

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,

Petitioners,

v.

MARK B. HORTON, as State Registrar of
Vital Statistics, etc., et al.,

Respondents.

DENNIS HOLLINGSWORTH, et al.,

Interveners.

Case No. S168047

SUPREME COURT
FILED

DEC 19 2008

Frederick K. Ohlrich Clerk

Deputy

ANSWER TO AMENDED PETITION FOR WRIT OF MANDATE;
RETURN TO ORDER TO SHOW CAUSE

KENNETH C. MENNEMEIER (SBN 113973)
ANDREW W. STROUD (SBN 126475)
KELCIE M. GOSLING (SBN 142225)
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, CA 95814-2736
Telephone: 916-553-4000
Facsimile: 916-553-4011
E-Mail: kcm@mgsllaw.com

Attorneys for Respondents Mark B. Horton and Linette Scott

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

KAREN L. STRAUSS, et al.,)	Case No. S168047
)	
Petitioners,)	
)	
v.)	
)	
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,)	
)	
Respondents.)	
)	
DENNIS HOLLINGSWORTH, et al.,)	
)	
Interveners.)	
)	

**ANSWER TO AMENDED PETITION FOR WRIT OF MANDATE;
RETURN TO ORDER TO SHOW CAUSE**

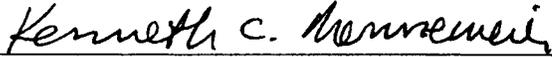
KENNETH C. MENNEMEIER (SBN 113973)
ANDREW W. STROUD (SBN 126475)
KELCIE M. GOSLING (SBN 142225)
MENNEMEIER, GLASSMAN & STROUD LLP
980 9th Street, Suite 1700
Sacramento, CA 95814-2736
Telephone: 916-553-4000
Facsimile: 916-553-4011
E-Mail: kcm@mgslaw.com

Attorneys for Respondents Mark B. Horton and Linette Scott

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208 & 8.490)

There are no interested entities or persons to list in this
certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Date: December 19, 2008 MENNEMEIER, GLASSMAN & STROUD LLP
KENNETH C. MENNEMEIER
ANDREW W. STROUD
KELCIE M. GOSLING



Kenneth C. Mennemeier, Attorneys for
Respondents Mark B. Horton and Linette Scott

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ANSWER TO AMENDED PETITION 1

JURISDICTIONAL ALLEGATIONS 1

THE PARTIES 3

FACTS. 4

CLAIMS ASSERTED. 5

BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE 6

INTRODUCTION 6

ISSUE THREE: IF PROPOSITION 8 IS NOT
UNCONSTITUTIONAL, WHAT IS THE EFFECT, IF ANY, ON
THE MARRIAGES OF SAME-SEX COUPLES PERFORMED
BEFORE THE ADOPTION OF PROPOSITION 8? 8

CONCLUSION 10

TABLE OF AUTHORITIES

CALIFORNIA CASES

Aktar v. Anderson,
(1997) 58 Cal.App.4th 1166 8

Evangelatos v. Superior Court,
(1988) 44 Cal.3d 1188 8

Glavinich v. Commonwealth Land Title Ins. Co.,
(1984) 163 Cal.App.3d 263 8

In re Marriage of Fabian,
(1986) 41 Cal.3d 440 9

Myers v. Philip Morris Companies, Inc.,
(2002) 28 Cal.4th 828 9

Rosasco v. Commission on Judicial Performance,
(2000) 82 Cal.App.4th 315 8, 9

CALIFORNIA CONSTITUTION

California Constitution
Article XVIII, sections 1-4 7

FEDERAL CASES

Bowen v. Georgetown University Hospital,
(1988) 488 U.S. 204 8

Pursuant to the Court's Order to Show Cause dated November 19, 2008, respondents Mark B. Horton, in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health ("CDPH"), and Linette Scott, in her official capacity as Deputy Director of Health Information and Strategic Planning for the CDPH (collectively, "Respondents"), hereby submit their Return to the "Amended Petition for Extraordinary Relief" filed by Petitioners Karen L. Strauss et al. (collectively, "Petitioners"). Respondents' Answer to the Amended Petition is set forth below at pages 1 to 5. Respondents' Brief regarding the issues in the Order to Show Cause are set forth at pages 6 to 10.

ANSWER TO AMENDED PETITION

JURISDICTIONAL ALLEGATIONS

1. Respondents admit that Petitioners seek extraordinary relief from this Court. Respondents admit that the results of the November 4, 2008 election indicate that a majority of California voters approved Proposition 8. Respondents admit that Mark B. Horton is the State Registrar of Vital Statistics of the State of California and Director of CDPH, that Linette Scott is the Deputy Director of Health Information and Strategic Planning for CDPH, and that Edmund G. Brown Jr. is the

Attorney General for the State of California. Respondents deny the remaining allegations of paragraph 1 on the basis that they merely describe the relief that Petitioners seek.

2. Respondents deny the allegations of paragraph 2 on the basis that they merely describe the relief that Petitioners seek. Respondents further respond by acknowledging that, by their Petition, Petitioners sought an order from this Court prohibiting enforcement of Proposition 8 pending resolution of their petition, and by noting that the Court denied such relief in its order dated November 19, 2008.

