

Case No. S211990

JUL 22 2013

In The Supreme Court Of The State of California

Frank A. McGuire Clerk

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ, Deputy
MARK A. JANSSON; AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF
CALIFORNIA RENEWAL,

Petitioners,

v.

PATRICK O'CONNELL, IN HIS OFFICIAL CAPACITY AS AUDITOR-CONTROLLER/COUNTY
CLERK-RECORDER OF ALAMEDA COUNTY, ET AL.,

Respondents,

and

EDMUND G. BROWN, JR., IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.,

REAL PARTIES IN INTEREST.

**PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OF
TWENTY RESPONDENT CLERK-RECORDERS***

* List of Respondents on Next Page

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**PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OF
KIMBERLY L. GRADY, in her official capacity as Clerk/Recorder/Registrar of
Voters/Commissioner of Civil Marriages of Amador County; MADALINE KRASKA,
in her official capacity as County Clerk recorder of Calaveras County; JOSEPH E.
CANCIAMILLA, in his official capacity as County Clerk-Recorder-Registrar of
Contra Costa County; WILLIAM E. SCHULTZ, in his official capacity as
Recorder-Clerk and Elections Official and Commissioner of Marriages of El
Dorado County; CAROLYN CRNICH, in her official capacity as County
Clerk/Recorder/Registrar of Voters of Humboldt County; KAMMI FOOTE, in her
official capacity as Clerk/Recorder and Registrar of Voters of Inyo County;
CATHY SADERLUND, in her official capacity as Auditor-Controller and County
Clerk of County of Lake; SUSAN M. RANOCHAK, in her official capacity as
Mendocino County Assessor-County Clerk-Recorder; LYNDIA ROBERTS, in her
official capacity as Mono County Clerk-Recorder-Registrar; STEPHEN L.
VAGNINI, in his official capacity as Assessor-County Clerk-Recorder of County of
Monterey; JOHN TUTEUR, in his official capacity as Assessor-Recorder-County
Clerk of Napa County; GREGORY J. DIAZ, in his official capacity as Clerk-
Recorder of Nevada County; JOE PAUL GONZALEZ, in his official capacity as
Clerk-Auditor and Recorder-Registrar of Voters of County of San Benito;
KENNETH W. BLAKEMORE, in his official capacity of Recorder/County Clerk of
San Joaquin County; GAIL PELLERIN, in her official capacity ad County Clerk of
the County of Santa Cruz; CATHY DARLING ALLEN, in her official capacity as
County Clerk/Registrar of Voters of Shasta County; HEATHER FOSTER, in her
official capacity as County Clerk-Recorder of Sierra County; WILLIAM F.
FOUSSEAU, in his official capacity as Sonoma County Clerk-Recorder-Assessor;
BEV ROSS, in her official capacity as Clerk-Recorder of Tehama County; and
ROLAND P. HILL, in his official capacity as Assessor/Clerk-Recorder of Tulare
County**

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Respondents named on the previous page hereby certify that they are not aware of any entity or persons that rules 8.208 and 8.488 of the California Rules of Court require to be listed in this Certificate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTRODUCTION..... 1

ARGUMENT 3

 I. THE STATE REGISTRAR SUPERVISES COUNTY
 OFFICIALS IN THEIR PERFORMANCE OF MARRIAGE-
 RELATED DUTIES 3

 II. THIS COURT SHOULD DENY THE WRIT TO PROMOTE
 UNIFORMITY IN CALIFORNIA’S MARRIAGE LAWS
 AND AVOID ADMINISTRATIVE AND LEGAL BURDENS
 ON COUNTIES 8

