LARA WEISIGER

From: Paul Foreman <ps4man@comcast.net>
Sent: Tuesday, February 12, 2019 11:28 AM
To: Jim Oddie; John Knox White; Marilyn Ezzy Ashcraft; Malia Vella; Tony Daysog
Cc: Manager Manager; Michael Roush; LARA WEISIGER; Ruben Tilos; heatherlittle9691 @gmail.com; Rasheed Shabazz; 'Bryan Schwartz'; michaelhenneberry5@gmail.com
Subject: City Council Feb. 19, 2019 Agenda Item 6-D Sunshine Ordinance & Cannabis Ordinances
Attachments: Microsoft Word - Letter OGC.PDF; AUTHORITIES 12-17-18.pdf; Sullwold on Sunshine Ordinance Enforcement.docx

Dear Mayor Ashcraft & Councilmembers Knox-White, Vella, Oddie and Daysog:

As a recently retired member of the OGC I believe that I owe you the benefit of my view of the issues set forth in the above captioned Agenda Item.

Separation of the Issues of Sunshine Ordinance Enforcement and Disposition of Cannabis Ordinances:

I fully agree with Irene Dieter that Council should first determine the legality of the enforcement provisions of our Sunshine Ordinance before moving to a separate determination of the disposition of the cannabis ordinances . The determination of the Sunshine Ordinance issue should not be influenced by its impact on the cannabis ordinances. **This will allow Mr. Daysog to participate in the Sunshine Ordinance determination. An issue of this generic importance needs the participation of the entire Council.** This can be accomplished within the scope of agenda item 6-D by the passage of a bifurcation motion upon the initial introduction of the item at your meeting.

The Legality of the Enforcement Provisions of the Sunshine Ordinance:

It has been my consistent advice to Council that you need to follow the advice of the City Attorney even in instances where I believe it to be in error. However, the current issue is the exception that proves the rule. The provisions of Sunshine Ordinance that deal with adjudication of complaints of violation of the Ordinance are as follows.

Sec. 2-22.4a. It shall be the duty of the Open Government Commission to hear and decide complaints by any person concerning alleged non-compliance with the Sunshine Ordinance

Sec. 2-93.1 The primary regulatory and enforcement body of the Sunshine Ordinance shall be the Open Government Commission formed pursuant to Section 2-22 (Open Government Commission) of Article II (Boards and Commissions).

Sec. 2-93.8
a. If the Commission finds a violation of Section 2-91, the Commission may order the action of a body null and void and/or may issue an order to cure or correct. The Commission may impose a two hundred fifty ($250.00)dollar fine on the City for a subsequent similar violation, and a five hundred ($500.00)dollar fine for a third similar violation, that occurs within the same 12-month period.

b. If the Commission finds a violation of Section 2-92, the Commission may order the City to comply. The Commission may impose a two hundred fifty ($250.00) dollar fine on the City for a subsequent similar violation, and a five hundred ($500.00) dollar fine for a third similar violation, that occurs within the same 12-month period.

The City Attorney's core argument asserts that these provisions are unlawful because they delegate legislative powers to the OGC and that such delegation is impermissible under California law. I submit that these provisions are not quasi-

legislative, but are quasi-judicial. My conclusion is based upon the enforcement provision of the Brown Act which states in part:

54960.1. (a) The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section.

Thus, the Brown Act gives a complainant substantially the same remedy through the medium of a lawsuit and court order as Sec. 2-93.8 of our Sunshine Ordinance. If the City Attorney is correct in asserting that Sec. 2-93.8 is an unlawful delegation of legislative power, then this Brown Act provision is equally unlawful. A court has no more right to legislate than an administrative agency. The more reasonable conclusion is that Sec. 2-93.8 is a delegable quasi-judicial function of the OGC.

These provisions have been in our Sunshine Ordinance since 2011. **The original draft of the Ordinance presented to Council by the City Attorney on Oct. 18, 2011 contained a provision that allowed for an appeal of an OGC decision to Council. That provision was fully discussed, roundly rejected and deleted from the Ordinance without objection from the City Attorney.** (See the bottom of page 4 through page 6 of the minutes of the Oct. 18, 2011 meeting and pages 11-12 of the Nov. 1, 2011 meeting when the Ordinance was adopted unanimously.)

Just a few years ago the OGC did a complete review of the Ordinance with the full participation of our current acting City Attorney. No suggestion was made that the enforcement sections were unlawful. In December of 2018, when the same City Attorney opined in a memo that the enforcement provisions of the Ordinance were unlawful, he provided no authority that there had been a change in the law. He basically asserted that these provisions were unlawful from their inception. **Thus, his current opinion conflicts not only with the conclusion of a past City Attorney but is also inconsistent with his previous role in the review of the Ordinance.**

In response to the City Attorney's memo, the OGC received an extensive memorandum in opposition to the same by a local attorney, Cross Creason. A have attached it along with his authorities. Another opposing argument by well-known local attorney Robert Sullwold was published in his blog at https://alamedamgr.wordpress.com/2018/12/13/treating-the-ogc-like-a-potted-plant/ I have attached only that portion of the article that disputes the City Attorney's legal position . Both Mr. Creason and Mr. Sullwold argue that even if the enforcement provisions of the Ordinance are quasi-legislative, they are delegable.

If, notwithstanding the arguments above, Council confirms the opinion of the City Attorney, Council is left with the imperative of repealing the applicable provisions and redefining the enforcement role of the OGC. Without taking immediate action to codify the enforcement role of the OGC, we are left with an unenforceable Sunshine Ordinance, other than by lawsuit, and, even then, only in the event that the Brown Act has been violated, leaving those provisions in our Ordinance that are more stringent unenforceable.

Disposition of Cannabis Ordinances:

Finally, a determination that the enforcement provisions of the Sunshine Ordinance are unlawful raises the question of how to do justice to the current complainant, Serena Chen. She proceeded with her complaint to the OGC, rather than pursuing a court order under the Brown Act, in reliance upon the enforcement authority of the OGC as expressed in Sec. 2-93.8. She will have suffered a change of the rules in the middle of the game. Council must give her a remedy that at least approximates the remedy provided by the Commission.

I suggest that the only meaningful remedy would be the introduction and second of a motion to repeal Ordinances Nos. 3227 and 3228. This would at least give Ms. Chen the opportunity to present her arguments against the same. Even if the motion was adopted, Council would still be able to re-introduce the Ordinances in their original or in an amended form, just as they could if the "null and void " order of the OGC were upheld. This would be a starkly different process

than the sham nature of Item 6-B of the Jan. 15, 2019 Council meeting wherein the draft replacement ordinances were written to provide for repeal of ordinances nos. 3227 and 3228 only in the event that the replacements were adopted!

Sincerely,

Paul S Foreman

Open Government Commission Meeting - December 17, 2018

The Open Government Commission ("Commission") has been urged to decide that grounds exist to revisit its November 14, 2018, decision, and to accept the City Attorney's December 10, 2018 Report ("Report") which concludes that Sunshine Ordinance's "null and void" remedy is invalid and that, if nothing else, the Commission must exclude that remedy from its revised decision.

Altering the November 14 decision on the basis of the Report's conclusion about the legality of the "null and void" remedy would be problematic in several ways:

1) The Commission may not have the authority to determine the validity of the Sunshine Ordinance. Determining whether the "null and void" remedy expressly provided for in the Sunshine Ordinance is valid under the City Charter, state Constitution, etc., is not an express duty or power of the Commission under the Sunshine Ordinance or Section 2-22 of the Alameda Municipal Code ("AMC") [the Commission's "organic" statute]. The City Attorney's office also does not appear to have been assigned by the City Charter the task of retroactively determining previous City Council enactments to be invalid under the state Constitution, City Charter, etc.

See generally Hand v. Board of Examiners (1977) 66 Cal.App.3d 605, 619–620 ["since the Board of Examiners in Veterinary Medicine is…not an administrative agency of constitutional origin, it may not declare a statute enacted by the Legislature unconstitutional."]; *see also, generally, Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086 ["when, as here, a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute" and rejecting proposition that public agencies' "duty to follow the law (including the Constitution) includes the implied or inherent authority to refuse to follow an applicable statute whenever the official personally believes the statute to be unconstitutional, even though there has been no judicial determination of the statute's unconstitutionality and despite the existence of the rule that a duly enacted statute is presumed to be constitutional"].

Assuming that the Commission does not have the authority to determine the validity of the Sunshine Ordinance itself, or the remedies expressly provided for in the Ordinance, rescinding the "null and void" portion of the November 14 decision on the grounds of validity would also likely exceed the Commission's authority. *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 48–49 [agency *lacked the authority* to cure a facially unconstitutional statute by refusing to enforce it as written].

2) Assuming that the Commission somehow *does* have the authority to alter its November 14 decision based on a non-judicial determination that the "null and void" remedy expressly provided for by the City Council is invalid/unconstitutional, the Commission should also consider whether the legal analysis on these points is sufficiently developed to serve as a well-considered basis for reversing this duly-constituted body's decision. After all, the null and void remedy has been part of the Sunshine Ordinance since its enactment and was part of the original enactment with the advice of the City Attorney's office. Have there been developments in the law since the Sunshine Ordinance was enacted in 2011 that render the null and void remedy invalid? If so, it is difficult to discern from the Report because it cites to no legal authority. The legal authorities discussed below, at the very least, call into question the conclusion that the "null and void" remedy enacted by the City Council is invalid. It seems also, at the very least, that more than seven days consideration (the short period of time that has passed since the City Attorney's office first revealed its opinion that the "null and void"

remedy enacted by the City Council is invalid) should be given to this question before making it the basis for altering a previous decision of this Commission. Where the question is in doubt, the way to better implement the intent of the City Council and respect its fundamental policy determinations concerning proper noticing of public meetings would be to assume that its Sunshine Ordinance is a valid ordinance.

3. By all accounts, the Commission, and each Commissioner, took its duties under the Sunshine Ordinance seriously and faithfully in hearing and reaching a decision on Serena Chen's complaint on November 14, 2018. As much as the Report hypothesizes about the potential for abuse of a "limitless and unbounded" power granted the Commission – while downplaying both the multiple safeguards against abuse and the very limited nature of the power itself – there is no indication that the Commission abused its authority for political reasons, or at all, in this case. While the City Council has full authority to modify the Sunshine Ordinance, revise standards under it, create carve-outs for certain legislation, or do away with it entirely, the Report makes a debatable case, at best, that what City Council has already enacted is invalid on its face, much less that the Commission's decision on November 14, 2018 in particular was invalid.

None of the herein is meant to argue that the City Council should not undertake to amend the Sunshine Ordinance, if it sees fit. The Report identifies parts of the Sunshine Ordinance that the Council may very well wish to review and consider revising. The Commission, however, should proceed very cautiously before taking action such as altering the November 14 decision on the basis of the Sunshine Ordinance's purported invalidity. That does not seem to be the role assigned to the Commission by the City Council, and one that seems better suited to a court to fulfill.

Attached are copies of some of the authorities discussed herein:

Golightly v. Molina (2014) 229 Cal.App.4th 1501
Kugler v. Yocum (1968) 69 Cal.2d 371
Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055
Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859
Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291
Whitmire v. City of Eureka (1972) 29 Cal.App.3d 28

1. Delegation of Legislative Power

A. General Principles

The Report does not cite to California case law in support of its assertion that "[The Commission] does not have legal authority to order a new first reading under the Sunshine Ordinance via the null-and-void remedy because it would amount to an improper delegation of legislative power". In *Kugler v. Yocum*, the California Supreme Court set forth a basic framework for evaluating the delegation of legislative power:

> 'The power * * * to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it * * *.' (citations omitted). Moreover, the same doctrine precludes delegation of the legislative powers of a city (citations omitted).
>
> Several equally well established principles, however, serve to limit the scope of the doctrine proscribing delegations of legislative power. For example, legislative

> power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature * * *.' (citations omitted)
>
> A related doctrine holds: 'The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect * * *.' (citations omitted) Similarly, the cases establish that '(w)hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' (citations omitted).
>
> 8 We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that 'truly fundamental issues (will) be resolved by the Legislature' and that a 'grant of authority (is) * * * accompanied by safeguards adequate to prevent its abuse.' * * * * This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to *377 establish an effective mechanism to assure the proper implementation of its policy decisions.

Kugler v. Yocum (1968) 69 Cal.2d 371, 374–377; see also *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1604 ["An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions. [Citations.] 'This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.']; *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1516.

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B. Delegation of Legislative Powers and Alameda's Sunshine Ordinance

It is not difficult to fit the Sunshine Ordinance, and the Committee's "null and void" remedy provided therein, within *Kugler's* framework for proper delegations of legislative power.

With passage of the Sunshine Ordinance, the ***City Council*** resolved the *"truly fundamental issue"* (*Krugler* at 377) that, "[i]t is government's duty to serve the public, reaching its decisions in full view of the public, except as provided elsewhere in this article" (AMC § 2-90.2(a)) and, as specifically relevant here, that:

> Twelve (12) days before a regular meeting of City Council, and seven (7) days for all other policy bodies, the policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. These time requirements shall apply to posting on the internet. (AMC § 2-91.5(a)).

Enforcement of, and abidance by, that easy to meet noticing standard established by the City Council, moreover, should not impose any real barrier to the Council's ability to make *other fundamental policy decisions*, such as the policy decisions underlying the two ordinances amending the Cannabis Business Regulatory Ordinance and the Land Use Ordinance (Ordinance Nos. 3227 and 3228, respectively) at issue in the complaint.

Kugler also teaches that "*legislative power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a* ***rule*** *or* ***standard*** *previously established by the legislature*". That seems to be precisely what the City Council did with the Sunshine Ordinance, in at least two ways relevant here. The City Council did not give the Commission broad discretion to determine when the City government fails to make "its decisions in full view of the public". Instead, it gave the Commission power to determine whether the facts of a particular case constitute a violation of specific ***rules*** *established by the City Council*, including the rule that policy bodies must, within the deadlines set by the Council, "post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting" (AMC § 2-91.5(a)). The Council established not only a specific ***rule*** for the Commission to apply in this case, but also a reasonably specific and detailed ***standard*** for the Commission to apply when determining whether the "meaningful description" element of the rule is satisfied

> b. A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda or, if such documents are of more than one (1) page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours. (AMC § 2-91.5(b))

Those specific City Council-established rules and standards, which the Commission must find were violated before issuing a remedy, are primary "safeguards against its abuse". *Southern Pac. Transp. Co. v. Public Util. Comm'n* (1976) 18 Cal.3d 308, 313, (overruled on other grounds by adoption of Cal. Const. Art. III, § 3.5) [PUC must make various findings before closing railroad crossing was safeguard]. Another safeguard is the very limited duration of *any* remedy the Commission can issue. A null and void remedy issued by the Commission after a noticing violation, for example, has a temporal effect no longer than it takes the policy body to properly re-notice a meeting for consideration of the voided act. That the Commission's meetings and hearings are themselves subject to the Sunshine Ordinance and, therefore, conducted in public with notice, is another safeguard. Another safeguard is the Commission enjoyment of the assistance and guidance of the City Attorney, including at its meeting and hearings. *Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 295 [adequate safeguards existed on Fish and Game Director's power to temporarily suspend or conform statute statutes to multi-state fishing plan and issue emergency fishing regulations adopted without any public procedures in that they are limited to180 days' duration and submitted to Office of Administrative Law, and must immediately be reported to Legislature].

Mandamus relief is also available from the courts if the Commission were to abuse its discretion and authority under the Sunshine Ordinance. *Scott B. v. Board of Trustees of Orange County High School of Arts* (2013) 217 Cal.App.4th 117, 122-124. Moreover, whether through the Commission's own judgment, or as imposed by a court in a mandamus action, the Sunshine Ordinance on its face does not seem to pose the risk of hyper-technical grounds being used to invalidate City government actions. In the absence of an express command in the Sunshine Ordinance that strict compliance is required, the Commission would be justified in excluding de minimis violations as the basis for a null and void remedy under the Sunshine Ordinance. *People v. Wright,* (1982) 30 Cal. 3d 705, 713 [applicable standards can be implied from the statutory purpose]. In the present case, the Commission hardly seems to have applied the Sunshine Ordinance to use trivial violations as a way to hamstring the City Council and impose its own policy ends. Assuming the noticing violation found by the Commission was a violation of the Sunshine Ordinance, it was not a de minimis violation.

All of the the safeguards described above most likely satisfy the rules set forth in *Kugler* and the cases that have followed.

C. *Whitmire v. City of Eureka* and *Salmon Trollers Marketing Assn. v. Fullerton*

Although the Report cites no case authority, the California case that perhaps comes closest to supporting the argument that the Sunshine Ordinance constitutes an improper delegation of legislative power to the Open Government Commission is the case of *Whitmire v. City of Eureka* (1972) 29 Cal.App.3d 28. However, crucial differences between Alameda's Sunshine Ordinance and the ordinance at issue in *Whitmire* render *Whitmire* very weak authority for opining that the Sunshine Ordinance is invalid.

Whitmire addressed the Firemen's and Policemen's Retirement Fund System of the City of Eureka ('System'), which was established by an ordinance that provided, in relevant part, that "This Ordinance….may be amended in the following manner, to wit: 'That any proposed improvement or amendment shall be voted upon by secret ballot in the Fire Department and Police Department, separately, and the results thereof certified to the City Council. That in the event such proposed amendment shall have passed by a majority vote by each said Fire and Police Department, then if the Council, by a majority vote, shall pass such proposed amendment, the same shall become effective and binding.' *Whitmire* at 30. Between 1960 and 1968, the unfunded liability of the System grew from $1,241,395 to $3,373,841.

The *Whitemire* court, relying on the principles discussed in *Kugler, supra,* held that an ordinance requiring the Eureka City Council to obtain prior approval from fire and police employees before amending the System's enabling ordinance would constitute an unlawful delegation of legislative power.

> As the city points out, none of the recognized exceptions or limitations to the application of the doctrine as set forth by the Supreme Court in *Kugler* are evident in section 16. Section 16 does not limit itself to a delegation of power to determine a fact or state of facts upon which the operation of the ordinance depends; rather, it delegates to a small number of private persons in the employ of the city the Original control of the enactment of laws relating to the administration of the fiscal affairs of the city and provision for maintenance of its fire and police departments and to payment of compensation for services. In effect, if section 16 is interpreted as the Exclusive procedure for amending the

> System, any proposed action by the city council regarding the retirement fund is subject to Approval or veto by the two departments' members**.** Since the power to approve or veto actions of a legislative body is, of course, part of the legislative process, this grant of authority must be accompanied by "safeguards adequate to prevent its abuse" (Kugler, supra, at p. 376, 71 Cal.Rptr. at p. 690, 445 P.2d at p. 306). None exist under appellants' 'exclusive remedy' interpretation, and therefore this section must be declared an unconstitutional delegation of legislative power if interpreted in that manner.

Whitmire at 32–33.

Alameda's Sunshine Ordinance stands in contrast with each aspect of the Eureka ordinance in *Whitmire* that failed the test of a proper delegation of legislative power. The Sunshine Ordinance establishes specific rules and standards the Commission is required to apply when determining whether proper notice was given by a published meeting agenda. By contrast, the Eureka ordinance in *Whitmire* set no standards whatsoever that fire and police employees were required to apply in deciding whether to approve of amendments to the ordinance. In essence, fire and police employees would have been given a veto power over city legislation that they could exercise for *any reason*, including for the very purpose of frustrating the city council's policy decisions.

The "null and void" sanction under Alameda's Sunshine Ordinance does not constitute a "veto" power. It cannot be imposed because the Commission dislikes, on substantive policy grounds, a particular ordinance (as the Governor and some mayors are permitted with the veto power). Instead, it can only be imposed when events – outside of the control of the Commission – occur which violate the specific rules established in the Sunshine Ordinance. Moreover, an obvious and non-burdensome way for the City Council to avoid the null and void remedy – and to make fundamental policy decisions - is to simply not violate the objective noticing rules it established in the Sunshine Ordinance or promptly cure any failure to do so. Thus, even if it were considered a very limited form of "veto" – which it is not – the null and void remedy in the Sunshine Ordinance is confined by specific standards and safeguards against abuse which *Whitmire* found lacking in the Eureka ordinance.

Indeed, the Court of Appeal in *Salmon Trollers Marketing Assn. v. Fullerton,* upheld the delegation by the Legislature of a limited power akin to a "veto" power to the Director of Fish and Game of the State of California. The delegation upheld in *Salmon Trollers* is best characterized as exceeding the power granted the Commission in the Sunshine Ordinance because, among other things, the Director was given the authority to *suspend* the operation of state statutes – with broader discretion – for up to 180 days. Here, the limited power of the Commission has a duration no longer than the *much shorter* period of time it would take the City Council to properly notice

In *Salmon Trollers* the court addressed the Legislature's grant to the Fish and Game Director power to temporarily suspend or conform statute statutes to multi-state fishing plan "if necessary to avoid a substantial adverse impact on the Pacific Fishery Management Council's plan" and issue emergency fishing regulations adopted without any public procedures up to180 days' duration.

> Reviewing sections 7650-7653, it is clear that adequate standards are set forth to guide the Director as he implements the basic policy decision already made by the Legislature. It is legislative judgment that the state shall fully cooperate and assist in the formulation of fishery management plans adopted by the council. A basic

> policy determination has also been made to support the Fishery Management Plan once adopted by the council. This support is to be carried out by the Director, when necessary, by suspending inconsistent statutes or regulations temporarily and adopting consistent regulations effective up to 180 days only. In the meantime, the Legislature clearly intends to consider conforming California statutory law to fishery management plans adopted by the council (Fish & G. Code, s 7653), based on the Director's report to the Legislature as to which statutes should be amended, repealed or adopted. (Fish & G. Code, s 7653.) A lasting and underlying policy decision is that the Legislature has determined to continue state jurisdiction over its fisheries within three miles offshore by avoiding conflict with the Federal **367 Fishery Plan. (Fish & G. Code, s 7652.) These are fundamental policy determinations made by the Legislature and not by the Director of Fish and Game.

Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291, 300. For the reasons discussed above and don't need to be repeated here, Alameda's Sunshine Ordinance grants more limited authority to the Sunshine Commission, and contains comparable safeguards to those addressed in *Salmon Trollers*.

At the very least, the above-cited cases do not lead to any clear and certain conclusion that the Sunshine Ordinance's null and void remedy is invalid.

2. Alameda City Charter

The Report asserts that "Second, and most significantly, is the null-and-void remedy cannot be applied to the legislative action of a City Council without conflicting with certain provisions of the City's Charter." The Report states, more specifically, that "Under the City's Charter, the Council is vested with all powers of the City and powers vested in city councils. See Article III, Sec. 3-1. Chief among these powers is the power to legislate locally", and that "use of the null-and-void remedy to effectively repeal an ordinance contravenes the Charter's provisions related to local lawmaking."

The Report cites no authority for this reading of the City Charter and it seems mistaken. Nothing in the Charter provisions vesting legislative control in the City Council cited in the Report appear to assert principles more restrictive than the delegation of legislative power doctrine discussed above. Moreover, no express provision of the Charter prohibits the creation of the Open Government Commission or granting it the narrow authority to enforce the notice requirements set forth in the Sunshine Ordinance. As the Report acknowledges, moreover, "the Council also has the authority to vest in officers or boards "powers and duties additional to those set forth in the Charter." See id., at Sec. 3-3." That is what the Council did within its considerable and broad authority to legislate under the Charter:

> A charter constitutes a city's local constitution, and city ordinances stand in the same relationship to a charter as do statutes to the state constitution. (Porter v. City of Riverside (1968) 261 Cal.App.2d 832, 836, 837 (Porter).) Thus, ***the same presumptions favoring the constitutionality of statutes apply to ordinances.*** (Id. at p. 837.) " 'In considering the scope or nature of appellate review in a case [concerning the validity of an ordinance] we must keep in mind the fact that the courts are examining the act of a coordinate branch of the government-the legislative-in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a factfinding body.' " (Ratkovich v. City of San Bruno (1966) 245 Cal.App.2d 870, 879 (Ratkovich).) "Courts have nothing to do

with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties." (Ibid.)

Further, unless expressly limited by its charter, a city council has plenary authority to interpret and implement charter provisions and may exercise all powers not in conflict with the California Constitution. (Miller v. City of Sacramento (1977) 66 Cal.App.3d 863, 867-868 (Miller); Simons v. City of Los Angeles (1976) 63 Cal.App.3d 455, 467-468.) The City Council's action "will be upheld by the courts unless beyond its powers, 'or in its judgment or discretion is being fraudulently or corruptly exercised.' " (Porter, supra, 261 Cal.App.2d at p. 836.) **Thus, a party making a facial challenge to an ordinance, requesting that it be voided, must demonstrate that its provisions " 'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions .' "** (Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 Cal.App.4th 129, 137-138 (Personal Watercraft Coalition).) "If reasonable minds might differ as to the reasonableness of the ordinance [citations] or if the reasonableness of the ordinance is fairly debatable [citations], the ordinance must be upheld." (Ratkovich, supra, 245 Cal.App.2d at p. 878.)
Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859, at *2

Alameda's charter provides that its legislative powers are vested in the City Council, and because there is no provision in the charter limiting the authority of the City Council, the City Council had full power to enact ordinances interpreting and implementing [a Charter provision]. (See Miller, supra, 66 Cal.App.3d at pp. 867-868.)

Where a charter provision is ambiguous or susceptible of two or more meanings, the city council, not the court, has the authority to decide issues of interpretation and applicability. (*Porter, supra,* 261 Cal.App.2d at p. 836.)

Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859, at *3.

Ordinances enacted by the City Council are presumptively ***valid*** under the City Charter. Because the Charter contains no prohibition against enactments such as the Sunshine Ordinance, it is unlikely it would be found invalid under the Charter.

The argument that "unless cabined in some way, the null-and-void remedy is arguably an end-run around [the referendum] process as well" is not well developed and is doubtful. As discussed above, the remedy is cabined by specific rules, a violation of which must be found before it is imposed. Moreover, the Report cites no authority for its arguable position. One would think that there would be such authority relating to the Brown Act (under which the null and void remedy has existed for over 30 years), which has been heavily litigated and would "arguably" be just as much of a potential "end-run" around the referendum process, which has constitutional status in California. The lack of mention of any such authority indicates that this concern may be misplaced.

3. Miscellaneous Points

a. "when viewed in context, the Sunshine Ordinance's null-and-void remedy is without precedent….. Additionally, as applied here, the null and void remedy is at odds with the Brown Act."

As an initial matter, the second point raises questions about the first. The "null and void" remedy under the Sunshine Ordinance is a remedy under the much older Brown Act and can hardly be called "unprecedented". It may be "unprecedented" at the municipal level in California, but there is no applicable rule of law (derived from the Charter or the state constitution) under which "unprecedented" equates to invalid or illegal. Nor is it correct to label the Sunshine Ordinance "at odds" with the Brown Act, or clear how that invalidates the Sunshine Ordinance.

There is no claim in the Report that the Sunshine Act somehow purports to set lower standards, allow for less public participation, or to relieve City government of any of its duties under the Brown Act. Were that the case, the Sunshine Ordinance would be "at odds with" – and preempted by – the Brown Act. *People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1174 ["If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."]; *see Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 168 ["Ribakoff misperceives the relationship between the Brown Act and the ordinance. Ribakoff's argument that the ordinance must be authorized by the Brown Act evidences a misunderstanding of the fact that the City of Long Beach is a charter city and therefore has plenary power over its municipal affairs, including the police power to adopt ordinances such as LBMC 2.03.140, so long as its actions are not preempted by state or federal law. (Cal. Const., art. XI, §§ 5, 7; see *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1"], as modified (Sept. 13, 2018), reh'g denied (Oct. 3, 2018), review filed (Oct. 23, 2018)

The Report cites no authority for the suggestion that as a matter of constitutional or statutory law that such a null and void determination must be made in the first instance by a court and that it cannot be properly assigned within the *Kugler* framework to an administrative body such as the Commission. Moreover, the decisions of the Commission *are in any event* subject to judicial review in a mandamus action in court.

Lurking in the Report might be the implied argument that if the Sunshine Ordinance requires greater public access or imposes more stringent noticing standards than the Brown Act, it is invalid. It cites no authority for this proposition or the corollary notion that the Brown Act somehow establishes the maximum in terms of public access to which residents of any California city can ever be entitled. And, whatever the strength of the legal argument, it goes contrary to the intent of the City Council: **"In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply." AMC § 2-91.3.**

b. "the null-and-void remedy contradicts the local organic statute that formed the Commission and governs its continued existence"

Although the Commission might consider whether the local organic statute that formed the Commission AMC § 2-22 was intended to repeal the null and void remedy in the Sunshine Ordinance or that the two so inconsistent that they cannot both be enforced or carried out (*see e.g. Burlington N. & Santa Fe Ry. Co. v. Puc* (2003) 112 Cal.App.4th 881, 889), there does not in fact seem to be any contradiction between the two. In fact, the Commission's organic statute was enacted in the same ordinance (Ord. No. 3042, § 4, 1-3-2012) that amended the provisions in the Sunshine Ordinance that named the Commission the primarily regulatory and enforcement body under the Sunshine Ordinance AMC § 2-93.1 ["The primary regulatory and enforcement body of the Sunshine Ordinance shall be the Open Government Commission formed pursuant to Section 2-22 (Open Government Commission) of Article II (Boards and Commissions)"]. Because the *same* ordinance enacted the Commission's organic statute *and* amended the

Sunshine Ordinance, it is highly unlikely that the City Council intended to repeal any part of the Sunshine Ordinance except as explicitly stated in Ord. No. 3042. The Sunshine Ordinance also provides in AMC § 2-93.7, "Sunshine Ordinance Supersedes Other Local Laws. The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply."

Moreover, together, the organic statute and the Sunshine Ordinance direct the Commission to "Hear and decide complaints by any person concerning alleged non-compliance with the Sunshine Ordinance" and "Consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints" and grant it the power to issue a null and void remedy when the Sunshine Ordinance's noticing rules are violated. Those functions are not mutually exclusive; the Commission is capable of both considering ways to to informally resolve complaints as well as deciding cases and imposing remedies.

The Report's concern that "At a minimum, the Sunshine Ordinance lacks guidelines for assisting the Commission to decide whether to make a recommendation or use the extraordinary null-and-void remedy," does not make the Sunshine Ordinance invalid under the delegation principles discussed above. In some instances, the Commission may able to do both and in other cases a choice between remedies may be dictated by the case presented. A recommendation may be appropriate in some cases, whereas in other cases *not* imposing a null and void remedy would essentially be a judgment validating an underlying noticing violation. That does not lead the conclusion that the Ordinance itself gives unfettered and unconstitutional discretion to the Commission.

Conclusion

Thank you for considering this response to the City Attorney's December 10 Report. Finally, this is not a paid effort. Please excuse any shortcomings in it in light of the fact that it was necessarily prepared during "free time" in the very short time since the City Attorney first made public its opinion that the "null and void" remedy enacted by the City Council is an invalid remedy.

GOLIGHTLY v. MOLINA

Court of Appeal, Second District, Division 3, California.

Robert Glen GOLIGHTLY, Plaintiff and Appellant, v. Gloria MOLINA et al., Defendants and Respondents.

B246413

Decided: September 25, 2014

Huskinson, Brown & Heidenreich, David W.T. Brown and Paul E. Heidenreich for Plaintiff and Appellant.
Judy W. Whitehurst, Assistant County Counsel, Dawyn Harrison, Principal Deputy County Counsel; Miller Barondess, Louis R. Miller, Mira Hashmall and Vinay Kohli for Defendants and Respondents.
Plaintiff and appellant Robert Glen Golightly (Plaintiff) appeals a judgment following a grant of summary judgment in favor of defendants and respondents County of Los Angeles (County) and the five members of the County Board of Supervisors (Board), namely, Gloria Molina, Zev Yaroslavsky, Don Knabe, Mark Ridley–Thomas and Mike Antonovich (sometimes collectively referred to as the County).

The essential issue presented is whether the procedure by which the County enters into Social Program Agreements (SPAs) with social service organizations that provide social services to county residents is subject to the Brown Act (Gov.Code, § 54950 et seq.), a statutory scheme which imposes open meeting requirements on legislative bodies.

Proposed SPAs are individually scrutinized by the Executive Officer of the Board (Board's Executive Officer), County Counsel, County Auditor–Controller, and ultimately, by the County Chief Executive Officer (County CEO), and the approval of each is required. However, the four signatories do not collectively decide to approve an SPA. Rather, a proposed SPA is reviewed in sequence by the four signatories, for issues within each one's purview. The Brown Act applies to meetings of legislative bodies. (Gov.Code, § 54952.2.) The four SPA signatories do not constitute a legislative body and do not deliberate collectively in approving a SPA. Therefore, Plaintiff's Brown Act claim is meritless.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

On April 22, 2010, Plaintiff, a taxpayer, filed his original complaint against the County. The fourth amended complaint, which is the operative pleading, alleged causes of action for: waste of public funds (Code Civ. Proc., § 526a); violation of the Brown Act (Gov.Code, § 54950 et seq.); declaratory relief for ultra vires acts; and conflicts of interest including violations of the Political Reform Act of 1974 (Gov.Code, § 81000 et seq.).

The gravamen of Plaintiff's action is that the County "secretly uses public funds" to enter into SPAs with social service providers in violation of the Brown Act, and instead of being publicly approved by the Board, SPAs are actually entered into by County officials pursuant to an improper delegation of decisionmaking authority by the Board.

2. County's motion for summary judgment.

The County moved for summary judgment or summary adjudication of issues. It argued, inter alia: Plaintiff's Brown Act claim fails because the Board did not create a "legislative body" and there is no evidence of a secret meeting; the Board is not required to vote on every discretionary expenditure and the delegation of authority to the County CEO and others cannot support a Brown Act claim; the waste claim fails as it is predicated on the Brown Act claim; the Board's delegation of authority was lawful, and courts cannot interfere with lawful delegations. Further, there was no evidence the County violated the Political Reform Act or the conflict of interest statute.

In opposition, Plaintiff argued: the County's motion had failed to address the hundreds of allegations in his fourth amended complaint; the County failed to establish that a single discretionary expenditure was not wasteful; the decisions regarding SPA discretionary expenditures were made by a "legislative body" and required open meetings pursuant to the Brown Act; the Board has only limited power to delegate its discretionary authority; and the County did not submit sufficient evidence to summarily adjudicate the cause of action for conflicts of interest.

In reply, the County argued Plaintiff "has provided virtually no evidence in opposition to [the] summary judgment motion. Indeed, after propounding 1,700 written discovery requests, taking 18 days of deposition and receiving more than 70,000 pages of documents, Plaintiff is still unable to provide evidence that any of the Supervisors had a conflict of interest with respect to any transaction. Plaintiff has not presented any evidence of a 'secret meeting' held by the Supervisors (even though Plaintiff unequivocally makes that allegation in the [fourth amended complaint]). And Plaintiff has not presented any evidence of wasteful conduct. Plaintiff cannot defeat summary judgment by relying on his own pleadings. If Plaintiff had any evidence to support his claims, this would have been the time to submit it to the Court—he cannot proceed to trial on the basis of unsupported allegations."

3. Plaintiff's cross-motion for summary adjudication.

Plaintiff moved for summary adjudication on the County's third affirmative defense that its alleged wrongful acts or omissions were based on the exercise of a legislative or discretionary function and therefore such claims are barred by the County's legislative immunity.

4. Trial court's ruling.

After hearing the matter, the trial court granted summary judgment in favor of the County. In an extensive writing ruling, the trial court held, inter alia:

In creating a procedure for processing SPAs, the Board did not create a "legislative body" within the meaning of the Brown Act. The Board's Executive Officer, County Counsel, Auditor–Controller, and County CEO act as administrative officers who are delegated specific responsibility in reviewing proposed SPAs, but they are not a "commission, committee, board, or other body" with regard to the SPA approval process. The Brown Act "is concerned with the collective investigations and deliberations" of a legislative body. The four SPA signatories do not meet as a body to discuss proposed SPAs, and "do not collectively decide to approve a SPA, but rather . each signatory has a separate obligation to review the proposed SPAs to meet county contracting standards." Therefore, Plaintiff failed to raise a triable issue with respect to his Brown Act claim.

The "backbone of Plaintiff's waste claim appears to be that every single expenditure of SPA funds constitutes waste because Defendants failed to comply with the Brown Act." This claim fails for the reasons already stated.

Plaintiff also contended that all SPA expenditures involve waste because the Board improperly delegated authority over a discretionary process to county administrators. The claim was meritless because the evidence established the Board retained control over fundamental policy decisions, and its delegation of SPA authority contained adequate safeguards.

As for Plaintiff's claims the Supervisors allegedly participated in governmental decisions in which they had a financial interest (Gov.Code, § 87103) and violated the prohibition on elected officials being financially interested in a contract made by them in an official capacity (Gov.Code, § 1090), the trial court relied on Plaintiff's factually devoid discovery responses. Those questions were as follows: "Are you aware [from sources other than your attorney] of any conflict of interest between any of the supervisors' offices and any social program agreement recipients?"; "Are you aware of any . social program agreement recipients who provided campaign donations to any of the supervisors' officers [sic]?"; "Are you aware of any instances in which any of the supervisors had a financial interest in any organizations that received social program agreement funds?"; "Do you know whether any of the county supervisors are on the boards of directors of any of the organizations that are listed here?"; "Do you know whether any of the county supervisors are on a board of advisors with respect to any of the organizations that are listed here?"; "Do you know whether any of the county supervisors are paid by any of the organizations that are listed here?"; "Do you know whether any of the county supervisors have a financial interest in any of the organizations that are listed here?"; "Do you know whether any of the spouses, of any of the supervisors, has a financial interest [in] any of the organizations that are listed here?"; "Do you know whether any of the children, of any of the supervisors, has a financial interest [in] any of the organizations that are listed here?"; "Do you have any documents reflecting a relationship between any of the supervisors and the organizations that are listed on pages 98 and 99 of the fourth amended complaint?" To each of the above questions, Plaintiff answered, "No." Plaintiff's responses "were admissible evidence to show the absence of facts to support the allegations of the complaint."

The trial court concluded, "Under the doctrines of legislative immunity and separation of powers, the courts generally should avoid marching into the legislative domain, except in the most egregious circumstances. When the layers of the proverbial onion are stripped away in this lawsuit, we see a plaintiff as a concerned taxpayer who complains that the Los Angeles County Board of Supervisors has been illegally expending funds and failing to properly account for certain expenditures. Plaintiff has chosen theories of illegal meetings under the Brown Act, waste and conflicts of interest as his theories in pursuit of judicial intervention to right these perceived wrongs. While it is surely healthy for all levels of citizenry and government to continually look for ways to 'build a better mousetrap' in terms of government operations and accountability, not all activity of a legislative body will meet with the approval of all citizens. This case, in a nutshell, involves the question of whether the Board of Supervisors has lawfully delegated contracting authority for SPAs to the administrative level. The Court can find no secret meetings, unlawful meetings or other violation of the Brown Act, no acts of waste and no conflicts of interest under the evidence herein presented. In a county the size of Los Angeles . the concept of careful delegation makes perfect sense and is authorized by law. Additionally, the evidence discloses that the SPAs are adequately accounted for in the postings by the County. [¶] Defendants' motion for summary judgment is granted. Plaintiff's motion for summary adjudication [is] moot."

5. Judgment and postjudgment proceedings.

On November 5, 2012, pursuant to the earlier grant of summary judgment, the trial court entered judgment in favor of the County. On January 3, 2013, Plaintiff filed a timely notice of appeal from said judgment.

On January 11, 2013, during the pendency of the appeal, Plaintiff filed a motion in the trial court for attorney fees pursuant to Code of Civil Procedure section 1021.5 under a catalyst theory of recovery. (Graham v. DaimlerChrysler Corp. (2004) 34 Cal.4th 553.) On March 15, 2013, the trial court heard and denied Plaintiff's attorney fee motion. Plaintiff did not appeal that order.

CONTENTIONS

We summarize Plaintiff's contentions as follows: the Board's delegation of its power to the County CEO to enter into SPAs was improper; the County's review process for SPAs contravenes the Brown Act; because the SPAs violate open meeting requirements, SPA expenditures constitute waste; and Plaintiff was entitled to attorney fees under a catalyst theory.

