret the constitution and then act on that interpretation is concomitant to the authority vested in the executive, judicial, and legislative branches of government. Respondent’s proposition is that “[t]he power to interpret the Constitution is a shared one that is ancillary to the functions of all three branches of government within their respective spheres.” (Resp. Supp. Opp. at 11) (emphasis in original). The authority that Respondent cites to support this proposition discusses only the power of co-equal branches of government.¹³ (Resp. Supp. Opp. at 11-13.) *See, e.g., Huggins v. Isenbarger* 798 F.2d 203, 208 (7th Cir. 1986) (Easterbrook, F., concurring) (stating that the Attorney General’s argument in court on a topic not addressed by the state’s highest court should be given deference because of co-equal branch’s authority to interpret the constitution);¹⁴ F. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 928 (1990) (discussing the presidential authority to veto legislation on constitutional grounds); *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (discussing the authority of Congress to determine the constitutionality of certain acts). And even in these examples, a co-equal branch’s counter-interpretation of the constitution is a historic rarity. Simply stated, no authority cited by Respondent contemplates a county clerk’s power to independently interpret the constitution as co-equal with

¹³ Perhaps Respondent’s argument would support her interpretation of the Constitution if it were only contrary to that of the city council. But certainly Respondent can not in good faith argue that she may take the vertical leap to argue that a county clerk has the authority to interpret and enact law that is contrary to well-established law of both California and the United States.

¹⁴ Incidentally, this example cuts against Respondent’s arguments because the Attorney General is arguing in this case that the Respondent does not have authority to act on her own view of what the law ought to be.

the legislature and judiciary – much less her power to unilaterally rewrite the law.

C. California Bars Liability For Public Employees Acting in Good Faith.

California law contains safeguards to protect public officials from personal liability. Section 820.6 of the California Government Code states:

If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable.

Therefore, even if a statutory provision is unconstitutional, “Government Code section 820.6 would clothe the [officials] with immunity.” *Rutherford v. State*, 188 Cal. App. 3d 1267, 1289 n.14 (1987). As in this case, even where an official personally believes a statute is unconstitutional, yet enforces it anyway, the Ninth Circuit has recognized that § 820.6 may still be a shield from liability. *City of South Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 239 (9th Cir. 1980).

California case law provides additional protection to public officials performing ministerial duties in accordance with state law. *Ne Casek v. City of Los Angeles*, 233 Cal. App. 2d 131, 135 (1965). Where the duty is “absolute, certain, and imperative, involving merely the execution of a set task,” the official is not liable without “omitting to perform the task, or by performing it negligently or unskillfully.” *Id.* In this case, the duty of Respondent is absolute and certain under California law concerning marriage licenses. Under California law, Respondent must issue licenses to opposite-sex couples who meet the qualifications proscribed by statute. Therefore, Respondent would be personally liable only for “omitting to perform” or “performing negligently or unskillfully” the ministerial duty of issuing licenses to qualifying opposite-sex couples. Respondent has cited

no case where a public official has been held individually liable for performing a ministerial duty according to longstanding law.

D. Qualified Immunity Bars § 1983 Liability For Public Officials Performing Duties in Accordance with Prevailing Law.

The Supreme Court has held that qualified immunity shields government officials from liability for civil damages under 42 U.S.C. § 1983 where “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity “generally turns on the ‘objective legal reasonableness’ of the action . . . assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.” *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow*, 457 U.S. at 818-19). In order for the right to be “clearly established,” “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson*, 483 U.S. at 640. Simply stated, this means “that in light of pre-existing law the unlawfulness [of the official conduct] must be apparent.” *Id.*

The general rule of qualified immunity is intended to provide government officials with the ability “reasonably [to] anticipate when their conduct may give rise to liability for damages.” . . . Where that rule is applicable, officials can know that they will not be held personally liable in light of current American law.

Id. at 646 (citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). “[Q]ualified immunity operates ‘to ensure that before they are subject to suit, officers are on notice their conduct is unlawful.’” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). In *Hope*, the Supreme Court stated that the “salient question” is whether the law at the

time of the official conduct gave “fair warning” that the official conduct was unconstitutional. *Id.*

In this case, qualified immunity protects state officials who enforce state statutes limiting marriage as between a man and a woman because there is no clearly established constitutional right to same-sex “marriage.” As stated in the discussion of the current state of the law, *supra* Section I, there is no federal or state authority that defines “the contours of the right” in a “sufficiently clear” manner so that Respondent could objectively believe that refusing to issue marriage licenses to same-sex couples in California violates that right. *Anderson*, 483 U.S. at 640.¹⁵ Moreover, no plaintiff could say that it is apparent “in light of pre-existing law” that a clerk refusing to issue marriage licenses to same-sex couples is acting unlawfully. *Id.* Respondent has not been given “fair warning” that state statutes limiting marriage to opposite-sex couples are unconstitutional. *Hope*, 536 U.S. at 739. On the contrary, public officials, such as Respondent, are on notice that statutes restricting marriage to opposite-sex couples are exactly in line with federal law because of the similar federal Defense of Marriage Act (“DOMA”), which has not been challenged in any court. 1 U.S.C. § 7 (2004).¹⁶ As a result, Respondent is not subject to personal liability for performing her duties in accordance with the state statutes because there is no “clearly established” constitutional right to

