IN THE SUPREME COURT OF THE STATE 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.	No._____

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

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IN THE SUPREME COURT OF THE STATE 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.

INTRODUCTION

This original proceeding presents a legal issue of utmost importance to the State of California, warranting this Court's immediate intervention to maintain the rule of law and the stability of our system of government. The issue presented is whether the City and County of San Francisco can defy certain laws of the State of California, and encourage others to defy those state laws, based simply on the belief, without any controlling judicial determination, that the state laws are unconstitutional. The Attorney General submits that the prospect of local governmental officials unilaterally defying state laws with which they disagree is untenable and inconsistent with the precepts of our legal system.

Our State is founded on the rule of law. The genius of our legal system is in the orderly way our laws can be changed, by the Legislature or by a vote of the People through the initiative process, to reflect current wisdom or societal values. A law can also be struck down by an appropriate tribunal if the law is determined, through our judicial process, to be inconsistent with basic rights or higher legal authority. These concepts are at the very core of our system of constitutional government.

It is also fundamental, however, that individuals and government entities cannot take the law into their own hands without authorization. While individuals can express opposition to laws they find objectionable, and they can work to change or strike down laws that they believe are problematic, our system of government would deteriorate into chaos if people could simply defy those particular laws with which they disagree. Peaceful civil disobedience may have its place in an open society, but there are usually consequences for such disobedience. Moreover, there are always appropriate and available processes and forums for effecting governmental change.

The City and County of San Francisco has been issuing thousands of

altered License and Certificate of Marriage forms that differ from the forms prescribed by the State of California. The forms have been altered by city and county officials to permit couples of the same gender to apply for marriage certificates, despite the express provisions of California Family Code section 300 ["[m]arriage is a personal relation arising out of a civil contract between a man and a woman . . . ."], section 301 ["[a]n unmarried male . . . and an unmarried female . . . are capable of consummating marriage"], and section 308.5 ["[o]nly marriage between a man and a woman is valid or recognized in California"]. The California Department of Health Services issued a directive to the Assessor-Recorder for the City and County of San Francisco on February 25, 2004, pursuant to the Department's authority set forth in Health and Safety Code sections 102180 et seq., ordering her to cease registering License and Certificate of Marriage forms other than those approved by the State of California, and to certify that the registration of unapproved forms has ceased. No such certification has been forthcoming from the Assessor-Recorder.

The result is that the City and County of San Francisco has issued thousands of marriage certificates that are not recognized by the State of California, there is a conflict in the administration of marriage certificates among counties, and the federal Social Security Administration (SSA) has requested that the State of California review future marriage certificates presented to the SSA as evidence for name change, because there is now uncertainty as to whether certain marriage certificates issued in California are valid under state law. This conflict and uncertainty, and the potential for further ambiguity, instability and inconsistent administration among various jurisdictions and levels of government, present a legal issue of statewide importance that warrants immediate intervention by this Court.

Immediate intervention is also warranted for reasons of judicial economy

and prompt resolution of the legal issues surrounding same-sex marriage. Absent action of this Court on this petition, the Attorney General anticipates that further substantial litigation over these issues will be filed in numerous courts throughout California. Prompt intervention by this Court would render unnecessary much duplicative litigation. More importantly, a definitive resolution by this Court of the fundamental constitutional questions involved would provide much-needed certainty and guidance to lower courts and the public.

The Attorney General has the constitutional duty to see that the laws of the state are uniformly and adequately enforced. (Cal. Const., art. V, § 13.) The Attorney General has attempted to pay deference to the lower courts and to the administrative process in the hope that this matter could be resolved without this Court's immediate intervention. However, the trial courts have not acted to stop the violation of state law, and the First District Court of Appeal has declined to intervene. In addition, although the Department of Health Services ordered the Assessor-Recorder to cease and desist, no evidence of compliance has been forthcoming. It therefore now becomes necessary for the Attorney General to request this Court to intervene in order to maintain the rule and uniformity of law.

Respondents will likely oppose this writ petition by arguing that the applicable state laws are unconstitutional. Of course, such a challenge does not justify their issuance of same-sex marriage licenses in violation of state law, because article III, section 3.5 of the California Constitution prohibits administrative agencies from declaring state laws unconstitutional in the absence of an appellate court determination. The county is a political subdivision of the state charged with administering state government, and local

registrars of vital statistics act as state officers. The state's agents at the local level simply cannot refuse to enforce state law.

Regarding respondents' constitutional challenge, this Court can maintain the rule and uniformity of law on a prospective basis by granting the relief requested in this petition without reaching those constitutional issues at this time, thereby permitting the lower courts to address such matters in due course. Nevertheless, the Attorney General urges this Court's resolution of the constitutional issues now. As the issues presented are pure legal issues, and there is no need for the development of a factual record, these issues are ready for this Court's review. The uncertainty surrounding the validity and effect of certificates already issued by respondents to thousands of persons, and the potential harm to those holders of the same-sex marriage certificates, warrant this Court's immediate intervention and resolution of these important issues.

Accordingly, the Attorney General respectfully requests the following:

1. That this Court maintain administrative uniformity and certainty by immediately issuing an order directing respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California, while this original writ proceeding is pending.