DISCUSSION

1. Overview of SPA expenditures.

For the 2009–2010 fiscal year, the Board/Executive Office budgeted $147 million for its own operations, representing about 0.67 percent of the County's $23 billion budget. Said $147 million budget includes a fund called the Equal Budget Allocation (EBA). Funds from the EBA are used to pay the Supervisors' office staff salaries, office and travel expenses, and to fund SPAs pursuant to Government Code section 26227.

Government Code section 26227 gives the Board the authority to appropriate and spend funds for social service programs for county residents.[1] The County uses SPAs to provide funding to organizations to address

issues such as hunger, sexual and domestic violence, child abuse, as well as services for the elderly, physically and mentally disabled, and persons affected by HIV/AIDS, cancer and other serious illnesses. For the 2009–2010 fiscal year, approximately $17 million was allocated to the EBA. Each of the five Supervisors' offices receives a proportionate share of the EBA. The allocation for the 2009–2010 fiscal year was $3.4 million per supervisorial district.

a. Delegation by Board of its contracting authority.

In 1990, the Board formally delegated authority to the County's Chief Administrative Officer (CAO) (now the County CEO) to "execute such contracts and agreements as may be necessary to implement the social programs to be paid from funds appropriated in the Budget for discretionary use by the supervisors, when such programs are to meet the social needs of the population of the County, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons."

In 1992, the Board took additional action, directing that the CAO's "previously delegated contracting authority shall be exercised in the future only when countersigned by the Auditor–Controller and the Executive Officer of the Board."

Further, although not ordered by the Board, every SPA also is reviewed and signed by County Counsel, which is typical for many contracts entered into by the County. Thus, every SPA is signed by three County offices (Auditor–Controller, Board's Executive Officer and County Counsel) before the County CEO executes the SPA pursuant to the Board's delegation of authority.

b. The SPA approval mechanism.

The SPA process begins with requests from funding from the offices of the five individual Supervisors. After the Board's Executive Officer receives the requests, it analyzes the request and conducts research to determine whether fulfilling the request would serve a social need of County residents. The Board's Executive Officer does not discuss the request with any Supervisors other than the Supervisor's office which submitted the request.

The Board's Executive Officer does not approve a request for SPA funding. The role of the Board's Executive Officer is to evaluate the request and to determine whether the SPA is necessary to meet a social need. If the Board's Executive Officer concludes the funding request satisfies a social need of County residents, the Board's Executive Officer prepares the agreement and forwards it to County Counsel for its review and signature.

County Counsel then reviews the proposed SPAs and will reject SPAs that do not comply with the law. After County Counsel has executed and returned the proposed SPA to the Board's Executive Officer, the agreement is sent to the requesting organization for signature. The requesting organization signs the SPA and sends it back to the Board's Executive Officer.

The Board's Executive Officer then forwards the SPA to the Auditor–Controller for its approval. Once the Board's Executive Officer obtains the proposed SPA with the signature of the Auditor–Controller, the Board's Executive Officer executes the proposed SPA.

Once the proposed SPA has been approved by County Counsel, the recipient organization, the Auditor–Controller and the Board's Executive Officer, it is sent to the County CEO for final approval. The County CEO is vested with the final authority to approve the SPA.

Once the County CEO signs the SPA and returns it to the Board's Executive Officer, the Auditor–Controller issues a check to the recipient organization.

2. Standard of review.

The pivotal issue before us is the applicability of the Brown Act, specifically, whether the four signatories to a SPA constitute a legislative body within the meaning of Government Code section 54952, so as to be subject to the Act. As an appellate court, "we 'conduct independent review of the trial court's determination of questions of law.' [Citation.] Interpretation of a statute is a question of law. [Citations.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination. [Citation.]" (Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control Dist. (1996) 43 Cal.App.4th 854, 859.)

3. The Brown Act' s purpose, scope and broad construction.

"Open government is a constructive value in our democratic society. [Citations.]" (Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 380 (Roberts). The Brown Act (Gov.Code, § 54950 et seq.), adopted in 1953 and since amended, is intended to ensure the public's right to attend the meetings of public agencies. (Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal.4th 821, 825.) To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. (Gov.Code, § 54954.2, subd. (a); Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555.) The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation by public bodies. (Cohan, supra, 30 Cal.App.4th at p. 555.)

The Brown Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (Gov.Code, § 54950; Stats.1953, ch. 1588, § 1.)

The Brown Act dictates that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (Gov.Code, § 54953, subd. (a).)

The term "legislative body" has numerous definitions, set forth in Government Code section 54952. The question presented is whether the four SPA signatories constitute a legislative body within the meaning of subdivision (b) of Government Code section 54952. This provision states in relevant part: "As used in this chapter, 'legislative body' means: [¶] . [¶] (b) A commission, committee, board, or other body of a local agency,

whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." (Ibid.)

In determining whether the four SPA signatories are a legislative body within the meaning of the Brown Act, we are mindful the Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (San Diego Union v. City Council (1983) 146 Cal.App.3d 947, 955 [construing open-meeting requirements].) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 313.)

4. The four SPA signatories are not a legislative body and do not engage in collective decisionmaking within the meaning of the Brown Act.

The Brown Act contemplates collective action by a legislative body. As relevant here, the Act defines a legislative body as "[a] commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." (Gov.Code, § 54952, subd. (b), italics added.) Plaintiff seeks to characterize the four signatories to a SPA as a "committee" whose decisionmaking is subject to the Brown Act.

The argument fails because the four SPA signatories do not engage in collective decisionmaking. Rather, as set forth above in some detail, the four SPA signatories act separately in scrutinizing proposed SPAs. Because they deliberate individually as opposed to collectively, their decisionmaking is outside the ambit of the Act.

a. Brown Act applies to collective decisionmaking.

The Supreme Court's decision in Roberts, supra, 5 Cal.4th 363 is instructive. It explained, "the keystone of the Brown Act is the requirement that '[a]ll meetings of the legislative body of a local agency shall be open and public.' ([Gov.Code,] § 54953, subd. (a).) An early case interpreted this language to apply only to formal meetings; an informal ' "fact-finding meeting" ' conducted by members of a city planning commission at a local country club was held not within the scope of the act. (Adler v. City Council (1960) 184 Cal.App.2d 763, 767.) The Legislature responded in 1961 with substantial revisions of the act intended to bring informal deliberative and fact-finding meetings within its scope. (Stockton Newspapers, Inc. v. Redevelopment Agency [(1985)] 171 Cal.App.3d [95,] 101–102; 42 Ops.Cal.Atty.Gen. 61, 68 (1963); Comment, Access to Governmental Information In California (1966) 54 Cal.L.Rev. 1650, 1654; 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 579, p. 788.) At that time, [Government Code] section 54952.6 was added to provide that the deliberative action covered by the act included 'a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.' (Stats.1961, ch. 1671, § 3, p. 3637.)" (Roberts, supra, 5 Cal.4th at p. 375, italics added.)

After "the 1961 revisions, the courts have applied provisions of the act to informal deliberative action, but have always required that some sort of collective decisionmaking process be at stake. Thus the action of one public official is not a ' meeting' within the terms of the act; a hearing officer whose duty it is to deliberate alone does not have to do so in public. (Wilson v. San Francisco Mun. Ry. (1973) 29 Cal.App.3d 870, 878–879.) As the Court of Appeal in Wilson reasoned, because the act uniformly speaks in terms of collective action, and because the term 'meeting,' as a matter of ordinary usage, conveys the presence of more than one person, it follows that under [Government Code] section 54953, the term ' meeting' means that ' two or more persons are required in order to conduct a " meeting" within the meaning of the Act.' (29 Cal.App.3d at p. 879.)" (Roberts, supra, 5 Cal.4th at pp. 375–376, italics added.)

Another court "has characterized the term as referring to a 'collective decision-making process ' and as a 'deliberative gathering.' (Sacramento Newspaper Guild, supra, 263 Cal.App.2d at pp. 47, 48, italics added.) More recently the Court of Appeal has opined that the term 'comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business.' (Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d at pp. 100, 102, italics added; see also 7 Witkin, Summary of California Law, supra, Constitutional Law, § 579, p. 788.) Another court has declared that the act applies to informal collective acquisition and exchange of facts before a decision is reached. (Rowen v. Santa Clara Unified School Dist., supra, 121 Cal.App.3d at p. 234 [act prohibits closed session of school board to consider qualifications of real estate agents before public session at which agents would receive contract to dispose of public property].)" (Roberts, supra, 5 Cal.4th at p. 376, certain italics added.)

In sum, it is collective decisionmaking by a legislative body, not the solitary decisionmaking of an individual public official, which is subject to the Brown Act.

b. No collective deliberations in approval of proposed SPAs.

As set forth above, proposed SPAs are individually scrutinized by the Board's Executive Officer, County Counsel, Auditor–Controller and ultimately by the County CEO, and the approval of all four officials is required. However, the four signatories do not collectively decide to approve an SPA. Rather, a proposed SPA is reviewed in sequence by the four signatories, for issues within each one's purview. The Brown Act only applies to meetings of legislative bodies. (Gov.Code, §§ 54952.2, 54953.) The four SPA signatories do not constitute a legislative body and do not deliberate collectively in approving a SPA. Therefore, Plaintiff's Brown Act claim is meritless.

Of course, "the intent of the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement. (See, e.g., Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d at p. 102; 65 Ops.Cal.Atty.Gen. 63, 65 (1982).)" (Roberts, supra, 5 Cal.4th at pp. 376–377.) Stockton held "the alleged participation by defendants, a majority of the legislative body of the redevelopment agency, in a series of one-to-one nonpublic and unnoticed telephone conversations with the agency's attorney for the commonly agreed purpose of collectively deciding to approve the transfer of ownership in redevelopment project property constitutes a 'meeting' at which 'action' was taken in violation of the Brown Act." (Stockton, supra, 171 Cal.App.3d at p. 105.)

Here, unlike Stockton, there is no end run around the Brown Act. The four SPA signatories, in sequence, each make their own determination with respect to a proposed SPA. Because the SPA approval process does not involve collective deliberation, the concerns presented in Stockton are absent.

5. No merit to claim the Board improperly delegated its authority to enter into SPAs.

Plaintiff contends the Board is prohibited from delegating its authority under Government Code section 26227 to appropriate and spend funds for social services, or alternatively, that the delegations lack adequate safeguards and guidelines. The arguments are unavailing.

a. Government Code authorizes delegation of authority by Board.

Plaintiff contends Government Code section 26227 prohibits the Board from delegating its authority with respect to SPAs because the statute provides, "The board of supervisors of any county may appropriate and expend money . to meet the social needs of the population." (Italics added.) However, nothing in Government Code section 26227 prohibits a board of supervisors from delegating its contracting authority with respect to SPAs.

Moreover, Government Code section 23005 states: "A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law." (Italics added.)

We conclude the Government Code permits a board of supervisors to delegate its authority to enter into SPAs with recipient social service organizations.

b. A legislative body may delegate administrative authority.

Moreover, delegation by legislative bodies is essential to the basic ability of government to function. "As long ago as 1917 [the Supreme Court] recognized that legislative bodies have neither the resources nor the expertise to deal adequately with every minor question potentially within their jurisdiction. (Kugler v. Yocum (1968) 69 Cal.2d 371, 383 (Kugler), citing Gaylord v. City of Pasadena (1917) 175 Cal. 433, 436.)

In 1937, the Supreme Court observed, " ' "The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws." ' " (Stanislaus Co. etc. Assn. v. Stanislaus (1937) 8 Cal.2d 378, 390.) Only "in the event of a total abdication of [legislative] power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision." (Kugler, supra, 69 Cal.2d at p. 384, italics added.)

The nondelegation doctrine is " 'rooted in the principle of separation of powers that underlies our tripartite system of Government.' " (Samples v. Brown (2007) 146 Cal.App.4th 787, 804.) An unconstitutional delegation of legislative power occurs when a legislative body confers upon an administrative agency unrestricted authority to make fundamental policy decisions. (Ibid.)

The nondelegation doctrine serves "to assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] . accompanied by safeguards adequate to prevent its abuse.' [Citations.] This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (Kugler, supra,69 Cal.2d at pp. 376–377.) [2]

Thus, the real issue is not whether the Board can lawfully delegate its authority to execute SPAs to the County CEO, but whether, in doing so, the Board has retained sufficient power and has established adequate safeguards.

c. The Board's retention of control over fundamental policy decisions.

The approval of a county budget is a fundamental legislative function and the power and obligation to enact a county's budget is vested by law in the board of supervisors. (County of Butte v. Superior Court (1985) 176 Cal.App.3d 693, 698, citing Gov.Code, § 29088.)

In contrast, the execution of SPAs with social service providers, utilizing funds which have been appropriated to the EBA, is not a fundamental policy decision. The "fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme [does not] render the legislation invalid as an unlawful delegation." (Kugler, supra, 69 Cal.2d at pp. 379–380.)

Here, the Board has retained its budgeting authority. There has been no delegation in that regard. The Board has delegated to the County CEO only its authority to execute SPAs with social service providers, using funds which the Board already has appropriated to the EBA.

Further, the Board expressly retained authority to modify or rescind its delegation of SPA authority to the County CEO. At the inception in 1990, the Board specified the delegation of SPA authority would remain in place "[u]ntil otherwise ordered by the Board." Thereafter, in 1992, the Board directed that the "previously delegated contracting authority shall be exercised in the future only when countersigned by the Auditor–Controller and the Executive Officer of the Board."

Clearly, there has been no "total abdication" by the Board of its legislative power. (Kugler, supra, 69 Cal.2d at p. 384.)

d. The SPA approval process has adequate safeguards.

The language of the original delegation in 1990 authorized the then CAO to enter into SPA agreements only "when such programs are to meet the social needs of the population of the County, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons." This language is consistent with Government Code section 26227, which gives the Board the authority to appropriate and spend funds for social service programs for county residents.

In 1991, new guidelines were added, providing, inter alia, that no more than 20 percent of the recipient organization's budget could be spent on administrative expenses. The following year, as indicated, the Board further required that SPAs also be signed by the Auditor–Controller and Board's Executive Officer.

Moreover, each proposed SPA undergoes multiple layers of scrutiny. The SPA process begins with requests from funding from the offices of the five individual Supervisors. After the Board's Executive Officer receives the requests, it analyzes the request and conducts research to determine whether fulfilling the request would serve a social need of County residents. If the Board's Executive Officer so finds, that office prepares the agreement and forwards it to County Counsel for its review and signature. County Counsel then reviews the proposed SPA for legal compliance. The SPA also requires approval by the Auditor–Controller. Once those approvals have been obtained, the Board's Executive Officer executes the proposed SPA. Thereafter, the SPA is transmitted to the County CEO for final approval. Once SPAs are approved and funded they are posted online on the County's website, on a quarterly basis.

Clearly, the County has put in place "an effective mechanism to assure the proper implementation of its policy decisions." (Kugler, supra, 69 Cal.2d at p. 377.)

In sum, we conclude the Board properly delegated to the County CEO its authority to enter into SPAs with social service providers.[3]

6. No merit to Plaintiff's cause of action for waste and related arguments.

A taxpayer may, in his or her representative capacity, sue concerning fraud, collusion, ultra vires, or a failure on the part of the governmental body to perform a duty specifically enjoined. (Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1046.) "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." (Code Civ. Proc., § 526a.)

As the trial court found, the gravamen of Plaintiff's waste claim appears to be that every single expenditure of SPA funds constitutes waste because the County failed to comply with the Brown Act. Given our conclusion the SPA approval process is not subject to the Brown Act, the waste claim, insofar as it is predicated on alleged violations of the Brown Act, is meritless.

Likewise, to the extent Plaintiff's waste claim is predicated on a theory of improper delegation by the Board of SPA authority to the County CEO, the claim is meritless.

The appellant's opening brief also lists, without discussion, 13 other legal theories as a basis for his waste claim, and faults the County for failing to dispose of each of those theories on its motion for summary judgment. The theories of illegality include: violation of the County Budget Act (Gov.Code, § 29000 et seq.); State Controller Regulations "State of California – Accounting Standards and Procedures for Counties"; the First Amendment to the United States Constitution; Generally Accepted Accounting Principles; and the Governing Accounting Standards Board standards. "On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . '[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.' [Citation.]" (Claudio v. Regents of University of California (2005) 134 Cal.App.4th 224, 230.)

Further, Plaintiff's arguments near the end of his opening brief, pertaining to burden shifting on summary judgment and other issues, are not properly developed and require no discussion.

7. Plaintiff's contention the trial court erred in denying his motion for catalyst attorney fees is not properly before this court; because the postjudgment order was not appealed, it is final and no longer reviewable.

Lastly, Plaintiff contends the trial court erred in denying his motion for $1,949,606 in attorney fees pursuant to the catalyst theory.[4] This contention is not properly before us because Plaintiff did not appeal the postjudgment order denying his attorney fee motion.

"A postjudgment order awarding [or denying] attorney fees is separately appealable. (Code Civ. Proc., § 904.1, subd. (a)(2); Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal.App.3d 35, 46.) The failure to appeal an appealable order ordinarily deprives the appellate court of jurisdiction to review the order. (Praszker, at p. 46.) However, when the judgment awards attorney fees but does not determine the amount, the judgment is deemed to subsume the postjudgment order determining the amount awarded, and an appeal from the judgment encompasses the postjudgment order. (Grant v. List & Lathrop (1992) 2 Cal.App.4th 993, 998.)" (R.P. Richards, Inc. v. Chartered Construction Corp. (2000) 83 Cal.App.4th 146, 158; see generally, 4 Cal. Jur.3d (2014) Appellate Review, § 86.)

Here, the pertinent chronology is as follows.

On November 5, 2012, following the grant of summary judgment in favor of the County, the trial court entered judgment for the County and awarded the County costs in the amount of $21,152.01, but denied the County any recovery of attorney fees.

On January 3, 2013, Plaintiff filed a timely notice of appeal, specifying the November 5, 2012 judgment.

On January 11, 2013, after Plaintiff filed notice of appeal from the judgment, Plaintiff filed the subject motion for catalyst attorney fees.

On March 15, 2013, the trial court heard and denied Plaintiff's motion for attorney fees.

Plaintiff did not file notice of appeal from the March 15, 2013 postjudgment order denying his motion for attorney fees. However, Plaintiff asserts the March 15, 2013 order is properly before this court because his notice of appeal from the November 5, 2012 judgment embraces the March 15, 2013 order. He is mistaken. The November 5, 2012 judgment did not provide for attorney fees to Plaintiff in an amount to be determined later. In fact, the judgment did not award anything to Plaintiff, who was the losing party. To the contrary, the judgment, which was in favor of the County, awarded the County costs of suit in the amount of $21,152, but denied the County any recovery of attorney fees. Because the November 5, 2012 judgment did not award attorney fees to Plaintiff in an amount to be determined later, the January 3, 2013 notice of appeal from said judgment cannot be construed to embrace the March 15, 2013 order.

In sum, the March 15, 2013 order was separately appealable, was not appealed, and is long since final. Plaintiff's failure to appeal said order eliminates the denial of catalyst attorney fees as an issue on appeal.[5]

DISPOSITION

The November 5, 2012 judgment is affirmed. Respondents shall recover their costs on appeal.

FOOTNOTES

1. Government Code section 26227 provides in relevant part: "The board of supervisors of any county may appropriate and expend money from the general fund of the county to establish county programs or to fund other programs deemed by the board of supervisors to be necessary to meet the social needs of the population of the county, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education, and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons. [¶] The board of supervisors may contract with other public agencies or private agencies or individuals to operate those programs which the board of supervisors determines will serve public purposes."

2. In Kugler, the issue presented was whether an initiative ordinance providing for parity of firefighters' salaries constituted an improper delegation of legislative power. (69 Cal.2d at pp. 373–374.) "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation. Thus the decision on the legislative policy has not been delegated; the implementation of the policy by reference to Los Angeles salaries is not the delegation of it." (Id. at p. 377.)

3. It is unnecessary to address the County's argument the Supervisors have legislative immunity against Plaintiff's claim challenging the SPA delegation.

4. "Under the catalyst theory, attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation. In order to be eligible for attorney fees under [Code of Civil Procedure] section 1021.5, a plaintiff must not only be a catalyst to defendant's changed behavior, but the lawsuit must have some merit . and the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." (Graham v. DaimlerChrysler Corp., supra, 34 Cal.4th at pp. 560–561.) Plaintiff contended he was a catalyst to the County's changed behavior in that, inter alia, two of the five Supervisors now place their SPAs in excess of $1,000 on the Board's agenda for Brown Act approval.

5. Plaintiff asserts the parties "agreed" through counsel that an additional notice of appeal was not necessary. However, the timely filing of a notice of appeal is a jurisdictional prerequisite (Silverbrand v. County of Los Angeles (2009) 46 Cal.4th 106, 113) and appellate jurisdiction cannot be conferred by the consent or stipulation of the parties (Estate of Hanley (1943) 23 Cal.2d 120, 123), making any purported agreement between the parties an irrelevancy.Moreover, the record cited by Plaintiff does not reflect such an agreement. Rather, at a hearing on February 8, 2013, the trial court stated, "there are two or three different ways that are employed by different parties in these cases amending judgments, filing a separate appeal on issues related to such things as attorney's fees and costs, and then asking the Court of Appeal to consolidate. I have no idea. So I can't give you any guidance on it." (Emphasis added.) The attorney for the County then added "We'll discuss it and I think between the two of us, we can figure out how to do it so it's sensible for all." In sum, leaving aside the fact that parties cannot confer jurisdiction on the Court of Appeal by stipulation, the record does not reflect an agreement between the parties that a separate notice of appeal from the March 15, 2013 order was unnecessary.

KLEIN, P. J.

We concur: KITCHING, J. ALDRICH, J.

KUGLER v. YOCUM

Docket No. L.A. 29549.

69 Cal.2d 371 (1968)

445 P.2d 303

71 Cal. Rptr. 687

CAROL J. KUGLER et al., Plaintiffs and Respondents, v. NORMA YOCUM et al., Defendants and Appellants.

Supreme Court of California. In Bank.

October 1, 1968.

Attorney(s) appearing for the Case

Don D. Bercu, City Attorney, for Defendants and Appellants.

Weinstein, Shelley & Proctor, Weinstein & Shelley and Robert C. Proctor, Jr., for Plaintiffs and Respondents.

Charles P. Scully as Amicus Curiae on behalf of Plaintiffs and Respondents.

TOBRINER, J.

We hold here that an ordinance which decrees that the salaries of certain city employees shall be no less than the average of those of an adjoining city and those of an adjoining county does not unlawfully delegate legislative power because the power to legislate has been expressed and exerted in the enactment of the policy of such parity; future adjustment in salaries pursuant to that formula is no more than the automatic execution of that policy; that process is protected from any abusive or arbitrary consequences by its own inherent safeguards.

Plaintiffs, residents of the City of Alhambra, bring mandate to compel defendants, as members of the city council of that city, either to adopt a proposed initiative ordinance or to call a special citywide election to vote upon it. Although plaintiffs had obtained the required number of signatures to secure the election, the city council refused to hold it; the council likewise rejected the proposed ordinance.

The proposed ordinance reads, in relevant part, as follows: "Except as otherwise provided for herein the monthly salaries of the members of the Fire Department in each classification shall not be less than an amount computed as follows: Beginning January 1, 1965, and the first day of each succeeding year thereafter, the City Manager of the City of Alhambra shall determine the then existing monthly salaries of each classification of like or comparable grades or ranks of the Fire Departments of the City of Los Angeles and the County of Los Angeles. The average of the salaries for the comparable grades or ranks of the members of the Fire Departments of the City of Los Angeles and the County of Los Angeles shall be the minimum salaries payable by the City of Alhambra to the members of its Fire Department of the same or comparable

[69 Cal.2d 374]

grades or ranks." Thus the proposed ordinance provides that in setting the salaries of the firemen, the council could not fix them at an amount less than

the average of the salaries received by the firemen of the City of Los Angeles and the salaries received by the firemen of the County of Los Angeles.

After the council's refusal to submit the ordinance to the electorate plaintiffs brought this action in the Superior Court of Los Angeles County to compel defendants to do so. That court found that plaintiffs had followed the proper procedure, [1] that the proposed ordinance was a proper subject for the exercise of the initiative power of the Alhambra electors, and that, if enacted, the ordinance would not improperly delegate the council's legislative power. Accordingly, the court issued a peremptory writ of mandate compelling the defendants to call a special election for consideration of the ordinance. Defendants have appealed from this judgment.

[1] The trial court correctly concluded that the subject matter of the proposed ordinance, that is the salaries of city firemen, falls within the electorate's initiative power. The city charter provides that the "Council ... shall have the power to... establish ... the amount of [the fire division's] ... salaries" (§ 81) and that the "electors ... shall have the right to ... adopt ... any ordinance which the council might enact" (§ 176). Since in dealing with wage rates, the city council acts in its "legislative" rather than its "administrative" capacity (*Spencer* v. *City of Alhambra* (1941) 44 Cal.App.2d 75, 77 [111 P.2d 910]; *Collins* v. *City & County of San Francisco* (1952) 112 Cal.App.2d 719, 730 [247 P.2d 362]; *City & County of San Francisco* v. *Boyd* (1943) 22 Cal.2d 685 [140 P.2d 666]), wage rates are a proper subject for adoption as an ordinance by a city council and, accordingly, pursuant to section 176, for enactment by an initiative.

[69 Cal.2d 375]

[2] [See fn. 2] Defendant's main contention rests upon the proposition that the enactment of the ordinance by either the council or the electorate would constitute an unlawful delegation of legislative power. [2] They point out that no representative of Alhambra can either predict or control the exact wage rates that will be established in the City or the County of Los Angeles. Accordingly, they argue, the proposed ordinance, in fixing the Los Angeles rates as the minimum for Alhambra firemen's salaries, would unlawfully delegate legislative power to those parties who establish salaries for Los Angeles firemen.

[3a] At the outset, we note that the doctrine prohibiting delegation of legislative power, although much criticized as applied (see, e.g., Witkin, Summary of Cal. Law (7th ed. 1960) p. 1834; 1 Davis, Administrative Law Treatise (1958) § 2.01), is well established in California. "The power ... to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it...." (*Dougherty* v. *Austin* (1892) 94 Cal. 601, 606-607 [28 P. 834, 29 P. 1092, 16 L.R.A. 161]; see also *People* v. *Johnson* (1892) 95 Cal. 471, 475 [31 P. 611]; *People* v. *Wheeler* (1902) 136 Cal. 652, 655 [69 P. 435]; *Coulter* v. *Pool* (1921) 187 Cal. 181, 190 [201 P. 120]; *Duskin* v. *State Board of Dry Cleaners* (1962) 58 Cal.2d 155, 161-162 [23 Cal.Rptr. 404, 373 P.2d 468].) Moreover, the same doctrine precludes delegation of the legislative powers of a city (*City of Redwood City* v. *Moore* (1965) 231 Cal.App.2d 563, 576 [42 Cal.Rptr. 72], and cases cited therein; see generally 2 McQuillin, The Law of Municipal Corporations (3d ed. 1966) § 10.39, p. 843, and cases cited at fn. 63).

Several equally well established principles, however, serve to limit the scope of the doctrine proscribing delegations of legislative power. For example, legislative power may properly

[69 Cal.2d 376]

be delegated if channeled by a sufficient standard. "It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature...." (*Dominguez Land Corp.* v. *Daugherty* (1925) 196 Cal. 468, 484 [238 P. 703]; see also *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal.2d 436, 448 [254 P.2d 29]; Case Note (1959) 6 U.C.L.A.L.Rev. 312 and cases cited therein.)

A related doctrine holds: "The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the `power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect...." (*First Industrial Loan Co.* v. *Daugherty* (1945) 26 Cal.2d 545, 549 [159 P.2d 921].) Similarly, the cases establish that "[w]hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." (*Wheeler* v. *Gregg* (1949) 90 Cal.App.2d 348, 363 [203 P.2d 37].)

We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that "truly fundamental issues [will] be resolved by the Legislature" and that a "grant of authority [is] ... accompanied by safeguards adequate to prevent its abuse." (*Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 369 [55 Cal.Rptr. 23, 420 P.2d 735]; see also Jaffe, *An Essay on Delegation of Legislative Power* (1947) 47 Colum. L.Rev. 359, 561; 1 Davis, Administrative Law Treatise, supra, § 2.15; *Gaylord* v. *City of Pasadena* (1917) 175 Cal. 433, 437 [166 P. 348]; *Warren* v. *Marion County* (1960) 222 Or. 307, 313-315 [353 P.2d 257]; *Lien* v. *City of Ketchikan* (Alaska 1963) 383 P.2d 721, 723-724; *Group Health Ins.* v. *Howell* (1963) 40 N.J. 436, 445, 447 [193 A.2d 103]; *Heath* v. *Mayor & City Council of Baltimore* (1946) 187 Md. 296, 303 [49 A.2d 799] (dictum).) [4a] This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to

[69 Cal.2d 377]

establish an effective mechanism to assure the proper implementation of its policy decisions.

[5a] In the instant case, the adoption of the proposed ordinance, either through promulgation by the Alhambra City Council or by initiative, will constitute the legislative body's resolution of the "fundamental issue." Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the "fundamental issue"; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation. Thus the decision on the legislative policy has not been delegated; the implementation of the policy by reference to Los Angeles salaries is not the delegation of it.

Whatever the motivation for the legislative policy, Alhambra will have rendered and pronounced it. The policy may be based upon the recognition that Alhambra could not recruit firemen at *lesser* rates than those paid in the adjoining County and City of Los Angeles. The policy may rest upon the fact that Los Angeles possesses a superior ability to canvass comparable wages for firemen and perform the research necessary to reach a fair salary decision. In any event, Alhambra will have reached the fundamental decision: the policy of parity with Los Angeles.

Alhambra's formula for salary adjustments based upon the Los Angeles rates does not differ from other formulae, recognized as lawful, that tie adjustments in compensation for employees into future events which do not lie within the power or control of the legislative body. The elemental illustration of such a formula is that which relates a wage adjustment to future dates or time periods for periodic adjustments. Moreover, adjustment

may be linked to the cost of living, to average earnings or prevailing wages of a comparable occupation, to prevailing wages or average earnings generally, or to any number of such desiderata. The fact that the formula operates upon eventualities which may lie outside the control of the legislative body and within the control of other persons does not convert the legislative action into an unlawful delegation. [3]

In upholding the prevailing wage statutes this court has recognized that a statute, which set minimum wages for contractors

[69 Cal.2d 378]

performing public work as those "prevailing" in the locality, did not "delegate" legislative power. In *Metropolitan Water Dist.* v. *Whitsett* (1932) 215 Cal. 400 [10 P.2d 751], this court rejected a variety of attacks on the statutory provision [4] that "Not less than the general prevailing rate of *per diem* wages for work of a similar character in the locality in which the work is performed ... shall be paid all laborers, workmen and mechanics employed by or on behalf of the state of California." (P. 404.) Petitioner contended "(1) that said act is void for uncertainty ... and (3) that the act makes an invalid delegation of legislative power." (P. 406.) The court points out that "The petitioner concedes that the object to be accomplished may be directed by the legislature to be carried into effect by subordinate officers and bodies having better opportunities for accomplishing the object, or doing the thing understandingly, and that the legislature may delegate the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend...." (P. 418.) Holding that the statute has not "delegated to the board power to make law" (p. 419), the court stated: "Unless the power thus granted to fix the salary or wages of its own employees is an unlawful delegation of power to the board, and we do not intimate that it is, or that it would be conceded by the petitioner to be unlawful, the power granted by the statute under attack to fix a minimum wage for the employees of contractors with the district would not be an unlawful delegation." (P. 419.)

Although the prevailing wage statute, like the questioned ordinance, entails the alleged dual dangers which defendants contemplate here: that the legislative body will neither know in advance nor control the level of the "general prevailing rate of *per diem* wages," this court did not strike down the statute on that ground but sustained it. The *Whitsett* decision

[69 Cal.2d 379]

has an even deeper significance in the present matter because in substance it applies to the kind of enactment we ponder here. The instant ordinance in essence adopts the "prevailing" rate for firemen in the larger locality which Alhambra adjoins. Although such a rate is fixed by a governmental rather than a private agency, that factor is an inevitable one, since firemen are employed by public and not private entities, and it surely cannot serve to render one enactment an unlawful delegation of legislative power and the other not. Hence *Whitsett,* in substance, disposes of the present issue. [5]

Decisions in other states likewise sustain the power of the legislative body to base compensation for the involved employees upon comparable prevailing wages. In *Baughn* v. *Gorrell & Riley* (1949) 311 Ky. 537 [224 S.W.2d 436], for example, a statute requiring the board of education to ascertain the prevailing rates of wages and pay not less than this rate on public works projects was attacked as an unlawful delegation of legislative power to those who, cumulatively, "set" the prevailing rate. In rejecting this contention, the court said: "In the eyes of the Legislature, wages paid under agreements between labor organizations and employers constitute a fair criteria [*sic*] of reasonable compensation for different types of work. It will be noted these wages are agreed upon as the result of bargaining between labor on one side and the employer on the other ... [T]he competitive market will tend to establish a fair wage." (311 Ky. at p. 541.) The court concluded that "the Legislature has not delegated the exercise of its legislative function to private persons or interests." (311 Ky. at p. 542.) [6]

[4b] Nor does the fact that a third party, whether private or governmental, performs some role in the application and

[69 Cal.2d 380]

implementation of an established legislative scheme render the legislation invalid as an unlawful delegation. Thus, in *Brock* v. *Superior Court* (1937) 9 Cal.2d 291, [71 P.2d 209, 114 A.L.R. 127], a statute precluding the California Director of Agriculture from entering into a marketing agreement without the assent of a percentage of persons engaged in the industry was attacked as an unlawful delegation to those private persons. In rejecting this contention, this coutr said: "a statute is not invalid merely because it provides for consent of interested persons to the contemplated regulation." (9 Cal.2d at p. 299.) [7]

Furthermore, we find here, as we said in *Wilke & Holzheiser,*

[69 Cal.2d 381]

Inc. v. *Department of Alcoholic Beverage Control, supra,* 65 Cal.2d 349, 369, that the "grant of authority [is] ... accompanied by safeguards adequate to prevent its abuse." [6] As Professor Davis has stated, "The need is usually not for standards but for safeguards.... [T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards...." (1 Davis, Administrative Law Treatise, *supra,* § 2.15.) The requirement for "standards" is but one method for the effective implementation of the legislative policy decision; the requirement possesses no sacrosanct quality in itself so long as its purpose may otherwise be assured.

The Oregon case of *Warren* v. *Marion County, supra,* 222 Or. 307, illustrates the point that safeguards inherent in a statute which protect against its arbitrary exploitation obviate the need for standards. [8] In that case, the following ordinance was attacked as an invalid delegation of legislative power because it failed to provide sufficient standards: "ORS215.108 *Building code ordinance.* (1) The governing body of a county may adopt ordinances establishing building codes for the county, or any portion thereof, in conformity with the standards set forth in ORS 215.104.... (2) Any governing body of a county which adopts ordinances establishing building codes shall by ordinance provide procedures for appeals from decisions made under the authority of the ordinances establishing building codes." In rejecting this challenge, the Oregon Supreme Court stated: "It is now apparent that the requirement of expressed standards has, in most instances, been little more than a judicial fetish for legislative language, the recitation of which provides no additional safeguards to persons affected by the exercise of the delegated authority.... [T]he important consideration is not whether the statute

[69 Cal.2d 382]

delegating the power expresses *standards,* but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action." (222 Ore. at p. 314.) The court concluded: "We believe that the appeals procedure required by ORS 215.108(2) provided a sufficient safeguard to persons wishing to contest administrative action in the enforcement of the code." (P. 315.)

[5b] The proposed Alhambra ordinance contains built-in and automatic protections that serve as safeguards against exploitive consequences from the operation of the proposed ordinance. Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra. Los Angeles as an employer will be motivated to avoid the incurrence of an excessive wage scale; the interplay of competitive economic forces and bargaining power will tend to settle the wages at a realistic level. As we noted in an analogous area involving the establishment of prices: "the Legislature could reasonably assume that competition ... coupled with ... bargaining power ... would provide a safeguard against excessive prices. In all probability, that safeguard is at least as effective as any which the Legislature could be expected to provide by promulgating explicit standards...." (*Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 65 Cal.2d 349, 367-368.)

The criteria set up by the proposed enactment reasonably relate to the fulfillment of the legislative purposes. If an external private or governmental body will be involved in the application of the legislative scheme, it must be an agency that the Legislature can expect will reasonably perform its function. If, for instance, the statute provides that salaries are to be adjusted to future changes in the cost of living, the legislation must designate a body, such as the United States Department of Labor, which may be expected to reasonably perform the function of ascertaining the cost of living. Such a qualification to the operation of the statute parallels that placed upon the ministerial officer who is designated to formulate the rules or regulations under a statute which expresses the legislative policy in the matter. Thus the officer cannot promulgate a rule or regulation "which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." (*First Industrial Loan Co.* v. *Daugherty, supra,* 26 Cal.2d 545, 550.)

Applying these criteria to the instant situation, we conclude

[69 Cal.2d 383]

that the City of Alhambra could properly expect that the appropriate bodies of the City of Los Angeles and the County of Los Angeles would reasonably discharge their obligations. Once Alhambra establishes the policy of parity between the Alhambra and the Los Angeles wages, the fact that the Los Angeles governing bodies participate in setting Los Angeles salaries does not defeat the Alhambra legislation since Alhambra could expect that the authorities would reasonably investigate, negotiate, and finally determine such salaries. Thus the designated method appropriately attains the purposes of the ordinance.

Indeed, the method comports with the practical necessities of city governments. As an effort both to achieve fair wage rates and to compete effectively for competent employees, many city governments have based employee wages to some degree on rates paid in surrounding communities. (For discussion of similar provisions in other cities, see, e.g., *San Bernardino Fire & Police Protective League* v. *City of San Bernardino, supra,* 199 Cal.App.2d 401; *Walker* v. *County of Los Angeles, supra,* 55 Cal.2d 626; *Parker* v. *Bowron* (1953) 40 Cal.2d 344 [254 P.2d 6]; *Adams* v. *Wolff, supra,* 84 Cal.App.2d 435; see, for instance, Culver City Ordinance No. 1931/2.) Reliance on rates in other communities, moreover, obviates any need for the expense, perhaps oppressive in smaller communities, of surveys or other expert assistance in determining appropriate wage scales.

In sum, the ordinance in question, if enacted, would not unlawfully delegate legislative power. As long ago as 1917 this court recognized that legislative bodies have neither the resources nor the expertise to deal adequately with every minor question potentially within their jurisdiction. "Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs — national, state, and municipal — and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many *quasi*-legislative and *quasi*-judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done

[69 Cal.2d 384]

at all...." (*Gaylord* v. *City of Pasadena, supra,* 175 Cal. 433, 436.)

The complexity of government in the span of a half century since that analysis has illustrated its verity. Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. [3b] Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an "unlawful delegation," and then only to preserve the representative character of the process of reaching legislative decision.

The judgment of the trial court granting a peremptory writ of mandate is affirmed.

Traynor, C.J., Peters, J., Mosk, J., and Sullivan, J., concurred.

BURKE, J.

I dissent. If by charter amendment the people of Alhambra undertook to establish a minimum wage for members of the Fire Department of the City of Alhambra by reference to an average (to be computed periodically) of the wages generally prevailing for work of a similar character in, for example, all of the cities in the same county (County of Los Angeles) or all of the cities and unincorporated areas within a more limited geographical area, or even of a substantial number of such communities of comparable size and with similar fire problems, then I could agree that under the prevailing wage cases there would be no question of unlawful delegation of legislative authority. As an amendment to the organic law of the city this would be a lawful limitation upon the exercise of the legislative power of the local legislative body and also upon the initiative power of the city's electorate. But this is not what is attempted here. The city charter sets forth how the legislative power of the city is to be exercised and places equal power to legislate in the council and the electorate; what one may do so may the other. But here, one, the electorate by initiative ordinance, seeks to limit the *future* exercise of power by the other and this violates fundamental concepts of municipal law. Such a limitation upon future actions by the council or, if attempted by the council, upon future actions by the electorate, is void and could only be effected by an amendment of the city's organic law — the city charter. The latter may be amended only in the manner prescribed in the Constitution.