¹⁵ Respondent claims the existence of a right to same-sex “marriage” based on decisions from outside jurisdictions, other countries, and a dissenting opinion of the Supreme Court. In addition, Respondent justifies her actions on the assumption that the President would not support a federal marriage amendment unless he believed that current marriage laws violate the United States Constitution. (Resp. Supp. Opp. at 2.) This foundation is woefully inadequate to support a claim under § 1983.

¹⁶ Respondent, like any “reasonably competent public official[,] should know the law governing his conduct.” *Harlow*, 457 U.S. at 819.

same-sex “marriage.” Respondent’s purported fear that she will be subject to civil damages is groundless.

E. Article III, § 3.5 of the California Constitution Applies to a County Clerk Performing a State Function.

1. As a county officer, Respondent is an agent of the State.

As discussed above, this Court may issue a writ of mandate directing Respondent to perform her ministerial duty under state law. This remains true regardless of whether § 3.5 applies to county clerks performing a state function. However, Respondent is acting as an agent of the state when issuing marriage licenses on forms created by a state administrative agency, and therefore she is subject to the provisions of § 3.5. Thus, she may not refuse to follow state law absent an appellate judicial declaration that the law is invalid. *See* Cal. Const. art. III, § 3.5.

San Francisco’s status as a “city and county” is irrelevant to the determination of Respondent’s function and position. This Court has repeatedly distinguished municipal functions governed by local policy from county functions governed by state law – specifically in San Francisco:

In the somewhat anomalous municipal corporations recognized by the constitution, and known to the law as consolidated cities and counties, the officers do not lose their distinctive characters as county officers or city officers merely because they hold within the corporate limits of such government. The county clerk of the city and county of San Francisco, the sheriff of the city and county of San Francisco, the recorder of the city and county of San Francisco, are each and all county officers. They have no place properly as officers of a city. Upon the other hand, the mayor of the city and county is distinctly and separately a city officer, as distinguished from a county. A law, therefore, which, under the constitutional mandate, undertook to regulate the duties or the compensation of county officers, would fail of the basic requisite of the constitution that all laws of a general nature shall have a uniform operation (Const. art. 1, § 11), if it should be held that its terms did not apply, and were not meant to apply, to county officers in consolidated governments; and it must therefore be concluded, without room for

question, that the act under consideration is in its terms applicable to the city and county of San Francisco.

Miller v. Curry, 113 Cal. 644, 646 (1896) (applying statutory uniform county fee schedule to the City and County of San Francisco) (emphasis added); *see also Kerr v. Russell*, 209 Cal. 36, 38 (1930) (“It has always been the policy of our law to preserve uniformity throughout the state as to the time for the election of elective county officers.”) (emphasis added); *Nicholl v. Koster*, 157 Cal. 416, 420 (1910) (“the charter of San Francisco [is not] paramount to [state] laws as to county affairs”). The Courts of Appeal have reiterated the doctrine that county officers derive their powers and duties directly from the legislature:

Article XI, section 5, of the Constitution provides that: “The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of . . . county clerks . . . as public convenience may require, and shall prescribe their duties and fix their terms of office.”

. . . .

The preceding section of the Constitution has been held to be mandatory upon the Legislature, requiring it to provide for the election or appointment in the several counties, by uniform laws, of particular county officers and to “prescribe their duties and fix their terms of office.”

Cleland v. Super. Ct. of Mendocino County, 52 Cal. App. 2d 530, 535 (1942) (quoting *Welsh v. Bramlet*, 98 Cal. 216, 224 (1893) (emphasis added)); *see also Madison v. City and County of San Francisco*, 106 Cal. App. 2d 232, 238 (1951) (“When [San Francisco is] acting in respect to any other matter [not a municipal affair] it is subject to and controlled by state general laws”). Respondent’s argument would lead to a balkanization of California cities and counties, with each clerk applying a personal view of what the law ought to be. This is not the law. Respondent has very clear, state-mandated duties with regard to marriage. County clerks are required to issue marriage licenses on a form prescribed by the Department of

Health Services (a state administrative agency), ensure that the applicants meet the requirements for a valid marriage, oversee the applicants as they fill out the certificate of registry, and transmit the licenses to the county recorder. *See* Cal. Fam. Code §§ 352, 355, 357, 359. Conspicuously absent from the list of powers and duties is “rewriting marriage laws” or “changing the DHS forms.” Arrogation of these powers would eliminate state uniformity.