2. That this Court exercise its original jurisdiction in this matter, determine the validity of Family Code sections 300, 301 and 308.5 as a matter of law, and grant the instant writ petition in its entirety, issuing an order (a) declaring the invalidity of the same-sex marriage licenses and certificates issued and registered by respondents, and (b) directing 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 approved by the State of California, and to refund any fees collected in connection with previously-issued same-sex licenses or certificates.

3. That, while this original proceeding is pending in this Court, the Court stay the related proceedings entitled *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco et al.*, San Francisco Superior Court case number CPF-04-503943; and *Randy Thomasson et al. v. Gavin Newsom et al.*, San Francisco Superior Court case number CGC 04-428794, which have now been consolidated. (Appendix To Original Petition For Writ Of Mandate, Prohibition, Certiorari And/Or Other Appropriate Relief ("Appendix"), Exh. 2 (Docket In *Thomasson*, Feb. 20, 2004), p. 4.)

4. In the alternative, if this Court should decide to grant and transfer this matter to another forum for further proceedings, that this Court nonetheless stay all proceedings other than the one transferred by this Court, and that it immediately issue an order directing respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California, while the transferred proceedings are pending.

5. Alternatively, if this Court should decide to transfer the related matters pending in the San Francisco Superior Court to this Court for final resolution of the constitutional issues presented in those cases, that this Court nonetheless immediately issue an order directing respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California, while the proceedings in this Court are pending.

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PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI AND/OR OTHER APPROPRIATE RELIEF

PARTIES

1. Petitioner Bill Lockyer is the Attorney General of the State of California, and brings this petition in his official capacity.

2. This Court has original jurisdiction over this petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief pursuant to article VI, section 10 of the California Constitution.

3. Respondent City and County of San Francisco is a charter city and county. The County of San Francisco is a legal subdivision of the State of California.

4. Respondent Gavin Newsom is the Mayor of the City and County of San Francisco, and is sued in his official capacity.

5. Respondent Nancy Alfaro is the San Francisco County Clerk, and is sued in her official capacity. As the San Francisco County Clerk, respondent Alfaro is the designated "commissioner of civil marriages" for San Francisco County.

6. Respondent Mabel S. Teng is the Assessor-Recorder for the City and County of San Francisco, and is sued in her official capacity.

AUTHENTICITY OF EXHIBITS

7. All the exhibits in the Appendix filed in support of this petition are true and correct copies. Exhibits 2, 3, 4, and 5 in the Appendix are true and correct copies of documents obtained from the website of the Superior Court of California, County of San Francisco, *http://www.sftc.org/*, in the cases of *Thomasson, et al. v. Newsom, et al.*, San Francisco Superior Court Case No. CGC-04-428794, and *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, San Francisco Superior Court Case No. CPF-04-503943. The remaining exhibits are true and correct copies of

documents obtained by the Office of the Attorney General. The exhibits are incorporated herein by reference as though fully set forth in this petition. The exhibits are paginated consecutively from page 1 through page 78, and the page references in this petition are to that consecutive pagination.

FACTUAL ALLEGATIONS

8. Petitioner is informed and believes, and based thereon alleges that on or about February 10, 2004, respondent Newsom instructed the San Francisco County Clerk to alter the state-approved marriage license form in a manner that does not conform to sections 300, 301, and 308.5 of the Family Code. Petitioner is further informed and believes, and based thereon alleges that, as directed by respondent Newsom, respondent Alfaro thereafter caused to be prepared marriage license forms that do not conform to sections 300, 301, and 308.5 of the Family Code, and which are to be issued by the County of San Francisco for use in all same-sex marriages taking place within the County of San Francisco.

9. Since on or about February 12, 2004, and continuing to the present, respondents have caused to be issued marriage licenses that do not fully conform to sections 300, 301, and 308.5 of the Family Code. Petitioner is informed and believes, and based thereon alleges that respondents intend to continue issuing and registering, and will continue issuing and registering, License and Certificate of Marriage forms that do not fully conform to sections 300, 301, and 308.5 of the Family Code unless they are commanded by judicial order to comply with the Family Code.

10. Respondents are under a clear, present and ministerial duty to comply with and implement all duly enacted legislative measures. Sections 300, 301, and 308.5 of the Family Code are duly enacted legislative measures and are entitled to a presumption of validity. By failing to comply with and implement sections 300, 301, and 308.5 of the Family Code, respondents have breached their ministerial duty to comply with state law. Respondents' actions are in

violation of Article III, section 3.5 of the California Constitution.

11. Petitioner, as the chief law officer of the State of California, has a clear, present and beneficial right to San Francisco's full compliance with all provisions of the Family Code.

12. On or about February 13, 2004, an action styled *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, et al.,* case number CPF-04-503943 ("*Proposition 22 Legal Defense Fund v. San Francisco*"), was filed in the Superior Court of California for the County of San Francisco. Petitioner is informed and believes, and based thereon alleges that *Proposition 22 Legal Defense Fund v. San Francisco* raises issues concerning, inter alia, whether San Francisco has the authority to issue marriage licenses that do not fully conform to the California Family Code. A true and correct copy of the *Proposition 22 Legal Defense Fund v. San Francisco* petition is included in the Appendix as Exhibit 4. The State of California is not named as a party in *Proposition 22 Legal Defense Fund v. San Francisco*.