[69 Cal.2d 385]

Furthermore, when an ordinance selects from the community only two public agencies and specifies that the average wage paid by those two agencies from year to year shall be the minimum wage to be paid to Alhambra firemen, there has plainly been an invalid delegation to the legislative bodies of those agencies of the authority vested by Alhambra's Charter in the Alhambra City Council to "establish" the salaries of the Alhambra Fire Department. That such a delegation of legislative power and responsibility is illegal was the holding of the court in *Mitchell* v. *Walker,* 140 Cal.App.2d 239 [295 P.2d 90], in which case this court denied a hearing. The majority opinion erroneously, I submit, disapproves the *Walker* decision (fn. 6, *ante,* pp. 379-380).

The ordinance under consideration here would strip from Alhambra's City Council its discretion to determine one end of the wage scale (the minimum), and delegate that discretion to the governing bodies of two outside public agencies which are entirely without responsibility to the City of Alhambra, its employees, voters, or taxpayers. This seems to me to offend democratic principles in addition to the basic requirements of the city's charter. The record affords no basis whatever for the assumption indulged in by the majority that the average wage paid by the two handpicked agencies represents the prevailing wage in the general area. Obviously, the size of a city, the types of structures (residential, industrial, multi-dwellings), the heights of its buildings, the classes of fire equipment, living conditions, etc., vary to a great degree within a geographical area the size of Los Angeles County and wages may vary to a considerable degree depending upon local conditions. Furthermore, the tax resources which a small city, such as Alhambra (population 64,500), has with which to cope with such problems may be substantially different from those of Los Angeles (population 2,743,500),

Under our system of government such inquiries and policy determinations are for the duly elected and responsible officials of the particular city involved and not for this court.

In my view, the Alhambra City Council itself could not validly delegate its authority and responsibilities in the manner here attempted by the proposed ordinance. Since under section 176 of the Alhambra City Charter the electorate purports to exercise directly by means of the initiative only such legislative action as the council itself could lawfully enact, the ordinance in question was properly refused submission to the voters. No one suggests that the initiative may be used to

[69 Cal.2d 386]

enact legislation which the council itself could not enact. It follows that the judgment granting the writ should be reversed.

McComb, J., concurred.

FootNotes

1. The portions of the charter relevant to the procedure provide as follows: Section 81: "The council, subject to the provisions of this Charter, shall have power to organize the fire division and ... establish the number of its members and the amount of their salaries...." Section 176: "The electors of the city shall have the right to propose, by petition, and to adopt at the polls, any ordinance which the council might enact." Section 179: "Upon presentation to the council of such petition,... it must either adopt and enact such measure without alteration, or submit the same to the electorate at the next city election occurring subsequent to sixty days after the filing of said petition. But if said petition requests the calling of a special election and is signed and verified as herein provided and by electors in number equal to twenty-five per cent of said vote, then such ordinance, if not so adopted and enacted by the council, must be submitted to the electorate at a special election to be called within sixty days from the presentation of such petition."

2. Defendants urge a somewhat indirect argument against the validity of the proposed ordinance based upon an attempted distinction between the powers of the city council and those of the electorate. They assert that if the voters approved the ordinance, the city council, under the Alhambra Charter, would never be able to repeal it; only the electorate can repeal an ordinance enacted by initiative. The unavailability of a specific method of repeal of an ordinance, however, does not affect the type or scope of an ordinance that the electorate in the first instance can enact. Section 176 of the city charter governs the latter question. If the policy underlying the rule that the city council cannot undo what the electorate has voted to do by initiative is deemed unwise, the remedy lies in either a frontal attack on that rule or a formal amendment of section 176 to narrow the electorate's initiative power. Accordingly, we reject defendants' indirect attempt to subvert section 176.

3. The proposed Alhambra ordinance provides merely for a finding of the average Los Angeles earnings before the Alhambra council fixes the salaries. The Alhambra council thereafter decides what the salaries will be; it determines whether higher rates will be paid in any or all of the classifications. The Alhambra city manager reports to the council his findings upon the average Los Angeles rates; these serve only as a basement for the council's action; the council itself sets the salaries; the council exercises, and does not delegate, legislative power.

4. The current counterpart of the statute involved in *Whitsett* is Labor Code section 1773. Although this court has not directly confronted an attack on the validity of section 1773, we have implicitly sustained it. (*Franklin* v. *City of Riverside* (1962) 58 Cal.2d 114 [23 Cal.Rptr. 401, 373 P.2d 465]; contra, *Parrack* v. *City of Phoenix* (1959) 86 Ariz. 88 [340 P.2d 997]; *Adams* v. *City of Albuquerque* (1957) 62 N.M. 208 [307 P.2d 792].) Moreover, the federal Walsh-Healey Act (41 U.S.C. § 35(b)) contains the same prevailing wage provision for contracts with the federal government; its validity has been upheld. (*Perkins* v. *Lukens Steel Co.* (1940) 310 U.S. 113 [84 L.Ed. 1108, 60 S.Ct. 869].)

5. *Walker* v. *County of Los Angeles* (1961) 55 Cal.2d 626 [12 Cal.Rptr. 671, 361 P.2d 247], which involved a county requirement that employees receive a salary at least equal to that paid to comparable persons in private employment, makes the same point. We characterized the county board of supervisors' duty as a "fact-finding function ... in finally fixing the rate of compensation at or above the minimum coincident with the prevailing wage found" and stated that this fact-finding function "precede[s] ... the legislative act." (55 Cal.2d at p. 635; see also *San Bernardino Fire & Police Protective League* v. *City of San Bernardino* (1962) 199 Cal.App.2d 401, 416 [18 Cal.Rptr. 757].) That which "precedes legislative action" cannot literally constitute a delegation of the power to legislate.

6. The California cases of *In re Burke* (1923) 190 Cal. 326 [212 P. 193], and *Adams* v. *Wolff* (1948) 84 Cal.App.2d 435 [190 P.2d 665], cited by defendants, do not pass upon the present issue. *Burke* involves an attempted adoption of a future statute of another state; the court specifically reserves the point here at issue, as does *Wolff.* The cited case of *Mitchell* v. *Walker* (1956) 140 Cal.App.2d 239 [295 P.2d 90], does conflict with part of our ruling in the instant case, and to that extent it is disapproved.

In upholding the definition of prohibited drugs by future decision of a recognized private pharmaceutical institution, the Supreme Court of Wisconsin, in *State* v. *Wakeen* (1953) 263 Wis. 401, 411 [57 N.W.2d 364], held: "This is not a case of the *delegation* of legislative powers. The publications referred to in the statute are not published *in response* to any delegation of power, legislative or otherwise, by the statute. The compendia are published independently of the statute and not in response to it." (Italics added.) Similarly, in our case an independent, authoritative source determines the comparable Los Angeles rates, and such decision is made "independently of the statute and not in response to it." For other out-of-state cases, see *Crowley* v. *Thornbrough* (1956) 226 Ark. 768, and cases cited at page 774 [294 S.W.2d 62], and *State* ex rel. *Kirschner* v. *Urquhart* (1957) 50 Wn.2d 131 [310 P.2d 261]. See generally 1 Davis, Administrative Law Treatise, *supra,* § 2.14; Note (1934) 34 Colum.L.Rev. 1077, 1084-1086.

7. In *Currin* v. *Wallace* (1939) 306 U.S. 1 [83 L.Ed. 441, 59 S.Ct. 379], a similar challenge was levelled against the Tobacco Inspection Act of 1935, a statute authorizing the federal Secretary of Agriculture to designate markets to be regulated only if two-thirds of the growers affected favored such a designation. The Supreme Court upheld the act, noting that "[t]his is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution.... So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market `unless two-thirds of the growers voting favor it.' ... Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions." (306 U.S. at pp. 15-16 [83 L.Ed. at pp. 451-452]; see also *Parker* v. *Brown* (1943) 317 U.S. 341, 352 [87 L.Ed. 315, 326, 63 S.Ct. 307]; *Floresta, Inc.* v. *City Council* (1961) 190 Cal.App.2d

599, 610 fn. 4 [12 Cal.Rptr. 182] and cases cited therein.)

The private act of the producer in entering into a contract setting a price for the resale of his own brand is neither the performance of a legislative function nor the exercise of an unlawfully delegated power. (*Scoville Mfg. Co. v. Skaggs etc. Drug Stores* (1955) 45 Cal.2d 881 [291 P.2d 936]; see *Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 65 Cal.2d 349, 369.)

8. Other cases have also recognized that "standards" constitute merely one method, albeit the most common one, of assuring that the legislative body does not unlawfuly delegate its power. The New Jersey Supreme Court, in striking down a delegation to The Medical Society of New Jersey, stated: "We think such a power ... may not validly be delegated by the Legislature to a private body ... at least where the exercise of such power is not *accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action...."* (*Group Health Ins.* v. *Howell, supra,* 40 N.J. 436, 445.) (Italics added.) The Supreme Court of Maryland has asserted: "[A]n ordinance which delegates a part of the police power to a zoning board may be valid, even though it confers upon the board a certain discretion in the exercise of that power, provided that its discretion is sufficiently limited by rules and standards to protect the people against any arbitrary or unreasonable exercise of power." (*Heath* v. *Mayor & City Council of Baltimore, supra,* 187 Md. 296, 303 (dictum).)

33 Cal. 4th 1055, *; 95 P.3d 459, **;
17 Cal. Rptr. 3d 225, ***; 2004 Cal. LEXIS 7238

3 of 5 DOCUMENTS

BILL LOCKYER, as Attorney General, etc., Petitioner, v. CITY AND COUNTY OF SAN FRANCISCO et al., Respondents. BARBARA LEWIS et al., Petitioners, v. NANCY ALFARO, as County Clerk, etc., Respondent.

S122923, S122865

SUPREME COURT OF CALIFORNIA

33 Cal. 4th 1055; 95 P.3d 459; 17 Cal. Rptr. 3d 225; 2004 Cal. LEXIS 7238; 2004 Cal. Daily Op. Service 7342; 2004 Daily Journal DAR 9916

August 12, 2004, Filed

SUBSEQUENT HISTORY: Clarified by Lewis v. Alfaro, 2004 Cal. LEXIS 9064 (Cal., Sept. 15, 2004)
Later proceeding at Lockyer v. City & County of San Francisco, 2004 Cal. LEXIS 10498 (Cal., Oct. 26, 2004)
Costs and fees proceeding at, Motion denied by Lockyer v. City & County of San Francisco, Lewis v. Alfaro, 2005 Cal. LEXIS 1698 (Cal., Feb. 16, 2005)
Costs and fees proceeding at, Sub nomine at Lewis v. Alfaro, 2005 Cal. LEXIS 2678 (Cal., Mar. 7, 2005)

PRIOR HISTORY: Original Proceeding.

DISPOSITION: Writ of mandate issued compelling respondents to comply with the requirements and limitations of the current marriage statutes and to take particular corrective actions.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

The Attorney General and three taxpayer-residents of the City and County of San Francisco filed original proceedings in the Supreme Court, seeking writ relief and other relief, including a stay in lower court proceedings, after local public officials began issuing marriage licenses to and solemnizing and registering the marriages of same-sex couples. The officials took these actions after the mayor sent a letter to the county clerk expressing his belief that the state Constitution prohibits discrimination against same-sex couples with respect to marriage, and requesting that the county clerk determine what changes should be made to the forms and documents used for applying for and issuing marriage licenses so that they could be provided without regard to gender or sexual orientation. Although various state marriage statutes provide that forms used for marriage license applications, marriage licenses and the certificate of registry are those prescribed by the state Department of Health Services, and also restrict marriage to a couple consisting of a man and a woman, city officials changed the forms and issued marriage licenses to approximately 4,000 same-sex couples.

The Supreme Court issued a writ of mandate directing the officials to comply with the requirements and limitations of the current marriage statutes, in performing their ministerial duties under the statutes. The court stayed all proceedings in two lower court cases, but specified that the stay did not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes. The writ also directed the officials to take all necessary remedial steps to undo the continuing effects of their past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials were [*1056] void from their inception and of no legal effect. The court held that the city officials charged with the ministerial duty of enforcing the state marriage statutes exceeded their authority when, without any court having determined that the statutes were unconstitutional, they deliberately declined to enforce the statutes because each had determined or was of the opinion that the statutory requirement limiting marriage to a union between a man and a woman was unconstitutional. The oath to support and defend the Constitution required the city officials to act within the constraints of the constitutional system and not to disregard presumptively valid statutes. Because Fam. Code, § 300, clearly defines marriage as a personal relationship arising out of a civil contract between a man and a woman and the court held that it explicitly establishes that the existing same-sex marriages are void and invalid. The court held that any asserted invalidity of Fam. Code, § 300, was not so patent or clearly established that no reasonable official could believe it was constitutional. The court emphasized that the substantive question of the

constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman was not before it. Its decision was not intended, and should not be interpreted, to reflect any view on that issue. There did exist a clear and readily available means--a lawsuit brought by a same-sex couple who had been denied a license under existing statutes--to bring the constitutionality of the current marriage statutes before a court. The city could not plausibly justify its wholesale defiance of the applicable statutes by a desire to obtain a judicial ruling on the constitutional issue. (Opinion by George, C. J., with Baxter, Chin, Brown, and Moreno, JJ., concurring. Concurring opinion by Moreno, J. (see p. 1120). Concurring and dissenting opinion by Kennard, J. (see p. 1125). Concurring and dissenting opinion by Werdegar, J. (see p. 1133).)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 36--Distribution of Governmental Powers--Between Branches of Government--Doctrine of Separation of Powers.--Under the separation of powers doctrine, the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. However, the doctrine does not create an absolute or rigid division of functions.

(2) Constitutional Law § 38--Distribution of Governmental Powers--Executive Power--Ministerial Duty--No Authority to Disregard Statutory Mandate.--A local executive official charged with the ministerial duty of enforcing a duly [*1057] enacted statute generally has no authority to disregard the statutory mandate, based solely on the official's own determination that the statute is unconstitutional.

(3) Marriage § 8--Validity--Void Marriages--Same-sex Marriages--Authority to License Same-sex Marriages in Absence of Judicial Determination That Marriage Statutes Are Unconstitutional.--Absent a judicial determination that statutory provisions limiting marriage to a couple comprised of a man and a woman were unconstitutional, a county clerk and county recorder lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples. Consequently, marriages conducted between same-sex couples in violation of the applicable statutes were void and of no legal effect.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § § 57, 58, 110; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Husband and Wife, § § 38, 57A.]

(4) Marriage § 1--Regulation Solely Within the Province of the Legislature.--The Legislature has full control of the subject of marriage and may fix the conditions under which marital status may be created or terminated. The regulation of marriage and divorce is solely within the province of the Legislature, except as it may be restricted by the Constitution.

(5) Marriage § 7--Statutory Provisions--Validity.--Family Code § 300 clearly establishes that current California statutory law limits marriage to couples comprised of a man and a woman.

(6) Marriage § 3--Requisites--Matter of Statewide Concern.--Marriage is a matter of statewide concern rather than a municipal affair, and state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.

(7) Marriage § 3--Statutory Provisions--Licensing and Registration--Authority of Local Officials--County Clerk and County Recorder.--The only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are the county clerk and the county recorder. The statutes do not authorize the mayor of a city or any other comparable local official to take any action with regard to the process of issuing marriage licenses or registering marriage certificates. Although a mayor may have authority under a local charter to supervise and control the actions of the county clerk or county recorder with regard to other subjects, the mayor has no authority to [*1058] expand or vary the authority of the county clerk or county recorder to grant marriage licenses or register marriage certificates under the governing state statutes, or to direct those officials to act in contravention of those statutes.

(8) Marriage § 3--Statutory Provisions--Licensing and Registration--Authority of Local Officials--Abdication of Statutory Responsibility.--To the extent a mayor purported to direct or instruct the county clerk and the county recorder to take specific actions with regard to the issuance of marriage licenses or the registering of marriage certificates, the mayor exceeded the scope of his authority. Furthermore, if the county clerk or the county recorder acted in contravention of the applicable statutes solely at the behest of the mayor and not on the basis of the official's own determination regarding the constitutionality of the statutes, the official acted

improperly by abdicating the statutory responsibility imposed directly on him or her as a state officer.

(9) Mandamus and Prohibition § 21--Mandamus--To Public Officers--Ministerial Duties Dictated by Statute.--If a controlling rule of law requires a public official to carry out a ministerial duty dictated by statute unless and until the statute has been judicially determined to be unconstitutional, the official cannot compel a court to rule on the constitutional issue by refusing to apply the statute. The court properly may issue a writ of mandate directing the official to comply with the statute unless and until the statute has been judicially determined to be unconstitutional.

(10) Marriage § 3--Statutory Provisions--Ministerial Duties of County Officials.--Under the statutes that deal with marriage, the duties of a county clerk and county recorder in issuing marriage licenses and recording certificates of registry of marriage are ministerial rather than discretionary. When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage.

(11) Administrative Law § 7--Powers and Functions of Administrative Agencies--Determinative or Adjudicatory Powers.--Prior to the [*1059] adoption of Cal. Const., art. III, § 3.5, it already was established under California law that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis to refuse to apply the statute. The adoption of Cal. Const., art. III, § 3.5, plainly did not grant or expand the authority of local executive officials to determine that a statute is unconstitutional and to act in contravention of the statute's terms on the basis of such a determination.

(12) Statutes § 47--Construction--Presumptions--Constitutionality Presumed.--A statute, once duly enacted, is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.

(13) Public Officers and Employees § 13--Statutory Duty--Scope of Authority.--When a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute. When a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of the power.

(14) Statutes § 20--Construction--Constitutionality--Judicial Function.--The determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution.

(15) Public Officers and Employees § 13--Powers--Local Executive Official--No Authority to Exercise Judicial Power.--A local administrative agency has no authority under the California Constitution to exercise judicial power. In light of this principle, a local executive official who makes decisions--without the benefit of even a quasi-judicial proceeding--has no authority to exercise judicial power, such as by determining the constitutionality of applicable statutory provisions.

(16) Mandamus and Prohibition § 21--Mandamus--To Public Officers--Ministerial Acts--Public Finance.--Mandate is the proper remedy to compel a public officer to perform ministerial acts such as the issuance of bonds, the letting of public contracts, or the disbursement of public funds, and the constitutionality of the law authorizing such acts may be determined in a writ proceeding.

(17) Public Officers and Employees § 13--Duties--Refusal to Perform Ministerial Acts.--The circumstance that a public official may refuse to [*1060] perform a ministerial act in the public finance context does not signify that in all other contexts every public official is free to refuse to perform a ministerial act based upon the official's view that the statute the officer is statutorily obligated to apply is unconstitutional.

(18) Public Officers and Employees § 16--Liabilities--Not Liable for Official Acts in Good Faith, Without Malice, and Under Apparent Authority.--Gov. Code, § 820.6, explicitly provides that if a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid, or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable. Thus, city officials clearly would not have incurred liability under California law simply for following the current marriage statutes and declining to contravene those statutes by issuing marriage licenses or registering marriage certificates of same-sex couples.

(19) Public Officers and Employees § 16--Liabilities--Not Liable for Official Acts.--Under federal law, a local public official generally is immunized from liability for official acts so long as the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

(20) Public Officers and Employees § 16--Liabilities--Officials Sued in Personal Capacity.--If city officials are sued in their personal capacity for actions taken pursuant to statute and in the scope of their employment, under Gov. Code, § 825, the officials are entitled to have their public employer provide a defense and pay any judgment entered in such an action, whether the action is based on a state law claim or a claim under the federal civil rights statutes.

(21) Marriage § 3--Statutory Provisions--Same-sex Marriage--Challenge to Constitutionality--Defiance of Statutory Provisions Not Justified.--A clear and readily available means, other than wholesale defiance of the applicable marriage statutes by city officials, existed to ensure that the constitutionality of the statutes as applied to same-sex couples would be decided by a court. If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes were unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. The city could not plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified its wholesale defiance of the applicable statutes.

[*1061]

(22) Public Officers and Employees § 18--Powers, Duties, and Liabilities--Oath to Defend the Constitution.--A public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority and justifying such action by reference to his or her personal constitutional views. On the contrary, the oath to support and defend the Constitution requires a public official to act within the constraints of our constitutional system, not to disregard presumptively valid statutes and take action in violation of such statutes on the basis of the official's own determination of what the Constitution means.

(23) Marriage § 4--Requisites--A Man and a Woman--Constitutionality.--Any asserted invalidity of statutes that limit marriage to a man and a woman is not so patent or clearly established that no reasonable official could believe that the current California marriage statutes are valid. No judicial decision has held a statute limiting marriage to a man and a woman unconstitutional under the California or federal Constitution.

(24) Marriage § 4--Requisites--A Man and a Woman--Constitutionality.--The United States Supreme Court's decision holding a state sodomy statute unconstitutional has not clearly established that a state statute limiting marriage to a man and a woman is unconstitutional under the federal Constitution, in light of the court's specific disclaimer that the case did not involve whether the government must formally recognize any relationship that homosexual persons seek to enter.

(25) Public Officers and Employees § 13--Powers--Federal Supremacy Clause--No Authority to Refuse to Enforce a Statute the Official Believes Is Unconstitutional.--The supremacy clause of the United States Constitution does not prohibit a state of the power from requiring that a public official comply with a state statute that the official believes violates the federal Constitution.

(26) Mandamus and Prohibition § 68--Mandamus--Procedure--Nature of Relief.--As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case, and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate.

(27) Mandamus and Prohibition § 68--Mandamus--Procedure--Nature of Relief--City Officials Who Issued Marriage Licenses to Same-sex Couples.--It was appropriate for the Supreme Court in an original writ [*1062] proceeding, arising out of the actions of city officials in issuing marriage licenses to same-sex couples, not only to order city officials to comply with the applicable marriage statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correcting all relevant official records and notifying affected individuals of the invalidity of the officials' actions. The officials authorized, performed, and registered literally thousands of same-sex marriages, in direct violation of explicit state statutes, and the state Attorney General, as well as a number of local taxpayers, had filed original mandate proceedings in the Supreme Court to halt the local officials' unauthorized conduct and to compel the officials to correct or undo their numerous unlawful actions.

(28) Mandamus and Prohibition § 68--Mandamus--Procedure--Nature of Relief--Issuance of Marriage Licenses to Same-sex Couples.--In light of the clear terms of Fam. Code, § 300, defining marriage as a personal relationship arising out of a civil contract between

a man and a woman, and its legislative history, which demonstrated that the purpose of this limitation was to prohibit persons of the same sex from entering lawful marriage, it plainly followed that all same-sex marriages authorized, solemnized, or registered by city officials had to be considered void and of no legal effect from their inception.

(29) Marriage § 8--Validity--Voidable Marriages--Parties Who May Bring Action to Nullify.--Fam. Code, § 2211, sets forth the categories of individuals who may bring an action to nullify a voidable marriage--categories that generally are limited to one of the parties to the marriage or, where a party to the marriage is a minor or a person incapable of giving legal consent, the parent, guardian, or conservator of such party.

(30) Marriage § 8--Validity--Void Marriages--Unauthorized Same-sex Marriages--Mandamus Proceeding by Attorney General and Taxpayers.--The procedural requirements generally applicable in an action to nullify or annul a voidable marriage are inapplicable when a purported marriage is void from the beginning or is a legal nullity. A marriage declared to be void or void from the beginning is a legal nullity and its validity may be asserted or shown in any proceeding in which the fact of marriage may be material. A mandate action, which sought to compel public officials to correct the effects of their unauthorized official conduct in issuing marriage licenses to or registering marriage certificates of thousands of same-sex couples, was such a proceeding, because the validity or invalidity of the same-sex marriages authorized and registered by such officials was central to the scope of the remedy to be ordered. Therefore, petitioners did not lack standing to challenge the validity of the marriages.
[*1063]
(31) Marriage § 8--Validity--Void Marriages--Validity of Same-sex Marriages Licensed in Disobedience of Statutory Prohibition--Legal Question--Same-sex Couples Not Party to Mandate Action.--The Supreme Court could properly determine the validity or invalidity of thousands of existing same-sex marriages in mandate actions brought to preclude a city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples, even though the couples themselves were not before the court. The question of the validity or invalidity of the same-sex marriages did not depend upon any facts that were peculiar to any individual same-sex marriage, but rather was a purely legal question applicable to all existing same-sex marriages, and rested on the circumstance that the governing state statutes limited marriage to a union between a man and a woman. Under ordinary principles of stare decisis, an appellate decision holding that, under current California statutes, a same-sex marriage performed in California is void from its inception would effectively resolve that legal issue with respect to all couples who had participated in same-sex marriages, even though such couples had not been parties to the original action. Because the validity or invalidity of same-sex marriages under current California law involved only a pure question of law, couples who were not formal parties to the mandate action were in no different position had the question been presented and resolved in an action involving some other same-sex couple rather than in an action in which the legal arguments regarding the validity of such marriages had been vigorously asserted not only by the city officials who authorized and registered them but also by various amici curiae representing similarly situated same-sex couples. Requiring a separate legal proceeding to be brought to invalidate each of the thousands of same-sex marriages, or requiring each of the thousands of same-sex couples to be named and served as parties in the mandate action, would have added nothing of substance to the proceeding.

(32) Marriage § 8--Validity--Void Marriages--Validity of Same-sex Marriages Licensed in Disobedience of Statutory Prohibition--Same-sex Couples Not Party to Mandate Action--Due Process Rights.--Same-sex couples who obtained marriage licenses through the deliberate unauthorized conduct of city officials were not denied the right to meaningfully participate in the proceedings of mandate actions brought to preclude a city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. Although the Supreme Court did not permit the same-sex couples to intervene formally in the actions as parties, the court's order denying intervention to a number of such couples explicitly was without prejudice to their participation as amici curiae, and numerous amicus [*1064] curiae briefs were filed on behalf of such couples, directly addressing the question of the validity of the existing same-sex marriages. Accordingly, the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages were heard and fully considered.

(33) Marriage § 8--Validity--Void and Invalid Marriages--Same-sex Marriages.--Fam. Code, § 300, explicitly establishes that existing same-sex marriages are void and invalid.

(34) Marriage § 7--Validity--Noncompliance with Procedural Requirements by Nonparty to a Marriage--Marriage Licenses Issued to Same-sex Couples Not Procedural Defect.--Fam. Code, § 306, which provides, in part, that noncompliance with certain Family

Code provisions by a nonparty to a marriage does not invalidate the marriage, does not demonstrate that if a county clerk errs in issuing marriage licenses to same-sex couples, such noncompliance by the county clerk (a nonparty to the marriage) does not invalidate the marriage. The statute had no application to mandate actions brought to preclude the city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. The defect at issue was not simply a procedural defect in the issuance of the license or in the solemnization or registration process or even the invalidity or unauthorized nature of a county clerk's action in issuing a marriage license to a same-sex couple that rendered such marriages void. What renders a purported same-sex marriage void is the circumstance that the current California statutes reflect a clear legislative decision to prohibit persons of the same sex from entering lawful marriage. In the mandate actions, it was the substantive legislative limitation on the institution of marriage, and not simply the circumstance that the actions of the county clerk or county recorder were unauthorized, that rendered the existing same-sex marriages invalid and void from the beginning.

(35) Marriage § 10--Actions--Mandate Action to Preclude the Licensing and Registration of Same-sex Marriages--Remedy for Unauthorized and Unlawful Actions of City Officials.--In light of the explicit terms of Fam. Code, § 300, and a warning included in gender-neutral marriage license applications provided by a city, same-sex couples whose marriages were licensed by and registered with city officials clearly were on notice that the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages. As city officials lacked this authority, these couples did not have a persuasive equitable claim to have the validity of the marriages left in doubt until a court ruled on the substantive constitutional challenges to the California marriage statutes, since this would have created [*1065] uncertainty and potential harm to others who may have needed to know whether the marriages were valid or not.

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[*1066]
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JUDGES: George, C. J., with Baxter, Chin, Brown, and Moreno, JJ., concurring. Concurring opinion by Moreno, J. Concurring and dissenting opinions by Kennard and Werdegar, JJ.

OPINION BY: GEORGE

OPINION:

[**462] [***229] **GEORGE, C. J.**--We assumed jurisdiction in these original writ proceedings to address an important but relatively narrow legal issue--whether a local executive official who is charged with the ministerial duty of enforcing a state [*1067] statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.

In the present case, this legal issue arises out of the refusal of local officials in the City and County of San Francisco to enforce the provisions of California's marriage statutes that limit the granting of a marriage license and marriage certificate only to a couple comprised of a man and a woman.

The same legal issue and the same applicable legal principles could come into play, however, in a multitude of situations. For example, we would face the same legal issue if the statute in question were among those that restrict the possession or require the registration of assault weapons, and a local official, charged with the ministerial duty of enforcing those statutes, refused to apply their provisions because of the official's view that they violate the Second Amendment of the federal Constitution. In like manner, the same legal issue would be presented if the statute were one of the environmental measures that impose restrictions upon a property owner's ability to obtain a building permit for a development that interferes with the public's access to the California coastline, and a local official, charged with the ministerial [**463] duty of issuing building permits, refused to apply the statutory limitations because of his or her belief that they effect an uncompensated "taking" of property in violation of the just compensation clause of the state or federal Constitution.

Indeed, another example might illustrate the point even more clearly: the same legal issue would arise if the statute at the center of the controversy were the recently enacted provision (operative January 1, 2005) that imposes a ministerial duty upon local officials to accord the same rights and benefits to registered domestic partners as are granted to spouses (see Fam. Code, § 297.5, added by Stats. 2003, ch. 421, § 4), and a local official--perhaps an officeholder in a locale where domestic partnership [***230] rights are unpopular--adopted a policy of refusing to recognize or accord to registered domestic partners the equal treatment mandated by statute, based solely upon the official's view (unsupported by any judicial determination) that the statutory provisions granting such rights to registered domestic partners are unconstitutional because they improperly amend or repeal the provisions of the voter-enacted initiative measure commonly known as Proposition 22, the California Defense of Marriage Act (Fam. Code, § 308.5) without a confirming vote of the electorate, in violation of article II, section 10, subdivision (c) of the California Constitution.

As these various examples demonstrate, although the present proceeding may be viewed by some as presenting primarily a question of the substantive [*1068] legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority

granted to them as officeholders. In short, the legal question at issue--the scope of the authority entrusted to our public officials--involves the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being "a government of laws, and not of men" (or women). n1

> n1 The phrase "a government of laws, and not of men" was authored by John Adams (Adams, Novanglus Papers, No. 7 (1774), reprinted in 4 Works of John Adams (Charles Francis Adams ed. 1851) p. 106), and was included as part of the separation of powers provision of the initial Massachusetts Constitution adopted in 1780. (Mass. Const. (1780) Part The First, art. XXX.) The separation of powers provision of that state's Constitution remains unchanged to this day, and reads in full: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men*." (Italics added.)

As indicated above, that issue--phrased in the narrow terms presented by this case--is whether a local executive official, charged with the ministerial duty of enforcing a statute, has the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional. As we shall see, it is well established, both in California and elsewhere, that--subject to a few narrow exceptions that clearly are inapplicable here--a local executive official does *not* possess such authority.

(1) This conclusion is consistent with the classic understanding of the separation of powers doctrine--that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. It is true, of course, that the separation of powers doctrine does not create an absolute or rigid division of functions. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 [51 Cal. Rptr. 2d 837, 913 P.2d 1046].) **(2)** Furthermore, legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion. When, however, a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no [***231] authority to disregard [**464] the statutory mandate based on the official's own determination that the statute is unconstitutional. (See, e.g., *Kendall v. United States* (1838) 37 U.S. 524, 613 [9 L.Ed. 1181] ["To contend, that the obligation imposed on the president to see the [*1069] laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible"].)

Accordingly, for the reasons that follow, we agree with petitioners that local officials in San Francisco exceeded their authority by taking official action in violation of applicable statutory provisions. We therefore shall issue a writ of mandate directing the officials to enforce those provisions unless and until they are judicially determined to be unconstitutional and to take all necessary remedial steps to undo the continuing effects of the officials' past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials are void and of no legal effect.

(3) To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue. We hold only that in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect. Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.

I

The events that gave rise to this proceeding began on February 10, 2004, when Gavin Newsom, the Mayor of the City and County of San Francisco and a respondent in one of the consolidated cases before us, n2 sent a letter to [*1070] Nancy Alfaro, identified in the letter as the San Francisco County Clerk, n3 requesting that she "determine [***232] 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." The mayor stated in his letter that "[t]he Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit [**465] discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage," and explained that it is his "belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination." The mayor indicated that the request to the county clerk was made "[p]ursuant to [his] sworn duty to uphold the California Constitution, including specifically its equal protection clause ... ." n4

n2 Petitioner in the *Lockyer* matter is Bill Lockyer, the Attorney General of California. The petition in *Lockyer* names as respondents the 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 County Clerk of the City and County of San Francisco.

Petitioners in the *Lewis* matter are Barbara Lewis, Charles McIlhenny, and Edward Mei, San Francisco residents and taxpayers. The petition in *Lewis* names as respondent Nancy Alfaro in her official capacity as the County Clerk of the City and County of San Francisco.

For convenience, in this opinion we generally shall refer to the Attorney General and petitioners in *Lewis* collectively as "petitioners" and to respondents in both *Lockyer* and *Lewis* collectively as "the city" or "the city officials."

n3 The letter from Mayor Newsom identified Alfaro as the San Francisco County Clerk. In its answer to the petition for writ of mandate in *Lockyer*, filed in this court on March 18, 2004, however, the city alleges "that Daryl M. Burton is the San Francisco County Clerk, and that Nancy Alfaro is the Director of the County Clerk's Office, to whom all of the responsibilities and privileges of County Clerk have been delegated." The answer further alleges that "as Burton's delegate, Nancy Alfaro is the designated 'commissioner of civil marriages' for San Francisco." Alfaro has filed a declaration stating that she is the Director of the County Clerk's Office for the City and County of San Francisco and that "[i]n that capacity I perform all the duties, and hold all the responsibilities of, the County Clerk. These duties include the issuance of all marriage licenses." Petitioners do not contend that Alfaro is not the official authorized to perform the duties assigned by the applicable statutes to the county clerk, and thus we shall consider Alfaro the county clerk for purposes of this proceeding.

n4 The letter read in full: "Upon taking the Oath of Office, becoming the Mayor of the City and County of San Francisco, I swore to uphold the Constitution of the State of California. Article I, Section 7, subdivision (a) of the California Constitution provides that '[a] person may not be ... denied equal protection of the laws.' The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men and have suggested that laws that treat homosexuals differently from heterosexuals are suspect. The California courts have also stated that discrimination against gay men and lesbians is invidious. The California courts have held that gender discrimination is suspect and invidious as well. The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage. It is my belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination.

"Pursuant to my sworn duty to uphold the California Constitution, including specifically its equal protection clause, I request that you 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."

In response to the mayor's letter, the county clerk designed what she describes as "a gender-neutral application for public marriage licenses, and a gender-neutral marriage license," to be used by same-sex couples. The newly designed form altered the official state-prescribed form for the "Application [*1071] for Marriage License" and the "License and Certificate of Marriage" by eliminating the terms "bride," "groom," and "unmarried man and unmarried woman," and by replacing them with the terms "first applicant," "second applicant," and "unmarried individuals." The revised form also contained a

new warning at the top of the form, advising applicants that "[b]y entering into marriage you may lose some or all of the rights, protections and benefits you enjoy as a domestic partner" and that "marriage of gay and lesbian couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer," and encouraging same-sex couples "to seek legal advice regarding the effect of entering into marriage." n5

n5 The warning reads in full: "Please read this carefully prior to completing the application: [P] By entering into marriage you may lose some or all of the rights, protections, and benefits you enjoy as a domestic partner, including, but not limited to those rights, protections, and benefits afforded by State and local government, and by your employer. If you are currently in a domestic partnership, you are urged to seek legal advice regarding the potential loss of your rights, protections, and benefits before entering into marriage. [P] Marriage of gay and lesbian couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer. If you are a same-gender couple, you are encouraged to seek legal advice regarding the effect of entering into marriage."

[***233]

The county clerk, using the altered forms, began issuing marriage licenses to same-sex couples on February 12, 2004, and the county recorder thereafter registered marriage certificates submitted on behalf of same-sex couples who had received licenses from the city and had participated in marriage ceremonies. The declaration of the county clerk, filed in this court on March 5, 2004, indicates that as of that date, the clerk had issued more than approximately 4,000 marriage licenses to same-sex couples. In more recent filings, the city has indicated that approximately 4,000 same-sex marriages have been performed under licenses issued by the County Clerk of the City and County of San Francisco. [*1072]

On February 13, 2004, two separate actions were filed in San Francisco County Superior Court seeking to halt the city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. (*Thomasson v. Newsom* (Super. [**466] Ct. S.F. City and County, 2004, No. CGC-04-428794); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City and County, 2004, No. CPF-04-50943) (hereafter *Proposition 22 Legal Defense*).) In each case, a request for an immediate stay of the city's actions was denied by the superior court after a hearing. n6

n6 On February 17, 2004, the superior court, in addition to declining to grant the request for an immediate stay, issued an alternative writ in *Proposition 22 Legal Defense*, directing the city to cease and desist issuing marriage licenses to same-sex couples or performing marriage ceremonies for such couples, or show cause why the city has not done so, and set a hearing on the show cause order for March 29, 2004. On February 19, 2004, the city filed a cross-complaint for declaratory relief against the State of California in *Proposition 22 Legal Defense*, seeking a declaration that the California statutes that deny the issuance of marriage licenses to same-sex couples are unconstitutional.

On February 27, 2004, the Attorney General filed in this court a petition for an original writ of mandate, prohibition, certiorari, and/or other relief, and a request for an immediate stay. The petition asserted that the actions of the city officials in issuing marriage licenses to same-sex couples and solemnizing and registering the marriages of such couples are unlawful, and that the problems and uncertainty created by the growing number of these marriages justify intervention by this court. The petition pointed out that despite a directive issued by the state Registrar of Vital Statistics, the San Francisco County Recorder had not ceased the practice of registering marriage certificates submitted by same-sex couples on forms other than those approved by the State of California, and that officials of the federal Social Security Administration had raised questions regarding that agency's processing of name-change applications resulting from California marriages--not confined to single-sex marriages--because of the uncertainty as to whether certain marriage certificates issued in California are valid under state law. Noting that "[t]he Attorney General has the constitutional duty to see that the laws of the state are uniformly and adequately enforced" (see Cal. Const., art. V, § 13), the petition maintained that the existing " conflict and uncertainty, and the potential for future ambiguity, instability, [***234] and inconsistent administration among various jurisdictions and levels of government, present a legal issue of statewide importance that warrants immediate intervention by this Court." The petition requested that this court issue an order (1) directing the local officials to comply with the applicable statutes in issuing marriage licenses and certificates, (2) declaring invalid the same-sex marriage licenses and certificates that have been issued, and (3) directing the city to refund

any fees collected in connection with such licenses and certificates.

Anticipating that the respondent city officials likely would oppose the petition by arguing that the applicable state laws are unconstitutional, the petition maintained that such a claim could not justify the officials' 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 petition asserted that "[t]he 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." [*1073]

Although the Attorney General's petition acknowledged that the court could grant the relief requested in the petition without reaching the substantive question of the constitutionality of the California statutes limiting marriage to a man and a woman, the petition urged that we also resolve the substantive constitutional issue at this time, arguing that "[a]s 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."

On February 25, 2004, two days prior to the filing of the petition in *Lockyer*, the petition in *Lewis* was filed in this court. In *Lewis*, three residents and taxpayers in the City and County of San Francisco sought a writ of mandate to compel the county clerk to cease and desist issuing marriage licenses to couples other than those who meet state law marriage requirements and on forms that do not comply with state law license requirements, and also sought an immediate stay [**467] pending the court's determination of the petition.

