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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 CITY AND COUNTY OF SAN FRANCISCO

19 PROPOSITION 22 LEGAL DEFENSE AND
EDUCATION FUND, a California nonprofit
20 public benefit corporation, on its own behalf and
on behalf of the people of California,

21 Petitioner,

22 v.

23 CITY AND COUNTY OF SAN FRANCISCO,
a charter city and county, GAVIN NEWSOM,
24 in his official capacity as Mayor of San
Francisco, NANCY ALFARO, in her official
25 capacity as San Francisco County Clerk, and
DOES 1 through 100,

26 Respondents.
27
28

CASE NO. CPF-04-503943

**SUPPLEMENTAL MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF VERIFIED PETITION
FOR WRIT OF MANDATE AND
IMMEDIATE STAY, AND
INJUNCTIVE AND DECLARATORY
RELIEF**

Action Filed: February 13, 2004
Hearing Date: February 17, 2004
Hearing Time: 2 p.m.
Dept.: 301
Judge: James L. Warren

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1 **INTRODUCTION**

2 This memorandum supplements Petitioner’s Memorandum of Points and Authorities in
3 Support of the Petition for Writ of Mandate, and further explains issues raised in the February 13,
4 2004 oral argument.

5 This case arose after Respondent Mayor Gavin Newsom concluded that limiting marriage
6 to one man and one woman violated the California Constitution by discriminating against same-
7 sex couples on the basis of sex and sexual orientation. He acted swiftly, directing the San
8 Francisco County Clerk to issue “marriage licenses” to same-sex couples, and made available his
9 offices for “marriages” between such couples, in blatant violation of state law.

10
11 **I. RESPONDENTS MAY NOT RAISE THE CONSTITUTIONALITY OF**
12 **CALIFORNIA’S MARRIAGE STATUTES AS A DEFENSE TO PETITIONER’S**
13 **REQUEST FOR MANDATE.**

14 In defense of his actions, Respondent Newsom contends that he was compelled to act by
15 his sworn oath as Mayor to uphold the California Constitution. But almost thirty years ago,
16 California Public Utilities Commissioners made the same contention when they declared
17 unconstitutional a state statute. The Commissioners were wrong then, and Respondent Newsom
18 is wrong now:

19 The contention is twice flawed. First, every public official in the state takes a
20 similar oath to uphold the Constitution, including notaries public, city councilmen
21 and county supervisors. Few in those categories have ever maintained the right to
22 erroneously equate the duty of a commissioner [or Mayor] to uphold the
23 Constitution with an asserted "duty" to declare laws with which he is unsympa-
24 thetic to be unconstitutional. A commissioner faithfully upholds the Constitution
25 by complying with the mandates of the Legislature, leaving to courts the decision
26 whether those mandates are invalid. The oath of office to obey the Constitution
27 requires obedience to the Constitution not as self-indulgently defined by the
28 commission [or the Mayor], but as interpreted by objective judicial tribunals.

25 *Southern Pac. Transp. Co. v. Public Utilities Com’n.*, 18 Cal. 3d 308, 318-319 (1976) (Mosk, J,
26 concurring and dissenting) (citing to *Barr v. Watts* 70 So. 2d 347, 351(Fla. 1953) (emphasis
27 added)).

1 *Southern Pacific Transportation* arose when Commissioners concluded that a statute
2 regulating railroad crossings was an unlawful delegation of the state’s police power to private
3 litigants. *Id.* at 311. The majority concluded that the Commission had the power to declare
4 statutes unconstitutional. *Id.* at 311 n.2. Judge Mosk agreed that the statute was unconstitutional,
5 but argued that only “the courts have authority to take action which runs counter to the expressed
6 will of the legislative body.” *Id.* at 317 (citation omitted). His rationale ultimately carried the
7 day: the Legislature unanimously placed a proposition on the ballot, and California’s voters
8 approved it; thus Cal. Const., art. III, § 3.5 became law. *Burlington N. and Santa Fe Railway Co.*
9 *v. Public Util. Comm’n*, 112 Cal. App. 4th 881, 886 (2003).