13. On or about February 13, 2004, an action styled *Thomasson, et al. v. Newsom, et al.*, case number CGC-04-428794, was filed in the Superior Court of California for the County of San Francisco. Petitioner is informed and believes, and based thereon alleges that *Thomasson v. Newsom* raises issues concerning, inter alia, whether San Francisco has the authority to issue marriage licenses that do not fully conform to the California Family Code. A true and correct copy of the *Thomasson v. Newsom* amended complaint is included in the Appendix as Exhibit 5. The State of California is not named as a party in *Thomasson v. Newsom*.

14. On February 19, 2004, in *Proposition 22 Legal Defense Fund v. San Francisco,* defendant City and County of San Francisco filed a cross-complaint naming the State of California, Proposition 22 Legal Defense and Education Fund, Campaign for California Families, and Randy Thomasson as

cross-complainants. A true and correct copy of the *Proposition 22 Legal Defense Fund v. San Francisco* cross-complaint is included in the Appendix as Exhibit 6.

15. The Superior Court of California for the County of San Francisco has declined to issue an order restraining respondents from issuing and/or registering marriage licenses and certificates that do not fully conform to the Family Code and commanding respondents to issue marriage licenses and certificates that are in full compliance with the Family Code. In addition, the First District Court of Appeal has declined to intervene. (*See Thomasson v. Superior Court (Newsom),* Calif. Ct. of App., First. App. Dist., Case No. A105550.)

Accordingly, the Attorney General prays as follows:

1. That this Court maintain administrative uniformity and certainty by immediately issuing an order directing respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California, while this original writ proceeding is pending.

2. That this Court exercise its original jurisdiction in this matter, determine the validity of Family Code sections 300, 301 and 308.5 as a matter of law, and grant the instant writ petition in its entirety, issuing an order (a) declaring the invalidity of the same-sex marriage licenses and certificates issued and registered by respondents; and (b) directing 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 approved by the State of California, and to refund any fees collected in connection with same-sex licenses or certificates.

3. That, while this original proceeding is pending in this Court, the Court stay the related proceedings entitled *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco et al.*, San Francisco

County Superior Court case number CPF-04-503943, and *Randy Thomasson et al. v. Gavin Newsom et al.*, San Francisco County Superior Court case number CGC 04-428794, which have now been consolidated. (Appendix, Exh. 2 (Docket In *Thomasson*, Feb. 20, 2004), p. 4.)

4. In the alternative, if this Court should decide to grant and transfer this matter to another forum for further proceedings, that this Court nonetheless stay all proceedings other than the one transferred by this Court, and that it immediately issue an order directing respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California, while the transferred proceedings are pending.

5. Alternatively, if this Court should decide to transfer the related matters pending in the San Francisco Superior Court to this Court for final resolution of the constitutional issues presented in those cases, that this Court nonetheless immediately issue an order directing respondents to cease and desist from issuing or registering License and Certificate of Marriage forms, other than those approved by the State of California, while the proceedings in this Court are pending.

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6. That Petitioner be awarded attorney's fees and costs of suit.

7. That Petitioner be awarded such other relief as is just and proper.

Dated: February 27, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ANDREA LYNN HOCH
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LOUIS R. MAURO
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Deputy Attorney General

Attorneys for Petitioner Bill Lockyer, Attorney General of the State of California

VERIFICATION

I, Christopher E. Krueger, declare as follows:

I am an attorney at law duly admitted and licensed to practice before all courts of the State of California. I am a Deputy Attorney General and one of the attorneys for the petitioner in this action, Bill Lockyer, the Attorney General of the State of California. I have read the foregoing Original Petition For Writ Of Mandate, Prohibition, Certiorari And/Or Other Appropriate Relief and know its contents. All facts alleged in the Petition and the accompanying Memorandum of Points and Authorities submitted herewith, not otherwise supported by citation to the record, exhibits, or other documents, are true of my own personal knowledge, except for matters stated on information and belief, and as to those matters, I believe them to be true. If called upon to testify, I could and would testify competently to those matters stated upon my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 27, 2004, at Sacramento, California.

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Christopher E. Krueger

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT PETITION

STATEMENT OF FACTS

A. Without Legal Authority To Do So, The City and County Of San Francisco Has Issued Thousands Of Marriage Licenses To Same-Sex Couples Pursuant To The Mayor's Directive On February 10, 2004.

The facts giving rise to this original writ petition have been widely publicized and do not appear to be subject to any substantial dispute. On February 10, 2004, Gavin Newsom, the Mayor of the City and County of San Francisco ("Mayor"), directed San Francisco County Clerk Nancy Alfaro ("County Clerk") "to determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation." (Appendix, Exh. 1 (Letter From Mayor to County Clerk, 2/10/04), p. 1.) The Mayor indicated in his letter that he believed that the equal protection provision contained in Article I, section 7(a) of the California Constitution prohibited San Francisco from denying marriage licenses to gays and lesbians. (*Ibid.)*

On February 12, 2004, San Francisco began issuing marriage licenses to same-sex couples. Based on press accounts and filings by the parties in the Superior Court, the Attorney General is informed and believes that San Francisco has issued several thousand such licenses and continues to do so.

B. Two Groups Opposed To Same-Sex Marriages Have Filed Legal Actions, Which Are Now Consolidated In The Superior Court, And The State of California Has Been Brought Into The Consolidated Action As A Cross-Defendant.