After receiving the petitions in *Lockyer* and *Lewis*, we requested that the city file an opposition to the petition in each case on or before March 5, 2004. The city filed its opposition to the petitions on March 5, arguing that the provisions of article III, section 3.5 of the California Constitution do not apply to local officials and that, in any event, under the supremacy clause of the United States Constitution, California Constitution article III, section 3.5 could not properly be applied to preclude a local official from refusing to enforce a statute that the official believes violates the federal Constitution. With regard to the question of the constitutionality of California's statutory ban on same-sex marriages, the opposition maintained that "the issue is one best left to the lower courts in the first instance to undertake the extensive fact-finding that will be necessary." n7

n7 The petition in *Lewis*--filed by parties who maintain that the existing California marriage statutes are constitutional--similarly took the position that "[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts."

On March 11, 2004, we issued an order in both *Lockyer* and *Lewis* directing the city officials to show cause why a writ of mandate should not issue requiring the officials to apply and abide by the current California marriage statutes in the absence [***235] of a judicial determination that the statutory provisions are unconstitutional. Pending our determination of these matters, we directed the officials to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions. We also stayed all proceedings in the two pending San Francisco County Superior Court cases (the *Proposition 22 Legal Defense* action and the *Thomasson v. Newsom* action), but specified that the stay "does not [*1074] preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."

Our March 11 order also specified that the return to be filed by the city officials in each case was to be limited "to the issue whether respondents are exceeding or acting outside the scope of their authority in refusing to enforce the provisions of Family Code sections 300, 301, 308.5, and 355 in the absence of a judicial determination that such provisions are unconstitutional," and that in addressing this issue, the return "should discuss not only the applicability and effect of article III, section 3.5 of the California Constitution" but also any other constitutional or statutory provisions or legal doctrines that bear on the question whether the city officials acted outside the scope of their authority in refusing to comply with the applicable statutes in the absence of a judicial determination that the statutes are unconstitutional.

Our March 11 order further established an expedited briefing schedule and indicated that the court would hear oral argument in these matters at its late May 2004 or June 2004 oral argument calendar. After receiving the briefs filed by the parties and numerous amici curiae, we requested that the parties file supplemental letter briefs addressing several questions relating to the validity of the marriage licenses and certificates of registry of marriage that already had been issued or registered by city officials to or on behalf of same-sex couples. The supplemental briefs were timely filed, and the cases were argued before this court on May 25, 2004. After oral argument, we filed an order consolidating the two cases for decision.

II

(4) It is well settled in California that "the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated. ..." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 728 [205 P.2d 17].) "The regulation of marriage and divorce is solely within the province of the Legislature, except as the same may be restricted by the Constitution." (*Beeler v. Beeler* (1954) 124 Cal. App. 2d 679, 682 [268 P.2d 1074]; see, e.g., *Estate of DePasse* (2002) 97 Cal.App.4th 92, 99 [118 Cal. Rptr. 2d 143].) In view of the primacy of the Legislature's role in this area, we begin by setting forth the relevant statutes relating to marriage that have some bearing on the issue before us. As we shall [**468] see, the Legislature has dealt with the subject of marriage in considerable detail.

As applicable to the issues presented by this case, the relevant statutes dealing with marriage are contained in the Family Code and the Health and Safety Code. [*1075]

(5) The provisions regarding the validity of marriage are set forth in Family Code sections 300 to 310.

Section 300 provides in full: "*Marriage is a personal relation arising out of a civil contract between a man and a woman*, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized [***236] by this division, except as provided by Section 425 [n8] and Part 4 (commencing with Section 500). [n9]" (Italics added.)

n8 Family Code section 425 provides: "If no record of the solemnization of a marriage previously contracted is known to exist, the parties may purchase a License and Certificate of Declaration of Marriage from the county clerk in the parties' county of residence." Family Code section 350 provides that "[b]efore ... declaring a marriage pursuant to Section 425, the parties shall first obtain a marriage license from a county clerk." As the Court of Appeal explained in *Estate of DePasse, supra,* 97 Cal.App.4th 92, 104, "[t]he purpose of the [section 425] procedure is to create a record of an otherwise unrecorded marriage, thus focusing on the registration requirement, as opposed to the licensing requirement." The section 425 procedure has no bearing on the issues presented by this case.

n9 Part 4 of division 3 of the Family Code (§ § 500-536) governs confidential marriages. With respect to the issue presented in this case, the provisions governing confidential marriages parallel the provisions governing ordinary marriages. (Compare, e.g., Fam. Code, § 505 [specifying form of confidential marriage license] with Fam. Code, § 355 [specifying form of ordinary marriage license].)

Section 301 provides: "*An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 or older*, and not otherwise disqualified, *are capable of consenting to and consummating marriage.*" (Italics added.)

Section 308.5 provides: "*Only marriage between a man and a woman is valid or recognized in California.*" (Italics added.)

In the opposition filed in this court, the city takes the position that neither section 301 nor section 308.5 is relevant to the question whether current California statutes limit marriages performed in California to marriages between a man and a woman, n10 but the city concedes that section 300, both [*1076] by its terms and its purpose, imposes such a limitation on marriages performed in California. n11 Because we agree that section 300 clearly establishes that current California statutory law limits marriage to couples comprised of a man and a woman, we need not and do not [***237] address the scope or effect of sections 301 and 308.5 in this case.

n10 With respect to section 301--which, as noted above, provides that "[a]n unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, ... are capable of consenting to and consummating marriage"--the opposition filed in this court maintains that "the statute is silent as to whom an unmarried male and an unmarried female may marry, and thus is irrelevant." Petitioners maintain, by contrast, that section 301 clearly contemplates that a marriage will be consummated between an unmarried male and unmarried female.

With regard to section 308.5--which provides that "[o]nly marriage between a man and woman is valid or recognized in California"--the opposition maintains that, in light of the provision's history, "[t]his statute is irrelevant to the case at hand because it addresses only out-of-state marriages." Petitioners assert, by contrast, that by

specifying that only marriage between a man and woman is "valid" or "recognized" in California, section 308.5 addresses both in-state and out-of-state marriages.

n11 The language in Family Code section 300 specifying that marriage is a relation "between a man and a woman" was adopted by the Legislature in 1977, when the provision was set forth in former section 4100 of the Civil Code. (Stats. 1977, ch. 339, § 1, p. 1295, introduced as Assem. Bill 607 (1977-1978 Reg. Sess.).) The legislative history of the measure makes its objective clear. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 ["The purpose of the bill is to prohibit persons of the same sex from entering lawful marriage"].) The provisions of Civil Code former section 4100 were moved to Family Code section 300 when the Family Code was enacted in 1992. (Stats. 1992, ch. 162, § 10, p. 474.)

The Family Code provisions relating to marriage licenses and to the certificate of [**469] registry of marriage are set forth in Family Code sections 350 to 360. These statutes provide that "before entering a marriage, ... the parties shall first obtain a marriage license from a county clerk" (Fam. Code, § 350), and the provisions state what information must be contained on the license (Fam. Code, § 351) and place the responsibility on the county clerk to ensure that the statutory requirements for obtaining a marriage license are satisfied. (Fam. Code, § 354.) The statutes also specifically provide that the forms for (1) the application for a marriage license, (2) the marriage license, and (3) the certificate of registry of marriage that are to be used by the county clerk and provided to the applicants "shall be prescribed by the State Department of Health Services." (Fam. Code, § § 355, 359.) n12

n12 Family Code section 350 provides: "*Before entering a marriage*, or declaring a marriage pursuant to Section 425, *the parties shall first obtain a marriage license from a county clerk*." (Italics added.)

Section 351 provides: "The marriage license shall show all of the following: [P] (a) The identity of the parties to the marriage. [P] (b) The parties' real and full names, and places of residence. [P] (c) The parties' ages."

Section 354 provides: "(a) Each applicant for a marriage license may be required to present authentic identification as to name. [P] (b) *For the purpose of ascertaining the facts mentioned or required in this part, if the clerk deems it necessary, the clerk may examine the applicants for a marriage license on oath at the time of the application.* The clerk shall reduce the examination to writing and the applicants shall sign it. [P] (c) *If necessary, the clerk may request additional documentary proof as to the accuracy of the facts stated.* [P] (d) Applicants for a marriage license shall not be required to state, for any purpose, their race or color." (Italics added.)

Section 355 provides: "(a) *The forms for the application for a marriage license and the marriage license shall be prescribed by the State Department of Health Services, and shall be adapted to set forth the facts required in this part.* [P] (b) The form for the application for a marriage license shall include an affidavit on the back, which the applicants shall sign, affirming that they have received the brochure provided for in Section 358. [P] (c) *The affidavit required by subdivision (b) shall state:*

AFFIDAVIT

I acknowledge that I have received the brochure titled _____ _____ _____
Signature of Bride Date _____ _____
Signature of Groom Date[End of section 355.]" (Italics added.)

Section 359 provides: "(a) *Applicants for a marriage license shall obtain from the county clerk issuing the license, a certificate of registry of marriage.* [P] (b) *The contents of the certificate of registry are as provided in Division 9 (commencing with Section 102100) of Division 102 of the Health and Safety Code.* [P] (c) The certificate of registry shall be filled out by the applicants, *in the presence of the county clerk issuing the marriage license,* and shall be presented to the person solemnizing the marriage. [P] (d) The person solemnizing the marriage shall complete the registry and shall cause to be entered on the certificate of registry the signature and address of one witness to the marriage ceremony. [P] (e) The certificate of registry shall be returned by the person solemnizing the marriage *to the county recorder of the county in which the license was issued* within 10 days after the ceremony. [P] (f)

> As used in this division, 'returned' means presented to the appropriate person in person, or postmarked, before the expiration of the specified time period." (Italics added.)

[*1077]

Provisions regarding the solemnization of marriage are set forth in Family Code sections 400 to 425. These statutes contain a list of the numerous persons who may solemnize a marriage under California [***238] law (Fam. Code, § 400), and require the person solemnizing a marriage (1) to require the applicants to present the marriage license to him or her prior to solemnization (Fam. Code, § 421), (2) to sign and endorse upon or attach to the marriage license a statement, "in the form prescribed by the State Department of Health Services," setting forth specified information (Fam. Code, § 422), and (3) to return the marriage license, with the requisite endorsement, to the county recorder of the county in which the license was issued within 30 days after the marriage ceremony. (Fam. Code, § 423.) n13

> n13 Family Code section 421 provides in relevant part: "Before solemnizing a marriage, the person solemnizing the marriage shall require the presentation of the marriage license. ..."
>
> Section 422 provides in relevant part: "The person solemnizing a marriage shall make, sign, and endorse upon or attach to the marriage license a statement, *in the form prescribed by the State Department of Health Services*, showing all of the following: [P] (a) The fact, date (month, day, year), and place (city and county) of solemnization. [P] (b) The names and places of residence of one or more witnesses to the ceremony. [P] (c) The official position of the person solemnizing the marriage ... ." (Italics added.)
>
> Section 423 provides: "The person solemnizing the marriage shall return the marriage license, endorsed as required in Section 422, *to the county recorder of the county in which the license was issued* within 10 days after the ceremony." (Italics added.)

[**470]

The Health and Safety Code contains numerous additional provisions prescribing in detail the procedures governing marriage licenses and marriage [*1078] certificates as part of the state's registration and maintenance of vital statistics. These statutes designate the California Director of Health Services as the State Registrar of Vital Statistics (Health & Saf. Code, § 102175) and provide that "[e]ach live birth, fetal death, death, and *marriage* that occurs in this state shall be registered as provided in this part *on the prescribed certificate forms.* ..." (Health & Saf. Code, § 102100, italics added.) The statutes also specify that "[t]he State Registrar is charged with the execution of this part in this state, *and has supervisory power over local registrars, so that there shall be uniform compliance with all the requirements of this part*" (Health & Saf. Code, § 102180, italics added), that "[t]he Attorney General will assist in the enforcement of this part upon request of the State Registrar" (Health & Saf. Code, § 102195), and that "[t]he State Registrar *shall prescribe and furnish all record forms for use in carrying out the purpose of this part, ... and no record forms or formats other than those prescribed shall be used.*" (Health & Saf. Code, § 102200, italics added.) n14 The code also contains a specific provision pertaining to all of the official forms related to marriage, which expressly provides that "[*t*]*he forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar*." (Health & Saf. Code, § 103125, italics added.)

> n14 The Health and Safety Code contains a number of additional provisions that demonstrate the state's overriding interest in the uniform application of the state's marriage laws. (See, e.g., Health & Saf. Code, § § 102205, 102215.)

The relevant Health and Safety Code statutes also specify that "[t]he county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages" (Health & Saf. Code, § 102285), and that " [e]ach local registrar is hereby charged with the enforcement of this part in his or her registration district *under the supervision and direction of the State Registrar and shall make an immediate report to the State* [***239] *Registrar of any violation of this law coming to his or her knowledge.*" (Health & Saf. Code, § 102295, italics added.) The statutes also provide that "[t]he local registrar of marriages shall carefully examine each certificate before acceptance for registration and, if it is incomplete or unsatisfactory, he or she shall require any further information to be furnished as may be necessary to make the record satisfactory before acceptance for registration." (Health & Saf. Code, § 102310.)

Pursuant to the foregoing provisions, the State Registrar of Vital Statistics (who, as noted, is also the California Director of Health Services) has prescribed a form--Department of Health Services Form VS-117--which serves as the application for license to marry, the license to marry, and the certificate of registry of mar-

riage. One of the principal California family law practice guides describes the relevant portions of the form as follows: "The [*1079] first three sections of the form (Groom Personal Data, Bride Personal Data, and Affidavit) constitute the application for license to marry. The personal data sections are filled out by the court clerk, using information and/or documents provided by the applicants. The bride and groom must both sign the application (*see* [**471] lines 23 [entitled Signature of Groom], 24 [entitled Signature of Bride]) after the personal data sections have been completed. The fourth section of the form (lines 25A-25F) constitutes the license to marry. This section is to be completed by the clerk." (1 Kirkland et al., Cal. Family Law: Practices and Procedure (2d ed. 2003) Validity of Marriage, Forms, § 10.100[1], p. 10-80, fns. omitted.)

The city acknowledges that the county clerk altered the form prescribed by the State Registrar of Vital Statistics by replacing references to "bride," "groom," and "unmarried man and unmarried woman" with references to "first applicant," "second applicant," and "unmarried individuals," that the county clerk further issued marriage licenses to same-sex couples, and that the county recorder registered certificates of registry of marriage for such couples, despite the knowledge of these officials that the current California statutes do not authorize such actions. The city defends the actions of these officials on the ground that they were based on the belief that the statutory restriction in California law limiting marriage to a man and a woman is unconstitutional. The principal question before us is whether the local officials exceeded or acted outside of their authority in taking these actions.

III

In light of several questions raised by the briefs filed by the city in this court, we begin with a brief discussion of the respective roles of state and local officials with regard to the enforcement of the marriage statutes (in particular, the issuance of marriage licenses and the registering of marriage certificates), and of the nature of the duties of local officials under the applicable statutes.

A

(6) As is demonstrated by the above review of the relevant statutory provisions, the Legislature has enacted a comprehensive scheme regulating marriage in California, establishing the substantive standards for eligibility for marriage and setting forth in detail the procedures to be followed and the public officials who are entrusted with carrying out these procedures. In light of both the historical understanding reflected in this statutory scheme and the statutes' repeated emphasis on the importance of having uniform rules and procedures apply throughout the [***240] state to the subject of marriage, [*1080] there can be no question but that marriage is a matter of "statewide concern" rather than a "municipal affair" (see Cal. Const., art. XI, § § 4, 5, 6; see, e.g., *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17 [283 Cal. Rptr. 569, 812 P.2d 916]), and that state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.

(7) Furthermore, the relevant statutes also reveal that the only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are *the county clerk* and *the county recorder*. The statutes do not authorize the mayor of a city (or city and county, as is San Francisco) or any other comparable local official to take any action with regard to the process of issuing marriage licenses or registering marriage certificates. Although a mayor may have authority under a local charter to supervise and control the actions of a county clerk or county recorder with regard to other subjects, a mayor has no authority to expand or vary the authority of a county clerk or county recorder to grant marriage licenses or register marriage certificates under the governing state statutes, or to direct those officials to act in contravention of those statutes. (See, e.g., *Coulter v. Pool* (1921) 187 Cal. 181, 187 [201 P. 120] ["A public officer is a public agent and as such acts only on behalf of his principal ... . The most general characteristic of a public officer ... is that a public duty is delegated and entrusted to him, as agent, *the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting*" (italics added)]; *Sacramento v. Simmons* (1924) 66 Cal.App. 18, 24-25 [225 P. 36] [when state statute designated local health officers as local registrars of vital statistics, "to the extent [such officials] are discharging such duties they are acting as state officers. *They are state officers performing state functions and are under the* [**472] *exclusive jurisdiction of the state registrar of vital statistics*" (italics added)]; *Boss v. Lewis* (1917) 33 Cal.App. 792, 794 [166 P. 843] [city clerk, when acting as local registrar of vital statistics under state law, is state officer].)

(8) Accordingly, to the extent the mayor purported to "direct" or "instruct" the county clerk and the county recorder to take specific actions with regard to the issuance of marriage licenses or the registering of marriage certificates, we conclude he exceeded the scope of his authority. (See, e.g., *Sacramento v. Simmons, supra,* 66 Cal.App. 18, 24-28.) n15 Furthermore, if the county

clerk or the county recorder acted in this case in contravention of the [*1081] applicable statutes solely at the behest of the mayor and not on the basis of the official's own determination that the statutes are unconstitutional, such official also would appear to have acted improperly by abdicating the statutory responsibility imposed directly on him or her as a state officer. (See, e.g., *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 874 [19 Cal. [***241] Rptr. 2d 357], disapproved on another point in *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 305, fn. 5 [105 Cal. Rptr. 2d 636, 20 P.3d 533] ["An executive or administrative officer can no more abdicate responsibility for executing the laws than the Legislature can be permitted to usurp it"].)

n15 In the mayor's February 10 letter to the county clerk, the mayor simply "request[ed]" the clerk to determine what changes should be made to the forms and documents used to apply for and issue marriage licenses. In the opposition and supplemental opposition filed in this court, however, the city states that the mayor "directed the County Clerk's Office to arrange for the issuance of marriage licenses to same-sex couples" and that "Alfaro was not the decisionmaker with respect to San Francisco's issuance of marriage licenses to same-sex couples. She and the other employees within the County Clerk's Office issued marriage licenses to such couples because Mayor Newsom told them to do so."

(9) Although it is not clear that the county clerk and the county recorder acted on the basis of each individual official's own opinion or determination as to the unconstitutionality of the applicable statutes (see fn. 15, *ante*), and the actions of these officials might be vulnerable to challenge on that ground alone, it is nonetheless appropriate in this case to address the question whether a public official may refuse to enforce a statute when he or she determines the statute to be unconstitutional. The city maintains that when, as here, a public official has asserted in a mandate proceeding that a statutory provision that the official has refused to enforce is unconstitutional, a court may not issue a writ of mandate to compel the official to perform a ministerial duty prescribed by the statute unless the court first determines that the statute is constitutional. If, however, the controlling rule of law requires such an official to carry out a ministerial duty dictated by statute unless and until the statute has been judicially determined to be unconstitutional, it follows that such an official cannot *compel* a court to rule on the constitutional issue by refusing to apply the statute and that a writ of mandate properly may issue, without a judicial determination of the statute's constitutionality, directing the official to comply with the statute unless and until the statute has been judicially determined to be unconstitutional. Accordingly, in deciding whether a writ of mandate should issue, it is appropriate to determine whether the city officials were obligated to comply with the ministerial duty prescribed by statute without regard to their view of the constitutionality of the statute.

B

(10) In addition, we believe it is appropriate to clarify at the outset that, under the statutes reviewed above, the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary. When the substantive and procedural requirements [*1082] established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same [**473] token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage. As we stated recently in *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [129 Cal. Rptr. 2d 811, 62 P.3d 54]: " 'A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists.' "

Thus, the issue before us is whether under California law the authority of a local executive official, charged with the ministerial duty of enforcing a state statute, includes the authority to disregard the statutory requirements when the official is of the opinion the provision is unconstitutional [***242] but there has been no judicial determination of unconstitutionality.

IV

In the opposition and supplemental opposition filed in this court, the city maintains that a local executive official's general duty and authority to apply the law includes the authority to refuse to apply a statute whenever the official believes it to be unconstitutional, even in the

absence of a judicial determination of unconstitutionality and even when the duty prescribed by the statute is ministerial. The city asserts that such authority flows from every public official's duty "to conform [his or her] acts to constitutional norms." The Attorney General argues, by contrast, that it is well established that a duly enacted statute is presumed to be constitutional, and he maintains 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."

As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional. n16

n16 As indicated, the issue presented in this case is purely whether a local official may refuse to apply a statute solely on the basis of the official's view that the statute is unconstitutional. There is no claim here that the officials acted as they did because of questions regarding the proper interpretation of the applicable statutes or because of doubts as to which of two or more competing statutory provisions to apply. (Cf. *Burlington Northern & Santa Fe Ry. Co. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887-889 [5 Cal. Rptr. 3d 503].) Here, the officials acknowledge that the current California statutes limit marriage to a union between a man and a woman, and concede that they refused to apply the relevant statutory provisions solely because of a belief that this statutory requirement is unconstitutional.

[*1083]

A

In the initial petitions filed in this matter, petitioners relied primarily on the provisions of article III, section 3.5 of the California Constitution (hereafter generally referred to as article III, section 3.5) in maintaining that the challenged actions of the local officials were improper.

Article III, section 3.5 provides in full: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [P] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. [P] (b) To declare a statute unconstitutional. [P] (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."

Article III, section 3.5 does not define the term "administrative agency" as used in this constitutional provision. Petitioners maintain that in light of the purpose of the provision, the term "administrative agency" should be interpreted to include local executive officials, particularly local officials who [**474] are acting as state officers in carrying out a function prescribed by state statute.

Article III, section 3.5 was proposed by the Legislature and placed before the voters as Proposition 5 at the June 6, 1978 [***243] election, and was adopted by the electorate. The ballot argument in favor of Proposition 5, contained in the election brochure distributed to voters prior to the election, stated in part: "Every statute is enacted only after a long and exhaustive process, involving as many as four open legislative committee meetings where members of the public can express their views. If the agencies question the constitutionality of a measure, they can present testimony at the public hearing during legislative consideration. Committee action is followed by full consideration by both houses of the Legislature. [P] Before the Governor signs or vetoes a bill, he receives analyses from the agencies which will be called upon to implement its provisions. If the Legislature has passed the bill over the objections of the agency, the Governor is not likely to ignore valid apprehensions of his department, as he is Chief Executive of the State and is [*1084] responsible for most of its administrative functions. [P] Once the law has been enacted, however, it does not make sense for an administrative agency to refuse to carry out its legal responsibilities because the agency's members have decided the law is invalid. Yet, administrative agencies are so doing with increasing frequency. These agencies are all part of the Executive Branch of government, charged with the duty of enforcing the law. [P] The Courts, however, constitute the proper forum for determination of the validity of State statutes. There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform. [P] Proposition 5 would prohibit the State agency from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid. [P] We urge you to support this Proposition 5 in order to insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and

the Courts. Your passage of Proposition 5 will help preserve the concept of the separation of powers so wisely adopted by our founding fathers." (Ballot Pamp. Primary Elec. (June 6, 1978) argument in favor of Prop. 5, p. 26.) Petitioners maintain that the rationale set forth in this ballot argument applies to local executive officials as well as state administrative agencies, and thus that the term "administrative agency" as used in the provision properly should be construed to apply to local executive officials.

The city vigorously contests petitioners' suggested interpretation of article III, section 3.5, maintaining that this provision is addressed only to state, not local, administrative agencies, and that in any event the local officials here at issue are not an "administrative agency" within the meaning of article III, section 3.5. The city concedes there may be some anomaly in article III, section 3.5's application only to state administrative agencies and not to local executive officials, but insists such an anomaly "would not be license to rewrite Section 3.5 and give it a meaning nobody had in mind when it was passed." The city argues that "[t]he voters were responding to a specific problem [involving state administrative agencies] when they enacted Section 3.5, and they chose specific means to address that problem. In the end, if some in hindsight question the wisdom of that choice, the answer lies in amending California's Constitution, not judicially rewriting it." In sum, the city asserts that the existing terms of article III, section 3.5 cannot properly be interpreted to include local executive officials.

Although one Court of Appeal decision contains language directly supporting petitioners' argument that article III, section 3.5's reference to administrative agencies properly is interpreted to include local executive officials such as county clerks (*Billig v. Voges* (1990) 223 Cal. App. 3d 962, 969 [***244] [273 Cal. Rptr. 91] (*Billig*)), the city maintains that the question of the proper scope of article III, section 3.5 never was raised in *Billig*, and further that the [*1085] pertinent language in *Billig* clearly is dictum. Accordingly, the city argues, the appellate court's decision in *Billig* cannot properly be viewed as resolving [**475] the issue whether article III, section 3.5 applies to local officials. n17

n17 In *Billig, supra,* 223 Cal. App. 3d 962, the plaintiffs had submitted a referendum petition to the city clerk, but the clerk refused to process the petition or submit it to the city council because the petition did not include the full text of the challenged ordinance, as required by section 4052 of the Elections Code. The plaintiffs then sought a writ of mandate in superior court against the clerk, claiming that this official's authority was limited to determining whether there were sufficient signatures on the petition and did not extend to rejecting a petition for noncompliance with section 4052. The trial court ruled against the plaintiffs and the Court of Appeal affirmed.

The appellate court explained in *Billig* that the city clerk's duty "is limited to the ministerial function of ascertaining whether the *procedural* requirements for submitting a petition have been met" (*Billig, supra,* 223 Cal. App. 3d at pp. 968-969), and found that Elections Code section 4052 "involves purely procedural requirements for submitting a referendum petition. Therefore a city clerk who refuses to accept a petition for noncompliance with the statute is only performing a ministerial function involving no exercise of discretion." (*Billig,* at p. 969.)

Stating that the city clerk lacked discretion *not* to enforce the statutory provision, the Court of Appeal discussed article III, section 3.5 and observed: "Administrative agencies, *including public officials in charge of such agencies*, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.) [Elections Code] [s]ection 4052 has not been declared unconstitutional by an appellate court in this state. Consequently, *the offices of city clerks throughout the state* are mandated by the [C]onstitution to implement and enforce the statute's procedural requirements. In the instant case, respondent had the clear and present ministerial duty to refuse to process appellants' petition because it did not comply with the procedural requirements of section 4052." (*Billig, supra,* 223 Cal. App. 3d at p. 969, italics added.)

Although the italicized language in *Billig* supports petitioners' position with regard to the scope of article III, section 3.5, there is no indication that any party in *Billig* raised the argument that article III, section 3.5 applies only to *state* agencies and not to *local* agencies or officials, and thus the court in *Billig* had no occasion to resolve that issue. Moreover, in any event the discussion of article III, section 3.5 in *Billig* clearly was dictum, because an analysis and resolution of the scope of that constitutional provision not only was unnecessary to the decision in *Billig*, but arguably was entirely irrelevant. The plaintiffs in *Billig* had *not* asked the city clerk to refrain from applying Elections Code section 4052 on the ground that the statute was unconstitutional, and the city clerk's decision not to accept the petition

did *not* involve consideration of whether he had the authority to determine the provision's constitutionality; moreover, the plaintiffs did not raise any constitutional challenge to section 4052 in the trial court or on appeal. Instead, the plaintiffs in *Billig* simply argued that the applicable provisions of section 4052 did not authorize *a city clerk* (as opposed to a court) to reject a petition for noncompliance with that statute, and that only a court was authorized to disqualify a petition for nonconformance with the requirements of section 4052.

Because the provisions of article III, section 3.5 did not bear on the question before the court in *Billig*, we believe it would be inappropriate to accord much significance to the cited language in that decision.

(11) As we shall explain, we have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5, because [*1086] we conclude that prior to the adoption of article III, section 3.5, it already was established under California law--as in the overwhelming majority of other states (see, *post*, at pp. 1104-1107) [***245] -- that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute. Because the adoption of article III, section 3.5 plainly *did not grant or expand* the authority of local executive officials to determine that a statute is unconstitutional and to act in contravention of the statute's terms on the basis of such a determination, we conclude that the city officials do not possess this authority and that the actions challenged in the present case were unauthorized and invalid.

B

We begin with a few basic legal principles that were well established prior to the adoption of article III, section 3.5 in 1978.

(12) First, one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity." (7 Witkin, Summary of Cal. Law (9th ed. 1988) [**476] Constitutional Law, § 58, pp. 102-103 [citing, among numerous other authorities, *In re Madera Irrigation District* (1891) 92 Cal. 296, 308; *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 280; *People v. Globe Grain and Mill. Co.* (1930) 211 Cal. 121, 127 [294 P. 3]].)

(13) Second, it is equally well established that when, as here, a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute. "It is well settled in this state and elsewhere, that when a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of the power." (*Cowell v. Martin* (1872) 43 Cal. 605, 613-614; see, e.g., *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 797 [322 P.2d 449]; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal. App. 3d 340, 346-347 [129 Cal. Rptr. 824] ["[a]dministrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or by statute"].)

The city has not identified any provision in the California Constitution or in the applicable statutes that purports to grant the county clerk or the county recorder (or any other local official) the authority to determine the constitutionality of the statutes each public official has a ministerial duty to enforce. Instead, the city's position appears to be that a public executive official's duty [*1087] to follow the law (including the Constitution) includes the implied or inherent authority to refuse to follow an applicable statute whenever the official personally believes the statute to be unconstitutional, even though there has been no judicial determination of the statute's unconstitutionality and despite the existence of the rule that a duly enacted statute is presumed to be constitutional.

As we shall see, the California authorities that were in place prior to the adoption of article III, section 3.5, do not support the city's position.

C

Although in this case we need not determine the scope of article III, section 3.5, the historical background that led to the proposal and adoption of that constitutional provision in 1978 nonetheless provides a useful starting point for our analysis. As this court explained in *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002 [251 Cal. Rptr. 299, 760 P.2d 495], "[a]rticle III, section 3.5, ... [***246] was placed on the ballot by a unanimous vote of the Legislature in apparent response to this court's decision in *Southern Pac. Transportation v. Public Utilities Com.* (1976) 18 Cal.3d 308 [134 Cal. Rptr. 189] [hereafter *Southern Pacific*], in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional." Accordingly, the

decision in *Southern Pacific* is an appropriate place to begin.

In *Southern Pacific*, the plaintiff railroad company sought review of two decisions of the Public Utilities Commission (PUC) in which the PUC held that section 1202.3 of the Public Utilities Code, a statute enacted in 1971, was unconstitutional. Section 1202.3 was one of a number of statutes in the Public Utilities Code dealing with railroad crossings. With respect to private or farm railroad crossings, Public Utilities Code section 7537 (1) granted "the owner of adjoining lands the right to *private* or *farm* crossings necessary or convenient for egress or ingress" (*Southern Pacific, supra,* 18 Cal.3d at p. 311), (2) provided that the railroad must maintain the crossings, and (3) granted the PUC the authority to fix and assess the cost of such crossings. With respect to railroad crossings on *public* or *publicly used roads*, Public Utilities Code section 1202 gave the PUC the exclusive power "to regulate *public* or *publicly used* road or highway crossings, including locating, maintaining, protecting, and closing them" (*Southern Pacific, supra,* 18 Cal.3d at p. 312), and further granted the PUC the authority to allocate costs among the railroad and the affected public entities responsible for maintaining the public or publicly used road, including any costs involved in closing a crossing. [**477]

Public Utilities Code section 1202.3, the statute at issue in *Southern Pacific*, provided, in turn, that in any proceeding under Public Utilities Code [*1088] section 1202 "involving a *publicly used* road or highway not on a publicly maintained road system," the PUC could apportion costs to the public entity if the PUC found "(a) express dedication and acceptance of the road or (b) a judicial determination of implied dedication." (*Southern Pacific, supra,* 18 Cal.3d at p. 312.) If neither condition was found, section 1202.3 provided that the PUC "shall order the crossing abolished by physical closing." Section 1202.3 further provided that "the railroad shall in no event be required to bear improvement costs 'in excess of what it would be required to bear in connection with the improvement of a public street or highway crossing.' " (*Southern Pacific, supra,* 18 Cal.3d at pp. 312-313.)

In *Southern Pacific*, the PUC concluded in an administrative proceeding that Public Utilities Code section 1202.3 was unconstitutional because it unlawfully delegated the state's police power to private litigants by granting private litigants absolute discretion to require the closing of a railroad crossing merely by commencing a proceeding under Public Utilities Code section 1202. The PUC's conclusion was based in part on its determination that under section 1202.3, once the PUC found that there had been neither an express dedication and acceptance of the publicly used road, nor a judicial determination of an implied dedication of the road, the PUC had no alternative but to order the crossing closed and to require the railroad to pay for the closing. (*Southern Pacific, supra,* 18 Cal.3d at p. 313.) [***247]

On review, this court unanimously disagreed with the PUC's constitutional determination. Observing that Public Utilities Code section 1202.3 provided, in its introductory phrase, that the statute applied "in any proceeding under Section 1202," the court in *Southern Pacific* reasoned that "the Legislature has declared that section 1202.3 is an exception to the former section and that the provisions for cost allocation and closing crossings in the latter section *are only applicable when the commission would otherwise have ordered improvement of a crossing pursuant to the former section.* The standard for compelling crossing improvement implicit in section 1202 is obviously public convenience and necessity, including safety concerns [citations], and this standard must be read into section 1202.3. [P] Thus, before the commission may close a crossing under section 1202.3, it must not only find public use and lack of requisite dedication, but also find that necessity and convenience preclude continued use of the crossing in its existing condition. Such findings--rather than mere commencement of a proceeding under section 1202--[are] the basis for closing a crossing under section 1202.3. [P] The function of the private litigant within the statutory framework is merely to call the commission's attention to the need for improving or closing a crossing and perhaps to urge action on the commission." (*Southern Pacific, supra,* 18 Cal.3d at p. 314, italics added.) [*1089]

As noted, in *Southern Pacific* all of the justices of this court agreed that the PUC had erred in concluding that Public Utilities Code section 1202.3 was unconstitutional. Although the briefs filed in this court in *Southern Pacific* did not raise any question regarding the authority of the PUC to determine the constitutionality of section 1202.3, n18 and the majority in *Southern Pacific* did not address that question in the text of the opinion, Justice Mosk authored a vigorous concurring and dissenting opinion in *Southern Pacific*, arguing strongly that neither the PUC nor any other administrative agency "may declare a duly enacted statute unconstitutional," and that "it is incongruous for the will of the people of the state, reflected by their elected legislators, to be thwarted by a governmental body which exists only to implement that will." (*Southern Pacific, supra,* 18 Cal.3d at p. 315 (conc. & dis. opn. of Mosk, J.).)

n18 Indeed, in the petition filed in this court, the petitioner in *Southern Pacific* expressly stated that it did "not question the authority of the Commission, which has quasi judicial powers and

is a court of special jurisdiction, to declare and hold a statute to be unconstitutional."

[**478]

Justice Mosk's concurring and dissenting opinion in *Southern Pacific* acknowledged that a prior California decision-- *Walker v. Munro* (1960) 178 Cal. App. 2d 67 [2 Cal. Rptr. 737] (hereafter *Walker*)--had held that an administrative agency that has been granted judicial or quasi-judicial power by the California Constitution (a type of entity commonly referred to as a "constitutional agency") n19 has the authority to consider the constitutionality of a statute in the course of its quasi-judicial proceedings. Justice Mosk suggested, however, that *Walker* had been "indirectly [***248] criticized and implicitly disapproved" (*Southern Pacific, supra,* 18 Cal.3d at p. 316 (conc. & dis. opn. of Mosk, J.)) in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251 [115 Cal. Rptr. 497, 524 P.2d 1281] (hereafter *State of California v. Superior Court (Veta)*), and he took issue with "the debatable premise that any and all 'judicial power' inherently entails the authority to declare a law unconstitutional." (*Southern Pacific, supra,* 18 Cal.3d at p. 317.) Relying upon language in numerous decisions of the United States Supreme Court indicating that an administrative agency or executive official has no power to adjudicate constitutional issues (*id.* at p. 316), and decisions from other jurisdictions holding "that administrative agencies lack the powers appropriated in this case" (*ibid.*), Justice Mosk concluded that the extensive powers granted by the California Constitution to the PUC did not include the power to declare a statute unconstitutional and to refuse to apply it.

n19 See, e.g., *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal. App. 2d 315, 320 [314 P.2d 807] ("[The Department of Alcoholic Beverage Control] is a constitutional agency that has succeeded to some of the powers of the State Board of Equalization in alcoholic beverage control matters. Being an agency upon which the Constitution has conferred limited judicial powers, its decisions on factual matters must be affirmed if there is substantial evidence to support them").

[*1090]

The majority in *Southern Pacific* responded to Justice Mosk's concurring and dissenting opinion in a lengthy footnote. (See *Southern Pacific, supra,* 18 Cal.3d 308, 311-312, fn. 2.) The initial portion of the footnote contains some broad language that could be read to support the conclusion that the duty of any administrative agency or public official to obey the Constitution affords such agency or official the authority to determine the constitutional validity of statutes the agency or official is charged with enforcing. The majority in *Southern Pacific*, however, ultimately rested its holding that the PUC had the authority to determine the constitutional validity of statutes on the circumstance that the California Constitution grants broad judicial or quasi-judicial power to the PUC.

The majority in *Southern Pacific* stated in this regard: "[T]he Constitution and statutes of this state grant the commission wide administrative, legislative, and judicial powers. [Citations.] The Legislature has limited the judiciary from interfering with the commission by restricting review to the Supreme Court and by additionally restricting review to determining 'whether the commission has regularly pursued its authority, *including* a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.' (Italics added; [citations].) Public Utilities Code section 1732 provides corporations and individuals may not raise matters in any court not presented to the commission on petition for rehearing, reflecting, when read with the judicial review sections, legislative determination that all issues must be presented to the commission. *Under the broad powers granted it, the commission may determine the validity of statutes.*" (*Southern Pacific, supra,* 18 Cal.3d at pp. 311-312, fn. 2, italics added.)

This review of the decision in *Southern Pacific* demonstrates that there was a significant disagreement in this court on the particular question *whether a so-called constitutional agency* (like the PUC), *that has been granted the authority to exercise quasi-judicial power by the California Constitution*, has the authority to determine that a statute the agency is called upon to apply is unconstitutional and need not be followed. We are [**479] unaware, however, of any case, either prior to or subsequent to *Southern Pacific*, that suggests that under the California Constitution *a local executive official such as a county clerk*, who is charged with the *ministerial* duty to enforce a statute, has the authority [***249] to exercise judicial power by determining whether a statute is unconstitutional.

The case of *Walker, supra,* 178 Cal. App. 2d 67, cited (and criticized) in Justice Mosk's concurring and dissenting opinion in *Southern Pacific*, appears to be the first case in California to address the question whether an administrative agency has the authority to determine the constitutionality of a [*1091] statute that the agency is required to enforce. In *Walker*, the plaintiffs were retail liquor dealers who had been charged in an administrative proceeding before the Department of Alcoholic Beverage Control with violating the fair trade provisions of the

California Alcoholic Beverage Control Act. While the administrative proceeding was pending, the plaintiffs filed a declaratory judgment action in superior court against the administrative officials, seeking a declaration that the fair trade provisions of the Alcoholic Beverage Control Act were unconstitutional, and an order enjoining the officials from enforcing those provisions. The trial court in *Walker* granted summary judgment in favor of the defendants, relying upon the circumstance that the same constitutional issue had been raised in the pending administrative proceeding and upon the trial court's conclusion "that it is more expeditious and proper that the Department rule on the question before the court is required to rule on it." (178 Cal. App. 2d at p. 70.)

On appeal, the plaintiffs argued that the exhaustion of remedies doctrine upon which the trial court had relied was inapplicable, because the Department of Alcoholic Beverage Control "does not have the power ... to decide constitutional questions." (*Walker, supra,* 178 Cal. App. 2d at p. 73.) In rejecting this contention, the Court of Appeal in *Walker* began by referring to the applicable provision of the California Constitution that empowers the Alcoholic Beverage Control Appeals Board to review questions " 'whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in light of the whole record.' (Cal. Const., art. XX, § 22.)" (178 Cal. App. 2d at p. 73.) The court in *Walker* then observed: "The department and the Appeals Board are thus constitutional agencies *upon which limited judicial powers have been conferred*. [Citations.]" (*Ibid.*, italics added.)