11 Respondents would have been well served to visit the California Department of Health
12 Services and considered its summary of how the legal system works:

13 Laws are mutually accepted rules by which, together, we maintain a free society.
14 Liberty itself is built on a foundation of law. That foundation provides an orderly
15 process for changing laws. It also depends on our obeying laws once they have
16 been freely adopted.

16 www.dhs.ca.gov/hisp/chs/OVR/Marriage/MarriageIndex.htm (visited February 15, 2004)
17 (providing general information on the marriage license process) (citation omitted).

18 Respondents proclaim liberty but produce anarchy. *Cf. People v. Dillon*, 34 Cal. 3d 441,
19 487 n.39 (1983) (allowing jurors to ignore law “may achieve pragmatic justice in isolated
20 instances, but we suggest the more likely result is anarchy”). Respondents’ actions are analogous
21 to the defendants’ violation of a temporary injunction in *Walker v. City of Birmingham*, 388 U.S.
22 307 (1967). In *Walker*, a state court had issued a temporary injunction prohibiting mass street
23 parades without a permit. Several persons subject to the injunction participated in a parade
24 without seeking to lift the injunction or obtain a permit, and were later held in criminal contempt
25 for violating the injunction. The Supreme Court suggested that the defendants’ constitutional
26 arguments may have been valid. Nevertheless, the Court rejected the defendants’ efforts to raise
27
28

1 constitutional defenses to their convictions:

2 The rule of law . . . reflects a belief that in the fair administration of justice no man
3 can be judge in his own case, however exalted his station, however righteous his
4 motives, and irrespective of his race, color, politics, or religion. This Court cannot
5 hold that the petitioners were constitutionally free to ignore all the procedures of
6 the law and carry their battle to the streets. One may sympathize with the
7 petitioners' impatient commitment to their cause. But respect for judicial process
8 is a small price to pay for the civilizing hand of law, which alone can give abiding
9 meaning to constitutional freedom.

10 *Walker*, 388 U.S. at 320-21 (emphasis added).

11 California voters validated this rule of law when they adopted Article III, § 3.5. If a
12 public official that is part of an administrative agency believes a statute is unconstitutional, he or
13 she may not challenge it by open defiance. If any government official may ignore laws at will,
14 laws have no force, and there is no liberty.

15 Nor may Respondents properly characterize their outrageous disregard for their oaths of
16 office by claiming "civil disobedience." Such claims are nonsense. Civil disobedience is "an
17 unlawful act that is meant to urge reconsideration of a law or policy without threatening the
18 structure of the community in which it is carried out." *United States v. Santana*, 184 F. Supp. 2d
19 131, 141 (D. P.R. 2001) (quoting *The State Made Me Do It*, 39 Stan. L. Rev. at 1189-90). The
20 "civil disobedient must accept the enforcement of laws with which he disagrees if he is to expect
21 enforcement of [his] prospective social agenda." *Id.* Respondents' actions are the antithesis of
22 true civil disobedience; they usurp the roles of judge, legislator, and voter; they wreak
23 constitutional carnage; they invoke a rule of law grounded in nothing more than personal whim.

24 **II. THE COURT MAY NOT DENY PETITIONER'S REQUESTED RELIEF ON THE
25 BASIS OF A DEFENSE THAT THE STATUTES ARE UNCONSTITUTIONAL**

26 Even if this court concluded that the marriage laws unconstitutionally discriminate against
27 same-sex couples, a writ must issue because state officials must enforce statutes as written unless
28 or until a court of appeals invalidates the statute:

A trial court declaration that a state statute is unconstitutional does not bind state
agencies or officials. To the contrary, a state agency is forbidden to refuse to

1 enforce a statute thought to be unconstitutional unless an appellate court has so
2 determined.