Respondent cites precedent pre-dating § 3.5 to argue that the section’s location in Article III means that it does not apply to a county clerk but only applies to state government and state agencies. Petitioners certainly do not contest the location of the section – in fact, the location only strengthens Petitioner’s argument that the Clerk’s position is untenable. It cannot be questioned that the marital relationship is a state interest, not a city-by-city or county-by-county interest as Respondent seems to contend. *See, e.g., Deyoe v. Super. Ct. of Mendocino County*, 140 Cal. 476, 482 (1903) (the state itself is “an interested party” in the marital relationship). Respondent contends that only the recording of the license is a state function and that her actions as Clerk are “local.” (Resp. Supp. Opp. at 32.) Respondent errs. The Respondent is performing a county function as part of a process governed by state law on a form provided by a state administrative agency, and, as an agent of the state, she is subject to § 3.5.

2. The legislative history of § 3.5 does not support Respondent’s flouting of state law.

Respondent directs the Court to the “intent of the voters” in passing Proposition 5, now § 3.5. (Resp. Supp. Opp. at 24.)¹⁷ The legislative

¹⁷ Requiring the Clerk to follow the law is certainly not contrary to the intent of the voters. If the Clerk were seriously concerned about the intent of the voters, the intent of approximately 4.6 million Californians approving California Family Code § 308.5 would have made an impact on her as well.

history cited by Respondent does not resolve the issue in her favor. (Resp. Supp. Opp. at 24-25.) On the contrary, both the arguments for and against §3.5 cut against the Respondent's position. First, the arguments in favor of §3.5 stated that the section would "insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts." (Respondent's Request for Judicial Notice (RJN), Ex. L at 4.) Respondent has usurped both branches' authority in this instance.

Second, the arguments against enacting § 3.5 state that "Proposition 5 deals with *conflicts* between an agency's duty under a state statute, and a different duty under the Constitution or a federal law or regulation." *Id.* To the extent that the second argument is correct, Respondent has shown no legitimate "duty" to disregard state laws governing marriage or the authority to do so. However, as Respondent concedes, § 3.5 overruled that argument – just as it overruled *Southern California Gas Co. v. Pac. Utils. Comm'n*, 24 Cal. 3d 653 (1979). Respondent puts it nicely: a "power grab" led to § 3.5, designed to reduce the ability to "prefer the constitution to a statute claimed to be contrary to it." (Resp. Supp. Opp. at 21.) Respondent's "power grab" in this case should likewise be rejected.

3. Respondent misconstrues the case law on § 3.5.

Respondent erroneously cites two cases and misreads a third for the proposition that § 3.5 is to be construed narrowly, and thus she should be allowed to ignore the state law based on her personal interpretation of the state and federal constitutions. Respondent's interpretation of these cases is as misplaced as her interpretation of the state and federal constitutions.

First, Respondent asserts that *Reese v. Kizer* supports her argument that she may personally interpret the constitution and ignore state law. (Resp. Supp. Opp. at 28.) In reality, *Reese* held only that § 3.5 is not implicated when the legislature directs that a statute is to be enforced to the maximum extent possible under federal law. *Reese v. Kizer*, 46 Cal. 3d

996, 1002 (1988). The Department of Health Services (DHS) did not rely solely on its own interpretation of the statute at issue in *Reese*, but contacted the United States Department of Health and Human Services (HHS) to assist in making its determination. *Id.* at 1000. Based on the communications with HHS, DHS refused to enforce a portion of a statute because it was in direct conflict with federal Medicaid regulations. *Id.* In upholding DHS's decision, this Court stated:

We construe section 2 not as empowering DHS to determine independently whether section 14005.16 was in conflict with federal law, but rather as directing the agency to effectuate the statute to the maximum extent allowed under federal law as determined by the relevant federal authorities. As such, the enactment implicated none of the restraints contained in article III, section 3.5.

Id. (emphasis added). As discussed above, there are no “relevant federal authorities” supporting Respondent’s position.

Next, Respondent cites one footnote in the *Lentz v. McMahon* case to further cloud the issue. (Resp. Supp. Opp. at 29.) In *Lentz*, the issue was whether a recipient of welfare could assert equitable estoppel to a state administrative agency as a defense to recoupment. *Lentz v. McMahon*, 49 Cal. 3d 393, 396 (1989). The bulk of the analysis concerned Article III, § 3 (separation of powers) and Article VI, § 1 (reserving judicial powers to the courts). *Id.* at 398. The Court held that the legislature intended the Department of Social Services (DSS) to apply all relevant doctrines to recoupment hearings, including the doctrine of equitable estoppel. *Id.* at 406-07. In a footnote on the final page, the Court noted that § 3.5 was not implicated when DSS was merely “acting consistently with the Legislature’s intent” by applying equitable estoppel in recoupment hearings. *Id.* at 406 n.11. There is no suggestion in *Lentz* that DSS could ignore § 3.5 altogether.