In response to the plaintiffs' claim in *Walker* that the department only could make findings of fact and that the appeals board only was empowered "to review certain questions of law, which are only procedural" (*Walker, supra,* 178 Cal. App. 2d at p. 74), the court in *Walker* stated: "However, there does not appear to be any basis for so limiting the grant of power to the Appeals Board. The Appeals Board may determine whether the department acted within its jurisdiction. In *United Insurance Co. v. Maloney* [(1954)] 127 Cal. App. 2d [155,] 157 [273 P.2d 579], the court stated: 'A charge of unconstitutional action goes to the very jurisdiction of the administrative officer or body to entertain the proceeding ... .' [Citation.] This would also seem applicable to a charge that the statute which the agency is seeking to enforce is unconstitutional." (*Walker, supra,* 178 Cal. App. 2d at p. 74.) [*1092]

Accordingly, in concluding that the administrative agency in that case had the authority to determine, at least in the first instance, the question whether the fair trade statutes were unconstitutional, the court in *Walker* specifically relied upon the [***250] circumstance that the Alcoholic Beverage Control Appeals Board had been granted the authority by the California Constitution to exercise limited judicial power. n20

> n20 The significance attached by the court in *Walker* to the California Constitution's grant of judicial power to the Alcoholic Beverage Control Appeals Board is confirmed by the distinction the *Walker* decision drew between the case before it and a then recent decision of the California Supreme Court that was heavily relied upon by the plaintiffs. The court in *Walker* explained: " *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787 [322 P.2d 449], referred to extensively by plaintiffs, is not in point. There the county of Alpine brought an action to determine its boundaries with defendant counties. Judgment of dismissal was reversed. Defendants asserted that the county of Alpine had not exhausted an administrative remedy before the State Lands Commission. But the court held that the agency [the State Lands Commission] was empowered only to 'survey and mark' boundaries. ... [*I*]*t was without jurisdiction to make judicial determinations* of boundaries and therefore the county of Alpine could properly maintain its action." (*Walker, supra,* 178 Cal. App. 2d at p. 73, italics added.)

[**480]

As noted in Justice Mosk's concurring and dissenting opinion in *Southern Pacific*, this court held in *State of California v. Superior Court* (*Veta*), *supra*, 12 Cal.3d 237, some years after the appellate court's decision in *Walker*, that a plaintiff seeking a declaration that the California Coastal Zone Conservation Act of 1972 was unconstitutional was not required to pursue that constitutional claim before the Coastal Zone Conservation Commission prior to bringing a court action. (12 Cal.3d at pp. 250-251.) Although there is some language in *Veta* critical of *Walker*, the two cases nonetheless are clearly and easily distinguishable, because the Coastal Zone Conservation Commission, unlike the Alcoholic Beverage Control Appeals Board, had not been granted any judicial power by the California Constitution. Thus, the holding in *State of California v. Superior Court* (*Veta*) that the commission lacked authority to pass on the constitutionality of the statute establishing its status and functions was not inconsistent with the *Walker* decision.

(14) In light of the foregoing review of the relevant case law, we believe that after this court's decision in

Southern Pacific, supra, 18 Cal.3d 308, the state of the law in this area was clear: administrative agencies that had been granted judicial or quasi-judicial power by the California Constitution possessed the authority, in the exercise of their administrative functions, to determine the constitutionality of statutes, but agencies that had not been granted such power under the California Constitution lacked such authority. (See *Hand v. Board of Examiners in Veterinary Medicine* (1977) 66 Cal. App. 3d 605, 617-619 [136 Cal. Rptr. 187].) Accordingly, these decisions recognize that, under [*1093] California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution. n21

n21 In this regard it is worth noting that article III, section 3 of the California Constitution explicitly provides: "The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others *except as permitted by this Constitution*." (Italics added.)

Given the foregoing decisions and their reasoning, it appears evident that under California law as it existed prior to the adoption of article III, section 3.5 of the California Constitution, *a local executive official*, such as a county clerk or county [***251] recorder, possessed no authority to determine the constitutionality of a statute that the official had a ministerial duty to enforce. If, in the absence of a grant of judicial authority from the California Constitution, an administrative agency that was required by law to reach its decisions only after conducting court-like quasi-judicial proceedings did not generally possess the authority to pass on the constitutionality of a statute that the agency was required to enforce, it follows even more so that a local executive official who is charged simply with the ministerial duty of enforcing a statute, and who generally acts without any quasi-judicial authority or procedure whatsoever, did not possess such authority. As indicated above, we are unaware of any California case that suggests such a public official has been granted judicial or quasi-judicial power by the California Constitution. n22

n22 The city, in a footnote contained in its reply brief to several amicus curiae briefs, maintains that the actions of its officials did not constitute the exercise of judicial powers, citing a brief passage in this court's decision in *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 993 [4 Cal. Rptr. 2d 837, 824 P.2d 643] (*Lusardi*) (the Director of the Department of Industrial Relations' "determination that a project is a public work ... cannot be accurately characterized as 'judicial,' because it does not encompass the conduct of a hearing or a binding order for any type of relief"). In *Lusardi*, however, the director, unlike the city officials here, acted to enforce a statutory provision; he did not defy or disregard a statutory provision on the basis of his own determination that the statute was unconstitutional. *Lusardi* clearly provides no support for the city's position.

[**481]

(15) The city, in arguing that article III, section 3.5 does not apply to local officials, relies upon the statement in *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 36 [112 Cal. Rptr. 805], that the separation of powers clause in article III "is inapplicable to the government below the state level." n23 The city might well argue that this language in *Strumsky* also renders inapposite the line of California cases (*Southern* [*1094] *Pacific, supra,* 18 Cal.3d 308; *State of California v. Superior Court (Veta), supra,* 12 Cal.3d 237; and *Walker, supra,* 178 Cal. App. 2d 67) that we have just discussed. The city fails to recognize, however, that the decision in *Strumsky* emphatically did *not* hold that under the California Constitution local executive officials are free to exercise judicial power. On the contrary, in *Strumsky* this court expressly *overruled* a line of earlier California decisions that had held (for purposes of determining the appropriate standard of judicial review of a decision of a local administrative agency) that such an agency could exercise judicial power; the opinion in *Strumsky* concluded instead that a local administrative agency has *no* authority under the California Constitution to exercise judicial power. (*Strumsky, supra,* 11 Cal.3d at pp. 36-44.) In light of this holding in *Strumsky*, it appears clear that a local executive official who makes decisions-- [***252] without the benefit of even a quasi-judicial proceeding--has no authority to exercise judicial power, such as by determining the constitutionality of applicable statutory provisions.

n23 The statement in numerous California decisions that the separation of powers provision of article III is inapplicable to government below the state level means simply that, in establishing a governmental structure for the purpose of managing municipal affairs, the Legislature (through statutes) or local entities (through charter provisions and the like) may combine executive, legislative, and judicial functions in a manner different from the structure that the California Consti-

tution prescribes for state government. (See, e.g., *Wulzen v. Board of Supervisors* (1894) 101 Cal. 15, 25-26 [35 P. 353]; *People v. Provines* (1868) 34 Cal. 520, 532-540.) As explained hereafter, the statement does *not* mean that a local executive official has the inherent authority to exercise judicial power.

Accordingly, we conclude that at the time article III, section 3.5 was adopted, it was clear under California law that a local executive official did not have the authority to determine that a statute is unconstitutional or to refuse to enforce a statute in the absence of a judicial determination that the statute is unconstitutional. n24

n24 In a somewhat related context, this court held in *Farley v. Healey* (1967) 67 Cal.2d 325 [62 Cal. Rptr. 26, 431 P.2d 650] that an acting registrar of voters, who refused to determine whether sufficient signatures had been submitted to qualify a local initiative measure for the ballot because of his conclusion that the content of the initiative was not a proper subject for a local initiative, "exceeded his authority in undertaking to determine whether the proposed initiative was within the power of the electorate to adopt." (67 Cal.2d at p. 327.) We explained that under the applicable charter provision, the registrar's "duty is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met. *It is not his function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. These questions may involve difficult legal issues that only a court can determine. ...* Given compliance with the formal requirements for submitting an initiative, the registrar must place it on the ballot unless he is directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the initiative power." (*Ibid.*, italics added.)

The adoption of article III, section 3.5, of course, effectively overruled the majority's holding in *Southern Pacific* and largely embraced the reasoning set forth in Justice Mosk's concurring and dissenting opinion, amending the California Constitution to provide that "[a]n administrative agency, *including an administrative agency created by the Constitution or an initiative statute, has no power ... [t]o ...* refuse to enforce a statute on the basis of its being unconstitutional unless an appellate court has made a determination that such [*1095] statute is unconstitutional." [**482] (Italics added.) As we already have noted, we need not and do not decide in this case what effect the adoption of article III, section 3.5 has on the authority of local executive officials, because it is abundantly clear that this constitutional amendment did not *expand* the authority of such officials so as to permit them to refuse to enforce a statute solely on the basis of their view that the statute is unconstitutional. Accordingly, we conclude that under California law a local executive official generally lacks such authority.

D

(16) In support of its contrary claim that, as a general matter, California law long has recognized that an executive public official has the authority to refuse to comply with a ministerial statutory duty whenever the official personally believes the statute is unconstitutional, the city relies upon a line of California decisions that have reviewed the validity of statutes or ordinances authorizing the issuance of bonds, the letting of public contracts, or the disbursement of public funds in mandate actions filed against public officials who refused to comply with a ministerial duty. As the city accurately notes, numerous California decisions addressing these three subjects have held that "mandate is the proper remedy to compel a public officer to perform ministerial acts such as issuance of bonds [and that] the constitutionality of the law authorizing a bond issuance may be determined in a proceeding for such a writ." (*California Housing Finance Agency v. Elliott* [***253] (1976) 17 Cal.3d 575, 579-580 [131 Cal. Rptr. 361, 551 P.2d 1193] [bond]; see, e.g., *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 598 [116 Cal. Rptr. 361, 526 P.2d 513] [bond]; *Metropolitan Water District v. Marquardt* (1963) 59 Cal.2d 159, 170-171 [28 Cal. Rptr. 724, 379 P.2d 28] [public contract]; *City of Whittier v. Dixon* (1944) 24 Cal.2d 664, 666 [151 P.2d 5] [warrant]; *Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 315-320 [5 P.2d 585] [bond]; *Los Angeles Co. F.C. Dist. v. Hamilton* (1917) 177 Cal. 119, 121 [169 P. 1028] [bond]; *Denman v. Broderick* (1896) 111 Cal. 96, 99, 105 [43 P. 516] [warrant].)

In each of the foregoing cases, the mandate action was instituted after a public official who was under a statutory duty to perform a ministerial act that was a necessary step in the issuance of the bond, the letting of the contract, or the disbursement of public funds (such as affixing the official's signature to the bond or contract, or issuing a warrant) refused to perform that act based upon the official's ostensible doubts as to the constitutional validity of the statute authorizing the bond, contract, or

public expenditure. The city emphasizes that in none of these cases did the court criticize such a public official for declining to perform his or her ministerial act, but instead concluded that the public official's refusal to act was an appropriate means of [*1096] bringing the constitutional question of the validity of the bond, contract, or expenditure of public funds before the court for resolution. The city maintains that these decisions demonstrate that the general rule in California always has been that *every* public official is free to determine the constitutional validity of the statutory provisions that he or she has a ministerial duty to enforce or execute, and free to refuse to perform the ministerial act if he or she in good faith believes the statute to be unconstitutional. The city argues that the line of decisions we have analyzed above--holding, prior to the adoption of article III, section 3.5, that only administrative agencies constitutionally authorized to exercise judicial power have the authority to determine the constitutional validity of statutes--involved *a limited exception* applicable only to administrative agencies.

We believe the city's argument misconceives the state of the law prior to the adoption of article III, section 3.5. As we have discussed above, the general rule established by California decisions at the time *Southern Pacific, supra,* 18 Cal.3d 308, was decided was that, among administrative agencies, only one that had been granted judicial power under the California Constitution possessed the authority to determine the constitutionality of a statute it was charged with enforcing and to decline to apply the statute if the agency determined it was unconstitutional. As already [**483] explained, if a nonconstitutional administrative agency that rendered its decisions after an extensive quasi-judicial procedure--in which the arguments for and against constitutionality could be fully presented and considered in a quasi-judicial fashion--lacked authority to determine constitutional issues, it clearly would be anomalous to permit an ordinary executive official (who carries out his or her official action without the benefit of any sort of quasi-judicial procedures) to determine the constitutionality of a statute and to refuse to apply it based simply upon the official's own good faith belief that the statute is unconstitutional. Thus, the general rule in California--and, as we shall discuss below, in most jurisdictions--was (and continues to be) that an executive official does not possess such authority.

It is the line of public finance cases upon which the city relies that involves the exceptional [***254] situation. As the applicable decisions make clear, the public official in each of those cases was permitted to refuse to perform a ministerial act when he or she had doubts about the validity of the underlying bond, contract, or public expenditure, both in order to ensure that a mechanism was available for obtaining a timely *judicial* determination of the validity of the bond issue, contract, or public expenditure--a determination often essential to the marketability of bonds or to the contracting parties' willingness to go forward with the contract (see, e.g., *Golden Gate Bridge etc. Dist. v. Felt,* [*1097] *supra,* 214 Cal. 308, 315), or to avoid irreparable loss of public funds n25--and in recognition of the circumstance that, in this specific context, the public official frequently faced potential *personal* liability (as distinguished from the potential liability of a governmental entity) if the bond, contract, or public expenditure ultimately was found to be invalid. (See, e.g., *Golden Gate Bridge etc. Dist. v. Felt, supra,* 214 Cal. at pp. 316-317; *Denman v. Broderick, supra,* 111 Cal. 96, 105.)

n25 The public finance cases upon which the city relies generally preceded the adoption of California's validation statutes, which currently permit a public agency to file an in rem action in order to obtain a judicial determination of the validity of bonds, warrants, contracts, obligations, or similar evidences of indebtedness. (See Code Civ. Proc., § 860 et seq. [initially adopted in 1961 (Stats. 1961, ch. 1479, § 1, p. 3331)].) The current statutes provide that such actions "shall be given preference over all other civil actions ... to the end that such actions shall be speedily heard and determined." (Code Civ. Proc., § 867.)

(17) Although the city points to language in some of these decisions that could be read to support the city's broad position here, the *holdings* in these cases clearly are limited to a public official's ability to refuse to perform a ministerial act necessary for the execution of a bond issue or public contract, or the disbursement of public funds, where such refusal permits a judicial determination prior to the actual sale of the bonds, the carrying out of the contract, or the disbursement of public funds, and where the official's personal liability frequently is at stake. Contrary to the city's contention, the circumstance that a public official may refuse to perform a ministerial act in that context does not signify that in all other contexts every public official is free to refuse to perform a ministerial act based upon the official's view that the statute the officer is statutorily obligated to apply is unconstitutional.

The city attempts to bring the present matter within the reach of the foregoing cases by arguing that if the city officials enforced California's current marriage laws limiting marriage to a man and a woman, the officials would face possible personal liability for monetary damages under state or federal law if the marriage statutes

subsequently were determined to be unconstitutional. The city's argument in this regard clearly lacks merit.

(18) First, as a matter of state law, Government Code section 820.6 explicitly provides that "[i]f a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable." Thus, the officials clearly would not have incurred liability under California law simply for following the current marriage statutes and declining to issue marriage licenses [**484] or register marriage certificates in contravention of those statutes. **(19)** Second, under federal [*1098] law, a local public official generally is immunized from liability for official acts so long as the official's conduct "does not violate *clearly established* statutory or constitutional [***255] rights of which a reasonable person would have known" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L. Ed. 2d 396, 102 S. Ct. 2727], italics added; see *Anderson v. Creighton* (1987) 483 U.S. 635, 639 [97 L. Ed. 2d 523, 107 S. Ct. 3034]), and, as we discuss below (see, *post*, pp. 1102-1104), in this instance there simply is no plausible argument that the city officials would have violated "clearly established" constitutional rights by continuing to enforce California's current marriage statutes in the absence of a judicial determination that the statutes are unconstitutional. (Cf. *LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1160 [finding state officials were not entitled to qualified immunity when "no reasonable official could have believed" that application of the statute at issue was constitutional in light of prior controlling judicial decisions].) **(20)** Finally, even if the city officials were to be sued in their personal capacity for actions taken pursuant to statute and in the scope of their employment, under Government Code section 825 the officials would be entitled to have their public employer provide a defense and pay any judgment entered in such an action, whether the action was based on a state law claim or a claim under the federal civil rights statutes. (See *Williams v. Horvath* (1976) 16 Cal.3d 834, 842-848 [129 Cal. Rptr. 453, 548 P.2d 1125].) Accordingly, there is no merit to the city's contention that the actions of the city officials that are challenged here can be defended as necessary to avoid the incurring of personal liability on the part of such officials.

E

Some academic commentators, while confirming that as a general rule executive officials must comply with duly enacted statutes even when the officials believe the provisions are unconstitutional, have suggested that there may be room to recognize an exception to this general rule in instances in which a public official's refusal to apply the statute would provide the most practical or reasonable means of enabling the question of the statute's constitutionality to be brought before a court. (See, e.g., May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative* (1994) 21 Hastings Const. L.Q. 865, 994-996.) n26 As we have just seen, the line of public finance cases relied upon by the city may be viewed as an example of [*1099] just such a limited exception, and there are a number of other California decisions in which a constitutional challenge to a statute or other legislative enactment has been brought before a court for judicial resolution by virtue of a public entity's refusal to comply with the statute, under circumstances in which the public entity had a personal stake or interest [***256] in the constitutional issue and the public entity's action was the most practicable or reasonable method of obtaining a judicial determination of the validity of the statute. (See, e.g., *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 [132 Cal. Rptr. 2d 713, 66 P.3d 718] [impingement on county's home rule authority]; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 5-10 [227 Cal. Rptr. 391, 719 P.2d 987] [impingement on county's taxing authority].)

n26 A number of law review articles suggest that the federal Constitution should be interpreted as permitting the President of the United States to refuse to enforce a statute that the President believes is unconstitutional. (See, e.g., Easterbrook, *Presidential Review* (1990) 40 Case W. Res. L.Rev. 905.) Other scholars, however, have made a strong argument that the history of the proceedings of the constitutional convention that drafted the federal Constitution, and in particular the Founders' explicit rejection of a proposal for an absolute presidential veto, refutes such an interpretation. (See, e.g., May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative, supra,* 21 Hastings Const. L.Q. 865, 872-895.) To date, no court has accepted the contention that the President possesses such authority. (See, e.g., *Ameron, Inc. v. U.S. Army Corp. of Eng'rs* (3d Cir. 1986) 787 F.2d 875, 889 & fn. 11 ["This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best"].)

[**485]

(21) Although it may be appropriate in some circumstances for a public entity or public official to refuse or decline to enforce a statute as a means of bringing the constitutionality of the statute before a court for judicial resolution, it is nonetheless clear that such an exception does not justify the actions of the local officials at issue in the present case. Here, there existed a clear and readily available means, other than the officials' wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a court. If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure--a lawsuit brought by a couple who has been denied a license under existing statutes--is the procedure that was utilized to challenge the constitutionality of California's antimiscegenation statute in *Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17], and the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states. (See, e.g., *Baehr v. Lewin* (1993) 74 Haw. 530 [852 P.2d 44]; *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309 [798 N.E.2d 941]; *Baker v. State of Vermont* (1999) 170 Vt. 194 [744 A.2d 864].) The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here. n27

n27 As noted above, after several mandate actions were filed against the city in superior court challenging the actions of the city officials, the city filed a cross-complaint in one of the actions, seeking a declaratory judgment that the marriage statutes are unconstitutional insofar as they limit marriage to a union between a man and a woman. (See, *ante*, p. 1071, fn. 6.) We have no occasion in this case to determine whether the city properly could maintain a declaratory judgment action in this setting, but we note that in another context the Legislature specifically has authorized a public official who questions the constitutionality or validity of an enactment to bring a declaratory judgment action rather than act in contravention of the statute. (See Rev. & Tax. Code, § 538; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79-80 [124 Cal. Rptr. 2d 519, 52 P.3d 695].)

[*1100]

Accordingly, the city cannot defend the challenged actions on the ground that such actions were necessary to obtain a judicial determination of the constitutionality of California's marriage statutes.

F

The city also relies on the circumstance that each of the city officials in question took an oath of office to "support and defend" the state and federal Constitutions, n28 suggesting that a public official [***257] would violate his or her oath of office were the official to perform a ministerial act under a statute that the official personally believes violates the Constitution. In our view, this contention clearly lacks merit.

n28 Article XX, section 3 of the California Constitution provides in relevant part: "Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: [P] 'I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.' "

(22) As Justice Mosk explained in his concurring and dissenting opinion in *Southern Pacific, supra,* 18 Cal.3d 308, 319, a public official "faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid." A public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority and justifying such action by reference to his or her personal constitutional views. For example, it is clear that a justice of this court or of an intermediate appellate court does not act [**486] in contravention of his or her oath of office when the justice follows a controlling constitutional decision of a higher court even though the justice personally believes that the controlling decision was wrongly decided and that the Constitution

actually requires the opposite result. On the contrary, the oath to support and defend the Constitution requires a public official to act within the constraints of our constitutional system, not to disregard presumptively valid statutes and take action in violation of such statutes on the basis of the official's own [*1101] determination of what the Constitution means. n29 (See also *State v. State Board of Equalizers* (Fla. 1922) 84 Fla. 592 [94 So. 681, 682-683] ["The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is ... without merit. The fallacy in it is that every act of the legislature is presumptively constitutional until judicially [***258] declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined"].) n30

n29 The brief footnote discussion in *Board of Education v. Allen* (1968) 392 U.S. 236, 241, footnote 5 [20 L. Ed. 2d 1060, 88 S. Ct. 1923], relied upon by the city, does not conflict with this conclusion. In *Allen*, officials of a local public school district brought a court action challenging the validity, under the establishment clause of the First Amendment, of a state statute that required the school district to loan books free of charge to all students in the district, including students attending private religious schools. In the footnote in question, the court in *Allen* noted that no one had questioned the standing of the local district and its officials "to press their claim in this Court," and then stated that "[b]elieving [the statute in question] to be unconstitutional, [the officials] are in the position of having to choose between violating their oath [to support the United States Constitution] and taking a step--refusal to comply with [the applicable statute]--that would likely bring their expulsion from office and also a reduction in state funding for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." (*Allen,* 392 U.S. at p. 241, fn. 5, quoting *Baker v. Carr* (1962) 369 U.S. 186, 204 [7 L. Ed. 2d 663, 82 S. Ct. 691].) The footnote's reference to the officials' oath to support the Constitution indicates no more than that the public officials' belief that the statute was unconstitutional afforded them standing *to bring a court action* to challenge the statute. The footnote in *Allen* does not hold that the federal Constitution, or a public official's oath to support the federal Constitution, authorizes a state official to undertake official action forbidden by a state statute based solely on the official's belief that the statute is unconstitutional, and, as discussed below (*post,* pp. 1109-1112), numerous federal authorities refute that proposition.

n30 The city also obliquely suggests that the general rule requiring a public official to perform a ministerial duty prescribed by statute, despite the official's personal view that the statute is unconstitutional, is contrary to the teaching of the Nuremberg trials, which rejected the "I was just following orders" defense. In response to a similar claim, the federal district court in *Haring v. Blumenthal* (D.D.C. 1979) 471 F. Supp. 1172, 1178, footnote 15, cogently observed: "Plaintiff's comparison of his situation with that of the Nuremberg defendants is grossly simplistic. The Nuremberg defendants could have escaped liability by failing to seek and retain positions which exposed them to the execution of objectionable activity; and, should plaintiff feel sufficiently strongly about the matter, he may do likewise. Beyond that, plaintiff's analogy demonstrates primarily that debates and dialogues on public issues have become so debased in recent years that such terms as genocide, war crime, crimes against humanity, and the like are bandied about with considerable abandon in connection with almost every conceivable controversial issue of public policy. There is not the slightest similarity between the crimes committed under the aegis of a violent dictatorship and the implementation of laws adopted under a system of government which offers free elections, freedom of expression, and an independent judiciary as safeguards against excesses and as a guarantee of the ultimate rule of a sovereign citizenry." We agree.

[*1102]

G

The city further contends that a general rule requiring an executive official to comply with an existing statute unless and until the statute has been judicially determined to be unconstitutional is impractical and would lead to intolerable circumstances. The city posits a hypothetical example of a public official faced with a statute that is identical in all respects to another statute that a court already has determined is unconstitutional, and suggests it would be absurd to require the official to apply the clearly invalid statute in that instance. For sup-

port, the city points to a passage in the majority opinion in *Southern Pacific*, which asks rhetorically: "[W]hen the United States Supreme Court, for example, [**487] repudiates the separate but equal doctrine established by the statutes of one state, should the school boards of other states continue to apply identical statutes until a court declares them invalid [?]" (*Southern Pacific, supra,* 18 Cal.3d 308, 311, fn. 2.)

(23) Whatever force this argument might have in a case in which a governing decision previously has found an identical statute unconstitutional or in which the invalidity of the statute is so patent or clearly established that no reasonable official could believe the statute is constitutional, n31 the argument plainly is of no avail here. Although we have no occasion in this case to determine the constitutionality of the current California marriage statutes, we can say with confidence that the asserted invalidity of those statutes certainly is not so patent or clearly established that no reasonable official could believe that the current California marriage [***259] statutes are valid. Indeed, the city cannot point to any judicial decision that has held a statute limiting marriage to a man and a woman unconstitutional under the California or federal Constitution. Instead, the city relies on state court decisions from Massachusetts, Vermont, and Hawaii, that, in interpreting their own state constitutions, assertedly have found similar statutory restrictions to violate provisions of their state's own constitution. (See *Goodridge v. Department of Pub. Health, supra,* 798 N.E.2d 941; *Baker v. State of* [*1103] *Vermont, supra,* 744 A.2d 864; *Baehr v. Lewin, supra,* 852 P.2d 44.) n32 A significant number of [**488] other state and federal courts, however, have reached a contrary conclusion and have upheld the constitutional validity of such a restriction on marriage under both the federal Constitution and other state constitutions. (See, e.g., *Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185, 186-187], app. dism. for want of substantial federal question (1972) 409 U.S. 810 [federal Constitution]; n33 *Standhardt v. Super. Ct., supra,* 77 P.3d [*1104] 451, 454-465 [***260] [federal and Arizona Constitutions]; *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 361-364 (opns. of Terry, J. & Steadman, J.) [federal Constitution]; *Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588, 590 [federal Constitution]; *Singer v. Hara* (1974) 11 Wn. App. 247 [522 P.2d 1187, 1189-1197] [federal and Washington Constitutions]; *Adams v. Howerton* (C.D.Cal. 1980) 486 F. Supp. 1119, 1124-1125, affd. (9th Cir. 1982) 673 F.2d 1036, cert. den. (1982) 458 U.S. 1111 [federal Constitution].) Although the state court decisions from Massachusetts, Vermont, and Hawaii relied upon by the city surely would be of interest to a California court faced with the question whether the current California marriage statutes violate the California Constitution, a California court would be equally interested in the decisions of the courts that have reached a contrary conclusion (and in the reasoning of the minority opinions in the state court decisions relied upon by the city [see *Goodridge v. Department of Pub. Health, supra,* 798 N.E.2d 941, 974-1105 (dis. opns. of Spina, J., Sosman, J., & Cordy, J.); *Baehr v. Lewin, supra,* 852 P.2d 44, 70-73 (dis. opn. of Heen, J.)]). In light of the absence of any California authority directly on point and the sharp division of judicial views expressed in the out-of-state decisions that have considered similar constitutional challenges, this plainly is not an instance in which the invalidity of the California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional. Therefore, this case does not fall within any narrow exception that may apply to instances in which it would be absurd or unreasonable to require a public official to comply with a statute that any reasonable official would conclude is unconstitutional.

n31 See, for example, *Schmid v. Lovette* (1984) 154 Cal. App. 3d 466, 474 [201 Cal. Rptr. 424] (holding that article III, section 3.5 of the California Constitution did not require public community college officials to continue to apply a statute requiring public employees to sign an anti-Communist-Party loyalty oath when comparable statutes had been held unconstitutional by both federal and state supreme court decisions) and *LSO, Ltd. v. Stroh, supra,* 205 F.2d 1146, 1160 (holding that no reasonable official could have believed that a statute prohibiting exhibition of nonobscene erotic art on any premises holding a liquor license could constitutionally be applied in light of a then recent United States Supreme Court decision).

n32 Of the three decisions cited by the city, the Massachusetts decision in *Goodridge v. Department of Pub. Health, supra,* 798 N.E.2d 941, appears to be the only one squarely to hold that a state constitution precludes the state from withholding the status of marriage from same-sex couples.

In *Baker v. State of Vermont, supra,* 744 A.2d 864, the court summarized its conclusion under the "common benefits" clause of the Vermont Constitution, as follows: "[T]he State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within

the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative rests with the Legislature." (744 A.2d at p. 867; see also *id.* at pp. 886-887.) The Vermont Legislature subsequently enacted a civil union statute. (Vt. Stat. Ann., tit. 15, § § 1201-1207 (supp. 2001).)

In *Baehr v. Lewin, supra,* 852 P.2d 44, the Hawaii Supreme Court held that the trial court in that case had erred in granting judgment on the pleadings against three same-sex couples who had sued for declaratory and injunctive relief after being denied marriage licenses, concluding that the plaintiffs were entitled to go forward with their action and that, under the equal protection clause of the Hawaii Constitution, the state would have to demonstrate a compelling interest to justify the statutory classification. (852 P.2d at p. 68.) Following the decision in *Baehr*, the voters in Hawaii amended the Hawaii Constitution to limit marriage to unions between a man and a woman, and, in light of that amendment, the Hawaii Supreme Court thereafter ordered entry of judgment in favor of the defendants in the *Baehr* litigation. (See *Baehr v. Miike* (1999) 92 Haw. 634 [994 P.2d 566] [full order reported at 1999 Haw. Lexis 391].)

(24) In addition to relying upon *Goodridge*, *Baker*, and *Baehr*, the city points to a passage in the dissenting opinion of Justice Scalia in *Lawrence v. Texas* (2003) 539 U.S. 558 [156 L. Ed. 2d 508, 123 S. Ct. 2472], in which he expressed the view that the reasoning of the majority opinion in *Lawrence*--holding a Texas sodomy statute unconstitutional--would lead to the conclusion that a statute precluding same-sex marriages also would be unconstitutional. (*Lawrence v. Texas, supra,* 539 U.S. at pp. 604-605 (dis. opn. of Scalia, J.).) The majority opinion in *Lawrence*, however, expressly stated that "[t]he present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Lawrence, supra*, 539 U.S. at p. 578). In light of this very specific disclaimer in the majority opinion in *Lawrence*, we conclude that the city cannot plausibly claim that the *Lawrence* decision clearly establishes that a state statute limiting marriage to a man and a woman is unconstitutional under the federal Constitution. (See also *Standhardt v. Super. Ct.* (Ariz.Ct.App. 2003) 77 P.3d 451, 454-460, 464-465 [post-*Lawrence* case rejecting claim that *Lawrence* indicates the federal Constitution guarantees the right to same-sex marriage].)

n33 Petitioners in *Lewis* maintain that because the United States Supreme Court summarily dismissed the appeal in *Baker v. Nelson* for want of a substantial federal question and because such a summary dismissal is treated as a decision on the merits (see *Mandel v. Bradley* (1977) 432 U.S. 173, 176 [53 L. Ed. 2d 199, 97 S. Ct. 2238]; *Hicks v. Miranda* (1975) 422 U.S. 332, 344 [45 L. Ed. 2d 223, 95 S. Ct. 2281]), the summary dismissal in *Baker v. Nelson* definitively establishes that, under current federal law, a statute limiting marriage to a man and a woman does not violate the federal Constitution. The city, on the other hand, cites a number of decisions stating that when there have been subsequent doctrinal developments in the United States Supreme Court that undermine the holding in a summary dismissal, the lower courts are not bound to follow the summary dismissal as controlling authority (see, e.g., *Tenafly Eruv Ass'n v. Borough of Tenafly* (3d Cir. 2002) 309 F.3d 144, 173, fn. 33; *Lecates v. Justice of the Peace Court No. 4 of Delaware* (3d Cir. 1980) 637 F.2d 898, 904), and the city argues that there have been such doctrinal developments in subsequent high court decisions that undermine the holding in *Baker v. Nelson*. We find no need to resolve this dispute here, because whatever the current effect of the summary dismissal in *Baker v. Nelson*, the case before us clearly does not present an instance in which the invalidity of the current California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional.

H

Accordingly, we conclude that, under California law, the city officials had no authority to refuse to perform their ministerial duty in conformity with the current California marriage statutes on the basis of their view that the [*1105] statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional.

It is worth noting that the California rule generally precluding an executive official from refusing to perform

a ministerial duty imposed by statute on the basis of the official's determination or opinion that the statute is unconstitutional is consistent with the [**489] general rule applied in the overwhelming [***261] majority of cases from other jurisdictions. (See generally Annot., Unconstitutionality of Statute as Defense to Mandamus Proceeding (1924) 30 A.L.R. 378, 379 ["[t]he weight of authority [holds] that a public officer whose duties are of a ministerial character cannot question the constitutionality of a statute as a defense to a mandamus proceeding to compel him to perform some official duty, where in the performance of such duty his personal interests or rights will not be affected, and he will not incur any personal liability, or violate his oath of office"]; Annot. (1940) 129 A.L.R. 941 [supplementing 30 A.L.R. 378]; see also Note (1928) 42 Harv. L.Rev. 1071.) n34

n34 Our review of the decisions of our sister states and the District of Columbia reflects that of the 33 jurisdictions in which decisions have been found addressing this subject, 26 appear to have recognized and endorsed the proposition that, as a general rule, an executive official who is charged with a ministerial duty to enforce a statute has no authority to refuse to apply the statute, in the absence of a judicial determination that the statute is unconstitutional, on the ground that the official believes the statute is unconstitutional, although many of the jurisdictions, like California, also recognize an exception for bond or other public finance cases, in which an official is permitted to refuse to apply a statute as a means of obtaining a timely judicial determination of the legality of the bond or public expenditure. (See *Denver Urban Renewal Authority v. Byrne* (Colo. 1980) 618 P.2d 1374, 1379-1380 [foll. *Ames v. People* (1899) 26 Colo. 83 [56 P. 656, 658]]; *Levitt v. Attorney General* (1930) 111 Conn. 634 [151 A. 171, 176]; *Panitz v. District of Columbia* (D.C. Cir. 1940) 112 F.2d 39, 41-42 [applying District of Columbia law]; *Fuchs v. Robbins* (Fla. 2002) 818 So. 2d 460, 463-464 [foll. *State v. State Board of Equalizers, supra,* 94 So. 681, 682-684]; *Taylor v. State* (1931) 174 Ga. 52 [162 S.E. 504, 508-509]; *Howell v. Board of Comm'rs* (1898) 6 Idaho 154 [53 P. 542, 543]; *People ex rel. Atty. Gen. v. Salomon* (1870) 54 Ill. 39, 44-46; *Bd. of Sup'rs of Linn Cty. v. Dept. of Revenue* (Iowa 1978) 263 N.W.2d 227, 232-234 [foll. *Charles Hewitt & Sons Co. v. Keller* (1937) 223 Iowa 1372 [275 N.W. 94, 95-97]]; *Tincher v. Commonwealth* (1925) 208 Ky. 661 [271 S.W. 1066, 1068]; *Dore v. Tugwell* (1955) 228 La. 807 [84 So. 2d 199, 201-202] [foll. *State v. Heard* (1895) 47 La. Ann. 1679 [18 So. 746, 749-752]]; *Smyth v. Titcomb* (1850) 31 Me. 272, 285; *Maryland Classified Emp. Ass'n v. Anderson* (1977) 281 Md. 496 [380 A.2d 1032, 1035-1037]; *Assessors of Haverhill v. New England Tel. & Tel. Co.* (1955) 332 Mass. 357 [124 N.E.2d 917, 920-921]; *State v. Steele County Bd. of Comm'rs* (1930) 181 Minn. 427 [232 N.W. 737, 738-739]; *St. Louis County v. Litzinger* (Mo. 1963) 372 S.W.2d 880, 881-882 [foll. *State v. Becker* (1931) 328 Mo. 541 [41 S.W.2d 188, 190-191]]; *State v. McFarlan* (1927) 78 Mont. 156 [252 P. 805, 808]; *State v. Sedillo* (1929) 34 N.M. 1 [275 P. 765, 765-767]; *Attorney General v. Taubenheimer* (1917) 178 App.Div. 321, 321 [164 N.Y.Supp. 904, 904]; *Dept. of State Highways v. Baker* (1940) 69 N.D. 702 [290 N.W. 257, 260-262]; *State v. Griffith* (1940) 136 Ohio St. 334 [25 N.E.2d 847, 848-849]; *State ex rel. Cruce v. Cease* (1911) 28 Okla. 271 [114 P. 251, 252-253]; *Commonwealth v. Mathues* (1904) 210 Pa. 372 [59 A. 961, 964-969]; *State v. Burley* (1908) 80 S.C. 127 [61 S.E. 255, 257]; *Thoreson v. State Board of Examiners* (1899) 19 Utah 18 [57 P. 175, 177-179]; *City of Montpelier v. Gates* (1934) 106 Vt. 116 [170 A. 473, 476-477]; *Capito v. Topping* (1909) 65 W. Va. 587 [64 S.E. 845, 846]; *Riverton Valley D. Dist. v. Board of County Comm'rs* (1937) 52 Wyo. 336 [74 P.2d 871, 873].)

Of the seven states that may be viewed as adopting the minority position, most have addressed the issue only in the context of actions either relating to matters affecting the expenditure of public funds or where the rights or interests of the public officer or public entity were directly at stake. (See *State v. Steinwedel* (1932) 203 Ind. 457 [180 N.E. 865, 866-868] [public expenditure]; *Toombs v. Sharkey* (1925) 140 Miss. 676 [106 So. 273, 277] [public expenditure]; *Van Horn v. State* (1895) 46 Neb. 62 [64 N.W. 365, 371-372] [county reorganization]; *State v. Slusher* (1926) 119 Ore. 141 [248 P. 358, 359-360] [tax collection]; *Holman v. Pabst* (Tex. 1930) 27 S.W.2d 340, 342-343 [local election procedure]; *Hindman v. Boyd* (1906) 42 Wash. 17 [84 P. 609, 612] [local election procedure]; *State v. Tappan* (1872) 29 Wis. 664 [9 Am. Rep. 622, 635] [tax collection].)

A number of the out-of-state cases discuss a separate line of cases that address the issue whether a public official or public entity has "standing" to bring a court action--for example, a declaratory judgment action--challenging the

constitutionality of a statute the official or entity is obligated to comply with or enforce. (See, e.g., *Fuchs v. Robbins, supra,* 818 So. 2d 460, 463-464; *Bd. of Sup'rs of Linn Cty. v. Dept. of Revenue, supra,* 263 N.W.2d 227, 233-234; see also *City of Kenosha* (1967) 35 Wis. 2d 317 [151 N.W.2d 36, 42-43].) Although the standing issue involves some of the same considerations that are applicable to the issue we face here, from a separation of powers perspective, conduct by an executive official that simply asks a court to determine the constitutionality of a statute would appear to raise much less concern than an executive official's unilateral refusal to enforce a statute based on the official's opinion that the statute is unconstitutional.