 III. ARTICLE III, SECTION 3.5 OF THE CALIFORNIA
 CONSTITUTION HAS NO BEARING ON THIS WRIT 11

CONCLUSION 12

WORD COUNT CERTIFICATION..... 13

TABLE OF AUTHORITIES

Cases

<i>Fenske v. Bd. of Admin.</i> (1980) 103 Cal.App.3d 590.....	12
<i>Flores v. Pierce</i> (1980) 617 F.2d 1386	9
<i>Harlow v. Fitzgerald</i> (1982) 457 U.S. 800	9
<i>In re Marriage Cases</i> (2008) 43 Cal. 4th 757	4, 5, 8
<i>Lockyer v. City and County of San Francisco</i> (2004) 33 Cal.4th 1055	passim
<i>LSO, Ltd. v. Stroh</i> (9th Cir. 2000) 205 F.3d 1146.....	12
<i>Perry v. Brown</i> (9th Cir. 2012) 671 F.3d 1052	9
<i>Perry v. Brown</i> , N.D. Cal. No. 09-2292.....	8
<i>Perry v. Schwarzenegger</i> (N.D. Cal. 2010) 704 F. Supp. 2d 921.....	9
<i>Reese v. Kizer</i> (1988) 46 Cal.3d 996	11
<i>Ross v. Superior Court</i> (1977) 19 Cal.3d 899.....	9
<i>United States v. Windsor</i> (2013) 133 S. Ct. 2675	8

Statutes

Fam. Code § 350.....	6
Fam. Code § 355.....	7
Fam. Code § 359.....	6, 9
Fam. Code § 422.....	7
Fam. Code § 423.....	9
Gov. Code § 24300.....	7
Health & Saf. Code § 102180	7
Health & Saf. Code § 102200	7

Health & Saf. Code § 102295	7
Health & Saf. Code § 103125	7
Other Authorities	
Cal. Fam. Law Practice & Procedure 2d, Matthew Bender, ch. 10, Validity and Legal Effects of Marriage § 10.22	9
<i>California Marriage License and Certificate Handbook</i> , State of Calif., Calif. Dept. of Public Health-Vital Records (Sept. 1, 2011)	5, 6
Constitutional Provisions	
Article III, section 3.5.....	11
Cal. Const. art. 13a § 2	10

INTRODUCTION

This brief is respectfully submitted on behalf of respondents KIMBERLY L. GRADY, in her official capacity as Clerk/Recorder/Registrar of Voters/Commissioner of Civil Marriages of Amador County; MADALINE KRSKA, in her official capacity as County Clerk recorder of Calaveras County; JOSEPH E. CANCIAMILLA, in his official capacity as County Clerk-Recorder-Registrar of Contra Costa County; WILLIAM E. SCHULTZ, in his official capacity as Recorder-Clerk and Elections Official and Commissioner of Marriages of El Dorado County; CAROLYN CRNICH, in her official capacity as County Clerk/Recorder/Registrar of Voters of Humboldt County; KAMMI FOOTE, in her official capacity as Clerk/Recorder and Registrar of Voters of Inyo County; CATHY SADERLUND, in her official capacity as Auditor-Controller and County Clerk of County of Lake; SUSAN M. RANOCHAK, in her official capacity as Mendocino County Assessor-County Clerk-Recorder; LYNDA ROBERTS, in her official capacity as Mono County Clerk-Recorder-Registrar; STEPHEN L. VAGNINI, in his official capacity as Assessor-County Clerk-Recorder of County of Monterey; JOHN TUTEUR, in his official capacity as Assessor-Recorder-County Clerk of Napa County; GREGORY J. DIAZ, in his official capacity as Clerk-Recorder of Nevada County; JOE PAUL GONZALEZ, in his official capacity as Clerk-Auditor and Recorder-Registrar of Voters of County of San Benito; KENNETH W. BLAKEMORE, in his official capacity of Recorder/County Clerk of San Joaquin County; GAIL PELLERIN, in her official capacity as County Clerk of the County of Santa Cruz; CATHY DARLING ALLEN, in her official capacity as County Clerk/Registrar of Voters of Shasta County; HEATHER FOSTER, in her official capacity as County Clerk-Recorder of Sierra County; WILLIAM F. FOUSSEAU, in his official capacity as Sonoma

County Clerk-Recorder-Assessor; BEV ROSS, in her official capacity as Clerk-Recorder of Tehama County; and ROLAND P. HILL, in his official capacity as Assessor/Clerk-Recorder of Tulare County.