One day after San Francisco began issuing the same-sex marriage licenses, Campaign For California Families and its director, Randy Thomasson (collectively "CCF"), filed a writ of mandate proceeding against the Mayor

and the County Clerk in the Superior Court of California, County of San Francisco. (Appendix, Exh. 2 (Docket in *Thomasson, et al. v. Newsom*, et al., San Francisco Superior Court Case No. CGC-04-428794), p. 9.) That same day, a second group, Proposition 22 Legal Defense and Education Fund, filed its own writ of mandate action against San Francisco, the Mayor and the County Clerk. (Appendix, Exh. 3 (Docket in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco, et al.*, San Francisco Superior Court Case No. CPF-04-503943), p. 15.) The actions, which have now been consolidated,[1/] seek to enjoin San Francisco officials from issuing marriage licenses to same-sex couples on the ground that such licenses are unlawful under California law. (Appendix, Exh. 4 (Verified Petition For Writ Of Mandate And Immediate Stay, And Complaint For Injunctive And Declaratory Relief in *Proposition 22* action), p. 20; Exh. 5 (Verified Amended Complaint For Writ Of Mandamus, Declaratory And Injunctive Relief in *Thomasson* action), pp. 52-54.)

On February 19, 2004, the State of California was served with a cross-complaint seeking declaratory relief in the *Proposition 22* action. (Appendix, Exh. 6 (City And County Of San Francisco's Cross-Complaint For Declaratory Relief in the *Proposition 22* action, Feb. 19, 2004), pp. 67-74.)

C. Uncertainty About The Legal Effect Of Same-Sex Marriage Licenses Causes A Risk Of Harm To Holders Of The Licenses And Others.

While San Francisco continues to issue marriage licenses to same-sex couples, very important questions have arisen about the validity and legal effect of the licenses. The California Department of Health Services ("DHS") is authorized under state law to "prescribe and furnish all record forms" for use in implementing the Health and Safety Code's requirements related to the

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1. (Appendix, Exh. 2 (Docket in *Thomasson*, Feb. 20, 2004), p. 4.)

registration of marriage certificates. (Health & Saf. Code, § 102200.) Local registrars, under the supervision of DHS, are required to carefully examine each certificate before accepting it for registration. If a certificate is incomplete, a local registrar must require further information to be furnished as "necessary to make the record satisfactory before acceptance for registration." (Health & Saf. Code, § 102310.)

A letter dated February 25, 2004, from Michael L. Rodrian, the State Registrar for Vital Statistics, to Mabel S. Teng, the Assessor-Recorder for the City and County of San Francisco,[2/] indicated that DHS was informed that the County Clerk had been issuing License and Certificate of Marriage forms that differed from the forms prescribed by DHS. (Appendix, Exh. 7 (Letter From State Registrar Rodrian to Assessor-Recorder, Feb. 25, 2003), p. 75.) DHS directed Ms. Teng "to immediately cease and desist from registering License and Certificate of Marriage forms, other than those approved by this office, and to certify that you have ceased registering unapproved forms." (*Ibid.*) As of the date of this filing, no confirmation of compliance has been forthcoming from respondents.

Pursuant to statute, the State Registrar is authorized to examine marriage certificates for completeness and to return all incomplete or unsatisfactory certificates to the county registrar within 90 days of receipt. (Health & Saf. Code, § 102225.) If the State Registrar rejects the marriage certificates issued to same-sex couples, and those records are not corrected, then no official state record of these marriages will exist. Although the State Registrar's rejection of a marriage certificate, by itself, does not necessarily invalidate the marriage,[3/] the absence of a public document accepted by the State Registrar

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2. The county recorder is the local registrar of marriages. (Health & Saf. Code, § 102285.)

3. A 1943 opinion of the Attorney General concluded that the registrar lacks the authority to determine the validity of a marriage, because that is a

could cause confusion as to the existence of a marriage. Any circumstance that requires the proof of a marriage might be affected by failing to register the marriage license. Thus, the holder of a license approved by the County Clerk but not accepted for registration by the State Registrar might be unable to provide evidence of marriage if, upon death of the holder's spouse, the holder needed to prove the existence of the marriage in order to obtain survivor benefits.[4/]

Numerous other practical dilemmas could result from the continuing issuance of same-sex marriage licenses, and the continuing uncertainty about the legal validity of such licenses. Holders of these licenses may eschew writing wills, assuming that their spouses will inherit their property under the statutes governing intestate succession. If these licenses are ultimately found to be invalid, a surviving spouse of a person who dies without a will could find himself or herself legally ineligible to receive a share of the decedent's estate. In addition, many state and federal laws confer rights or impose responsibilities based on marital status. Until the issue of the legal validity of the licenses issued by San Francisco is resolved, thousands of holders of same-sex marriage licenses will remain in a form of legal limbo, with their

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question for the courts to resolve. (2 Ops.Cal.Atty.Gen. 532, 533 (1943).)

4. The federal Social Security Administration has informed DHS of its concern that legally invalid same-sex marriage licenses will be presented to the Social Security Administration to support name changes on Social Security cards. (Appendix, Exh. 8 (Letter From P. Spencer to T. McCaffrey, Feb. 23, 2004), p. 77.) The Social Security Administration has asked DHS to review marriage certificates that are presented to Social Security offices as evidence for name changes, to confirm their validity. (*Ibid.*)

ability to exercise the rights and responsibilities of marriage contingent upon future judicial rulings.