Finally, Respondent argues that only “dicta” in *Billig v. Voges* applies § 3.5 to the city clerk’s actions at issue in that case.¹⁸ (Resp. Supp. Opp. at 29.) Petitioners have previously addressed the applicability of *Billig* and reiterate only that this Court explicitly analyzed the arguments presented and in the analysis stated that “the offices of city clerks throughout the state are mandated by the constitution [§ 3.5] to implement and enforce the statute’s procedural requirements.” *Billig v. Voges*, 223 Cal. App. 3d 962, 969 (1990). Importantly, the clerk in that case had no discretion in performing the ministerial duty of determining whether a petition met procedural requirements. *Id.* Respondent similarly lacks discretion – her only task is to determine if the license is filled out correctly. Respondent cannot dodge the fact that she ignored state law with absolutely no federal or California authority supporting her and little or no secondary state authority to justify her actions. This errant behavior is precisely targeted – and prohibited – by § 3.5.

4. Respondent’s secondary authority is no help to her position.

Respondent cites an Attorney General opinion to support her “narrow construction of § 3.5” argument. (Resp. Supp. Opp. at 30.) The opinion does not discuss a county officer’s ability to ignore state law on her own whim – it states that § 3.5 would itself be unconstitutional if it indeed required the county assessor to violate a “valid federal summons.” 68 Ops. Cal. Atty. Gen. 209, at *12 (1985). This is hardly a blinding revelation – however, it is far from the case here where the Respondent has relied solely

¹⁸ Even if the *Billig* statements were deemed dicta, Respondent obviously has no compunction about following non-binding authority when it suits her. (Resp. Supp. Opp. at 1) (“Justice Scalia, dissenting from that decision [*Lawrence v. Texas*], opined that the principles it embodies would compel a holding that depriving same-sex couples of the right to marry violates the federal Constitution. It was in light of these decisions that Mayor Newsom acted.”).

upon personal interpretation – not federal directive – as an excuse to ignore state law.

Respondent also cites the text, purpose, and legislative analysis of California Revenue and Taxation Code § 538 to argue that local officials do not have to follow state law. However, the legislative analysis actually states “[t]his bill would establish a procedure to be followed by county assessors in challenging provisions of the state Constitution, statutory law, or rules and regulations of the State Board of Equalization relative to assessment practices.” (RJN, Ex. N at 1.) (emphasis added). This section did not impose a “new” duty on assessors to follow state law as Respondent claims. Rather, the statute simply authorized assessors to file lawsuits if they believe a particular law is unconstitutional. Importantly, the section does not address assessors’ discretion to refuse to enforce the law (or the applicability of § 3.5) – they may only bring a lawsuit challenging its constitutionality. This is perfectly harmonious with the application of § 3.5 to the county assessor – or the clerk. Although Respondent is not an assessor, nothing precluded her from bringing an action for declaratory relief to determine the consistency of her own actions with state law. That was the proper process – not the deliberate disregard of the state laws. As a state agent issuing marriage licenses, Respondent is required by § 3.5 to follow state marriage laws.

III. THE COURT SHOULD CONTINUE REQUIRING RESPONDENT TO ACT IN ACCORDANCE WITH STATE LAW.

During the pendency of this action, this Court should continue to require Respondent to follow California law – not what she believes the law ought to be. Respondent argues that she should be allowed to issue invalid marriage licenses until the constitutionality of the State’s marriage laws is fully litigated. (Resp. Supp. Opp. at 42-43.) This argument is absurd. It

could take years to litigate this matter through all appeals, with potentially tens of thousands of invalid licenses issued in the meantime. Respondent is asking the Court to allow her to rewrite state law until the constitutional issues are resolved. Only the Legislature has that authority. *See supra*, Section II.A.

Although the Court has the authority to modify or dissolve an injunction, there has been no material change in the facts or a change in the law upon which the injunction was granted. Cal. Code Civ. Proc. § 533. Furthermore, “the ends of justice” are hardly served by permitting public officials to act on their personal view of what the law ought to be until a lawsuit is completed. *Id.* Therefore, this Court should enforce its injunction throughout the litigation of this case.

CONCLUSION

In this case, the Respondent subjected applicable constitutional provisions and statutes to her personal interpretation of what the law ought to be. This is not the rule of law. Respondent has clearly exceeded the scope of her authority as a county clerk. This Court should continue to require the Respondent to perform her ministerial duty in accordance with state law and issue the peremptory writ of mandate in the first instance.

Dated: March 25, 2004

Respectfully submitted,

Alliance Defense Fund Law Center

By _____
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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 8,022 words.

Robert H. Tyler