The clerks of the undersigned counties oppose the petition for writ of mandate submitted to this Court by Dennis Hollingsworth *et al.* (“Petitioners”) because they believe that they are subject to the supervision of the California Department of Public Health with respect to the administration of California’s marriage laws. This Court has recognized that county clerks and recorders serve as state officers when administering the State’s marriage laws, and that they act under the supervision of state officials who are ultimately responsible for the State’s marriage license process. This is necessary to ensure uniformity in the administration of the marriage laws. Indeed, it has long been the practice of state officials to issue direction to county clerks and recorders regarding the marriage laws, and county clerks and recorders rely on that guidance and direction to carry out their ministerial duties. For this Court to determine, contrary to what it previously held in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, that county clerks and recorders are *not* subject to state supervision related to marriage licenses would subject them to legal uncertainty and require them to make independent determinations about their duties under state law. This in turn would seriously undermine the State’s interest in uniform administration of its marriage laws. This result is not compelled by Article III, Section 3.5, of the California Constitution, which is not controlling when a federal court injunction binds state or local officials. Accordingly, the Court should deny the writ.

ARGUMENT

I. THE STATE REGISTRAR SUPERVISES COUNTY OFFICIALS IN THEIR PERFORMANCE OF MARRIAGE-RELATED DUTIES.

In 2004, when the City and County of San Francisco began issuing marriage licenses to same-sex couples, then-Attorney General Bill Lockyer brought an action against the City and County of San Francisco, its mayor, and its county clerk in the California Supreme Court, contending that local officials in San Francisco lacked the authority to disregard the State's marriage statutes, which at the time prohibited marriage between members of the same sex. This Court agreed, and in the process conclusively established that county clerks and recorders are state officials with respect to administration of the marriage laws. (*Lockyer, supra*, 33 Cal.4th at p. 1080.)

This Court explained in *Lockyer* that marriage is a creation of state law and governed solely by state law. Although state law gives local officials a significant role in the administration of the marriage laws, the Court emphasized that marriage is nonetheless a matter of “statewide concern” given “the importance of having uniform rules and procedures apply throughout the state to the subject of marriage.” (*Lockyer, supra*, 33 Cal.4th at p. 1079.) Accordingly, no local variation in the administration of the marriage laws is permitted (*id.* at p. 1080), and local officials have no discretion. Their functions with respect to marriage are purely “ministerial.” (*Id.* at p. 1081 [emphasis original].) Although a county clerk or recorder is a local official with respect to the discharge of other duties, she serves “as a state officer” with respect to marriage. (*Ibid.*) Put another way, county clerks and recorders serve as agents of the state, not agents of the county. (*Id.* at pp. 1080-81.) In performing their state duties, they are subject to the supervision of state officials, who are ultimately responsible for ensuring statewide uniformity in the administration of marriage in California. (*See id.* at p. 1080.)

After describing the “comprehensive” regulatory framework provided by state statutes over the licensing, solemnization, and registration of marriages (*id.* at p. 1076-79), this Court opined that the “California Director of Health Services, . . . by statute, has general supervisory authority *over the marriage license and marriage certificate process.*” (*Id.* at p. 1118 [emphasis added].) Thus, when this Court issued its remedy, it directed both “the county clerk *and* the county recorder of the City and County of San Francisco to take [specified] corrective actions under the supervision of the California Director of Health Services.” (*Id.* at p. 1118 [emphasis added]; see also *id.* at p. 1120.)