The holders of same-sex marriage licenses may not be willing or able to put their lives on hold pending final judicial resolution of this matter. Rather, they may well continue to make decisions -- for themselves and their families -- in reliance on respondents' recognition of marital status. Thus, in addition to the present ambiguity and conflict in the administration of the laws among different jurisdictions, there is also the very real potential for legal harm to the holders of the same-sex marriage licenses.

STATEMENT OF THE CASE

In filing this original petition for writ of mandate, prohibition, certiorari or other appropriate relief, the Attorney General respectfully requests that this Court exercise its original jurisdiction under Article VI, section 10 of the California Constitution and Rule 56(a) of the California Rules of Court. This action is an original petition, rather than a challenge to the actions of the Superior Court in the cases described above. As noted in the accompanying petition, the Attorney General requests that this Court issue an order compelling respondents to perform their ministerial duties under California law.

ARGUMENT

I

THIS COURT HAS THE AUTHORITY TO GRANT THE REQUESTED RELIEF AND MAINTAIN THE RULE OF LAW PENDING A FINAL RESOLUTION OF THE LEGAL ISSUES SURROUNDING SAME-SEX MARRIAGE

Article VI, section 10 of the California Constitution confers on this Court "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Although the Court generally declines to exercise original jurisdiction except in unique circumstances (see

Legislature v. Eu (1991) 54 Cal.3d 492, 500), the exercise of original jurisdiction is warranted in cases of sufficient public importance. (*Ibid.*) Where the issues presented are of great public importance and should be resolved promptly, it is appropriate for this Court to exercise its original jurisdiction and take prompt action to maintain the rule of law. (*Ibid.*; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340.)

The issue presented in this case -- whether a local government entity can defy state laws with which it disagrees, without first obtaining a judicial determination on those laws in an appropriate legal forum -- is of utmost public importance and urgency. For the past few weeks, San Francisco has been issuing marriage licenses in direct contravention of Family Code sections 300, 301, and 308.5, based merely on the belief -- without a controlling judicial determination -- that those state laws are unconstitutional. It is difficult to imagine an issue of greater public importance or urgency than whether a local government can take the law into its own hands while at the same time encouraging thousands of persons to participate in the violation of state law.

This Court has exercised its original jurisdiction on issues of statewide importance in the past, addressing questions regarding the constitutionality of state laws. In *Perry v. Jordan* (1949) 34 Cal.2d 87, this Court exercised its original jurisdiction and issued a writ commanding the Secretary of State to take the steps required to present an initiative to the voters. The Court exercised its original jurisdiction even though a pending Superior Court action already presented the same issues. (*Perry v. Jordan, supra,* 34 Cal.2d at 90.)

Moreover, in *Legislature v. Eu, supra,* 54 Cal. 3d 492, the Court exercised its original jurisdiction to decide various constitutional challenges to Proposition 140, "The Political Reform Act of 1990." Among other things, Proposition 140 amended the Constitution to impose term limits on state legislators and various constitutional officers, and imposed budgetary

limitations on the Legislature. (*Id.* at 501-02.) The Court viewed the Legislature's constitutional challenges to the initiative as involving "issues of sufficient public importance to justify" an exercise of original jurisdiction. (*Id.* at 500.) Likewise, in *Raven v. Deukmejian, supra,* 52 Cal.3d 336, the Court granted an original petition for writ of mandate to invalidate one section of Proposition 115, the "Crime Victims Justice Reform Act." Proposition 115's passage resulted in numerous changes to California's constitution and statutes, and the challenges to Proposition 115 were of "great public importance" that required prompt resolution. Consequently, the Court found it appropriate to exercise its original jurisdiction. (*Id.* at 340.)

Furthermore, in *Brosnahan v. Brown* (1982) 32 Cal.3d 236, taxpayers and voters filed an original writ in the Court of Appeal, claiming that Proposition 8, "The Victims' Bill of Rights," had been submitted to the voters in a constitutionally defective manner. (*Id.* at 240.) The Attorney General viewed the case as raising issues warranting original Supreme Court review and, thus, the Attorney General asked that the case be transferred to the Supreme Court. The Court found it was, indeed, appropriate to exercise its original jurisdiction since it was "uniformly agreed that the issues are of great public importance and should be resolved promptly." (*Id.* at 241.)

And in *Clean Air Constituency v. California Air Resources Bd.* (1974) 11 Cal.3d 801, the California Air Resources Board claimed it had the authority to delay implementing a statewide "pollution control device" program because of an energy crisis. Whether the Board could do so was determined to be a question of great public importance, particularly in light of the public significance the Legislature placed on the program, and the resulting harm to the public and businesses. (*Id.* at 808.)

The issues presented in this case are no less important or urgent. With each passing day, San Francisco issues more marriage licenses in defiance of state law and the directive from the California Department of Health Services.

Such defiance is creating a substantial ambiguity and inconsistency in the administration of the law that is simply untenable. Accordingly, this Court should immediately grant the requested relief to maintain the rule of law pending full resolution of these issues.