3 *Regents of the U. of Cal. v. Superior Court*, 225 Cal. App. 3d 972, 976 (1991) (emphasis added)
4 (upholding order requiring University to comply with statute). In an earlier action, a different
5 trial court had enjoined the University from complying with a state statute. Instead of appealing
6 the injunction, the University complied with it and ceased enforcing the statute. An employee
7 who was terminated for refusing to comply with the injunction sued to enforce the statute. Both
8 the trial court and the court of appeals ruled in favor of the employee—the University had no
9 authority to generally refuse to follow the statute absent an appellate court ruling that it was
10 unconstitutional. *Id.*

11 The case law applying Article III, § 3.5 confirms that state officials may not redefine the
12 law through personal interpretation of the Constitution. *See, e.g., Ceridian Corp v. Franchise Tax*
13 *Bd.*, 85 Cal. App. 4th 875, 883 n.3 (2000) (even though statute violated Interstate Commerce
14 Clause, “the Board is constitutionally compelled to enforce the provision until it is judicially
15 invalidated”); *Regents of the U. of Cal. v. Public Employment Relations Bd.*, 139 Cal. App. 3d
16 1037, 1041-42 (1983) (“In view of [Art. III, § 3.5], we agree that the PERB properly declined to
17 decide the question whether the claimed statutory right to use the internal mail system is
18 unenforceable by reason of preemptive federal postal law”); *Valdes v. Cory*, 139 Cal. App. 3d
19 773, 780 (1983) (in justifying original appellate mandamus jurisdiction in action to invalidate an
20 unconstitutional statute, court observed that “the named respondents are under a constitutional
21 duty to comply with the contested provisions of chapter 115 unless and until an appellate court
22 declares them unconstitutional”).

23 Nor may Respondents justify their actions by claiming to “cure” an unconstitutional
24 statute by refusing to enforce it as written. In *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th
25 16, 60 (2001), one defense to a constitutionally infirm statute was that administrative regulations
26
27
28

1 were adopted that implemented it in a constitutional manner. The court held that “administrative
2 implementation cannot save a facially invalid statutory scheme.” *Id.* Thus, if the marriage
3 statutes were unconstitutional, implementing them in a manner to include same-sex couples could
4 not cure them. Respondents have no authority to attempt to cure the statute themselves.

5
6 **III. RESPONDENTS’ ABUSE OF OFFICIAL DISCRETION MUST BE CHECKED
7 BY A WRIT OF MANDAMUS.**

8 This is a mandamus action. Mandate is an extraordinary writ that is the proper remedy to
9 prevent a public official from willfully violating the rule of law. *California Educational Faci-*
10 *lities Authority v. Priest*, 12 Cal. 3d 593, 598 (1974). “[W]here . . . the performance of public acts
11 by public officials is the issue, mandate will lie.” *California Teacher Assn. v. Nielsen*, 87 Cal.
12 App. 3d 25, 28-29 (1978). The writ may properly be used to compel a public official to take
13 action or to refrain from taking action. *See McFadden v. Jordan*, 32 Cal. 2d 330, 331 (1948).

14 Respondents clouded the issue when they argued irreparable harm at oral argument on
15 February 13, 2004. Irreparable harm is an element of injunctive relief that is irrelevant to the
16 mandamus analysis. Indeed, mandate is the remedy *specifically* available when a public official
17 either fails to perform a public duty or abuses his or her discretion in fulfilling the duty. *See*
18 *Agricultural Labor Relations Bd. v. Exeter Packers, Inc.*, 184 Cal. App. 3d 483, 489 (1986).¹

19
20 Petitioner has satisfied every element required for mandamus: (1) Respondents have a
21 clear duty (*See* Memorandum of Points and Authorities in Support of Verified Petition For
22 Mandate (“Pet. Memo”) at Section C); (2) Petitioner has a beneficial interest in Respondents’
23 performance of that duty (*id.* at Section A); (3) Respondents have the ability to perform the duty
24

25 ¹ Mandamus is appropriate even if injunctive relief is available in the alternative. “[T]he fact that
26 an action in declaratory relief lies and there is some indication that in a proper case injunction will
27 lie does not prevent the use of mandate.” *Los Angeles County v. State Dept. of Public Health*, 158
28 Cal. App. 2d 425, 446-47 (1958) (citations omitted). Furthermore, mandamus is the proper
remedy in this case because an injunction would simply be commanding respondents to obey the
law. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1200-01 (11th 1999) (denying an
injunction designed to compel defendants simply to obey the law.); *see also District Attorney v.*

1 (*id.* at Section D); (4) Respondents have failed to perform the duty or have abused their discretion
2 in performing the duty (*id.* at Section D); and (5) Petitioner has no other plain, speedy, or
3 adequate remedy in the ordinary course of law (*id.* at Section F). *See Agricultural Labor*
4 *Relations Bd.*, 184 Cal. App. 3d 483, 489 (1986) (citing Cal. Code Civ. Pro. §§ 1085, 1086).