This Court again made clear that county clerks and recorders act under the guidance of state officials with respect to the marriage laws in *In re Marriage Cases* (2008) 43 Cal. 4th 757. In that case, the Court held that the statutory predecessor to Proposition 8, known as Proposition 22, violated the California Constitution by excluding same-sex couples from marriage. Three of the four coordinated cases challenging the State’s marriage laws named the State of California or the Attorney General as the defendant. Only one named a county, and that county did not actively defend against the challenge and was dismissed from the case before it reached this Court. (*See id.* at pp. 786-87; http://appellatecases.courtinfo.ca.gov/search/case/partiesAndAttorneys.cfm?dist=0&doc_id=1879677&doc_no=S147999 [listing parties]). The absence of a single county clerk did not deter this Court from issuing relief, and indeed statewide relief, in favor of the plaintiffs who challenged Proposition 22. After holding California’s marriage laws unconstitutional, the Court held that plaintiffs were entitled to “a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate our ruling in this case *so as to ensure that county clerks and other local officials throughout the state*, in performing their duty to

enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court.” (*In re Marriage Cases, supra*, 43 Cal. 4th at p. 857 [emphasis added].)

This Court’s directives in *Lockyer* and the *Marriage Cases* thus relied on the State Registrar to implement the marriage laws uniformly and effectuate judicial rulings relating to marriage. And consistent with the Court’s opinion, after the *Marriage Cases* ruling, the State Registrar issued a letter to all county clerks and recorders directing them to comply with this Court’s decision. (Exhibit A to Request for Judicial Notice [“RJN”].) All county clerks and recorders complied with the 2008 instructions, just as all have complied with the subsequent instructions from the State Registrar on this issue.

This type of direction from the State Registrar is not an anomaly. Instead, it is consistent with the California Department of Public Health’s (“Department”) longstanding practice of guiding county clerks and recorders in their performance of marriage-related duties. The Department has, for decades, published guidance for county clerks and recorders, known as the “Marriage Handbook.” (*California Marriage License and Certificate Handbook*, State of Calif., Calif. Dept. of Public Health-Vital Records (Sept. 1, 2011); See Exhibit B to RJN.) The Marriage Handbook is a 157-page manual that provides detailed guidance about California marriage requirements and instructs clerks and recorders about their specific duties related to marriage. The Marriage Handbook explains that *both* county clerks and county recorders act “under the direction of the State Registrar.” (*Id.* at p. 3.) Many sections of the Marriage Handbook are specific to the duties of county clerks, including a checklist of steps for county clerks to follow when issuing marriage licenses and registering confidential marriage licenses (*id.* at pp. 7-8), requirements and procedures for persons seeking to obtain a marriage license (*id.*

at pp. 14-20), instructions for the marriage license application (*id.* at pp. 21-22), and instructions for completing the marriage license itself (*id.* at pp. 23-32, 34-35). The Handbook also includes directions for processing confidential marriage certificates, which are maintained in the files of the county clerk rather than the county recorder. (See *id.* at pp. 45-49, 59-60.) Finally, the Handbook explains the different types of marriage license forms (*id.* at pp. 5-6), includes a set of current forms (*id.* at pp. 81-86), and provides supporting documents and sample letters for county clerks and recorders to use in performing their marriage-related duties (*id.* at pp. 67-78).

In addition, the Department, through the Registrar or another official, regularly issues “All County Letters” addressed to all county clerks and recorders in California informing them of changes to marriage laws and procedures. Exhibit A to the Request for Judicial Notice is but one of many examples. Others include the series of letters issued in the wake of this Court’s decision in *In re Marriage Cases*, directing counties as to changes in the forms relating to marriage licenses and other aspects of compliance with this Court’s decision. (See Exhibit C to RJN.) Counties rely heavily on the Registrar for guidance when they have questions concerning the marriage licensing, solemnization or registration processes. Besides All County Letters, the Registrar communicates with county clerks and registrars as a group by conference call and email (see Exhibit D to RJN), and likewise communicates with individual county officials when questions arise. (See Exhibit E to RJN.)