II

THE SUPREME COURT HAS AUTHORITY TO HALT SAN FRANCISCO'S VIOLATION OF STATE LAW BY FASHIONING APPROPRIATE WRIT RELIEF

The Court can properly fashion appropriate writ relief to stop San Francisco's continuing violations of state law. Article VI, section 10 of the California Constitution vests this Court with "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."[5/] In the past, this Court has exercised its original jurisdiction and, ultimately, issued a writ commanding a governmental official to take specified action. For example, *Perry v. Jordan, supra,* 34 Cal.2d 87, was an original proceeding where the Court issued a writ commanding the Secretary of State to take the steps required to present an initiative to the voters. (*Id.* at 89-90; see also, *Clean Air Constituency v. California Air Resources Bd.* (1974) 11 Cal.3d 801, 805, 819-20 [writ issued in original proceeding]; *Hyatt v. Allen, supra,* 54 Cal. at 361 [writ issued against City of Stockton's tax assessor in original proceeding].) Likewise, in *Legislature v. Eu, supra,* 54 Cal.3d at 500, the Court "temporarily stayed operation of" one section of the challenged initiative[6/] pending the Court's review of the constitutional issues

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5. Well before article VI, section 10's addition to the Constitution, it was established that the Court had the power to issue prerogative writs in original proceedings under its general grant of jurisdiction. (*Hyatt v. Allen* (1880) 54 Cal. 353 [writ issued against City of Stockton's tax assessor in original proceeding].)

6. This Court in *Legislature v. Eu* refers to its stay of "Section 5 of (continued...)

raised in that original writ proceeding. Thus, under article VI, section 10, the Court possesses the authority to fashion appropriate relief to maintain the rule of law pending full resolution of these issues.

Extraordinary writ relief is appropriate because respondents have no discretion to disregard state laws with which they disagree. Instead, respondents have a ministerial duty to comply with state law unless and until they are enjoined from enforcing the law or there is a binding judicial determination that the law is invalid. Where, as here, a government official refuses to implement a duly enacted legislative measure, mandamus "has long been recognized" as the appropriate means to correct that refusal. (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58, citing *City and County of San Francisco v. Callanan* (1985) 169 Cal.App.3d 643, 647.)

To be entitled to a writ of mandate, the petitioner must show (1) a clear, present and usually ministerial duty on the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. . . ." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-40.)[7/] A writ of prohibition has similar requirements for its issuance, but since it "arrests judicial functions,"[8/] it is preventative in nature.

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6. (...continued)
Proposition 115" (*Legislature v. Eu, supra,* 54 Cal.3d at 500), but it was obviously referring to Section 5 of Proposition 140. Section 5 of Proposition 140 added article IV, section 7.5 to the Constitution, which imposes budgetary restrictions on the Legislature. Section 5 was just one of Proposition 140's provisions that was being challenged. (*Id.* at 500, 502.)

7. A ministerial act is an act a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his or her own judgment or opinion concerning such acts's propriety or impropriety, when a given state of facts exists. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

8. In the view of Eisenberg, Horvitz and Weiner, "[t]here is no clear
(continued...)

(Eisenberg & Horvitz, Cal. Practice Guide: Civil Appeals and Writs [Rutter Group 2001] ¶¶ 15:55, 15:56.) And lastly, a writ of certiorari reaches completed "judicial functions," but otherwise has similar requirements for issuance as a writ of mandate. (*Id.* at ¶¶ 15:71, 15:76.) Since San Francisco has created a situation where there are completed acts (same-sex marriages that have taken place), threatened acts (same-sex marriages that could take place, or attempts to enforce any right or duty under a nonconforming marriage license), and a ministerial duty on San Francisco's part to comply with state law, this case warrants the Court's fashioning of appropriate writ relief.

Petitioner has met the requirements for extraordinary writ relief because respondents have a clear, present and ministerial duty to comply with the Family Code. Moreover, as chief law officer of the state, the Attorney General has a constitutional "duty . . . to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) Thus, by virtue of our Constitution, petitioner has a clear, present and beneficial right to San Francisco's full compliance with the Family Code. Consequently, relief in the form of mandamus is appropriate to compel San Francisco to cease issuing and registering marriage licenses and certificates that do not conform to the Family Code.

III

THE ISSUANCE OF MARRIAGE LICENSES AND CERTIFICATES TO SAME-SEX COUPLES IS CONTRARY TO EXISTING STATE LAW

The County Clerk for the City and County of San Francisco ("County Clerk") has been delegated the authority to issue marriage licenses and

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8. (...continued)
'test' for determining whether a challenged action is 'judicial' or 'ministerial.'" (Eisenberg, et al., *supra,* at ¶ 15:62.1.)

certificates of registry of marriage. (Fam. Code, § 350 et seq.) However, California law provides that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman." (Fam. Code, § 300.) The law also provides that "[o]nly marriage between a man and a woman is valid or recognized in California." (Fam. Code, § 308.5.) The County Clerk must follow these statutes, even if she believes them to be unconstitutional. To issue a marriage license and a certificate of registry of marriage to a same-sex couple is contrary to state law.

San Francisco is a charter city and county. (San Francisco City and County Charter, Preamble; Cal. Const., art. XI, § 6.) As a charter city and county, San Francisco has broad authority to address local problems and concerns, but not to act in conflict with state law. Under article XI, section 7 of the California Constitution, "[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 law*." (Cal. Const., art. XI, § 7, emphasis added; see *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62; *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048, 1053; *Younger v. Board of Supervisors of San Diego County* (1979) 93 Cal.App.3d 864, 870.) Local law or actions that are in conflict with general law of the state are void. (*People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.)