[*1106] [***262]

Although there are numerous out-of-state cases that address this issue, one of the most quoted decisions is *State v. Heard, supra,* 18 So. 746, 752, where the court, after an extensive [**490] review of the then existing authorities from various jurisdictions, concluded: "[E]xecutive officers of the State government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal, until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so the most inextricable confusion would inevitably result, and 'produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government.' 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' " (See also *Department of State Highways v. Baker, supra,* 290 N.W. 257, 259 ["There is no question as to the general rule that a subordinate ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of compliance with the statute may not question the constitutionality of the statute imposing such duty"]; *State v. Becker, supra,* 41 S.W.2d 188, 190 ["It is well settled in this state and in a great majority of our sister states that, as a general rule, a ministerial officer cannot defend his refusal to perform a duty prescribed by a statute on the ground that such statute is unconstitutional"]; *State v. Steele* [*1107] *County Board of Com'rs, supra,* 232 N.W. 737, 738 [although "[t]he authorities are in conflict," "[t]he better doctrine, supported by the weight of authority is that an official so charged with the performance of a ministerial duty will not be allowed to question the constitutionality of such a law. ... Officials acting ministerially are not clothed with judicial authority. ... Their authority is the command of the statute, and it is the limit of their power"]; *State v. State Board of Equalizers, supra,* 94 So. 681, 683 ["It is contended that an *individual* may refuse to obey a law that he believes to be unconstitutional, and take a chance on its fate in the courts. He does this, however, 'at his peril'; the 'peril' being to suffer the consequences, such as fine or imprisonment, or both, if the courts should hold the act to be constitutional. [P] A *ministerial officer* refusing to enforce a law because in his opinion it is unconstitutional takes no such risk. He does nothing 'at his peril,' because he subjects himself to no penalty if his opinion as to the unconstitutionality of an act is not sustained by the courts. [P] It is the doctrine of nullification, pure and simple, and whatever may have been said of the soundness of that doctrine when sought to be applied by states to acts of Congress, the most ardent [***263] followers of Mr. Calhoun never extended it to give to ministerial officers the right and power to nullify a legislative enactment" (italics added)].)

I

In addition to the California decisions reviewed above and the weight of judicial authority from other jurisdictions, consideration of the practical consequences of a contrary rule further demonstrates the unsoundness of the city's position.

To begin with, most local executive officials have no legal training and thus lack the relevant expertise to make constitutional determinations. Although every individual (lawyer or nonlawyer) is, of course, free to form his or her own opinion of what the Constitution means and how it should be interpreted and applied, a local executive official has no authority to impose his or her personal view on others by refusing to comply with a ministerial duty imposed by statute. (See, e.g., *Southern Pacific, supra,* 18 Cal.3d 308, 321 (conc. & dis. opn. of Mosk, J.) ["Certainly attorneys have no monopoly on wisdom, but a person trained for three or more years in a college of law and then tempered with at least a decade of experience within the judicial system is likely to be far better equipped to make difficult constitutional judgments than a lay administrator with no background in the law"].) n35

n35 Several amici curiae point out that nonattorney public officials are able to seek legal advice from a county counsel or city attorney (see Gov. Code, § § 27640, 41801) and assert that

such nonattorney officials presumably will do so before disobeying a statute on the ground it is unconstitutional. County counsel and city attorneys, however, also are executive officers who, like a nonattorney public official, have not been granted judicial power and thus also lack the authority to determine that a statute is unconstitutional and that it should not be followed. A nonattorney public official generally will be in no position to critically evaluate legal advice obtained from such counsel regarding the question of a statute's constitutionality. Outside the very narrow category of instances in which legal counsel can advise that the invalidity of the statute is so patent or clearly established that *any* reasonable public official would conclude that the statute in question is unconstitutional (see, *ante*, pp. 1102-1104), whenever a nonattorney official defies a statutory mandate on the basis of a county counsel's or city attorney's legal advice, the official's refusal to apply the statute actually will rest upon legal counsel's judgment on a debatable constitutional question, rather than upon the judgment of the official on whom the statute imposes a ministerial duty. Furthermore, a nonattorney official is under no obligation to act in accordance with a legal opinion (often given confidentially) provided by a county counsel or city attorney.

[*1108] [**491]

Second, if, as the city maintains, a local official were to possess the authority to act on the basis of his or her own constitutional determination, such an official generally would arrive at that determination without affording the affected individuals any due process safeguards and, in particular, without providing any opportunity for those supporting the constitutionality of the statutes to be heard. In its opposition to the initial petition filed in this case, the city urged this court not to immediately accept jurisdiction over the substantive question of the constitutionality of California's marriage laws at this time, because that question properly could be determined only after a full presentation of evidence before a trial court. The city officials themselves, however, made their own constitutional determination without conducting any such evidentiary hearing or taking other measures designed to protect the rights of those who maintain that the statute is constitutional. Thus, despite the settled rule that a duly enacted statute is presumed to be constitutional, under the city's proposed rule a local executive official [***264] would be free to determine that a statute is unconstitutional and refuse to enforce it, without providing even the most rudimentary of due process procedures--notice and an opportunity to be heard--to anyone directly affected by the official's action.

Third, there are thousands of elected and appointed public officials in California's 58 counties charged with the ministerial duty of enforcing thousands of state statutes. If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide. (Cf. *Haring v. Blumenthal, supra,* 471 F. Supp. 1172, 1178-1179 ["Unless and until the Congress, or a court of competent jurisdiction ... , determines that a particular tax exemption ruling is invalid, the employees of the [Internal Revenue] Service ... are obliged to implement that ruling. Not merely the concept of a uniform tax policy but the effectiveness of the government of the United States as a functioning entity would be [*1109] in jeopardy if each employee could take it upon himself to decide which particular laws, regulations, and policies are legal or illegal, and to base his official actions upon that private determination"].) Although in the past the multiplicity of public officials performing similar ministerial acts under a single statute never has posed a problem in this regard, that is undoubtedly true only because most officials never imagined they had the authority to determine the constitutionality of a statute that they have a ministerial duty to enforce. Were we to hold that such officials possess this authority, it is not difficult to anticipate that private individuals who oppose enforcement of a statute and question its constitutionality would attempt to influence ministerial officials in various locales to exercise--on behalf of such opponents--the officials' newly recognized authority. The circumstance that many local officials have no legal training would only exacerbate the problem. As a consequence, the uneven enforcement of statutory [**492] mandates in different local jurisdictions likely would become a significant concern.

Fourth, the confused state of affairs arising from diverse actions by a multiplicity of local officials frequently would continue for a considerable period of time, because under the city's proposed rule a court generally could not order a public official to comply with the challenged statute until the court actually had determined that it was constitutional. In view of the many instances in which a constitutional challenge to a statute entails lengthy litigation, the lack of uniform treatment afforded to similarly situated citizens throughout the state often would be a long-term phenomenon.

These practical considerations simply confirm the soundness of the established rule that an executive official generally does not have the authority to refuse to comply with a ministerial duty imposed by statute on the

basis of the official's opinion that the statute is unconstitutional. n36

n36 Despite the suggestion in Justice Werdegar's concurring and dissenting opinion (*post*, at pp. 1136-1139), this established rule does not represent any sort of broad claim of *judicial* power over the *executive* branch, but on the contrary reflects the general duty of an *executive* official, in carrying out a ministerial function authorized by statute, not to assume the authority to supersede or contravene the directions of the *legislative* branch or to exercise the traditional function of the *judicial* branch.

[***265]

V

The city further claims, however, that even if *California law* does not recognize the authority of a local official to refuse to comply with a statutorily mandated ministerial duty absent a judicial determination that the statute is unconstitutional, under the federal supremacy clause (U.S. Const., art. VI, § 2) California lacks the power to require a public official to comply with a state statute that the official believes violates the federal Constitution. [*1110] Although in the present case the mayor's initial letter to the county clerk relied solely upon the asserted unconstitutionality of the California marriage statutes under the *California* Constitution, the city, in the opposition filed in this court, for the first time advanced the position that the action taken by the city officials was based, at least in part, on their belief that the California statutes violate the *federal* Constitution, and the city now rests its supremacy clause claim on this newly asserted belief. Putting aside the question of the bona fides of this belatedly proffered rationale, we conclude that, in any event, the federal supremacy clause provides no support for the city's argument.

To begin with, the principal cases upon which the city relies-- *Ex Parte Young* (1908) 209 U.S. 123 [52 L. Ed. 714, 28 S. Ct. 441] and *LSO, Ltd. v. Stroh, supra,* 205 F.3d 1146--are readily distinguishable from the present case. Those cases stand only for the proposition that the circumstance that a state official is acting pursuant to the provisions of an applicable state statute does not necessarily shield the official (or the public entity on whose behalf the official acts) either from an injunction or a monetary judgment issued by a federal court, where the federal court subsequently determines that the state statute violates the federal Constitution. n37 The city has not cited any case holding that the federal Constitution prohibits a state from defining the authority of a state's executive officials in a manner that requires such officials to comply with a clearly applicable statute unless and until such a statute is judicially determined to be unconstitutional, nor any case holding that the federal Constitution compels a state to permit every executive official, state or local, to refuse to enforce an applicable statutory provision whenever the official personally believes the statute violates the federal Constitution.

n37 As explained above (*ante*, pp. 1097-1098), under the circumstances in this case there is no plausible basis for suggesting that the city officials would have subjected themselves to personal liability had they acted in conformity with the terms of the current California marriage statutes.

(25) Furthermore, numerous pronouncements by the United States Supreme Court directly refute the city's contention that the supremacy clause or any other provision of the federal Constitution embodies such a principle. To begin with, the high court's position on the proper role of federal executive [**493] officials with regard to constitutional determinations is instructive. In *Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 152-153 [88 L. Ed. 635, 64 S. Ct. 474], for example, in response to the plaintiff's contention that under one proposed reading of the applicable statute "the [federal Price] Administrator [an executive official] would have to decide whether the state regulation is constitutional before he should recognize it," the United States Supreme [*1111] Court stated: "We cannot give weight to this view of [the Price Administrator's] functions, which we think it unduly magnifies. *State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly* [***266] *no power to adjudicate constitutional issues is conferred on the Administrator. ... We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.*" (Italics added; see also *Weinberger v. Salfi* (1975) 422 U.S. 749, 765 [45 L. Ed. 2d 522, 95 S. Ct. 2457] ["[T]he constitutionality of a statutory requirement [is] a matter which is beyond [the Secretary of Health, Education, and Welfare's] jurisdiction to determine"]; *Johnson v. Robison* (1974) 415 U.S. 361, 368 [39 L. Ed. 2d 389, 94 S. Ct. 1160] ["[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"]; *Oestereich v. Selective Service Board* (1968) 393 U.S. 233, 242 [21 L. Ed. 2d 402, 89 S. Ct. 414] (conc.

opn. of Harlan, J.) [same]; cf. *Thunder Basin Coast Co. v. Reich* (1994) 510 U.S. 200, 215 [127 L. Ed. 2d 29, 114 S. Ct. 771].) In light of the high court's repeated statements that federal executive officials generally lack authority to determine the constitutionality of statutes, the city's claim that the federal supremacy clause itself grants a state or local official the authority to refuse to enforce a statute that the official believes is unconstitutional is plainly untenable.

Furthermore, there are several earlier United States Supreme Court cases that even more directly refute the city's contention. *Smith v. Indiana* (1903) 191 U.S. 138 [48 L. Ed. 125, 24 S. Ct. 51] was a case, arising from the Indiana state courts, in which a county auditor had refused to grant a statutorily authorized exemption to a taxpayer because the auditor believed the exemption violated the federal Constitution. A mandate action was filed against the auditor, and the state courts permitted the auditor to raise and litigate the asserted unconstitutionality of the statute as a defense in the mandate action, ultimately determining that the exemption was constitutionally permissible and directing the auditor to grant the exemption. The auditor appealed the state court decision upholding the constitutionality of the state statute to the United States Supreme Court.

In its opinion in *Smith*, the high court observed that "there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution" (*Smith v. Indiana, supra,* 191 U.S. at p. 148), but it recognized that a state court has "the power ... to assume jurisdiction [in such] a case if [it] choose[s] to do so." (*Ibid*.) At the same time, however, the court in *Smith* stated explicitly that " the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it ... *is a purely local question*" (*ibid.*, italics added)--that is, purely a question of state (not federal) law--a conclusion that directly refutes the city's claim that federal law requires a state to recognize the authority of a ministerial official to refuse to comply with a statute whenever the official believes it violates the federal Constitution. Moreover, in *Smith* itself the United States Supreme Court went on to hold that although the state court in that case had permitted the auditor to litigate the constitutionality of the state statute, the auditor did not have a sufficient personal interest in the litigation to support jurisdiction in the United States Supreme Court; thus the high court dismissed the auditor's appeal without reaching the question of the constitutionality of the underlying [***267] statute. n38 A few years later, the high [**494] court followed its decision in *Smith*, dismissing a similar appeal by a state auditor in *Braxton County Court v. West Virginia* (1908) 208 U.S. 192, 197 [52 L. Ed. 450, 28 S. Ct. 275].

n38 The court in *Smith* explained in this regard: "It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. ... He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers ... ." (*Smith v. Indiana, supra,* 191 U.S. at pp. 148-149.)

In light of the foregoing high court decisions, we conclude that the California rule set forth above does not conflict with any federal constitutional requirement.

VI

The city contends, however, that even if we conclude that its officials lacked the authority to refuse to enforce the marriage statutes, we still cannot issue the writ of mandate sought by petitioners without first determining whether California's current marriage statutes are constitutional, in light of the general proposition that courts will not issue a writ of mandate to require a public official to perform an unconstitutional act. As the Florida Supreme Court explained in a similar context, however, "[i]t is no answer to say that the courts will not require a ministerial officer to perform an unconstitutional act. That aspect of the case is not before us. We must first determine the power of the ministerial officer to refuse to perform a statutory duty because *in his opinion* the law is unconstitutional. When we decide that, we do not get to the question of the constitutionality of the act, and it will not be decided." (*State v. State Board of Equalizers, supra,* 94 So. 681, 684.) Accordingly, because we have concluded that the city officials have no authority to refuse to apply the current marriage statutes in the absence of a judicial determination that these statutes are unconstitutional, we conclude that the requested writ of mandate should issue. [*1113]

VII

(26) Finally, we must determine the appropriate scope of the relief to be ordered. As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case,

and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate. (See *Johnson v. Fontana County F.P. Dist.* (1940) 15 Cal.2d 380, 391-392 [101 P.2d 1092]; *George M. v. Superior Court* (1988) 201 Cal. App. 3d 755, 760 [247 Cal. Rptr. 330]; *Sacramento City Police Dept. v. Superior Court* (1984) 156 Cal. App. 3d 1193, 1197, fn. 5 [203 Cal. Rptr. 169].)

(27) In the present case, we are faced with an unusual, perhaps unprecedented, set of circumstances. Here, local public officials have purported to authorize, perform, and register literally thousands of marriages in direct violation of explicit state statutes. The Attorney General, as well as a number of local taxpayers, have filed these original mandate proceedings in this court to halt the local officials' unauthorized conduct and to compel these officials to correct or undo the numerous unlawful actions they have taken in the immediate past. As explained above, we have determined that the city officials exceeded their authority in issuing marriage licenses to, solemnizing marriages of, and registering marriage certificates on behalf of, same-sex couples. Under these circumstances, we conclude [***268] that it is appropriate in this mandate proceeding not only to order the city officials to comply with the applicable statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correction of all relevant official records and notification of affected individuals of the invalidity of the officials' actions.

(28) In light of the clear terms of Family Code section 300 *defining* marriage as a "personal relationship arising out of a civil contract between a man and a woman" and the legislative history of this provision demonstrating that the purpose of this limitation was to "prohibit persons of the same sex from entering lawful marriage" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 [discussed, *ante*, p. 1076, fn. 11]), [**495] we believe it plainly follows that all same-sex marriages authorized, solemnized, or registered by the city officials must be considered void and of no legal effect from their inception. Although this precise issue has not previously been presented under California law, every court that has considered the question has determined that when state law limits marriage to a union between a man and a woman, a same-sex marriage performed in violation of state law is void and of no legal effect. (See, e.g., *Jones v. Hallahan, supra,* 501 S.W.2d 588, 589 [same-sex marriage "would not constitute a marriage" under Kentucky law]; *Anonymous v.* [*1114] *Anonymous* (N.Y.Sup.Ct. 1971) 67 Misc. 2d 982 [325 N.Y.S.2d 499, 501] [under New York law, same-sex "marriage ceremony was a nullity" and "no legal relationship could be created by it"]; *McConnell v. Nooner* (8th Cir. 1976) 547 F.2d 54, 55-56 ["purported" same-sex marriage of no legal effect under Minnesota law]; *Adams v. Howerton, supra,* 486 F. Supp. 1119, 1122 [purported same-sex marriage has "no legal effect" under Colorado or federal law].) The city has not cited any case in which a same-sex marriage, performed in contravention of a state statute that bans such marriages and that has not judicially been held unconstitutional, has been given any legal effect.

The city and several amici curiae representing same-sex couples who obtained marriage licenses from city officials--and had certificates of registry of marriage registered by such officials--raise a number of objections to our determining that the same-sex marriages that have been performed in California are void and of no legal effect, but we conclude that none of these objections is meritorious.

(29) First, the city and amici curiae contend that the Attorney General and the petitioners in *Lewis* lack standing to challenge the validity of the same-sex marriages that already have been performed, relying upon the provisions of Family Code section 2211, which sets forth the categories of individuals who may bring an action to nullify a "voidable" marriage--categories that generally are limited to one of the parties to the marriage or, where a party to the marriage is a minor or a person incapable of giving legal consent, the parent, guardian, or conservator of such party. **(30)** Past California decisions, however, make clear that the procedural requirements generally applicable in an action to nullify or annul a "voidable" marriage are inapplicable when a purported marriage is void from the beginning or is a legal nullity. As this court stated in *Estate of Gregorson* (1911) 160 Cal. 21, 26 [116 P. 60]: "A marriage prohibited as incestuous *or illegal* and declared to be 'void' or 'void from the beginning' is a legal nullity *and its validity may be asserted or shown in any proceeding in which the fact of marriage* [***269] *may be material*." (Italics added.) In our view, the present mandate action, which seeks to compel public officials to correct the effects of their unauthorized official conduct in issuing marriage licenses to or registering marriage certificates of thousands of same-sex couples, is such a proceeding, because the validity or invalidity of the same-sex marriages authorized and registered by such officials is central to the scope of the remedy that may and should be ordered in this case. n39

n39 Contrary to the assertion of Justice Werdegar's concurring and dissenting opinion (*post*, at p. 1136), the validity or invalidity of the existing same-sex marriages is material to this case not simply because the Attorney General has re-

quested this court to decide that issue, but because resolution of the issue is necessary in determining the scope of the remedy that properly should be ordered in this mandate action to correct, and undo the potentially disruptive consequences of, the unauthorized actions of the city officials.

[*1115]

(31) The city and amici curiae additionally contend that we cannot properly determine the validity or invalidity of the existing same-sex marriages in this proceeding because the parties to a marriage are [**496] indispensable parties to any legal action seeking to invalidate a marriage, and the thousands of same-sex couples whose marriages were authorized and registered by the local authorities are not formal parties to the present mandate proceeding. The city relies on cases involving actions that have been brought to annul a particular marriage on the basis of facts peculiar to that marriage, in which the courts have held the parties to the marriage to be indispensable parties. (See, e.g., *McClure v. Donovan* (1949) 33 Cal.2d 717, 725 [205 P.2d 17].) In the present instance, by contrast, the question of the validity or invalidity of a same-sex marriage does not depend upon any facts that are peculiar to any individual same-sex marriage, but rather is a purely legal question applicable to all existing same-sex marriages, and rests on the circumstance that the governing state statute limits marriage to a union between a man and a woman. Under ordinary principles of stare decisis, an appellate decision holding that, under current California statutes, a same-sex marriage performed in California is void from its inception effectively would resolve that legal issue with respect to all couples who had participated in same-sex marriages, even though such couples had not been parties to the original action. Because the validity or invalidity of same-sex marriages under current California law involves only a pure question of law, couples who are not formal parties to this action are in no different position than if this question of law had been presented and resolved in an action involving some other same-sex couple rather than in an action in which the legal arguments regarding the validity of such marriages have been vigorously asserted not only by the city officials who authorized and registered such marriages but also by various amici curiae representing similarly situated same-sex couples. Requiring a separate legal proceeding to be brought to invalidate each of the thousands of same-sex marriages, or requiring each of the thousands of same-sex couples to be named and served as parties in the present action, would add nothing of substance to this proceeding.

(32) The city and amici curiae further contend that it would violate the due process rights of the same-sex couples who obtained marriage licenses, and had their marriage certificates registered by the local officials, for this court to determine the validity of same-sex marriages without giving the couples notice and an opportunity to be heard. To begin with, there may be some question whether an individual who, [***270] through the deliberate unauthorized conduct of a public official, obtains a license, permit, or other status that clearly is not authorized by state law, possesses a constitutionally protected [*1116] property or liberty interest that gives rise to procedural due process guarantees. (Cf., e.g., *Snyder v. City of Minneapolis* (1989) 441 N.W.2d 781, 792; *Mellin v. Flood Brook Union School Dist.* (2001) 173 Vt. 202 [790 A.2d 408, 421]; *Gunkel v. City of Emporia, Kan.* (10th Cir. 1987) 835 F.2d 1302, 1304-1305 & fns. 7, 8.) In any event, these same-sex couples have not been denied the right to meaningfully participate in these proceedings. Although we have not permitted them to intervene formally in these actions as parties, our order denying intervention to a number of such couples explicitly was without prejudice to participation as amicus curiae, and numerous amicus curiae briefs have been filed on behalf of such couples directly addressing the question of the validity of the existing same-sex marriages. Accordingly, the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages have been heard and fully considered. Furthermore, under the procedure we adopt below (see, *post*, p. 1118), before the city takes corrective action with regard to the record of any particular same-sex marriage license or same-sex marriage certificate, each affected couple will receive individual notice and an opportunity to show that the holding of the present opinion is not applicable to the couple.

(33) The city and amici curiae next maintain that even if this court properly may address the validity of the existing same-sex marriages in this proceeding, under California law such marriages cannot be held void (or voidable, for that matter), because there is no California statute that explicitly provides that a marriage between two persons of the same sex or gender is void (or voidable). As we have seen, however, Family Code section 300 explicitly *defines* marriage as "a personal relation arising out of a civil contract between a man and a woman," and in view of the language and legislative history of this provision (see, *ante*, p. 1076, fn. 11), we believe that the Legislature has made clear its intent that a same-sex marriage performed in California is not a valid marriage under California law. Accordingly, we view Family Code section 300 [**497] itself as an explicit statutory provision establishing that the existing same-sex marriages at issue are void and invalid.

(34) The city and amici curiae also rely upon Family Code section 306, which provides in part that "[n]oncompliance with this part by a nonparty to the marriage does not invalidate the marriage," maintaining that this statute demonstrates that even if the county clerk erred in issuing marriage licenses to same-sex couples, such noncompliance by the county clerk (a nonparty to the marriage) does not invalidate the marriage. In our view, section 306--which is unofficially entitled "Procedural requirements; effect of noncompliance"--has no application here. The defect at issue clearly is not simply a procedural defect in the issuance of the license or in the solemnization or registration process. Indeed, it is not simply the invalidity or unauthorized nature of the *county clerk's* action in issuing a marriage license to a same-sex [*1117] couple that renders void any marriage between a same-sex couple. What renders such a purported marriage void is the circumstance that the current California statutes reflect a clear legislative decision to "prohibit persons of the same sex from entering lawful marriage." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, discussed, *ante*, p. 1076, fn. 11.) [***271] It is that substantive legislative limitation on the institution of marriage, and not simply the circumstance that the actions of the county clerk or county recorder were unauthorized, that renders the existing same-sex marriages invalid and void from the beginning.

Finally, the city urges this court to postpone the determination of the validity of the same-sex marriages that already have been performed and registered until a court rules on the substantive constitutional [***272] challenges to the California marriage statutes that are now pending in superior court. From a practical perspective, we believe it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail. n40

> n40 Whether or not any same-sex couple "has filed a lawsuit seeking the legal benefits of their purported marriage" (conc. & dis. opn. of Werdegar, J., *post*, at p. 1134), there can be no question that the legal status of such couples has and will continue to generate numerous questions for such couples and third parties that must be resolved on an ongoing basis.

In any event, we believe such a delay in decision is unwarranted on more fundamental grounds. As we have explained, because Family Code section 300 clearly limits its marriage in California to a marriage between a man and a woman and flatly prohibits persons of the same sex from lawfully marrying in California, the governing authorities establish that the same-sex marriages that already have been performed are void and of no legal effect *from their inception.* (See, *ante*, p. 1113 and cases cited; see also *Estate of Gregorson, supra,* 160 Cal. 21, 26 ["A marriage prohibited as ... illegal and declared to be 'void' or 'void from the beginning' is a legal nullity ... ."].) In view of this well-established rule, we do not believe it would be responsible or appropriate for this court to fail at this time to inform the parties to the same-sex marriages and other persons whose legal rights and responsibilities may depend upon the validity or invalidity of these marriages that these marriages are invalid, notwithstanding the pendency of numerous lawsuits challenging the constitutionality of California's marriage statutes. Withholding or delaying a ruling on the current validity of the existing same-sex marriages might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm. [*1118]

(35) Although the city and the amici curiae representing same-sex couples suggest that these couples would prefer to live with uncertainty rather than be told at this point that the marriages are invalid, in light of the explicit terms of Family Code section 300 and the warning included in the same-sex marriage license applications provided by the [**498] city (see, *ante*, p. 1071, fn. 5) these couples clearly were on notice that the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages. Now that we have confirmed that the city officials lack this authority, we do not believe that these couples have a persuasive equitable claim to have the validity of the marriages left in doubt at this point in time, creating uncertainty and potential harm to others who may need to know whether the marriages are valid or not. Had the current constitutional challenges to the California marriage statutes followed the traditional and proper course (see, *ante*, pp. 1099-1100), no same-sex marriage would have been conducted in California prior to a judicial determination that the current California marriage statutes are unconstitutional. Accordingly, as part of the remedy for the city officials' unauthorized and unlawful actions, we believe it is appropriate to make clear that the same-sex marriages that already have purportedly come into being must be considered void from their inception. Of course, should the current California statutes limiting marriage to a man and a woman ultimately be repealed or be held unconstitutional, the affected couples then would be free to obtain lawfully authorized marriage licenses, have their marriages law-

fully solemnized, and lawfully register their marriage certificates. n41

n41 Contrary to the contention of Justice Werdegar's concurring and dissenting opinion (*post*, at p. 1133), should the existing marriage statutes ultimately be held unconstitutional, we do not believe that the principle of "basic fairness" or a claim for "full relief" justifies placing the same-sex couples who took advantage of the unauthorized actions of San Francisco officials in a different or better position than other same-sex couples who were denied marriage licenses in other counties throughout the state by public officials who properly fulfilled their duties in compliance with the governing state statutes.

Accordingly, to remedy the effects of the city officials' unauthorized actions, we shall direct the county clerk and the county recorder of the City and County of San Francisco to take the following corrective actions under the supervision of the California Director of Health Services, who, by statute, has general supervisory authority over the marriage license and marriage certificate process. (See, *ante*, pp. 1077-1078.) The county clerk and the county recorder are directed to (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to [*1119] demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.

VIII

As anyone familiar with the docket of the United States Supreme Court, of this court, or of virtually any appellate court in this nation is aware, many statutes currently in force may give rise to constitutional challenges, and not infrequently the constitutional questions presented involve issues upon which reasonable persons, including reasonable jurists, may disagree. If every public official who is under a statutory duty to perform a ministerial act were free to refuse to perform that act based solely on the official's view that the underlying statute is unconstitutional, any semblance of a uniform rule of law quickly would disappear, and constant and widespread judicial intervention would be required to permit the ordinary mechanisms of government to function. This, of course, is not the system of law with which we are familiar. Under long-established [***273] principles, a statute, once enacted, is presumed to be constitutional until it has been judicially determined to be unconstitutional. [**499]

An executive official, of course, is free to criticize existing statutes, to advocate their amendment or repeal, and to voice an opinion as to their constitutionality or unconstitutionality. As we have explained, however, an executive official who is charged with the ministerial duty of enforcing a statute generally has an obligation to execute that duty in the absence of a judicial determination that the statute is unconstitutional, regardless of the official's personal view of the constitutionality of the statute.

In this case, the city has suggested that a contrary rule--one under which a public official charged with a ministerial duty would be free to make up his or her own mind whether a statute is constitutional and whether it must be obeyed--is necessary to protect the rights of minorities. But history demonstrates that members of minority groups, as well as individuals who are unpopular or powerless, have the most to lose when the rule of law is abandoned--even for what appears, to the person departing from the law, to be a just end. n42 As observed at the outset of this opinion, granting every [*1120] public official the authority to disregard a ministerial statutory duty on the basis of the official's opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system's commitment to John Adams's vision of a government where official action is determined not by the opinion of an individual officeholder -- but by the rule of law.

n42 The pronouncement of Sir Thomas More in the well-known passage from Robert Bolt's A Man For All Seasons comes to mind:

"Roper: So now you'd give the Devil benefit of law!

"More: Yes. What would you do? Cut a great road through the law to get to the Devil?

"Roper: I'd cut down every law in England to do that!

"More: Oh? And when the last law was down, and the Devil turned round on you--where

would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake." (Bolt, A Man for All Seasons (1962) p. 66.)

IX

For the reasons discussed above, a writ of mandate shall issue compelling respondents to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes, and directing the county clerk and the county recorder of the City and County of San Francisco to take the following corrective actions under the supervision of the California Director of Health Services: (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex [***274] couples, and (5) make appropriate corrections to all relevant records.

As the prevailing parties, petitioners shall recover their costs.

Baxter, J., Chin, J., Brown, J., and Moreno, J., concurred.

CONCUR BY: Moreno; Kennard (In Part); Werdegar (In Part)

CONCUR:

MORENO, J.--I concur. The majority opinion addresses primarily the limitations on the power of local officials to disobey statutes that may be, but have not yet been judicially established to be, unconstitutional. I write separately to focus on the related but distinct question of what courts should do when confronted with such disobedience on the part of local officials. As the majority opinion suggests, a court should not invariably refuse to decide constitutional questions arising from local governments' or local officials' refusal to obey purportedly unconstitutional statutes. Indeed, California courts [*1121] under these circumstances [**500] have, on a number of occasions, decided the underlying constitutional questions. In the present case, the majority declines to decide the constitutional validity of Family Code section 300, prohibiting same-sex marriage, but instead concludes that a writ of mandate against San Francisco's (the city's) local officials is justified because they exceeded their ministerial authority. As elaborated below, I agree that under these somewhat unusual circumstances, local officials' disobedience of the statute justifies this court's issuance of a writ of mandate against those officials before the underlying constitutional question has been adjudicated.

At the outset, I review the requirements for obtaining a writ of mandate. To obtain writ relief a 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, 539-540 [28 Cal. Rptr. 2d 617, 869 P.2d 1142].) Also required is "the lack of any plain, speedy and adequate remedy in the usual course of law ... ." (*Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 203 [37 Cal. Rptr. 425, 390 P.2d 193].) Although the writ of mandate generally must issue if the above requirements are clearly met (see *May v. Board of Directors* (1949) 34 Cal.2d 125, 133-134 [208 P.2d 661]), the writ of mandate is an equitable remedy that will not issue if it is contrary to "promoting the ends of justice." (*McDaniel v. City etc. of San Francisco* (1968) 259 Cal. App. 2d 356, 361 [66 Cal. Rptr. 384]; see also *Bartholomae Oil Corp. v. Superior Court* (1941) 18 Cal.2d 726, 730 [117 P.2d 674].)

The local officials in the present case have a clear ministerial duty to issue marriage licenses in conformance with state statute and have violated that duty. The Attorney General, and for that matter the petitioners in *Lewis v. Alfaro*, have a substantial right to ensure that marriage licenses conform to the statute. (See *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627].) But when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality, the above-stated principles dictate that a court at least has the discretion to refuse to issue the writ until the underlying constitutional question has been decided.

How should courts exercise that discretion? In California, generally speaking, courts faced with local governments' or local officials' refusal to obey assertedly

unconstitutional statutes have decided the constitutional question before determining whether a writ or other requested relief should issue. (See, e.g., *County of Riverside* [***275] *v. Superior Court* (2003) 30 Cal.4th 278 [132 Cal. Rptr. 2d 713, 66 P.3d 718] [county refused to obey as unconstitutional a state statute mandating binding arbitration for local agencies that reach [*1122] negotiating impasse with police and firefighters]; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1 [227 Cal. Rptr. 391, 719 P.2d 987] [county refused to act in accordance with a state revenue statute it had judged, correctly, to violate the U.S. Const.]; *Zee Toys, Inc. v. County of Los Angeles* (1978) 85 Cal. App. 3d 763, 777-781 [149 Cal. Rptr. 750] [same]; *Paso Robles etc. Hospital Dist. v. Negley* (1946) 29 Cal.2d 203 [173 P.2d 813] [local financial officer refused to issue bonds and defended a lawsuit in order to expeditiously settle the constitutional validity of the bond issue]; *Denman v. Broderick* (1896) 111 Cal. 96, 105 [43 P. 516] [local official refused to spend public funds required by a statute believed to be unconstitutional "special legislation"]; *City of Oakland v. Digre* (1988) 205 Cal. App. 3d 99 [252 Cal. Rptr. 99] [local official refused to enforce a parcel tax believed to be unconstitutional and required the city to demonstrate its constitutionality in court]; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal. App. 3d 1, 14-15 [97 Cal. Rptr. 431] [county board of supervisors refused to issue permission for timber operations, although such refusal was not authorized under rules promulgated pursuant to state statute].) Indeed, any time a city determines that a state law is contrary to its own constitutional prerogative of self-governance and therefore refuses to obey the law, it is making a constitutional determination. (See, e.g., *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64 [81 Cal. Rptr. 465, 460 P.2d 137] [determining that state prevailing [**501] wage law for public works projects was not binding on cities].)

As the majority states, "the classic understanding of the separation of powers doctrine [is] that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." (Maj. opn., *ante*, at p. 1068.) But "the separation of powers doctrine does not create an absolute or rigid division of functions." (*Ibid.*) As the above cases suggest, local officials sometimes exercise their authority to *preliminarily* determine that a statute that directly affects the local government's functioning is unconstitutional and, in some circumstances, refuse to obey that statute as a means of bringing the constitutional challenge. This preliminary determination is the exercise of an *executive* function. Local officials and agencies do not "arrogate to [the local executive] core functions of [the judicial] branch" in violation of the separation of powers (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 [105 Cal. Rptr. 2d 636, 20 P.3d 533]), but rather raise constitutional issues for the courts to ultimately decide.

In my view, there are at least three types of situations in which a local government's disobedience of a statute would be reasonable. In these situations, courts asked to grant a writ of mandate to compel the local agency to obey the statute should therefore address the underlying constitutional issue rather than simply conclude the local governmental entity exceeded its [*1123] ministerial authority. First, there are some cases in which the statute in question violates a "clearly established ... constitutional right" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L. Ed. 2d 396, 102 S. Ct. 2727]). An executive decision not to spend resources to comply with a clearly unconstitutional statute is a reasonable exercise of the local executive power and [***276] does not usurp a core judicial function. Indeed, refusing to enforce clearly unconstitutional statutes saves the resources of both the executive and the judiciary.

A second category of "disobedience" cases involves a local official or governmental entity disobeying a statute when there is a substantial question as to its constitutionality *and* the statute governs matters integral to a locality's limited power of self-governance. In these cases, a local entity or official is directly affected by the statute and in a unique position to challenge it. As the above cases illustrate, local entities and officials have challenged statutes to determine the validity of a bond, or the payment of a government salary for a position unconstitutionally created, or an exemption to a local tax that assertedly violates the commerce clause, or a statute that intrudes on local matters of city or county employee compensation. It is noteworthy that in virtually all the above cases, the local agency's or official's refusal to obey an assertedly unconstitutional statute had the effect of preserving the status quo, pending judicial resolution of the matter, thereby minimizing interference with the judicial function.

Perhaps in some of these cases localities could have proceeded by obtaining declaratory relief as to a statute's unconstitutionality, rather than by disobeying the statute. In other cases, an actual controversy necessary for declaratory relief may have been lacking. In any case, the fact that the local government agency did not proceed by means of declaratory relief provided no insurmountable obstacle to a court's deciding the underlying constitutional issue raised by the agency's disobedience. (See, e.g., *County of Riverside v. Superior Court, supra,* 30 Cal.4th 278, 283.) n1 Of course, if a court determines that interim relief to compel a government agency to obey a statute is appropriate, it may grant such relief

before the constitutional question is ultimately adjudicated.

n1 The above dictum does not apply when the Legislature has required that a governmental entity challenge an assertedly unconstitutional statute by means of declaratory relief. (See, e.g., Rev. & Tax. Code, § 538 [county assessor to challenge constitutionality of state revenue statute by requesting declaratory relief under Code of Civ. Proc. § 1060].)

A third possible category of cases in which city officials might legitimately disobey statutes [**502] of doubtful constitutionality are those in which the question of a statute's constitutionality is substantial, and irreparable harm may result to individuals to which the local government agency has some protective [*1124] obligation--be they employees, or students of a public college, or patrons of a public library, or patients in a public hospital, or in some cases simply residents of the city. Again, a court asked to grant a writ of mandate could conclude that a delay in granting the writ pending resolution of the underlying constitutional question is justified. To issue a writ enforcing a statute that may be unconstitutional, and that will work irreparable harm, would not "promot[e] the ends of justice" (*McDaniel v. City etc. of San Francisco, supra,* 259 Cal. App. 2d at pp. 360-361), and a court has the discretion to delay such issuance until the underlying constitutional question is resolved.

The present case is quite different from the above situations. First, as the majority demonstrates, the unconstitutionality of Family Code section 300 is not clearly established by either state or federal constitutional precedent, and certainly not from the language of the constitutional provisions themselves. Nor does this case [***277] pertain to a statute that interferes with a city's or county's limited power of self-governance that these entities are in a unique position to challenge. Rather, local officials in this case perform a ministerial function pursuant to the state marriage law. Unlike the cases cited above, in which the constitutionality of a statute is likely to go unchallenged if a local governmental entity does not do so, Family Code section 300 limits individual rights, and those individuals subject to that limitation are in the best position to challenge it.

Nor does the present case fit the third category of cases, in which a city refuses to enforce a law so as to protect its citizens from irreparable harm. The only harm caused here is a delay in the ability of same-sex couples to get married while the constitutional issue is being adjudicated. But that delay will occur whether or not we grant a writ of mandate against the city in this case. Put another way, local officials have no real power to marry same-sex couples, given the statutory prohibition against doing so. What *was* within their power, prior to our issuance of a stay, was to issue licenses of indeterminate legal status. The exercise of the court's mandate power to preclude local officials from continuing this course of action, and voiding the licenses already issued, brings no irreparable harm to the individuals who have received or might receive such licenses.

In sum, the city advances no plausible reason why it had to disobey the statute in question. Even so, it might have been appropriate to have delayed the issuance of a writ of mandate against it until the underlying constitutional question had been adjudicated if, for example, the city had issued a single "test case" same-sex marriage license. But it went far beyond a test case. It issued thousands of these marriage licenses. As such, the city went well beyond making a preliminary determination of the statute's unconstitutionality or performing an act that would bring the constitutional issue to the [*1125] courts. Rather, city officials drastically and repeatedly altered the status quo based on their constitutional determination, issuing a multitude of licenses that purported to have an independent legal effect, contrary to their ministerial duty and statutory obligation and prior to any judicial determination of the statute's unconstitutionality. By such dramatic overreaching, these officials trespassed on a core judicial function of deciding the constitutionality of statutes and endowed the issue of their authority to disobey the statute with a life of its own, independent of the underlying constitutional issue. I therefore agree with the majority that a writ of mandate is rightly issued against the city and its officials in this case.

I reiterate what is clear in the majority opinion. Our holding in this case in no way expresses or implies a view on the underlying issue of the constitutionality of a statute prohibiting same-sex marriage. That issue will be addressed in the context of litigation in which the issue is properly raised. (See *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309 [798 N.E.2d 941].)