Notwithstanding this Court’s guidance in *Lockyer* and *In re Marriage Cases*, and the longstanding practices of county officials and the Department alike, Petitioners contend that county clerks, who are charged with issuing marriage licenses (see Fam. Code §§ 350, 359), are not supervised by any state officials in

the performance of their duties, in contrast to county recorders, who are expressly subject to the supervision of the State Registrar in registering marriages and other vital records. (See Health & Saf. Code §§ 102180, 102295; see generally Petition for Writ of Mandate and Request for Immediate Stay or Injunctive Relief; Memorandum of Points and Authorities (“Pet.”) at pp. 37-40.) However, the fact that no particular statute gives the State Registrar this authority is not dispositive. As the statutes cited by Petitioners concerning the Registrar’s marriage-related responsibilities indicate, the Registrar has significant responsibility with respect to marriage. (See also *Lockyer, supra*, 33 Cal.4th at pp. 1076-79; Fam. Code §§ 355, 422; Health & Saf. Code §§ 102200, 102295, 103125.) Given the broad authority conferred on the State Registrar and the absence of an explicit statutory command that any other state official exercise responsibility over marriage, the most logical conclusion, and the one this Court reached in *Lockyer*, is *not* that every county clerk is independent with respect to marriage, but instead that all local officials with marriage responsibilities are directly subordinate to the Registrar. (See *Lockyer, supra*, 33 Cal.4th at p. 1118, citing *id.* at pp. 1077-78.)

This conclusion is reinforced by the fact that, as Petitioners admit, in many counties the offices of clerk and recorder are combined and held by a single person. (See Gov. Code § 24300(e).) In practice, therefore, to say that recorders are subordinate to the Registrar concerning the forms that are used in the administration of the marriage laws but clerks are not is akin to saying that local officials must use the forms state officials prescribe but may disregard the instructions that come with the forms. This surely is not what the Legislature intended, and Petitioners offer no authority to rebut this commonsense proposition.

Accordingly, the Director of Public Health had the authority to issue guidance on June 26, 2013 and June 28, 2013,¹ directing all county clerks to issue marriage licenses to same-sex couples once the Court of Appeals for the Ninth Circuit lifted its stay of the United States District Court’s judgment in *Perry v. Brown*, N.D. Cal. No. 09-2292, just as she did in 2008 after this Court issued its decision in *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 857.² The undersigned counties are obliged to follow that guidance, and this Court should deny the writ seeking an order to the contrary.

II. THIS COURT SHOULD DENY THE WRIT TO PROMOTE UNIFORMITY IN CALIFORNIA’S MARRIAGE LAWS AND AVOID ADMINISTRATIVE AND LEGAL BURDENS ON COUNTIES.

As the United States Supreme Court recently observed, “[m]arriage laws may vary from State to State, but they are consistent within each State.” *United States v. Windsor* (2013) 133 S. Ct. 2675, 2681. This Court, too, has recognized “the importance of having uniform rules and procedures apply throughout the state to the subject of marriage.” (*Lockyer, supra*, 33 Cal.4th at p. 1079.) If this Court were to adopt a contrary rule, the effects on county clerks and other local officials carrying out State laws would be drastic.

A ruling that county clerks are not subject to state supervision regarding marriage would expose the counties to duplicative litigation and potentially conflicting orders. A federal court has already reviewed Proposition 8’s constitutionality and enjoined its enforcement by state officials, the named county

¹ Attached as Exhibits C and E, respectively, to the Appendix to Petition for Writ of Mandate and Request for Immediate Stay or Injunctive Relief (hereinafter “Appendix”) submitted by Petitioners in this matter.