The licensing and certification of marriage is a matter of statewide concern, and state law controls every aspect of marriage, leaving nothing to the discretion of local government. State law determines who can marry (Fam. Code, §§ 300, 308.5, 2200, 2201), and it also sets the age at which individuals can consent to marriage. (Fam. Code, §§ 300-304.)

State law also defines how marriage is created and terminated. A marriage is only valid following the issuance of a state-approved license and certificate of marriage registry by the County Clerk (Fam. Code, § 350 et seq.), solemnization (Fam. Code, § 400 et seq.), authentication (Fam. Code,

§§ 422-425), and registry with the County Recorder (Fam. Code, § 359). A marriage is terminated by way of a judgment of dissolution or legal separation through an action in superior court. (Fam. Code, § 2300 et seq.)

Thus, the regulation of marriage is solely within the province of the Legislature. (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 99.) "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." (*Ibid*.) It is for present purposes irrelevant whether the County Clerk believes it is unconstitutional to preclude same-sex couples from getting married. Article III, section 3.5 of the California Constitution prohibits any administrative agency from declaring a state law unconstitutional or refusing to enforce a state law:

> 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.

The County of San Francisco is an "administrative agency" under section 3.5, because counties are political subdivisions of the state and are charged with administering the general policies of state government. (Cal.

Const., art. XI, §1; *County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638-639.) Moreover, when local officers of a city act as local registrars of vital statistics, they are acting as state officers. (*City of Sacramento v. Simmons* (1924) 66 Cal.App.18, 24-25.) Just as a statewide administrative agency cannot refuse to enforce the "marriage statutes" on constitutional grounds, the state's representatives at the local level cannot do so. (See *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969 ["the offices of city clerks throughout the state are mandated by the constitution to implement and enforce the statute's procedural requirements"].)[9/]

California law is clear in specifying that only marriage between a man and a woman is valid. The County Clerk's issuance of marriage licenses and certificates is contrary to California law. Even if the County Clerk believes that the law is unconstitutional, she has no authority to disobey the law under article III, section 3.5 of the California Constitution. Respondents have a ministerial duty to comply with state law.

IV

IMMEDIATE ACTION BY THIS COURT IS NECESSARY TO ELIMINATE AMBIGUITY AND CROSS-JURISDICTIONAL CONFLICT IN THE ADMINISTRATION AND APPLICATION

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9. In the related superior court actions, the City and County of San Francisco argues that article III, section 3.5 does not apply to local governments "because the separation of powers clause is inapplicable to government below the state level," citing *Strumsky v. San Diego County Employees retirement Assn.* (1974) 11 Cal.3d 28, 36. But the *Strumsky* case is distinguishable, and the quote from *Strumsky* is taken out of context and misperceived. *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.

OF LAW

Marital status implicates many facets of our legal system, including, but not necessarily limited to, public assistance (Welf. & Inst. Code, § 11154); property ownership (Fam. Code, § 760); personal debt liability (Fam. Code, § 914); spousal and child support (Fam. Code, § 915); intestate succession (Prob. Code, § 6400 *et seq.*); workers compensation benefits (Lab. Code, § 3501); and taxation (Rev. & Tax. Code, § 18521). Government officials and the citizens of this state depend on the clarity and rule of law in carrying out their duties and activities.

Health and Safety Code sections 102140 and 102225 provide that no alteration may be made on the marriage license form prescribed by the Department of Health Services. Thus, when an altered form is received by the Department of Health Services and the State Registrar from a county, as required by Health and Safety Code section 102355, it will not be accepted for registration. But the lack of state registration does not necessarily, by itself, invalidate a marriage. (See 2 Ops.Cal.Atty.Gen. 532, 533 (1943).) And as the federal Social Security Administration aptly suggests in its letter to California's Department of Health Services (Appendix, Exh. 8 (Letter From State Registrar Rodrian to Assessor-Recorder, Feb. 25, 2003), pp. 77-78), it is no longer clear to observers whether a particular marriage license and certificate is valid in California. Such ambiguity and conflict among jurisdictions has the potential to create a wide array of substantial problems in the administration of multiple government programs. More importantly, the uncertainty surrounding the validity and effect of these marriage certificates will potentially result in harm to the holders of such certificates to establish marital rights and benefits that may not be valid under state and federal law. Several specific examples follow.

A. Taxation.

The State's ability to levy taxes is a vital, essential, and sovereign attribute of state government, without which it could not function. (*Greene v. Franchise Tax Board* (1972) 27 Cal.App.3d 38, 42.) The California Constitution mandates that the Legislature pass all laws necessary to implement a system of taxation. (Cal. Const., art XIII, §§ 33 & 26(a).) In carrying out this essential task, the Legislature requires that every individual file an income tax return with the Franchise Tax Board (FTB) if he or she has gross income from all sources in excess of statutorily specified amounts. These amounts differ depending upon whether a taxpayer asserts the single or married-filing-jointly status. (Rev. & Tax. Code, § 18501.)

State law requires that taxpayers use the same filing status (e.g. single, married, head of household, etc.) that they use on their federal income tax return for the same taxable year.[10/] (Rev. & Tax. Code, §18521.) Federal law provides that "[i]n determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word marriage means only a legal union between one man and one woman as husband and wife . . . ." (1 U.S.C. §7.) As such, for federal income tax purposes, only those individuals who satisfy the above definition of marriage, i.e., a man and a woman who are parties to a legal union as husband and wife, may use the married-joint-filing status when filing their federal income tax returns.

