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11 SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

12 CITY AND COUNTY OF SAN)
13 FRANCISCO, a charter city and county,)

14 Cross-Complainant,)

15 vs.)

16 STATE OF CALIFORNIA, PROPOSITION)
17 22 LEGAL DEFENSE AND EDUCATION)
18 FUND, a California nonprofit organization,)
19 CAMPAIGN FOR CALIFORNIA FAMILIES,)
20 a California nonprofit organization, RANDY)
THOMASSON, a California resident and)
21 taxpayer, and DOES 1 through 10)

22 Cross-Defendants.)

Case No. 428794

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEMURRER BY
CROSS-DEFENDANTS
CAMPAIGN FOR CALIFORNIA
FAMILIES AND RANDY
THOMASSON

DATE: March 30, 2004

TIME: 9:30 a.m.

DEPT: 302

JUDGE: Hon. Ronald Quidachay

ACTION FILED: Feb. 13, 2004

TRIAL DATE: Not Set

23 INTRODUCTION AND STATEMENT OF FACTS

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

9 The actions of the Mayor and County Clerk are in direct violation of California marriage
10 laws, which specifically state that marriage in California can only be entered into by one man and
11 one woman. In the cross-complaint, the City and County seek a declaration that the state marriage
12 laws violate the state constitution. The City and County lack standing to raise those claims. In
13 particular, Article III, § 3.5 specifically prohibits a county agency from declaring a state law
14 unconstitutional or from refusing to enforce a state law. In addition, California case law is clear that
15 a City cannot raise constitutional claims that are for the benefit of private individuals – i.e., claims
16 under the equal protection or privileges and immunities clauses.

17 **ARGUMENT**

18 The California Family Code leaves no doubts about who may marry – only an unmarried man
19 and an unmarried woman may marry. *See* Cal. Fam. Code §§ 300 (“Only marriage between a man
20 and a woman is valid or recognized in California.”); § 301 (those able to consent to marriage are
21 “[a]n unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years
22 or older”); § 308.5 (“Only marriage between a man and a woman is valid or recognized in
23 California.”). In addition, a valid marriage license (which can only be issued to a man and a woman)
24 is “a mandatory requirement for a valid marriage in California.” *Estate of DePasse*, 118 Cal. Rptr.
25 2d 143, 151 (Cal. Ct. App. 2002). California Family Code further provides that the forms for the
26 application of marriage “shall be prescribed by the State Department of Health Services.” *See* Cal.

1 Fam. Code §§ 355, 358, 422. See also Cal. Fam. Code §§ 325, 420; Penal Code § 359.

2 Despite the plain wording of the law, Mayor Newsom directed County Clerk Alfaro to alter
3 the state-prescribed marriage forms to permit same-sex couples to obtain “marriage licenses” and
4 to marry. Two days after the Mayor’s directive, nearly 80 same-sex couples reportedly married. By
5 the end of the first week, nearly 3,000 same-sex couples were reportedly married.

6 **A. Respondents Have No Standing To Raise Constitutional**
7 **Claims of Same-Sex Couples.**

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

17 Without question, the City and County, as creatures of the state, are duty-bound to follow
18 state law. Courts in this State have long applied the “no standing” rule to preclude counties from
19 raising state constitutional claims belonging to private individuals. *See, e.g., Star-Kist Foods*, 42
20 Cal.3d at 8, 228 Cal. Rptr. at 395; *City of Burbank*, 72 Cal. App.4th at 380, *Santa Monica*
21 *Community College*, 112 Cal. App.3d at 690; *Board of Supervisors of Butte County v. McMahon*,
22 219 Cal. App.3d 286, 268 Cal. Rptr. 219 (Cal. Ct. App. 1990) (“It is well established that ‘political
23 subdivisions of a state may not challenge the validity of a state statute’ on constitutional grounds).
24 This “no standing” rule simply reflects the fact that if state laws infringe on the rights of private

1 individuals, those persons should bring suit challenging the laws.¹ Political subdivisions cannot
2 bring suit asserting the rights of private individuals.. Yet, that is precisely what the county officials
3 in this case have done.