² Attached as Exhibit C to the Request for Judicial Notice filed with this brief are copies of the directives issued by the Registrar to county officials in 2008.

clerks, and all persons under their supervision or control. Under these circumstances, a state court order directing county clerks not to issue marriage licenses to same-sex couples would put them in the untenable position of having to decide whether to follow the state court or federal court order, with a risk of contempt either way. (See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 905 [county officials properly held in contempt for violating injunction issued against state department that oversaw implementation of the challenged law].) It would also invite an onslaught of further civil rights lawsuits against counties that opt not to issue marriage licenses to same-sex couples. The District Court decision and vacated Ninth Circuit decision strongly indicate that the counties would have little chance of prevailing in these lawsuits.³ (See *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F. Supp. 2d 921; *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052.)

Furthermore, having a patchwork of marriage laws throughout the State would mean that different counties – and sometimes different officials within the same counties – would have to determine which set of laws to follow in a variety of situations. For instance, public marriage licenses are valid for marriages anywhere in the state. (See Fam. Code, §§ 359, 423; Cal. Fam. Law Practice & Procedure 2d, Matthew Bender, ch. 10, Validity and Legal Effects of Marriage § 10.22 [marriage licenses “may be obtained in any county, and it need not be

³ Because the facial challenge was successful, it is conceivable that county officials could be personally liable for civil rights violation in federal court if they enforce Proposition 8 notwithstanding the trial court order and opinion. (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815 [“[Q]ualified immunity would be defeated if an official ‘knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.’”]; *Flores v. Pierce* (1980) 617 F.2d 1386, 1391 [same].)

obtained either in the county where the parties reside or in the county where the marriage ceremony will take place.”].) This means that a license issued by, for example, the Santa Cruz County Clerk authorizes a marriage that can be performed in any California county. Different marriage requirements in different counties would raise questions about the validity of inter-county marriages. Additionally, Petitioners have suggested that county registrars are subject to state supervision while county clerks are not. (Pet. at pp. 38-40.) This would create the absurd result that clerks and recorders would be subject to antithetical duties, even though in many counties a single person acts as both the clerk and the recorder.

Disuniformity would have consequences for other county officials, as well, who would face difficult legal questions and likely litigation if their counties did not recognize marriages of same-sex couples who received licenses in other California counties. What if a lesbian employee of Ventura County obtained a marriage license in Los Angeles? Should Ventura County treat her as married for purposes of providing spousal health benefits? Or should it insist that only a marriage between a man and woman is valid and recognized in that county, thus denying spousal benefits to its gay and lesbian employees lawfully married in Los Angeles? And what if a gay property owner in Sonoma County got a marriage license from San Francisco and then attempted to deed his property to his spouse? Should Sonoma recognize him as married (thereby allowing the assessed value of the property to remain the same (see Cal. Const. art. 13a § 2(g)), or should it insist that the assessed value must increase to present-day market value because it treats his spouse as a stranger? Would the Family or Probate Codes apply to same-sex marriages in only three counties and not the rest? All of a sudden, the legal status of California residents and their relationships would be affected not only by their sexual orientation, but also by their county of residence.

The practical and legal absurdities of a patchwork approach to marriage illustrate the wisdom of California in enacting statutes that provide for uniform marriage laws throughout the State. They also underscore why counties have no independent authority over marriage and why county clerks are subordinate to the State with respect to the administration of marriage laws. This statutory scheme makes abundantly clear that challenges to the State’s marriage laws should be directed at the responsible state officials, rather than opening the floodgates to a multitude of lawsuits against county officials.

III. ARTICLE III, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION HAS NO BEARING ON THIS WRIT.

Article III, section 3.5 of the California Constitution (“Section 3.5”) forbids administrative agencies from refusing to enforce state statutes on the basis of a determination that they are unconstitutional, absent an appellate decision that they are unconstitutional. The purpose of Section 3.5 “was to prevent agencies from using *their own interpretation* of the Constitution or federal law to thwart the mandates of the Legislature.” (*Reese v. Kizer* (1988) 46 Cal.3d 996, 1002.) This purpose is not served by construing Section 3.5 to limit the ability of State agencies to issue directives to local officials as necessary to comply with federal or state injunctions, or to require that such officials themselves be named parties to the federal court litigation in order to comply with such directives.