If the FTB determines that a taxpayer has used a different filing status on a State return than that used on the federal return, the FTB takes action to

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10. See, *Marriage Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code,* 47 Hastings L.J. 1593, 1602 (1996) [the benefits granted married persons under the Internal Revenue Code are so attractive that "most taxpayers would readily file jointly in order to receive these benefits"].

change the filing status to that which was used on the federal return.[11/] This could result in increased tax liability for the taxpayer, including interest and potential penalties. As such, using the wrong filing status could cause taxpayers to report less tax than is actually owed, thereby reducing the amount of revenue collected by the State and subjecting the taxpayers to subsequent administrative actions (and potential interest and penalties) to ensure that the correct amount of tax is paid.

Thus, problems are likely to arise if individuals mistakenly conclude that, due to San Francisco's issuance of a same-sex marriage certificate, they have now established the necessary prerequisite that would allow them to a file a tax return using the married-joint-filing status. Since these individuals would not be recognized as married for federal tax purposes under Revenue and Taxation Code section 18521, they could not use the married-joint-filing status for state purposes.

B. Legal Identification.

It is not uncommon for a married individual to legally change his or her name to reflect marital status. This can be done by petitioning the Superior Court (Code Civ. Proc., § 1276), or under federal law by applying to the Social Security Administration. Pursuant to federal regulation, an individual can legally change his or her name by completing form SS-5 and supplying acceptable identifying information. (20 C.F.R. § 422.110.) To change one's name to reflect marital status, it is sufficient under federal law for an individual to submit a copy of a "marriage record." (20 C.F.R. § 422.107.)

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11. There are limited statutory exceptions to the general rule that a taxpayer must use the same filing status on their state return as that use on the federal, such as where a taxpayer was not required to file a federal return; one spouse was an active member of the military; or one spouse was a nonresident of California for the entire year and had no California source income. (Rev. and Tax. Code §18521.)

A certified copy of a marriage record may be obtained from the county in which the marriage took place. It need not come from the Department of Health Services. Indeed, the Department specifically encourages individuals to obtain copies of marriage licenses from the county. (See http://www.dhs.ca.gov/hisp/chs/OVR/ordercert.htm ["Because of the large volume of requests that we process at the state level, most of the county offices can provide a ***faster processing time*** than our office (often within one week). Also, many of the county offices will accept requests (using a credit card) by phone, fax, or on-line."] (emphasis in original).)

Recently, however, the Social Security Administration asked the Department of Health Services to review all marriage certificates presented to the Social Security Administration, to confirm that the certificates are indeed legally valid. (Appendix, Exh. 7 (Letter From State Registrar Rodrian to Assessor-Recorder, Feb. 25, 2003), p. 75.) If, prior to San Francisco's issuance of same-sex marriage licenses, the large volume of requests at the state level already resulted in slower processing times for the Department of Health Services, the dramatically increased workload that would be required to review all marriage certificates presented to the Social Security Administration would undoubtedly cause substantially increased delays in processing.

C. Lending and Contracts.

Lenders assume different levels of risk based upon the marital status of the borrower, as marital status legally impacts personal liability for debts. (Fam. Code, § 914.) When a lender contracts with a married individual, the lender may believe that the law will impose personal liability for the loan on the individual as well as the spouse, as a community debt. (*Ibid*.) Moreover, contracts could be void or voidable depending on the status and representations of the contracting parties. (Rest.2d Contracts, § 7.)

D. Asset Transfers Upon Death.

Presently, California intestate succession law provides that upon the death of a spouse of a married couple with no children, the intestate share of the surviving spouse is the one-half of the community property that belonged to the decedent, and the entire share of separate property in certain cases. (Prob. Code, § 6401.) Thus, it is not uncommon for a married couple to choose not to execute wills, believing that the surviving spouse will inherit their property under intestate succession.

The foregoing are merely examples of the various ways in which marital status fundamentally affects public and private discourse, along with the potential problems created by issuance of altered marriage certificates that are not recognized by the State of California. As the recipients of same-sex marriage licenses attempt to use those licenses, they may experience problems in these areas as well as problems in less obvious areas. The potential legal risks and difficulties for these license holders will only increase as San Francisco continues to issue the licenses in contravention of the law. This situation warrants this Court's immediate intervention and determination of the validity of the applicable state laws.

CONCLUSION

The continuing issuance of same-sex marriage licenses by San Francisco officials in violation of state law has created a situation of extreme public significance. The recognition of marital status carries with it too many legal consequences to be determined on a county-by-county basis in each of California's 58 jurisdictions. To the contrary, uniformity and certainty in the law of marriage must prevail across the State. Resolution of this legal issue is too important, and the consequences of the recognition of same-sex marriages too significant, for this Court to delay consideration of this matter while the swiftly-moving streams of trial court litigation expand into a deluge of actions contesting any and all legal aspects of same-sex marriages. For these reasons, the Attorney General respectfully urges this Court to grant the writ relief sought

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in the attached writ petition, including a stay of the actions of respondents pending judicial resolution of these legal issues.

Dated: February 27, 2004

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CERTIFICATE OF COMPLIANCE

(California Rules of Court, Rule 14(c))

I certify that the attached brief contains 8694 words.

Dated: March 2, 2004

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