DISSENT BY: Kennard (In Part); Werdegar (In Part)

DISSENT: KENNARD, J., [**503] Concurring and Dissenting. -- I concur in the judgment, except insofar as it declares void some 4,000 marriages performed in reliance on the gender-neutral marriage licenses n1 issued in the City [***278] and County of San Francisco. Although I agree with the majority that San Francisco public officials exceeded their authority when they issued those licenses, and that the licenses themselves are therefore invalid, I would refrain from determining here, in a proceeding from which the persons whose marriages are

at issue have been excluded, the validity of the marriages solemnized under those licenses. That determination should be made after the constitutionality of California laws restricting marriage to opposite-sex couples has been authoritatively resolved through judicial proceedings now pending in the courts of California.

n1 As the majority explains, the license application was altered "by eliminating the terms 'bride,' 'groom,' and 'unmarried man and unmarried woman,' and by replacing them with the terms 'first applicant,' 'second applicant,' and 'unmarried individuals.' " (Maj. opn., *ante*, at p. 1071.)

I

Like the majority, I conclude that officials in the City and County of San Francisco exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, and I agree with the majority that those officials may not justify their actions on the ground that state laws restricting marriage to opposite-sex couples violate the state or the federal Constitution. The cases discussed by the majority demonstrate, in my view, that a public official may refuse to enforce a statute on constitutional grounds only in these situations: [*1126] (1) when the statute's unconstitutionality is obvious beyond dispute in light of unambiguous constitutional language or controlling judicial decisions; (2) when refraining from enforcement is necessary to preserve the status quo and to prevent irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the statute's validity; (3) when enforcing the statute could put the public official at risk for substantial personal liability; or (4) when refraining from enforcement is the only practical means to obtain a judicial determination of the constitutional question. (See Field, The Effect of an Unconstitutional Statute (1935, reprint ed. 1971) p. 119 et seq.; Note, *Right of Ministerial Officer to Raise Defense of Unconstitutionality in Mandamus Proceeding* (1931) 15 Minn. L.Rev. 340; Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes* (1927) 11 Minn. L.Rev. 585; Note, *Who Can Set Up Unconstitutionality--Whether Public Official Has Sufficient Interest* (1920) 34 Harv. L.Rev. 86.) Because none of these situations is present here, as I explain below, the public officials acted wrongly in refusing to enforce the opposite-sex restriction in California's marriage laws.

A. *Indisputably Unconstitutional Law*

In restricting marriages to couples consisting of one woman and one man, California's marriage laws are not plainly or obviously unconstitutional under either the state or the federal Constitution. Neither Constitution expressly prohibits limiting marriage to opposite-sex couples, and neither Constitution expressly grants any person a right to marry someone of the same sex. Nor does any judicial decision establish beyond reasonable dispute that restricting marriage to heterosexual couples violates any provision of the California Constitution or the United States Constitution.

Indeed, there is a decision of the United States Supreme Court, binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution's guarantees of equal protection and due process of law. After the Minnesota Supreme Court held that Minnesota laws preventing marriages between persons of [***279] the same sex did not violate the equal protection or due process clauses of the United States Constitution (*Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185]), the decision was appealed to the United States Supreme Court, as federal law then permitted (see 28 U.S.C. former [**504] § 1257(2), 62 Stat. 929 as amended by 84 Stat. 590). The high court later dismissed that appeal "for want of substantial federal question." (*Baker v. Nelson* (1972) 409 U.S. 810 [34 L. Ed. 2d 65, 93 S. Ct. 37].)

As the United States Supreme Court has explained, a dismissal on the ground that an appeal presents no substantial federal question is a decision on [*1127] the merits of the case, establishing that the lower court's decision on the issues of federal law was correct. (*Mandel v. Bradley* (1977) 432 U.S. 173, 176 [53 L. Ed. 2d 199, 97 S. Ct. 2238]; *Hicks v. Miranda* (1975) 422 U.S. 332, 344 [45 L. Ed. 2d 223, 95 S. Ct. 2281].) Summary decisions of this kind "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." (*Mandel v. Bradley, supra,* at p. 176.) Thus, the high court's summary decision in *Baker v. Nelson, supra,* 409 U.S. 810, prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution.

The binding force of a summary decision on the merits continues until the high court instructs otherwise. (*Hicks v. Miranda, supra,* 422 U.S. at p. 344.) That court may release lower courts from the binding effect of one of its decisions on the merits either by expressly overruling that decision or through " 'doctrinal develop-

ments' " that are necessarily incompatible with that decision. (*Id.* at p. 344.) The United States Supreme Court has not expressly overruled *Baker v. Nelson, supra,* 409 U.S. 810, nor do any of its later decisions contain doctrinal developments that are necessarily incompatible with that decision.

The San Francisco public officials have argued that the United States Supreme Court's decision in *Lawrence v. Texas* (2003) 539 U.S. 558 [156 L. Ed. 2d 508, 123 S. Ct. 2472], holding unconstitutional a state law "making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" (*id.* at p. 562), amounts to a doctrinal development that releases courts and public officials from any obligation to obey the high court's decision in *Baker v. Nelson, supra,* 409 U.S. 810. Although *Lawrence* represents a significant shift in the high court's view of constitutional protections for same-sex relationships, the majority in *Lawrence* carefully pointed out that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter" (*Lawrence v. Texas, supra,* at p. 568) and that the case "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" (*id.* at p. 578). Because there is a long history in this country of defining marriage as a relation between one man and one woman, and because marriage laws do involve formal government recognition of relationships, the high court's decision in *Lawrence* did not undermine the authority of *Baker v. Nelson* to such a degree that a lower federal or state court, much less a public official, could disregard it. Until the United States Supreme Court says otherwise, which it has not yet done, *Baker v. Nelson* defines federal constitutional law on the [***280] question whether a state may deny same-sex couples the right to marry. [*1128]

Because neither the federal nor the California Constitution contains any provision directly and expressly guaranteeing a right to marry another person of the same sex, and because no court has ever decided that either Constitution confers that right, this is not a situation in which a public official refused to enforce a law that was obviously and indisputably unconstitutional.

B. *Preserving the Status Quo to Prevent Serious Harm*

Nor was this a situation in which a public official, by temporarily refraining from enforcing a state law, merely preserved the status quo to prevent potentially irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the law's validity. By issuing licenses authorizing same-sex marriages, the San Francisco public officials did not preserve [**505] a status quo, but instead they altered the status quo in that California law has always prohibited same-sex marriage.

In 1977, the Legislature amended Family Code section 300 to specify that marriage is a relation "between a man and a woman." (See maj. opn., *ante*, at p. 1076, fn. 11.) At the March 2000 election, the voters approved Proposition 22, which enacted Family Code section 308.5 declaring that "[o]nly marriage between a man and a woman is valid or recognized in California." n2 But those statutory measures did not change existing law. Since the earliest days of statehood, California has recognized only opposite-sex marriages. (See, e.g., *Mott v. Mott* (1890) 82 Cal. 413, 416 [22 P. 1140] [quoting legal dictionary's definition of marriage as a contract " 'by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife' "].) In issuing gender-neutral marriage licenses, therefore, San Francisco public officials could not have intended merely a temporary or interim preservation of an existing state of affairs pending a judicial determination of a newly enacted law's constitutionality. Instead, as their public statements indicated, they issued those licenses to effect a fundamental and permanent change in traditional marriage eligibility requirements, based on their own views about constitutional questions. In so doing, they exceeded their authority.

n2 Although California law has expressly restricted matrimony to heterosexual couples, it has also extended most of the financial and other benefits of marriage to same-sex couples through domestic partner legislation. (See, e.g., Fam. Code, § 297 et seq., Stats. 2003, ch. 421, operative Jan. 1, 2005.)

C. *Public Officials' Personal Liability*

This was not a situation in which public officials had reason to fear they might be held personally liable in damages for enforcing a constitutionally [*1129] invalid state law. In a federal civil rights action brought under 42 United States Code section 1983, a public official may not be held personally liable for enforcing a state law that violates a federal constitutional right unless the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing

violates that right." (*Anderson v. Creighton* (1987) 483 U.S. 635, 640 [97 L. Ed. 2d 523, 107 S. Ct. 3034]; accord, *Saucier v. Katz* (2001) 533 U.S. 194, 202 [150 L. Ed. 2d 272, 121 S. Ct. 2151]; *Wilson v. Layne* (1999) 526 U.S. 603, 614-615 [143 L. Ed. 2d 818, 119 S. Ct. 1692].) Because the United States [***281] Supreme Court has determined that a state law prohibiting same-sex marriage does not violate the federal Constitution (*Baker v. Nelson, supra,* 409 U.S. 810), no reasonable public official could conclude that denying marriage licenses to same-sex couples would violate a right that was clearly established under the federal Constitution. Accordingly, federal civil rights law could not impose personal liability on local officials in California for enforcing California's same-sex marriage prohibition. "[A]bsent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." (*Lemon v. Kurtzman* (1973) 411 U.S. 192, 208-209 [36 L. Ed. 2d 151, 93 S. Ct. 1463] (plur. opn. of Burger, C. J.).)

Nor was there any reasonable basis for local officials to anticipate personal liability under the California Constitution or California civil rights laws for denying marriage licenses to same-sex couples. Government Code section 820.6 provides immunity for public employees acting in good faith, without malice, under a statute that proves to be unconstitutional. Because same-sex marriage has never been legally authorized in California, the California Constitution does not expressly grant a right to same-sex marriage, and no judicial decision by any California court has ever suggested, much less held, that state laws limiting marriage to opposite-sex couples violate the California Constitution, Government Code section 820.6 would immunize any public official from personal liability for enforcing the same-sex marriage prohibition should that prohibition, at some [**506] later time, be held to violate the California Constitution.

D. *Necessity of Nonenforcement to Obtain Judicial Resolution*

Finally, this is not a situation in which a public official's nonenforcement of a law was the only practical way to obtain a judicial determination of that law's constitutionality. Just as the constitutionality of California's prohibition against interracial marriage was properly challenged by a mixed-race couple who were denied a marriage license (*Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17]), the constitutionality of California's prohibition against same-sex marriage could have been readily challenged at any time through a lawsuit brought by a same-sex couple who had been denied a marriage [*1130] license. Indeed, challenges of this sort are now pending in the superior court. (See maj. opn., *ante*, at p. 1117.)

E. *Policy Grounds for General Rule Prohibiting Nonenforcement on Constitutional Grounds*

As the majority points out (maj. opn., *ante*, at pp. 1067-1068, 1108-1109), confusion and chaos would ensue if local public officials in each of California's 58 counties could separately and independently decide not to enforce long-established laws with which they disagreed, based on idiosyncratic readings of broadly worded constitutional provisions. To ensure uniformity and consistency in the statewide application and enforcement of duly enacted and presumptively valid statutes, the authority of public officials to decline enforcement of state laws, in the absence of a judicial determination of invalidity, based on the officials' own constitutional determinations, is and must be carefully and narrowly limited. I agree with the majority that San Francisco public officials exceeded those limits when they declined to enforce state marriage laws by issuing gender-neutral marriage licenses to same-sex couples. [***282]

II

Although I agree with the majority that San Francisco officials exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, I do not agree with all the reasoning that the majority offers in support of that conclusion. In particular, I do not agree that a "line of decisions" had established, before the 1978 enactment of section 3.5 of article III of the California Constitution, that "only administrative agencies constitutionally authorized to exercise judicial power have the authority to determine the constitutional validity of statutes." (Maj. opn., *ante*, at p. 1096.)

The majority does not identify any pre-1978 decision holding that a nonconstitutional administrative agency, during quasi-judicial administrative proceedings, lacked authority to determine a statute's constitutionality. The majority asserts that this court so held in *State of California v. Superior Court* (*Veta*) (1974) 12 Cal.3d 237. (Maj. opn., *ante*, at p. 1092.) But this court there decided only that the doctrine of exhaustion of administrative remedies did not apply to a constitutional challenge to the statute from which the administrative agency derived its authority. (*State of California v. Superior Court* (*Veta*), *supra*, at p. 251.) In concluding that a liti-

gant was not *required* during quasi-judicial administrative proceedings to make a constitutional challenge to the statute that created the agency, this court explained that "[i]t would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its [*1131] preponderantly lay membership on the constitutionality of the statute establishing its status and functions." (*Ibid.*) This court did not state, or even imply, that an administrative agency *lacked authority* to resolve constitutional issues that a litigant might present.

I also see no need for, and do not join, the majority's observations on topics far removed from the issue presented here, such as the powers of the President of the United States [**507] (maj. opn., *ante*, at p. 1098, fn. 26) and the existence of certain legal defenses to war crimes charges (*id.* at p. 1101, fn. 30). These issues are not before this court.

III

Because I agree with the majority that San Francisco's public officials exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, I concur in the judgment insofar as it requires those officials to comply with state marriage laws, to identify the same-sex couples to whom gender-neutral marriage licenses were issued, to notify those couples that their marriage licenses are invalid, to offer refunds of marriage license fees collected, and to make appropriate corrections to all relevant records. But I would not require notification that the marriages themselves "are void from their inception and a legal nullity." (Maj. opn., *ante*, at p. 1118.)

Although a marriage license is a requirement for a valid marriage (Fam. Code, § § 300, 350), some defects in a marriage license do not invalidate the marriage. (See *id.,* § 306; see also, e.g., *Argonaut Ins. Co. v. Industrial Acc. Com.* (1962) 204 Cal. App. 2d 805, 809 [23 Cal. Rptr. 1] [applicant's use of false names on license application did not invalidate marriage].) Whether the issuance of a gender-neutral [***283] license to a same-sex couple, in violation of state laws restricting marriage to opposite-sex couples, is a defect that precludes any possibility of a valid marriage may well depend upon resolution of the constitutional validity of that statutory restriction. If the restriction is constitutional, then a marriage between persons of the same sex would be a legal impossibility, and no marriage would ever have existed. But if the restriction violates a fundamental constitutional right, the situation could be quite different. A court might then be required to determine the validity of same-sex marriages that had been performed *before* the laws prohibiting those marriages had been invalidated on constitutional grounds.

When a court has declared a law unconstitutional, questions about the effect of that determination on prior actions, events, and transactions "are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an [*1132] all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (*Chicot County Dist. v. Bank* (1940) 308 U.S. 371, 374 [84 L. Ed. 329, 60 S. Ct. 317]; accord, *Lemon v. Kurtzman, supra,* 411 U.S. at p. 198.) This court has acknowledged that, in appropriate circumstances, an unconstitutional statute may be judicially reformed to retroactively extend its benefits to a class that the statute expressly but improperly excluded. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 624-625 [47 Cal. Rptr. 2d 108, 905 P.2d 1248] (lead opn. of Lucas, C. J.), 685 (conc. & dis. opn. of Baxter, J.) [joining in pt. III of lead opn.].) Thus, it is possible, though by no means certain, that if the state marriage laws prohibiting same-sex marriage were held to violate the state Constitution, same-sex marriages performed before that determination could then be recognized as valid.

Although the United States Supreme Court has determined that there is no right to same-sex marriage under the federal Constitution (*Baker v. Nelson, supra,* 409 U.S. 810), courts in other states construing their own state Constitutions in recent years have reached differing conclusions on this question. (Compare *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941] [denying marriage licenses to same-sex couples violates Massachusetts Constitution] with *Standhardt v. Sup. Ct.* (2003) 206 Ariz. 276 [77 P.3d 451] [no right to same-sex marriage under Arizona Constitution].) Recognizing the difficulty and seriousness of the constitutional question, which is now presented in pending superior court actions, this court has declined to address it in this case. *Until that constitutional issue has been finally resolved under the California Constitution*, it is premature and unwise to assert, as the majority essentially does, that the thousands of same-sex weddings performed in [**508] San Francisco were empty and meaningless ceremonies in the eyes of the law.

For many, marriage is the most significant and most highly treasured experience in a lifetime. Individuals in loving same-sex relationships have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give. In recognition of that, this court should proceed most cautiously in resolving the ultimate question of the validity of the same-sex marriages performed in San Francisco, even though those marriages were performed un-

der licenses issued by San Francisco public officials without proper authority and in violation of state law. Because the licenses were issued without proper authorization, [***284] and in the absence of a judicial determination that the state laws prohibiting same-sex marriage are unconstitutional, employers and other third parties would be under no legal obligation to recognize the validity of any of the same-sex marriages at issue here. Should the pending lawsuits ultimately be resolved by a determination that the opposite-sex marriage restriction is [*1133] constitutionally invalid--an issue on which I express no opinion--it would then be the appropriate time to address the validity of previously solemnized same-sex marriages.

WERDEGAR, J., Concurring and Dissenting.--I agree with the majority that San Francisco officials violated the Family Code by licensing marriages between persons of the same sex. Accordingly, I concur in the decision to order those officials to comply with the existing marriage statutes unless and until they are determined to be unconstitutional. Because constitutional challenges are pending in the lower courts, to order city officials not to license additional same-sex marriages in the meantime is an appropriate way to preserve the status quo pending the outcome of that litigation. That, however, is the extent of my agreement with the majority.

I.

I do not join in the majority's decision to address the validity of the marriages already performed and to declare them void. My concern here is not for the future of same-sex marriage. That question is not before us and, like the majority, I intimate no view on it. My concern, rather, is for basic fairness in judicial process. The superior court is presently considering whether the state statutes that limit marriage to "a man and a woman" (e.g., Fam. Code, § 300) violate the state and federal Constitutions. The same-sex couples challenging those statutes claim the state has, without sufficient justification, denied the fundamental right to marry (e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374, 383 [54 L. Ed. 2d 618, 98 S. Ct. 673]; *Loving v. Virginia* (1967) 388 U.S. 1, 12 [18 L. Ed. 2d 1010, 87 S. Ct. 1817]; *Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715 [198 P.2d 17]) to a class of persons defined by gender or sexual orientation. Should the relevant statutes be held unconstitutional, the relief to which the purportedly married couples would be entitled would normally include recognition of their marriages. By analogy, interracial marriages that were void under antimiscegeny statutes at the time they were solemnized were nevertheless recognized as valid after the high court rejected those laws in *Loving v. Virginia*. (E.g., *Dick v. Reaves* (Okla. 1967) 1967 OK 158 [434 P.2d 295, 298].) By postponing a ruling on this issue, we could preserve the status quo pending the outcome of the constitutional litigation. Instead, by declaring the marriages "void and of no legal effect from their inception" (maj. opn., *ante*, at p. 1113), the majority permanently deprives future courts of the ability to award full relief in the event the existing statutes are held unconstitutional. This premature decision can in no sense be thought to represent fair judicial process.

The majority asserts that "it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of [*1134] time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail." (Maj. opn., *ante*, at p. 1117.) Nowhere in the opinion, [**509] however, does the majority note that any same-sex couple has filed a lawsuit seeking the legal benefits [***285] of their purported marriage. Nor is the absence of such lawsuits surprising, since any reasonable court would stay such actions pending the outcome of the ongoing constitutional litigation. n1

n1 The majority does note that "officials of the federal Social Security Administration had raised questions regarding that agency's processing of name-change applications resulting from California marriages" (maj. opn., *ante*, at p. 1072), but this is unlikely to be a serious problem because San Francisco used a nonstandard, easily recognizable form for licensing same-sex marriages (*id.*, at pp. 1070-1071, 1079).

The majority's decision to declare the existing marriages void is unfair for the additional reason that the affected couples have not been joined as parties or given notice and an opportunity to appear. On March 12, 2004, we denied all petitions to intervene filed by affected couples. That ruling made sense at the time it was announced because our prior order of March 11, 2004, which specified the issues to be briefed and argued, did not identify the validity of the existing marriages as an issue. Only on April 14, 2004, *after* having denied the petitions to intervene, did the court identify and solicit briefing on the issue of the marriages' validity. To declare marriages void after denying requests by the purported spouses to appear in court as parties and be heard on the matter is hard to justify, to say the least. n2

n2 Compare Code of Civil Procedure section 389, subdivision (a): "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest ... ."

The majority counters that "the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages have been heard and fully considered." (Maj. opn., *ante*, at p. 1116.) But this is a claim a court may not in good conscience make unless it has given, to the persons whose rights it is purporting to adjudicate, notice and the opportunity to appear. This is the irreducible minimum of due process, even in cases involving numerous parties. (See *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314-315 [94 L. Ed. 865, 70 S. Ct. 652].) Amicus curiae briefs, which any member of the public may ask to file and which the court has no obligation to read, cannot seriously be thought to satisfy these requirements. The majority writes that "requiring each of the thousands of same-sex couples to be named and served as parties in the present action, would add nothing of substance to this proceeding." (Maj. opn., *ante*, at p. 1115.) Of [*1135] course, the same argument can be made in many class actions with respect to the absent members of the class, but due process still gives each class member the right to notice and the opportunity to appear. (*Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at pp. 314-315.) Here, notice has been given to none of the 4,000 affected couples; and even the 11 same-sex couples who affirmatively sought to intervene were denied the opportunity to appear. (Maj. opn., *ante*, at p. 1116.) What the majority has done, in effect, is to give petitioners the benefit of an action against a defendant class of same-sex couples free of the burden of procedural due process. If the majority truly desired to hear the views of the same-sex couples whose rights [***286] it is adjudicating, it would not proceed in absentia.

Aware of this problem, the majority offers a specious imitation of due process by ordering the city to notify the same-sex couples that this court has decided their marriages are void, and to "provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages" before canceling their marriage records. (Maj. opn., *ante*, at pp. 1118-1119; see also *id.*, at p. 1117.) This procedure may prevent the city from mistakenly deleting the records of heterosexual marriages, but it cannot benefit any same-sex couple. Notice after the [**510] fact that one's rights have been adjudicated is not due process.

The majority attempts to justify the procedural shortcuts it is taking by invoking the rule that '[a] marriage prohibited as ... illegal and declared to be "void" or "void from the beginning" is a legal nullity and its validity may be asserted or shown in any proceeding in which the fact of marriage may be material.' " (*Estate of Gregorson* (1911) 160 Cal. 21, 26 [116 P. 60], quoted in maj. opn., *ante*, at p. 1114, italics omitted.) But that rule, until today, has permitted persons other than spouses to challenge the validity of a marriage *only as and when necessary to resolve another issue in the case*, for example, the legitimacy of an heir's claim to property or an assertion of marital privilege. In essence, the *Gregorson* rule simply recognizes that a litigant whose claim or defense depends on the validity or invalidity of a marriage may introduce evidence to prove the point. n3 We have never held that this type of collateral attack on a marriage has any binding effect on *nonparties* to the [*1136] action. A court's refusal in the course of a criminal trial to recognize a claim of marital privilege, for example, does not compel the State Office of Vital Records to destroy a record of the marriage. The majority asserts that the question of the existing marriages' validity or invalidity is material because it is "*central to the scope of the remedy that may and should be ordered in this case.*" (Maj. opn., *ante*, at p. 1114, italics added.) But this is just another way of saying the question is material because the Attorney General has asked us to decide it. With this reasoning, the majority assumes the conclusion and converts the *Gregorson* rule into a pretext for denying fundamental fairness.

n3 For example, *Estate of Elliott* (1913) 165 Cal. 339, 343 [132 P. 439] (decedent's daughter may challenge purported marriage of decedent to person seeking appointment as administrator); *Estate of Stark* (1941) 48 Cal. App. 2d 209, 215-216 [119 P.2d 961] (heirs may challenge marriage of decedent's parents to show that other purported heirs were illegitimate and, thus, lack standing to contest the will); *People v. Little* (1940) 41 Cal. App. 2d 797, 800-801 (the People in a criminal case may challenge defendant's marriage to an alleged coconspirator in order to avoid the rule that spouses cannot commit the crime of conspiracy); *People v. MacDonald* (1938) 24 Cal. App. 2d 702, 704-705 [76 P.2d 121] (the People in a criminal case may challenge defendant's marriage to a witness in order to defeat a claim of spousal privilege); *People v. Glab* (1936) 13 Cal. App. 2d 528, 535 [57 P.2d 588] (same).

II.

I also do not join in the majority's unnecessary, wide-ranging comments on the respective powers of the judicial and executive branches of government.

The ostensible occasion for the majority's comments--a threat to the rule of law (maj. opn., *ante*, at pp. 1068, 1119-1120) [***287] -- seems an extravagant characterization of recent events. On March 11, 2004, when we assumed jurisdiction and issued an interim order directing San Francisco officials to cease licensing same-sex marriages, those officials immediately stopped. Apparently the only reason they had not stopped earlier is that the lower courts had denied similar applications for interim relief. While city officials evidently understood their oaths of office as commanding obedience to the Constitution rather than to the marriage statutes they believed to be unconstitutional, those officials never so much as hinted that they would not respect the authority of the courts to decide the matter. Indeed, not only did our interim order meet with immediate, unreserved compliance by city officials, but the same order apparently sufficed to recall to duty any other public officials who might privately have been thinking to follow San Francisco's lead. In the meantime, not one of California's 58 counties or over 400 municipalities has licensed a same-sex marriage.

Under these circumstances, I see no justification for asserting a broad claim of power over the executive branch. Make no mistake, the majority does assert such a claim by holding that executive officers must follow statutory rather than constitutional law until a court gives them permission in advance to do otherwise. For the judiciary to assert such power over the executive branch is fundamentally misguided. As the high court [**511] has explained, "[i]n the performance of assigned constitutional duties *each branch of the Government must initially interpret the Constitution*, and the interpretation of its powers by any branch is due great respect from the others." (*United States v. Nixon* (1974) 418 U.S. 683, 703 [41 L. Ed. 2d 1039, 94 S. Ct. 3090], italics added.) To recognize that an executive officer has the practical freedom to act based on an interpretation of the Constitution that may ultimately prove to be wrong [*1137] does not mean the rule of law has collapsed. So long as the courts remain open to hear legal challenges to executive conduct, so long as the courts have power to enjoin such conduct pending final determination of its legality, and so long as the other branches acknowledge the courts' role as " 'ultimate interpreter of the Constitution' " (*id.*, at p. 704, quoting *Baker v. Carr* (1962) 369 U.S. 186, 211 [7 L. Ed. 2d 663, 82 S. Ct. 691]) in matters properly within their jurisdiction, no genuine threat to the rule of law exists. San Francisco's compliance with our interim order eloquently demonstrates this.

Furthermore, a rule requiring an executive officer to seek a court's permission before declining to comply with an apparently unconstitutional statute is fundamentally at odds with the separation of powers and, in many cases, unenforceable. The executive branch is necessarily active, managing events as they occur. The judicial branch is necessarily reactive, waiting until invited to serve as neutral referee. The executive branch does not await the courts' pleasure. A rule to the contrary, though perhaps enforceable against local officials in some cases, will be impossible to enforce against executive officers who exercise a greater share of the state's power, such as a Governor or an Attorney General. By happy tradition in this country, executive officers have generally acquiesced in the judicial branch's traditional claim of final authority to resolve constitutional disputes. (*Marbury v. Madison* (1803) 5 U.S. 137, 176 [2 L. Ed. 60]; see also *United States v. Nixon, supra,* 418 U.S. 683, 703.) But a court can never afford to forget that the judiciary "may truly be said to have neither Force nor [***288] Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (Hamilton, The Federalist No. 78 (Willis ed. 1982) p. 394.) Accordingly, we are ill advised to announce categorical rules that will not stand the test of harder cases.

The majority acknowledges that "legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion." (Maj. opn., *ante*, at p. 1068.) But the majority views executive officers exercising "ministerial" functions as statutory automatons, denied even the scope to obey their oaths of office to follow the Constitution. (*Ibid.*) Contrary to the majority, I do not find the purported distinction between discretionary and ministerial functions helpful in this context. Were not state officials performing ministerial functions when, strictly enforcing state segregation laws in the years following *Brown v. Board of Education* (1954) 347 U.S. 483 [98 L. Ed. 873, 74 S. Ct. 686], they refused to admit African-American pupils to all-White schools until the courts had applied *Brown*'s decision about a Kansas school system to each state's law? We formerly believed that school officials' oaths of office to obey the Constitution had sufficient gravity in such cases to permit them to obey the higher law, even *before* the courts had [*1138] spoken state by state. (*Southern Pac. Transportation Co. v.*

Public Utilities Com. (1976) 18 Cal.3d 308, 311, fn. 2 [3d par.] [134 Cal. Rptr. 189, 556 P.2d 289].) So, too, did the United States Supreme Court. (*Cooper v. Aaron* (1958) 358 U.S. 1, 18-20.) Today, in contrast, the majority equivocates on this point (see maj. opn., *ante*, at pp. 1102-1104) and writes that "a public official 'faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid' " (*id.*, at p. 1100, quoting *Southern Pac. Transportation Co. v. Public Utilities Com., supra,* at p. 319 (conc. & dis. opn. of Mosk, J.)). But [**512] as history demonstrates, however convenient the majority's view may be in dealing with subordinate officers within a governmental hierarchy, that view is not entirely correct.

The majority's strong view of judicial power over the executive branch leads it to suggest, albeit without actually so holding, that a state may properly condition on advance judicial approval its executive officers' duty to obey even the *federal* Constitution. The majority writes, for example, that "[t]he city has not cited any case holding that the federal Constitution prohibits a state from defining the authority of a state's executive officials in a manner that requires such officials to comply with a clearly applicable statute unless and until such a statute is judicially determined to be unconstitutional" (maj. opn., *ante*, at p. 1110), and that " 'the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it ... *is a purely local question*' [citation]--that is, purely a question of state (not federal) law" (*id.*, at pp. 1111-1112, quoting *Smith v. Indiana* (1903) 191 U.S. 138, 148 [48 L. Ed. 125, 24 S. Ct. 51], italics in maj. opn.). n4

n4 In *Smith v. Indiana, supra,* 191 U.S. 138, the high court held only that it would not necessarily recognize a state official's *standing* to challenge a state law on federal grounds. (See *id.*, at pp. 148-150.) Even on this narrow point, *Smith* has not been consistently followed. (See *Board of Education v. Allen* (1968) 392 U.S. 236, 241, fn. 5 [20 L. Ed. 2d 1060, 88 S. Ct. 1923] [local school officials permitted to challenge under the federal Constitution a state statute requiring them to purchase and loan textbooks to parochial school pupils]; *Coleman v. Miller* (1939) 307 U.S. 433, 438 & fn. 3 [83 L. Ed. 1385, 59 S. Ct. 972] [state legislators permitted to challenge under the federal Constitution state's procedures for recording votes on constitutional amendments]; cf. *id*., at p. 466 (separate opn. of Frankfurter, J., citing *Smith*); *Akron Board of Ed. v. State Board of Ed. of Ohio* (6th Cir. 1974) 490 F.2d 1285, 1290-1291, cert. den. *sub nom. State Board of Education of Ohio v. Akron Board of Education* (1974) 417 U.S. 932 [41 L. Ed. 2d 236, 94 S. Ct. 2644] [local school officials permitted to challenge under the federal Constitution state officials' decision to transfer White students from desegregated schools to all-White schools]; cf. *Akron Board of Ed. v. State Board of Ed. of Ohio, supra,* 490 F.2d at p. 1296 (conc. & dis. opn. of Pratt, J., citing *Smith*).)

[***289]

Given that respondent city officials have complied with our interim order to cease issuing same-sex marriage licenses, and that the constitutionality of the existing marriage statutes is presently under review, I consider the majority's determination to speculate about the limits of a state official's duty to obey [*1139] the federal Constitution unnecessary and regrettable. A court should not trifle with the doctrine invoked by recalcitrant state officials, in the years following *Brown v. Board of Education, supra,* 347 U.S. 483, to rationalize their delay in complying with the Fourteenth Amendment. The high court definitively repudiated this erroneous doctrine in *Cooper v. Aaron, supra,* 358 U.S. 1, 18: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." The United States Constitution, itself, immediately commands the unqualified obedience of state officials in article VI, section 3, which declares that "all executive and judicial officers, both of the United States *and of the several states*, shall be bound by oath or affirmation, to support this Constitution ... ." (Italics added; see also *Cooper v. Aaron, supra,* 358 U.S. at pp. 19-20.)

We, as a court, should not claim more power than we need to do our job effectively. In particular, strong claims of judicial power over the executive branch are best left unmade and, if they must be made, are best reserved for cases presenting a real threat to the separation of powers--a threat that provides manifest necessity for the claim, a genuine test of the claim's validity, and a suitable incentive for caution in its articulation. None of these conditions, all of which are necessary to ensure sound decisions in hard cases, is present here.

III.

In conclusion, I agree with the majority's decision to order city officials not to license additional same-sex marriages pending resolution of the constitutional challenges to the [**513] existing marriage statutes. To say more at this time is neither necessary nor wise.

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2007 WL 1153859

Matthew v. City of Alameda

Court of Appeal, First District, Division 1, California. | April 19, 2007 | Not Reported in Cal.Rptr.3d | 2007 WL 1153859 *(Approx. 5 pages)*

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Court of Appeal, First District, Division 1, California.

Matthew MURPHY, Plaintiff and Appellant,

v.

CITY OF ALAMEDA et al., Defendants and Respondents.

No. A113144.
(Alameda County Super. Ct. No. RG-04-160042).
April 19, 2007.

Attorneys and Law Firms

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Opinion

STEIN, J.

*1 Plaintiff Matthew Murphy (Murphy) appeals from an order of the Alameda County Superior Court granting summary judgment in favor of defendants City of Alameda (City), City Council of the City of Alameda (City Council), and Planning Board of the City of Alameda. He asserts the trial court erred in concluding that a city ordinance authorizing the construction of work/live studios does not violate a city charter provision that prohibits the construction of multiple dwelling units. We conclude there was no error, and therefore, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 1973, Alameda voters approved a ballot initiative entitled "Measure A," which became part of the city charter. It provided: "There shall be no multiple dwelling units built in the City of Alameda. [¶] ... Exception being the Alameda Housing Authority replacement of existing low cost housing units and the proposed Senior Citizens low cost housing complex...." A few months later, the City Council enacted Ordinance 1693, which provided definitions of terms not defined in Measure A, and set forth how the measure would be implemented. Ordinance 1693 defined "dwelling" as "a building or portion thereof designed exclusively for residential occupancy" and "dwelling unit" as a "group of rooms, including one kitchen, a bath and sleeping quarters, designed for and not occupied by more than one family." It defined "multiple dwelling units" as a "residential building, whether a single structure or consisting of attached or semiattached structures, designed, intended or used to house, or for occupancy by, three or more families, or living groups, living independently of each other, located in districts or zones authorized therefor...."

In December 1998, the City Council adopted Ordinance 2784, authorizing the construction of work/live studios, which were defined as "a commercial or industrial unit with incidental residential accommodations occupying one or more rooms or floors in a building primarily designed and used for industrial or commercial occupancy...." Ordinance 2784 limited the construction of work/live studios to existing buildings in commercial and industrial zoning districts, and provided that no portion of any work/live studio was to be considered a "dwelling" as defined by Ordinance 1693.

Murphy challenged Ordinance 2784 on the ground that it violated Measure A. He filed a lawsuit against the City, seeking a declaration that Ordinance 2784 was "facially inoperative and void," as

well as an injunction preventing the City from implementing the ordinance. The trial court granted summary judgment in favor of defendants, holding Ordinance 2784 did not violate Measure A. Murphy filed a timely notice of appeal.

DISCUSSION

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The appellate court reviews the grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

A. Ordinance 2784 does not violate the "plain meaning" of Measure A.

***2** Citing dictionary definitions of the words "dwelling," "dwelling house" and "residence," Murphy asserts that Ordinance 2784 violates the "plain meaning" of Measure A because it allows the construction of multiple work/live studios, which are, by definition, "dwellings," where people reside. His claim is without merit.

A charter constitutes a city's local constitution, and city ordinances stand in the same relationship to a charter as do statutes to the state constitution. (*Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 836, 837 (*Porter*).) Thus, the same presumptions favoring the constitutionality of statutes apply to ordinances. (*Id.* at p. 837.) " 'In considering the scope or nature of appellate review in a case [concerning the validity of an ordinance] we must keep in mind the fact that the courts are examining the act of a coordinate branch of the government-the legislative-in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a factfinding body.' " (*Ratkovich v. City of San Bruno* (1966) 245 Cal.App.2d 870, 879 (*Ratkovich*).) "Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties." (*Ibid.*)

Further, unless expressly limited by its charter, a city council has plenary authority to interpret and implement charter provisions and may exercise all powers not in conflict with the California Constitution. (*Miller v. City of Sacramento* (1977) 66 Cal.App.3d 863, 867-868 (*Miller*); *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 467-468.) The City Council's action "will be upheld by the courts unless beyond its powers, 'or in its judgment or discretion is being fraudulently or corruptly exercised.' " (*Porter, supra,* 261 Cal.App.2d at p. 836.) Thus, a party making a facial challenge to an ordinance, requesting that it be voided, must demonstrate that its provisions " 'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions .' " (*Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 137-138 (*Personal Watercraft Coalition*).) "If reasonable minds might differ as to the reasonableness of the ordinance [citations] or if the reasonableness of the ordinance is fairly debatable [citations], the ordinance must be upheld." (*Ratkovich, supra,* 245 Cal.App.2d at p. 878.)

Alameda's charter provides that its legislative powers are vested in the City Council, and because there is no provision in the charter limiting the authority of the City Council, the City Council had full power to enact ordinances interpreting and implementing Measure A. (See *Miller, supra,* 66 Cal.App.3d at pp. 867-868.) This was especially appropriate here, where the measure consisted of just one sentence and one phrase for a total of 47 words, prohibiting the construction of multiple dwelling units in the City. Measure A was not clear as to meaning or applicability and was silent on the matter most critical to the determination of this case-the definition of "multiple dwelling units."

***3** The City Council acknowledged this problem and enacted Ordinance 1693 in which it stated: "The provisions hereof are designed to better achieve the objectives and will of the electorate, expressed at the March 13, 1973, General Municipal Election [at which Measure A was passed], ... by clarifying existing uncertainties and ambiguities as to the meaning of the phrase, 'multiple dwelling units'...." The limitations period to challenge Ordinance 1693 has long passed, as Murphy concedes, and he does not dispute that this ordinance is valid.

The City Council also had plenary power to enact Ordinance 2784, and it acted within its powers when it determined that the definition of "dwelling" did not extend to work/live studios. The City Council's conclusion that Measure A prohibited the construction of multiple dwelling units only in certain districts or zones was also valid in light of the fact that it had previously defined the term "multiple dwelling units" as a "residential building ... *located in districts or zones authorized therefor.* ..." Because the prohibition against multiple dwelling units applied only to certain districts or zones, the City Council acted reasonably in limiting the construction of work/live studios to commercial and industrial areas of the City.

Where a charter provision is ambiguous or susceptible of two or more meanings, the city council, not the court, has the authority to decide issues of interpretation and applicability. (*Porter, supra,* 261 Cal.App.2d at p. 836.) We therefore will not substitute the definitions and interpretations the City Council made in resolving the ambiguities of Measure A with Murphy's dictionary definitions that do not take into consideration the specific needs and circumstances of the City. [1] In light of the great deference we are to give to the City Council's actions, and the strong presumption of constitutionality

applied to ordinances, we conclude that Murphy has not met his burden of establishing that Ordinance 2784 is in "total and fatal conflict with applicable constitutional prohibitions." (See *Personal Watercraft Coalition, supra,* 100 Cal.App.4th at p. 138.) We therefore affirm the trial court's order.

B. Extrinsic evidence does not support Murphy's position that Ordinance 2784 violates Measure A.

Murphy asserts that "[e]ven if the Court were to believe that it needed to go behind the plain meaning of the language of Measure A," extrinsic evidence supports his claim that Ordinance 2784 violates Measure A. We disagree.

1. Ordinance 1693

Murphy asserts that Ordinance 1693 constitutes extrinsic evidence supporting his claim that Ordinance 2784 violates Measure A because (1) the definitions of "dwelling" and "dwelling unit" set forth in Ordinance 1693 support his position that work/live studios are "dwellings"; (2) Ordinance 1693 states that Measure A's prohibition against multiple dwelling units applies to the *entire city,* and not just to residential areas; and that (3) even if the prohibition applies only to residential areas, the construction of multiple work/live studios in otherwise commercial or industrial buildings converts these places into "residential" buildings, where multiple dwelling units are not allowed.