Even assuming that Section 3.5 applies to initiative constitutional amendments, and assuming that a county clerk or registrar is an “administrative agency” (a point this Court left open in *Lockyer, supra*, 33 Cal.4th at pp. 1094-95), Section 3.5 has no application here. First, it does not apply where a county official declines to enforce a state constitutional amendment not because of his or her own

determination of its unconstitutionality but because he or she is bound by a federal court injunction or has been directed to do so by a supervising state official, who in turn is bound by a federal court injunction. It is well established that even state trial court orders can bind state officials not to enforce unconstitutional enactments, notwithstanding Section 3.5. (See *Fenske v. Bd. of Admin.* (1980) 103 Cal.App.3d 590, 595.) Second, federal court orders are binding for the additional reason “that a state may not immunize its officials from the requirements of federal law.” (*LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1159-60 [recognizing that Article III, section 3.5 is limited by the Supremacy Clause].) Thus, as a matter of both state law and the federal Supremacy Clause, Section 3.5 does not and cannot excuse compliance with a federal court injunction.

CONCLUSION

For the foregoing reasons, this Court should deny the writ.

July 19, 2013

Respectfully submitted,

COUNTY OF MONTEREY

By Charles J. McKee
CHARLES J. McKEE
County Counsel

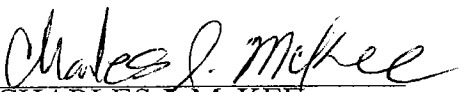
Counsel for Respondents

**CERTIFICATION OF COMPLIANCE WITH
CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)**

I hereby certify that this brief has been prepared using at proportionately double-spaced at least 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,508 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19 day of July, 2013 in Sacramento, California.

Respectfully submitted,

By: 
CHARLES J. McKEE
Counsel for Respondents

DECLARATION OF SERVICE BY MAIL

Case Name: *Hollingsworth, et al. v. O'Connell, et al.*

Case No.: S211990

I am employed in the office of the County Counsel, County of Monterey, which is the office of a member of the California State Bar, at which member's direction this service is made. I am over the age of 18 years and not a party to the within action. My business address is 168 West Alisal Street, 3rd Floor, Salinas, California.

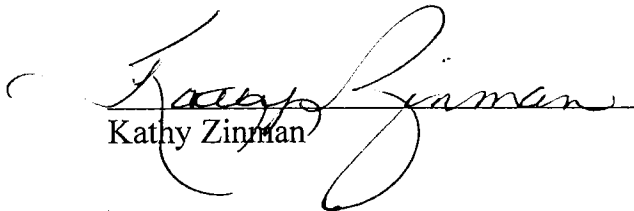
On **July 22, 2013**, I served a true copy of the following document:

**PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OF
TWENTY RESPONDENT CLERK-RECORDERS**

on the interested parties to said action by the following means:

- (BY PERSONAL DELIVERY)** By causing a true copy thereof, enclosed in a sealed envelope, to be hand-delivered on the interested parties as shown below.
- (BY MAIL)** By placing true copies thereof, enclosed in a sealed envelope, for collection and mailing on that date following ordinary business practices, in the United States Mail at the Office of the County Counsel, 168 West Alisal Street, 3rd Floor, Salinas, California, addressed as shown below. I am readily familiar with this business's practice for collection and processing of correspondence for mailing with the United States Postal Service, and in the ordinary course of business, correspondence would be deposited with the United States Postal Service the same day it was placed for collection and processing.
- (BY FACSIMILE TRANSMISSION)** By transmitting a true copy thereof by facsimile transmission from facsimile number (831) 755-5978 to the interested parties to said action at the facsimile number(s) shown below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **July 22, 2013**, at Salinas, California.


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