4 For this reason alone, the demurrer should be sustained.

5 **B. Pursuant to The California Constitution, City and County**
6 **Officials Cannot Refuse to Enforce State Laws.**

7 Article III, § 3.5 prevents the City from refusing to enforce state marriage laws, and therefore
8 from seeking declaratory relief after they have broken the law. The City’s actions directly violate
9 Article III, § 3.5 of the California Constitution. Article III, § 3.5 states:

10 An administrative agency, including an administrative agency created by the
11 Constitution or an initiative statute, has no power:

12 (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of
13 it being unconstitutional unless an appellate court has made a determination that such
14 statute is unconstitutional;

15 (b) To declare a statute unconstitutional;

16 (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis
17 that federal law or federal regulations prohibit the enforcement of such statute unless
18 an appellate court has made a determination that the enforcement of such statute is
19 prohibited by federal law or federal regulations.

20 Cal. Const. art. III, § 3.5 (emphasis added).

21 Counties, which are political subdivisions of the state according to California Constitution
22 art. XI, § 1, as well as their officers and clerks are “administrative agencies” of the state and thus
23 subject to Article III, § 3.5. *See Billig v. Voges*, 273 Cal. Rptr. 91, 96 (Cal. Ct. App. 1990) (counties
24 are “administrative officials” for purposes of Art. III, § 3.5); *Westminster Mobile Home Park*
25 *Owners’ Assoc. v. City of Westminster*, 213 Cal. Rptr. 640 (Cal. Ct. App. 1985) (city arbitrator
26 subject to Art. III, § 3.5); *Schmid v. Lovette*, 154 Cal. App.3d 466 (Cal. Ct. App. 1984) (local school
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28 ¹ For example, in this case, the City and County assert that California state laws violate
constitutional rights of same-sex couples by denying them marriage licenses. The appropriate manner
to address those claims would be for individuals who were denied licenses to commence suit
challenging the laws. Indeed, such a suit recently was filed in Los Angeles County by several same-
sex couples who were denied marriage licenses in that county. What the City and County has done,
in breaking the laws before challenging them, is an end run around the judicial process.

1 district and its **individual** employees subject to Art. III, § 3.5); Office of the Attorney General, State
2 of California, Opinion No. 88-902 (1989) (RJN, Ex. 1) (listing various applications of Art. III, § 3.5,
3 including county assessor, city employees and school district employees).

4 In papers previously submitted to this Court, the City argued that Art. III, § 3.5 does not apply
5 to local governments and their officials. They relied on *Strumsky v. San Diego County Employees*
6 *Retirement Assn.*, 11 Cal. 3d 28, 36 (1974). That case is readily distinguishable and the quote from
7 *Strumsky* is taken out of context and misperceived. *Strumsky* addressed the different standards of
8 review of an administrative agency’s decision under Code of Civil Procedure section 1094.5. The
9 Court focused on the distinction between state agencies and local agencies. The Court concluded that
10 the standard of review should be the same for state agencies and local agencies. Significantly,
11 ***Strumsky* did not address whether counties or local subdivisions of the state are administrative**
12 **agencies under Article III, § 3.5 because *Strumsky* was decided *four* years before Art. III, § 3.5**
13 **became a part of the Constitution.** Article III, § 3.5 was added to the California Constitution in
14 1978.

15 In *Billig*, the court explained that “[t]he very existence of the statute means it is there to be
16 enforced. Administrative agencies, including public officials in charge of such agencies, are
17 expressly forbidden from declaring statutes unenforceable” *Billig*, 273 Cal. Rptr. at 96. A
18 county, as a direct political subdivision of the state, must enforce the laws of the state. *See* Cal.
19 Const. art. XI, § 1. Thus, regardless of the City’s views on same-sex marriage, the California
20 Constitution makes clear that they have no power whatsoever to refuse to enforce California
21 marriage laws as they are written.

22 Because the City and County have an obligation to enforce the state marriage laws, there is
23 no actual controversy. For this reason alone, the demurrer should be sustained.

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1 **CONCLUSION**

2 For the foregoing reasons, Cross-Defendants Randy Thomasson and Campaign for California
3 Families respectfully requests that the Court sustain the demurrer to the Cross-Complaint.

4 Dated: March 5, 2004

5 Respectfully submitted,

6 Liberty Counsel

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8 By: _____
Rena M. Lindevaldsen

9 Attorneys for Cross-Defendants Campaign
10 For California Families and Randy Thomasson