5
6 When petitioner has a beneficial interest and is without a plain, adequate and speedy
7 remedy at law “he is entitled, as a matter of right, to the writ, or, perhaps more correctly . . . it
8 would be an abuse of discretion to refuse it.” *Dowell v. Superior Court*, 47 Cal. 2d 483, 487
9 (1956). In this case Petitioner has no other plain, speedy, or adequate remedy in the ordinary
10 course of law. “[T]he general rule that mandamus will not lie where any other remedy is
11 provided [at law] is subject to the qualification that mandamus may be invoked in those cases
12 where the remedy by any other form of action or proceeding would not be equally as convenient,
13 beneficial, and effective.” *Ross v. Board of Ed.*, 18 Cal. App. 222, 225 (1912). Because
14 Petitioner requests that Respondents be compelled to fulfill their non-discretionary duties of
15 public office, the writ of mandate is the most convenient, beneficial, and effective relief available.
16

17 Indeed, this case is precisely the sort that the writ of mandate is designed to remedy:
18 reigning in public officials who are ignoring a statutory mandate and disregarding the rule of law.
19 *Harbach v. El Pueblo De Los Angeles State Historical Monument Comm’n*, 14 Cal. App. 3d 828,
20 837 (1971) (Mandamus “will ordinarily be issued where a legal duty is established and no other
21 adequate means exist for enforcing that duty”).
22

23 **IV. EVEN IF THE COURT WERE TO CONSIDER THE CONSTITUTIONALITY OF**
24 **THE MARRIAGE STATUTES, IT MAY NOT DECIDE THAT ISSUE WITHOUT**
25 **DISCOVERY AND AN EVIDENTIARY HEARING**

26 “Neither the federal nor the state equal protection clause denies states the power to treat
27 different classes of persons in different ways” *People v. Boulerice*, 5 Cal. App. 4th 463, 472

28 *Board of Selectment*, 481 N.E.2d 1128, 1131 (Mass. 1985) (same).

1 (1992). As the California Supreme Court has held:

2 [T]he proponent of an equal protection claim must demonstrate that the challenged
3 state action results in disparate treatment of persons who are similarly situated
4 with regard to a given law’s legitimate purpose.

5 *People v. Raszler*, 169 Cal. App. 3d 1160, 1166-67 (1985) (citations omitted). Thus, in order to
6 establish that limiting marriage to the union of a man and a woman violates the equal protection
7 clause, Respondents would have to demonstrate the legitimate purpose of marriage—which has
8 existed for millennia—and that same-sex couples are similarly situated with opposite-sex couples
9 with respect to the legitimate purposes of state recognition of marriage. See *In re Strick*, 148 Cal.
10 App. 3d 906, 912-13 (1983). This must be demonstrated “before the question of what standard
11 [of scrutiny] is applicable can be reached” *Id.* at 914. Petitioner contends that same-sex
12 couples are not similarly situated with regard to the legitimate purpose of state recognition of
13 marriage. The court may not assume this element of proof.²

14
15 Respondents have a similar burden of proof to sustain a due process challenge to the
16 marriage laws:

17 Under the due process clause the test of legislative classification is whether the
18 classification bears a rational relation to a constitutionally permissible objective.
19 The two tests [equal protection and due process] are approximately the same, and
20 the party challenging the classification has the burden of proving it unreasonable
21 or irrational.

22 *McCourtney v. Cory*, 123 Cal. App. 3d 431, 439 (1981). Again, Respondents may not sustain
23 their burden of proof with assumptions.