***4** We reject Murphy's argument that the definitions of "dwelling" and "dwelling unit" set forth in Ordinance 1693 support his position that Ordinance 2784 violates Measure A. The definition of a "dwelling" as "a building or portion thereof designed exclusively for residential occupancy" is not reasonably interpreted to include an individual unit within a building that is designed for residential occupancy and other uses. Further, the fact that a work/live studio contains all of the accoutrements of a "dwelling unit," such as a kitchen and a bath, does not necessarily bring work/live studios within the definition of a "dwelling unit." In any event, the City Council, in defining the term "multiple dwelling units" as residential buildings "located in districts or zones authorized therefor," made clear that the prohibition against multiple dwelling units applied only to certain districts or zones. Thus, the construction of work/live studios outside of those districts or zones is, by definition, not prohibited.

Next, as Murphy points out, Ordinance 1693 states "[t]here shall be no multiple dwelling units built in the City of Alameda." It also states the City will not issue any building permits for the construction of multiple dwelling units "within the City." However, these are restatements of what Measure A states, and do not necessarily reflect the City Council's intent to interpret the measure in a way that would make the prohibition against multiple dwelling units applicable to the entire city, or to the work/live studios that are at issue here. To the contrary, as noted above, the City Council made it clear when defining the term "multiple dwelling units" in Ordinance 1693 that the prohibition applied only to certain districts or zones.

We also reject Murphy's assertion that the construction of work/live studios, which are "dwellings," in otherwise commercial or industrial areas converts these places into residential areas to which the prohibition against multiple dwelling units applies. Because the City Council has defined "multiple dwelling units" as residential buildings "located in districts or zones authorized therefor," the fact that buildings outside of those districts contain work/live studios does not convert the buildings into residential buildings, and the districts or zones in which they are located into residential districts or zones.

2. Voter Testimony

Murphy relies on extrinsic evidence in the form of voter testimony in asserting that the construction of multiple work/live studios violates Measure A. He claims the voters intended and understood the phrase "dwelling unit" to encompass any space in which people resided, and expected the prohibition would apply to the entire city. This argument is without merit.

Because different voters make their decisions for various subjective reasons, often not shared or even known by others, courts generally do not rely on the subjective intent of voters, or even the drafters, of an initiative proposal. (See *Carman v. Alvord* (1982) 31 Cal.3d 318, 331, fn. 10 [drafter's after-the-fact explanation of intent does not explain how voters understood the provision].) Expressions of individual motivation made "after-the-fact ... may deserve some consideration [citation]; but by no means does it govern our determination how the voters understood the ambiguous provisions." (*Ibid.*)

***5** Here, the recollections of several individual residents as to what their intent was when they supported Measure A in 1973 do not prove the meaning of undefined terms of Measure A, nor do they reflect the intent of the electorate generally. Their testimony also cannot replace the City Council's interpretations as to the meaning of Measure A. Thus, we reject Murphy's claim that voter testimony supports his position that Ordinance 2784 violates Measure A.

3. Other City Ordinances

Murphy relies on rent control ordinances from other cities that classify work/live studios as "residential" in asserting that work/live studios are "dwellings" and that the construction of work/live

studios thus violates Measure A. We conclude the trial court properly excluded these documents from evidence on the basis they were irrelevant, as there is nothing in the record indicating the City Council used or relied on these ordinances when enacting Ordinance 2784, and neither Measure A nor the ordinances makes any reference to any of the other city ordinances. We therefore need not address the issue of whether these city ordinances support Murphy's position.

C. Health and Safety Code section 17958.11 does not support Murphy's position, and in fact, specifically authorizes the City to convert commercial and industrial buildings into work/live studios.

Murphy asserts that Health and Safety Code section 17958.11, enacted after Measure A was passed, supports his position that Ordinance 2784 violates Measure A because the statute refers to work/live studios as a "residential occupancy." To the contrary, the statute supports the City's position, as it specifically *authorizes* the conversion of commercial and industrial buildings into work/live studios. It provides: "Any city or county may adopt alternative building regulations for the conversion of commercial or industrial buildings, or portions thereof, to joint living and work quarters." (Health & Saf.Code, § 17958.11, subd. (a).)

Noting that many manufacturing and commercial buildings in urban areas had lost their tenants to more modern premises, the Legislature in enacting Health and Safety Code section 17958.11 declared: "[T]he untenanted portions of such buildings constitute a potential resource capable, when appropriately altered, of accommodating joint living and work quarters which would be physically and economically suitable particularly for use by artists, artisans, and similarly-situated individuals." (Health & Saf.Code, § 17958.11, subd. (b).) Although it referred to these joint living and work quarters as residential spaces, it also made clear that the residential use of these units was "accessory to the primary use of such a space as a place of work," and that these units were to be constructed only in commercial or industrial districts. (Health & Saf.Code, § 17958.11, subd. (c).) Thus, the statute not only authorizes the City to enact an ordinance such as Ordinance 2784, but it also provides support for the City's position that its City Council acted reasonably in distinguishing between residential units constructed as "dwellings" in residential zones, and work/live studios designed primarily for commercial or industrial uses in nonresidential zones. The statute does not support Murphy's position that Ordinance 2784 violates Measure A.

DISPOSITION

***6** The trial court's order is affirmed. Defendants shall recover their costs on appeal.

We concur: MARCHIANO, P.J., and SWAGER, J.

All Citations

Not Reported in Cal.Rptr.3d, 2007 WL 1153859

Footnotes

1 We also conclude that the dictionary definitions of the words "dwelling," "dwelling house" and "residence" submitted by Murphy do not show there is a conflict between Ordinance 2784 and Measure A.

End of Document

Salmon Trollers Marketing Assn. v. Fullerton (1981)

[Civ. No. 50021. Court of Appeals of California, First Appellate District, Division Four. October 6, 1981.]
SALMON TROLLERS MARKETING ASSOCIATION, INC., et al., Plaintiffs and Respondents, v. E. C. FULLERTON, as Director, etc., Defendant and Appellant.

(Opinion by McCullum, J., with Caldecott, P. J., and Poche, J., concurring.)

COUNSEL

George Deukmejian, Attorney General, R. H. Connett, Assistant Attorney General, and Denis D. Smaage, Deputy Attorney General, for Defendant and Appellant.

James L. Larson for Plaintiffs and Respondents.

OPINION

McCULLUM, J.

This is an appeal by the Director of Fish and Game of the State of California, E. C. Fullerton (Director), from a judgment granting a writ of mandate and an injunction, issued by the Superior Court of Mendocino County in favor of Salmon Trollers Marketing Association, Inc., which consists of commercial salmon fishermen licensed to fish in the territorial waters of California. The Director had closed the commercial salmon fishing season for short terms during 1980, by emergency regulations adopted upon the authority of Fish and Game Code, section 7652. The trial court invalidated the emergency closures on the ground that section 7652 was an unconstitutional delegation of legislative power to the Director.

For the reasons set forth, we find that section 7652 of the California Fish and Game Code is valid and constitutional as enacted and applied. Therefore we reverse.

In April 1976, Congress enacted the Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801 et seq.) to conserve and manage fishery resources in a "fishery conservation zone" extending from 3 miles offshore to 200 miles offshore. The Secretary of Commerce was authorized to adopt regulations based on "fishery management plans" to be developed by regional "fishery management councils." The regional council for the area off the coast of Washington, Oregon, and California is the Pacific Fishery Management Council composed of 13 members of whom 3 (including the Director) are from California. fn. 1 California's **[124 Cal. App. 3d 296]** "state ... boundaries" include, along its Pacific shore, a zone extending three miles seaward. (People v. Weeren (1980) 26 Cal. 3d 654, 660-666 [163 Cal. Rptr. 255, 607 P.2d 1279].)

In September 1976, the California Legislature added to the Fish and Game Code a new article, beginning with section 7650, entitled "Federal Regulation." (Stats. 1976, ch. 1160.) fn. 2 **[124 Cal. App. 3d 297]**

In 1977, 1978, and 1979 the Department of Commerce regulated the salmon fishery in the Pacific Coast fishery conservation zone on the basis of a fishery management plan adopted and thereafter from time to time amended by the Pacific Fishery Management Council. (45 Fed.Reg. 29250(May 1, 1980).) The 1979 regulations imposed "more restrictive management measures" in light of a perceived salmon shortage. For 1980 the Pacific Fishery Management Council proposed even more restrictive amendments on the basis of findings that "many of the [salmon] stocks continue to be depressed as they were in 1979 and that their future productivity will be in serious jeopardy if ocean harvests are not reduced." On April 29, 1980, the Department of Commerce enacted the more restrictive regulations on an emergency basis in light of "the critical needs for reductions in the ocean harvests of these salmon stocks." (Id, at pp. 29252-29253.)

At all relevant times California's statutory commercial salmon seasons have been May 15 to September 30 for silver salmon and April 15 to September 30 for all other types of salmon. (Fish & G. Code, §§ 8210.2, 8210.3.) The effect of the federal emergency regulations was to close the commercial salmon season in the fishery conservation zone off the California coast between June 1 and June 30, 1980, south of Cape Vizcaino and between June 1 and July 15, 1980, north of that point. (45 Fed.Reg. 29250, 29251, 29253 (May 1, 1980).)

On May 28, 1980, Director responded to the federal regulations by filing emergency regulations prefaced by a statement of "specific facts constituting the need for immediate action" (Gov. Code, § 11346.1) which recited in part: "Drought conditions in 1976 and 1977 reduced the survival of juvenile salmon produced in those years. Adult salmon populations available to the 1980 fisheries will be depressed. In order to assure adequate numbers of spawning fish, fishing effort in 1980 must be reduced. Specific regulations to achieve the required resource protection are contained in the "Proposed Plan for Managing the 1980 Salmon Fisheries off the Coasts of California, Oregon and Washington," prepared by the Pacific Fishery Management Council. [¶] Pursuant to Section 7652 of the Fish and Game Code, the following **[124 Cal. App. 3d 298]** commercial salmon fishing regulation changes for the 1980 season are necessary to conform California laws to those adopted by the Pacific Fishery Management Council and approved by the Secretary of Commerce."

The California emergency regulations themselves sought to effect the same closures within California's three-mile limit as the federal emergency regulations had established outside the three-mile limit. (Cal.Admin.Code, tit. 14, former § 182 (replaced July 11, 1980: Cal.Admin.Reg. 80, No. 28).)

On June 20, 1980, plaintiff Salmon Trollers Marketing Association (hereinafter Salmon Trollers) sought injunctive and declaratory relief and a peremptory writ of mandate. After hearing, the superior court granted a peremptory writ of mandate and an injunction ordering the Director to annul and rescind the regulations and enjoining the Director from enforcing them.

The Director contends on appeal that the issuance of the emergency regulations and closure of the salmon fishing season was constitutional and valid pursuant to the enactment of Fish and Game Code sections 7650 to 7653. Respondent Salmon Trollers contends that section 7652 constitutes an unlawful delegation of legislative power and fails to afford substantive due process to Salmon Trollers.

By their own terms the California emergency regulations expired by the end of September 1980. The Salmon Trollers moved to dismiss this appeal as moot. The Director opposed the motion on the ground that the question of the validity of section 7652 will recur and is of substantial public interest. [1] "It is now established law that where ... issues on appeal affect the general public interest and the future rights of the parties, and there is reasonable probability that the same questions will again be litigated and appealed, an appellate court may, although the appeal be subject to dismissal, nevertheless adjudicate the issues involved." (People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 468 [89 Cal. Rptr. 290].) This court denied Salmon Trollers' motion to dismiss.

[2a] Salmon Trollers contends that section 7652 violated the constitutional doctrine of separation of powers in California Constitution, article III, section 3, in that it purported to delegate legislative functions **[124 Cal. App. 3d 299]** to an executive agency. fn. 3 The validity of a legislative body's delegation of powers to another agency was recently reviewed by this court in Groch v. City of Berkeley (1981) 118 Cal. App. 3d 518 [173 Cal. Rptr. 534] and the general principles set forth in that case are applicable to the case at bench. [3] "A legislative body such as a city council may properly delegate powers to an administrative body such as the board of adjustments if (1) the legislative body retains control over the power to make fundamental policy decisions, and (2) the procedure established for the exercise of delegated power adequately safeguards those affected. [Citation.] ... [¶] ... 'Once the legislative body has determined the issue of policy ... the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation.'" (Groch v. City of Berkeley, supra, 118 Cal. App. 3d 518, 522-523, citingKuglar v. Yocum (1968) 69 Cal. 2d 371, 377 [71 Cal. Rptr. 687, 445 P.2d 303].) These principles have often been spelled out in more detail. (E.g.,Kuglar v. Yocum, supra;Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-819 [114 Cal. Rptr. 577, 523 P.2d 617]; City of Santa Ana v. City of Garden Grove (1979) 100 Cal. App. 3d 521, 529 [160 Cal. Rptr. 907].) The basic precept is "the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy and that it must determine crucial issues whenever it has the time, information and competence to deal with them." (Clean Air Constituency v. California State Air Resources Board, supra, 11 Cal. 3d 801, 817.) The concept of the Legislature as the ultimate policymaker is basic to the separation of powers. (Cal. Const., art. III, § 3, art. IV, § 1.)

[4] A legislative act is presumed to be constitutional. "Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 43, p. 3281.)

[5] "The doctrine prohibiting delegation of legislative power rests on the premise that the Legislature may not abdicate its responsibility to resolve the 'truly fundamental issues' by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies. (Kugler v. Yocum [1968] 69 Cal. 2d 371, 376-377 **[124 Cal. App. 3d 300]** ....) Where the Legislature has made the fundamental policy decisions and delegated to some other body the task of implementing those policies under adequate safeguards, there is no violation of the doctrine of nondelegability of legislative power." (City of Santa Ana v. City of Garden Grove, supra, 100 Cal. App. 3d 521, 529; see also People ex rel.Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 507 [96 Cal. Rptr. 553, 487 P.2d 1193];Kugler v. Yocum, supra, at pp. 375-377.)

Because the Legislature by its very nature must frequently delegate authority to administrative officers, courts are understandably reluctant to interfere with such delegations. Rather, delegation by the Legislature is viewed as a positive and beneficial way to implement legislation. (See First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549 [159 P.2d 921].)

[2b] Reviewing sections 7650-7653, it is clear that adequate standards are set forth to guide the Director as he implements the basic policy decision already made by the Legislature. It is legislative judgment that the state shall fully cooperate and assist in the formulation of fishery management plans adopted by the council. A basic policy determination has also been made to support the fishery management plan once adopted by the council. This support is to be carried out by the Director, when necessary, by suspending inconsistent statutes or regulations temporarily and adopting consistent regulations effective up to 180 days only. In the meantime, the Legislature clearly intends to consider conforming California statutory law to fishery management plans adopted by the council (Fish & G. Code, § 7653), based on the Director's report to the Legislature as to which statutes should be amended, repealed or adopted. (Fish & G. Code, § 7653.) A lasting and underlying policy decision is that the Legislature has determined to continue state jurisdiction over its fisheries within three miles offshore by avoiding conflict with the federal fishery plan. (Fish & G. Code, § 7652.) These are fundamental policy determinations made by the Legislature and not by the Director of Fish and Game.

The Director is given the task of carrying out this policy by formulating fishery plans in cooperation with the Pacific Fishery Management Council. The Director is also instructed to temporarily conform state statutes if necessary to avoid a substantial adverse impact on the Pacific Fishery Management Council's plan. These are tasks of a type usually left in the hands of administrators. Formulating a fishery management **[124 Cal. App. 3d 301]** plan requires expertise, biological data collection and evaluation, and consultation with the commercial fishing industry. The Legislature may properly delegate these duties to an administrator. A determination that a particular state statute will or will not have substantial adverse effect on a federal fishery plan requires biological expertise, experience in the peculiar problems of fishery law enforcement, and an understanding of marketing practices. The Legislature has set out the basic policy guidelines. The standards are clear.

Sufficient safeguards are specified in the statute: The Director's authority to adopt regulations which conform to the federal fishery plan is limited to 180 days and the Director must immediately report such adoption to the Legislature and identify those statutes or other regulations which need modification, repeal or adoption. Reservation of this authority by the Legislature to itself is a significant "safeguard adequate to prevent ... abuse" of the delegated authority. (Kugler v. Yocum, supra, 69 Cal. 2d 371, 376.)

In Kugler an ordinance of the City of Alhambra, which sets the salaries of firemen to be not less than those for the City of Los Angeles and the County of Los Angeles, was challenged. The Supreme Court upheld the ordinance against a challenge of invalid delegation of legislative power, stating: "The criteria set up by the proposed enactment reasonably relate to the fulfillment of the legislative purposes. If an external private or governmental body will be involved in the application of the legislative scheme, it must be an agency that the Legislature can expect will reasonably perform its function. If, for instance, the statute provides that salaries are to be adjusted to future changes in the cost of living, the legislation must designate a body, such as the United States Department of Labor, which may be expected to reasonably perform the function of ascertaining the cost of living ...." (Kugler v. Yocum, supra, at p. 382; italics added.) Here, to the extent that decisions of the Federal Pacific Fishery Management Council will necessarily influence the Director's decisions, it is clear that the Pacific Fishery Management Council can be expected reasonably to perform its function.

[6] As a general rule regulations enacted by an agency exercising delegated powers "must conform to the legislative will if we are to preserve an orderly system of government" (Morris v. Williams (1967) 67 Cal. 2d 733, 737 [63 Cal. Rptr. 689, 433 P.2d 697]) and hence, for example, may not validly conflict with the enabling statute (Gov. Code, § 11342.2). But several California cases make clear that if it is the "legislative **[124 Cal. App. 3d 302]** will" that an agency have power to render legislative acts inoperative in one sense or another, such delegation will be valid so long as the usual conditions of valid delegation--retention of control over "fundamental policy decisions" and appropriate standards and safeguards for exercise of the delegated power--are met. Given a clear legislative articulation of fundamental policy and appropriate standards and safeguards it has been held that the Legislature

may validly delegate authority to determine whether and where a statutory regulatory plan should go into effect (Ray v. Parker (1940) 15 Cal. 2d 275, 284-286 [101 P.2d 665]; Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 620, 641-644 [91 P.2d 577]; Dept. Pub. Health v. Board of Supervisors (1959) 171 Cal. App. 2d 99, 104-105 [339 P.2d 884]) or to delay the effective date of statutory provisions enacted by the Legislature on an urgency basis to protect the public health (Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-819 [114 Cal. Rptr. 577, 523 P.2d 617]).

The trial court in its memorandum of decision also declared section 7652 to be "too broad" in that it granted power to the Director to suspend or affect other codes (e.g., Water, Civil Procedure, Public Resources, Penal), in addition to the Fish and Game Code. First, the only test here is whether a basic policy decision has been made by the Legislature. If in fact the Legislature has made a determination that statutes other than those pertaining to fishing may be suspended it clearly has the power to do so. Second, whether the Legislature did intend to address statutes outside of the Fish and Game Code is a matter of statutory interpretation, but in any event that question is not ripe for adjudication. The facts of this case do not involve a suspension of a statute in some other code not pertaining to fishing. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (People ex rel.Lynch v. Superior Court (1970) 1 Cal. 3d 910, 912 [83 Cal. Rptr. 670, 464 P.2d 126].) "Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give." (United States v. Fruehauf (1961) 365 U.S. 146, 157 [5 L. Ed. 2d 476, 483, 81 S. Ct. 547].)

Salmon Trollers contends that the procedure set forth in section 7710 of the Fish and Game Code was controlling in this case. Section 7710 **[124 Cal. App. 3d 303]** was enacted in 1974, two years prior to the adoption of the Federal Fishery Conservation and Management Act of 1976, and two years prior to the California legislation in response to the federal act, which is here challenged. The fact that the Director has other regulatory powers under other statutes does not affect the validity of the statutory scheme set forth in article 1.5, sections 7650-7653, Fish and Game Code.

[7] Salmon Trollers suggests that sections 7650-7653 are invalid because they contain no provision for public hearing. But clearly the Director's rule-making function is subject to the broad provisions of the Government Code chapter establishing an Office of Administrative Law. (Gov. Code, §§ 11340-11351; cf. Gov. Code, §§ 11342, 11343, 11346.1.) The record shows that an adequate declaration of emergency was made and that time restraints required immediate action in order to comply with the legislative mandate of section 7652. No hearing is required prior to the adoption of emergency regulations. (Gov. Code, § 11346.1.) The requirement of a later confirmation hearing became moot when the Director was compelled to withdraw the regulation by the trial court's writ of mandate.

The court below did not make a determination whether an emergency existed and based its ruling solely on its determination that section 7652 was unconstitutional. Thus, whether an emergency existed is not an issue on this appeal. Furthermore, no purpose would be served at this time by remanding the cause to the trial court for determination of whether a sufficient factual basis existed in 1980 for the exercise of emergency powers. The 1980 emergency regulations have by their own terms now expired and any future regulation would be based on facts existing at the time of its adoption.

In support of its substantive due process argument, Salmon Trollers contends that "[t]he director's construction of Section 7652 as mandating the enactment of whatever federal regulatory fishery management scheme might thereafter be enacted, however unwise or unsupported by evidence sufficient to meet the requirements of section 7710 of the Fish and Game Code, combined with his use of emergency powers herein, deprived petitioners of substantive due process in exposing them to arbitrary administrative action carried out under an unlawful delegation of legislative power."

What the Director might or might not have thought or done in arriving at the conclusion that he should suspend the salmon season is not **[124 Cal. App. 3d 304]** before this court. The question is whether the statute on its face afforded sufficient standards and safeguards. [8] "Substantive due process ... deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation reasonably applied, i.e., the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained." (Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 21 [94 Cal. Rptr. 904]; cf. 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 279, pp. 3569-3570.) It is said that "[i]ndefiniteness in statutory terminology may be tested as an invalid delegation of power as well as a denial of due process." (Wotton v. Bush (1953) 41 Cal. 2d 460, 468 [261 P.2d 256].) But here the

standard of definiteness would be the same under either test; if section 7652 is constitutional under a delegation analysis it also affords substantive due process.

Salmon Trollers' contention that under section 7652, as contrasted to section 7710, they were denied a public hearing at which they might have presented evidence to demonstrate that there was no emergency and that no closure was required misconceives the issue. Section 7652 adequately incorporates the administrative rule-making provisions of the Government Code, which in turn gave Salmon Trollers various ways to be heard. Salmon Trollers chose judicial review and obtained a hearing but then elected not to submit evidence. They had an adequate opportunity to be heard under section 7652 and the extent of the hearing was determined by their election. They should not now complain.

We conclude that Fish and Game Code section 7652 offends neither the separation of powers clause nor the due process clause.

The judgment is reversed.

Caldecott, P. J., and Poche, J., concurred.

FN 1. Included in the federal act is the following provision with respect to state jurisdiction: "(a) In general.--Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State. [¶] (b) Exception.--(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, that--[¶] (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and [¶] (B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan; [¶] the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan. [¶] (2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation." (16 U.S.C. § 1856.)

FN 2. The article reads in full as follows: "7650. As used in this article: [¶] (a) 'Act' means the Federal Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 et seq.). [¶] (b) 'Council' means the Pacific Fishery Management Council established pursuant to the act. [¶] (c) 'Secretary' means the Secretary of Commerce of the federal government. [¶] 7651. The director shall formulate such fishery management plan or plans as are necessary to meet the needs of the council in preparing a fishery management plan, or amendment thereto. [¶] 7652. Upon the approval of the secretary of a fishery management plan, or amendment thereto, prepared by the council pursuant to the act or a plan prepared by the secretary, the director may do the following to conform state law or regulations of the commission to the fishery management plan, or amendment thereto, of the council or the secretary to avoid a substantial and adverse effect on such plan by such state law or such regulations as necessary to continue state jurisdiction pursuant to Section 1856 of the act: [¶] (a) Adopt regulations that would make inoperative for up to 180 days any statute or regulation of the commission including, but not limited to, statutes or regulations regulating bag limits, methods of take, and seasons for taking of fish for commercial purposes. [¶] Any regulation adopted by the director pursuant to this subdivision shall specify the particular statute or regulation of the commission to be inoperative. [¶] (b) Adopt regulations effective for up to 180 days governing phases of the taking of fish for commercial purposes which are not presently regulated by statute or regulation of the commission. [¶] (c) Adopt regulations effective for up to 180 days governing phases of the taking of fish for commercial purposes which are presently regulated by statute or regulation of the commission, only if such statutes or regulations are made inoperative first pursuant to subdivision (a) for the effective period of the regulations adopted by the director. [¶] 7653. Upon the adoption of any regulations pursuant to Section 7652, the director shall report to the Legislature which statutes or regulations of the commission need to be amended or repealed, and any regulations adopted by the director that need to be enacted as statutes, to conform state law to any fishery management plan, or amendment thereto, that has been approved by the secretary to avoid any substantial and adverse effect on such plan, or its amendments, by such state law." (Fish & G. Code, §§ 7650-7653.)

FN 3. Article III, section 3, provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Whitmire v. City of Eureka

[Civ. No. 30052. Court of Appeals of California, First Appellate District, Division Two. November 30, 1972.]
WAYNE R. WHITMIRE et al., Plaintiffs, Cross-defendants and Appellants, v. CITY OF EUREKA, Defendant, Cross-complainant and Respondent

(Opinion by Kane, J., with Taylor, P. J., and Rouse, J., concurring.)

COUNSEL

Robert W. Hill for Plaintiffs, Cross-defendants and Appellants.

Melvin S. Johnsen, City Attorney, for Defendant, Cross-complainant and Respondent. **[29 Cal. App. 3d 30]**

OPINION

KANE, J.

This case is yet another installment in the herky-jerky development of a viable comprehensive retirement system for firemen and policemen employed by the City of Eureka.

Historical Background

In order to isolate and explain our resolution of the fundamental issue here involved it is necessary to briefly outline the legislative and judicial history pertaining to the Firemen's and Policemen's Retirement Fund System of the City of Eureka ("System").

The System was first established in 1943 by Ordinance No. 2262 enacted by the voters of the city. Under the provisions of this ordinance, a commission ("Commission") consisting of the president of the city council, the city treasurer, the chief engineer of the fire department, the chief of the police department, and one member elected from each of the departments, i.e., police and fire, was created "for the purpose of supervising the funds" and was charged with the duty of providing "for the collection and disbursement of the Fund and to designate the Beneficiaries thereof, as hereinafter provided, and to establish rules and regulations not inconsistent therewith."

Section 16 of the ordinance, which is pertinent in this appeal, provided as follows: "This Ordinance, in order to effect improvements and efficiently carry into effect the purposes hereof and supply provisions hereof that may not be herein contained to cause the purposes to be carried into effect, may be amended in the following manner, to wit:

"That any proposed improvement or amendment shall be voted upon by secret ballot in the Fire Department and Police Department, separately, and the results thereof certified to the City Council. That in the event such proposed amendment shall have passed by a majority vote by each said Fire and Police Department, then if the Council, by a majority vote, shall pass such proposed amendment, the same shall become effective and binding." fn. 1

In 1960, pursuant to a request from the Commission, the city engaged the services of professional actuaries to conduct an investigation and evaluation of the retirement fund. The result of this survey showed that as of March 31, 1960 the System had an unfunded liability of $1,241,395.

A second actuarial study estimated the unfunded liability to be $2,742,899 **[29 Cal. App. 3d 31]** as of October 31, 1964. This prompted the city council to establish a "Citizens Committee to Study the Firemen's and Policemen's Retirement Fund System." In its report dated August 11, 1965 the committee expressed its opinion and recommendations as follows: "It is the unanimous opinion of the Committee that the present Firemen's and Policemen's Retirement Fund System is economically unsound. Continuation of the plan will lead to financial disaster.

"It is the unanimous recommendation of the Committee that the Council immediately take all necessary steps to cause the repeal of the present plan and thereafter to institute a substitute plan, either the plan offered by the State Retirement Fund System or a private insurance plan.

"The Committee has been advised that the vested rights of Eureka's firemen and policemen in the present plan will not be affected by the abolishment of the plan. The purpose of a new plan would be to meet the financial threat to the City created by the hiring of firemen and policemen in the future."

Following receipt of the citizens' committee report, a special referendum election for January 18, 1966 was called on the proposition to repeal Ordinance No. 2262 as to new employees only. The proposed repeal was defeated.

The next significant developments were two court decisions -- Estes v. City of Richmond (1967) 249 Cal. App. 2d 538 [57 Cal. Rptr. 536], and Bellus v. City of Eureka (1968) 69 Cal. 2d 336 [71 Cal. Rptr. 135, 444 P.2d 711].

Estes upheld the validity of a city ordinance placing future firemen and policemen under the state retirement system rather than under the system established by the city charter.

In Bellus the Supreme Court concluded that payment of retirement benefits is a general obligation of the city and is not limited to matching the contributions of members of the fund.

In November 1968, a third actuarial study was authorized by the city council. The report covering this study estimated the unfunded liability as of June 30, 1968 to be $3,373,841.

Following receipt of this report the city adopted the two ordinances which are the subjects of this action and cross-action for declaratory relief.

Appellants Whitmire, a member of the city's police department, and Figas, a member of the city's fire department, filed this action challenging the validity of Ordinance 135-C.S. adopted November 19, 1969, which, among other things, restructured the composition of the Commission. **[29 Cal. App. 3d 32]**

Respondent city cross-complained for declaratory relief seeking a judicial determination that Ordinances 135-C.S. and 128-C.S. fn. 2 are valid, constitutional legislative enactments and that the city has the unrestricted power and authority to amend and modify the provisions of Ordinance No. 2262.

In the court below each side moved for summary judgment. The trial court, after denying the motion of appellants and granting the city's motion, entered a judgment dismissing appellants' action and decreed the relief sought by the city in its cross-complaint. fn. 3

Delegation of Legislative Power

The crucial issue here involves consideration of the doctrine prohibiting delegation of legislative power.

The issue is framed, on one side, by appellants' argument that section 16 of Ordinance No. 2262 is the exclusive means by which amendments to the ordinance may be enacted and, on the other side, by the city's contention that unless construed as a permissive alternative procedure for amending the ordinance, section 16 is invalid and unconstitutional as an unlawful delegation of legislative power to private individuals.

For the reasons which follow, we find the city's position to be unassailable and accordingly affirm the court below.

[1] The application in California of the doctrine prohibiting delegation of legislative power was reviewed in detail by the Supreme Court in Kugler v. Yocum (1968) 69 Cal. 2d 371, at pages 375-377 [71 Cal. Rptr. 687, 445 P.2d 303]. The court noted at the outset that the doctrine is well established in California, and that it precludes delegation of the legislative power of a city (at p. 375). The court explained that the purpose behind the doctrine is that "'truly fundamental issues'" should be resolved by the legislative body, and that any grant of authority must be accompanied by "'safeguards adequate to prevent its abuse'" (at p. 376). Lacking the required safeguards, such a grant of authority is an unconstitutional delegation of legislative power.

[2] As the city points out, none of the recognized exceptions or limitations **[29 Cal. App. 3d 33]** to the application of the doctrine as set forth by the Supreme Court in Kugler are evident in section 16. Section 16 does not limit itself to a delegation of power to determine a fact or state of facts upon which the operation of the ordinance depends; rather, it delegates to a small number of private persons in the employ of the city the original control of the enactment of laws relating to the administration of the fiscal

affairs of the city and provision for maintenance of its fire and police departments and to payment of compensation for services. In effect, if section 16 is interpreted as the exclusive procedure for amending the System, any proposed action by the city council regarding the retirement fund is subject to approval or veto by the two departments' members. Since the power to approve or veto actions of a legislative body is, of course, part of the legislative process, this grant of authority must be accompanied by "'safeguards adequate to prevent its abuse'" (Kugler v. Yocum, supra, at p. 376). None exist under appellants' "exclusive remedy" interpretation, and therefore this section must be declared an unconstitutional delegation of legislative power if interpreted in that manner.

In addition, section 20 of Ordinance No. 2262 appears to negate appellants' argument. That section provides that the provisions of the ordinance shall be interpreted in conformity with the charter; and, in the event of conflict, the charter prevails. Under section 300 of the charter, the legislative power of the city is vested in the city council, subject to some exceptions not applicable here. If section 16 is interpreted as giving private individuals (members of the fire and police departments) an ultimate right to veto or approve city council actions regarding the retirement system, it would remove from the council some of its vested legislative power under the charter. Section 16, utilizing appellants' interpretation, would therefore be in conflict with the city charter and, as we have pointed out, under section 20 of the ordinance, the charter must prevail. Since the complete legislative power of the city is vested in the council by the charter, it becomes apparent that appellants' contention cannot stand.

The logic behind this conclusion is evident in light of the situation presently before us. As a result of the decision in Bellus v. City of Eureka, supra, it has been determined that Ordinance No. 2262 created a general tax liability of the City of Eureka and that consequently, any deficit in the fund must be made up from general tax revenue. Upon receiving the June 30, 1968, actuarial report which estimated the unfunded liability to be over three and a quarter million dollars, the city council recognized even more strongly that it had the responsibility to take steps whereby the taxpayers of the city could be relieved from the ever-increasing financial burden resulting from the retirement fund liability. In order to accomplish this objective **[29 Cal. App. 3d 34]** while still protecting the vested rights of those individuals already within the retirement system, the council enacted the two ordinances in question without first submitting them to vote by the respective members of the fire and police departments.

It is patently obvious that appellants' contention, if valid, would amount to a clear grant of veto power to the members of the two interested departments. This, in the words of the court in Kugler, would be a "total abdication" of the council's vested legislative power and therefore unconstitutional.

[3] Appellants' contention that the vested rights of members of the System have been tampered with through the enactment of these two ordinances is also invalid. As the city points out, an examination of Ordinances 128-C.S. and 135-C.S. discloses that only administrative and procedural changes are involved. Future employees do not have a vested right in any particular pension plan (Estes v. City of Richmond, supra, pp. 544-545). And, although active and retired members have a vested right to a pension, they do not have a vested right to control the administration of the plan which provides for the payment of pensions. This is especially true under a plan, such as Eureka's, which is a general obligation of the city.

In light of the foregoing discussion, we uphold the trial court's determination that Ordinances Nos. 128-C.S. and 135-C.S. are valid legislative enactments and that the Council of the City of Eureka has the unrestricted power to amend and modify Ordinance No. 2262 with respect to any matter which does not affect the substantive vested rights of those who are receiving or entitled to receive benefits under the Firemen's and Policemen's Retirement System of the City of Eureka at the time of any such amendment or modification.

The purported appeal from the judgment (order) denying motion for summary judgment is dismissed. The judgment is affirmed.

Taylor, P. J., and Rouse, J., concurred.

FN 1. Although the language of this section was amended when codified in 1963 as section 2-5.417 of the Eureka Municipal Code, appellants concede that the "differences in language do not vary express purposes of this section."

FN 2. Ordinance 128-C.S., adopted July 25, 1967, provides that firemen and policemen hired after its effective date are excluded from membership in the retirement system.

FN 3. In their notice of appeal, appellants purport to appeal from "the judgment denying plaintiffs and cross-defendant's Motion for Summary Judgment."

No such judgment was -- nor could one be -- entered since an order denying a motion for summary judgment is nonappealable (4 Witkin, Cal. Procedure (2d ed. 1971) p. 2842). The ruling, of course, is reviewable on appeal from the ultimate judgment.

Sullwold Comments on Sunshine Ordinance Enforcement

The memo frames the legal issue this way: "Whether the Open Government Commission has the legal authority under Section 2-93.8 (Penalties), subsection (a), of the Alameda Municipal Code ("AMC") to order the City Council to re-notice the first reading of an ordinance based on a finding that the agenda description violated the City's Sunshine Ordinance?" As phrased, the answer is surely yes, because the Sunshine Ordinance, in so many words, gives the OGC the power to declare an action by Council "null and void" and to order corrective action.

The memo makes four arguments in support of denying to the OGC the authority the Sunshine Ordinance so plainly confers.

First, the memo argues that the Commission's power to declare an ordinance "null and void" and order corrective action is "unusual and unprecedented." So what? Nor is that power "at odds" with the Brown Act, as the memo also asserts. Under the Brown Act, it may indeed take a lawsuit for an aggrieved party to get an order invalidating an ordinance, but the statute does not purport to describe, much less circumscribe, the procedures followed to redress a violation of a local sunshine law.

Second, the memo argues that the remedy authorized by section 2-93.8 and ordered by the OGC is "incongruent with certain provisions of the City's Charter." Say what? We missed the law-school class in which "incongruence" was identified as a legitimate ground for nullifying a legislatively created remedy. Moreover, as the memo itself acknowledges, section 3.2 of the Charter specifically provides that, "The Council may confer upon any board or officer powers and duties additional to those set forth in this Charter." And that is exactly what Council did when it created the Open Government Commission and gave it the power to order the remedies set forth in section 2-93.8 of the Sunshine Ordinance. To us, that would seem to settle the matter.

Third, the memo argues that the remedy authorized by section 2-93.8 and ordered by the OGC "contradicts the local organic statute that formed the Commission and governs its continued existence." Another section of the Municipal Code indeed imposes a duty on the OGC generally to make recommendations to Council regarding citizen complaints. But the Commission's power to invalidate a specific action by Council upon finding a violation of the Sunshine Ordinance doesn't interfere with, much less "contradict," this general duty.

Fourth, the memo argues that the remedy authorized by section 2-93.8 and ordered by the OGC "is an improper delegation of quasi-legislative power under common law. . . ." Well, we confess that, not being experts in the common law of quasi-legislative power, we can't say whether Council transgressed some hoary principle when it exercised its Charter-given authority to give the OGC the power to invalidate a governmental action if it found a violation of the Sunshine Ordinance. But if it did, the validity of section 3.2 of the Charter is itself called into question.

Moreover, it is simply not true, as the memo states, that the remedy authorized by section 2-93.8 and ordered by the OGC gives the Commission "limitless and unbounded" power. Let's be clear: The Commission doesn't have the authority to wipe an ordinance passed by Council off the books permanently (or to direct Council to enact an ordinance with different terms). Rather, its role is to make sure that, in enacting an ordinance, Council complies with the notice and other requirements of the Sunshine Ordinance. If Council fails to do so, the Commission has – and, in our view, should have – the power to order the elected officials to do it over again and get it right the second time.

IRMA Glidden

From: KAREN BUTTER <karenbutter@comcast.net>
Sent: Monday, February 18, 2019 9:54 AM
To: Marilyn Ezzy Ashcraft; John Knox White; Tony Daysog; Jim Oddie; Malia Vella
Cc: City Clerk; Manager Manager; Attorney; LARA WEISIGER
Subject: City Council Meeting Comments -- Agenda Item 6

The League of Women Voters of Alameda is submitting the following public comment.

February 18, 2019

TO: The Honorable Mayor Ezzy Ashcraft, Vice Mayor Knox White, and Council Members Daysog, Oddie and Vella

CC: Open Government Commissioners, Acting City Attorney Roush, Acting City Manager Rudat

RE: Agenda Item 6-D – Sunshine Ordinance and Cannabis Ordinances

Mayor Ashcraft and Members of the City Council,

We are pleased to see that the complaint brought before the Open Government Commission in October is on the February 18th City Councl agenda.

The League of Women Voters of Alameda was a strong advocate for the formation of the Sunshine Task Force in 2010 and participated in many of its meetings to develop the Sunshine Ordinance. The Ordinance is a strong affirmation of open and democratic process for Alameda and ensures trust in the process.

We are here tonight to express our concerns about connecting Agenda 6D 1, 2 and 3 -- relating to the cannabis ordinance – with 6D 4 -- the authority of the Open Government Commission. The jurisdiction of the Open Government Commission is still in question and until that is decided any ruling on the Ordinances is premature. As requested in our letter to council and the Open Government Commission in January we urge the council to authorize independent counsel for the Commission in instances such as this where there is a potential conflict of interest by the City Attorney's Office.

We urge the council to **separate Agenda Item 6** into two discussions hearing 6D 4 first. The outcome of that discussion and the authority of the Open Government Commission will determine the next steps for the remainder of Agenda Item 6.

s/Georgia Gates Derr, LWV Alameda President

s/Susan Hauser, LWV Alameda V.P. Administration

s/Karen Butter, LWV Alameda Action Co-chair

s/Felice Zensius, LWV Alameda Action Co-chair