24 Moreover, Respondents may not rely upon the fundamental right to marry to shift the

25 ² Same-sex couples do not have the same assumption of being similarly situated that interracial
26 couples had in the miscegenation cases. In those cases, there was a constitutional determination
27 of being similarly situated because the purpose of the Fourteenth Amendment to the U.S.
28 Constitution was to eliminate racial discrimination. See *McLaughlin v. Florida*, 379 U.S. 184,
191-92 (1964). There is no similar constitutional provision directed toward sexual orientation.
Indeed, no California case has held that sexual orientation is a suspect class. See *Hinman v.*
Department of Personnel Admin., 167 Cal. App. 3d 516, 524 (1985) (disagreeing that “sexual
orientation should be viewed as ‘suspect’”).

1 burden of proof. The fundamental right to marry has no meaning apart from the terms used. And
2 the terms “marry” and “marriage” have meant the union of a man and a woman since at least the
3 Thirteenth Century. Random House Webster’s Unabridged Dictionary 1179 (1998). Indeed,
4 from the first judicial discussions of marriage, the courts have referred to marriage as the union of
5 a man and a woman. See *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). The California Supreme
6 Court has likewise observed the opposite-sex nature of marriage: “The joining of *the man and*
7 *woman* in marriage is at once the most socially productive and individually fulfilling relationship
8 that one can enjoy in the course of a lifetime.” *Marvin v. Marvin*, 18 Cal. 3d 660, 684 (1976)
9 (emphasis added). This court should not consider changing the meaning of the ancient institution
10 of marriage without clear and convincing proof that the historical definition is unreasonable.
11

12 **V. INTERVENORS HAVE NO LEGITIMATE INTEREST IN OPPOSING**
13 **PETITIONER’S REQUEST FOR MANDAMUS.**

14 Intervenor who have already obtained a marriage license have no basis for objecting to a
15 mandate barring further issuance of licenses, for it will not have a “direct and immediate” impact
16 on their rights. *People ex rel. Rominger v. County of Trinity*, 147 Cal. App. 3d 655, 661 (1983).
17 Nor do Intervenor David Scott Chandler and Jeffery Wayne Chandler have a direct and
18 immediate interest in the mandate, for there is no indication that they ever intend to apply for a
19 marriage license. David Scott Chandler affirms a mere desire to get married. He does not affirm
20 an intention to do so, that Jeffery Wayne Chandler is willing to marry him, or that they intend to
21 marry in San Francisco. Accordingly, to the extent the court permits intervention, it should do so
22 only on the issue of declaratory relief, which will invalidate the marriage licenses already issued.
23

24 **VI. CALIFORNIA’S MARRIAGE STATUTES ARE CLEAR AND MAY NOT BE**
25 **CONSTRUED TO APPLY ONLY TO OUT-OF-STATE MARRIAGES.**

26 During oral argument on February 13, 2004, counsel for Respondents made the specious
27 argument that Cal. Fam. Code § 308.5 applies only to out-of-state marriages. The language of §
28

1 308.5 could not be more clear: “Only marriage between a man and a woman is valid or
2 recognized in California.” “When statutory language is thus clear and unambiguous there is no
3 need for construction, and courts should not indulge in it.” *Solberg v. Superior Ct.*, 19 Cal. 3d
4 182, 198 (1977). Moreover, even if § 308.5 could be construed to apply only to out-of-state
5 marriages, § 300 defines marriage as a man and a woman also. Therefore, issuing marriage
6 licenses to same-sex couples is clearly in violation of California statutes.
7

8 **CONCLUSION**

9 Petitioner respectfully suggests that the writ of mandate should issue regardless of
10 whether the court decides to consider Respondents’ constitutional arguments, and that the court
11 should not reach the constitutional issues without discovery, further briefing, and an evidentiary
12 hearing.
13

14
15 Dated: February 16, 2004

16
17 Respectfully submitted,

18 Alliance Defense Fund Law Center

19
20 By _____
21 Robert H. Tyler
22 Attorney for Petitioner Proposition 22 Legal Defense
23 and Education Fund
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