3. Respondents deny the allegations of paragraph 3 on the basis that they constitute legal arguments or state legal conclusions to which no response is now required.

4. Respondents lack information concerning Petitioners' allegation that they have no other plain, speedy or adequate remedy at law, and on that basis deny this allegation.

5. Respondents admit that Petitioners have invoked the Court's original jurisdiction, as alleged in paragraph 5. Respondents admit that the Amended Petition presents issues of great public importance, that those issues should be resolved promptly, and that it is in the public interest to

have the Court resolve those issues in order that there be certainty regarding the validity and effect of Proposition 8.

6. Respondents admit the allegation of paragraph 6 that the Amended Petition presents no questions of fact.

THE PARTIES

7. Respondents lack information concerning the allegations of paragraph 7, and on that basis deny those allegations.

8. Respondents lack information concerning the allegations of paragraph 8, and on that basis deny those allegations.

9. Respondents lack information concerning the allegations of paragraph 9, and on that basis deny those allegations.

10. Respondents lack information concerning the allegations of paragraph 10, and on that basis deny those allegations.

11. Respondents lack information concerning the allegations of paragraph 11, and on that basis deny those allegations.

12. Respondents lack information concerning the allegations of paragraph 12, and on that basis deny those allegations.

13. Respondents lack information concerning the allegations of paragraph 13, and on that basis deny those allegations.

14. Respondents admit the allegations of paragraph 14.

15. Respondents admit the allegations of paragraph 15.

16. Respondents admit the allegations of paragraph 16.

FACTS

17. Respondents admit the allegation that, as of the morning of November 5, 2008, it appeared that a majority of California voters had passed Proposition 8. Respondents admit that the language used in the Official Title and Summary of Proposition 8 was prepared by the Attorney General's office and contained the language stated by Petitioners. However, Respondents contend that the Official Title and Summary of Proposition 8 speaks for itself, and Respondents deny the remaining allegations in paragraph 17 on that basis.

18. Respondents assert that the allegations contained in paragraph 18 amount to speculation, and on that basis deny each allegation contained in paragraph 18.

19. Respondents assert that the allegations contained in paragraph 19 amount to speculation, and on that basis deny each allegation contained in paragraph 19.

20. Respondents assert that the allegations contained in paragraph 20 amount to speculation, and on that basis deny each allegation contained in paragraph 20.

CLAIMS ASSERTED

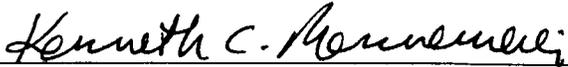
21. Respondents deny the allegations of paragraph 21 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

22. Respondents deny the allegations of paragraph 22 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

23. Respondents deny the allegations of paragraph 23 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

24. Respondents deny the allegations of paragraph 24 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

Date: December 19, 2008 MENNEMEIER, GLASSMAN & STROUD LLP
KENNETH C. MENNEMEIER
ANDREW W. STROUD
KELCIE M. GOSLING



Kenneth C. Mennemeier, Attorneys for
Respondents Mark B. Horton and Linette Scott

BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION

Respondent Mark B. Horton is the State Registrar of Vital Statistics and the Director of the California Department of Public Health (“CDPH”). Respondent Linette Scott is the Deputy Director of Health Information and Strategic Planning for the CDPH. Respondents Horton and Scott are responsible for maintaining standardized marriage forms in compliance with California law. In this capacity, Respondents have an interest in ensuring the uniformity, certainty and finality of California’s marriage laws.

As Respondents indicated in their preliminary response to the petition for extraordinary relief, this petition raises questions of statewide importance, implicating not only California’s marriage laws but also the initiative process and the Constitution itself. It is appropriate for this Court to address the issues presented to provide uniformity, certainty and finality in this matter. Respondents will comply with this Court’s determinations.

In its Order to Show Cause issued on November 19, 2008, this Court directed the parties to brief and argue the following issues:

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const., art. XVIII, §§ 1-4.)
- (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?
- (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

Because Respondents have an interest in ensuring the uniformity, certainty and finality of California's marriage laws, they take no position on issues (1) and (2) above, and they will comply with the decision of the Court on those issues. However, because issue (3) implicates the certainty and finality of the marriages performed before the adoption of Proposition 8, Respondents contend that Proposition 8 did not invalidate the marriages of same-sex couples performed before Proposition 8 became effective. Respondents address issue (3) in this response.

**ISSUE THREE: IF PROPOSITION 8 IS NOT
UNCONSTITUTIONAL, WHAT IS THE EFFECT, IF ANY, ON THE
MARRIAGES OF SAME-SEX COUPLES PERFORMED BEFORE
THE ADOPTION OF PROPOSITION 8?**

It is well-recognized that laws are presumed to operate prospectively “unless express language or clear and unavoidable implication negatives the presumption.” (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, quoting *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App.3d 263, 272.) Retroactivity is not favored, and laws will not be construed to have retroactive effect unless their language requires such a result. (*Aktar v. Anderson* (1997) 58 Cal.App.4th 1166, 1179, quoting *Bowen v. Georgetown University Hospital* (1988) 488 U.S. 204, 208.)

In the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. (*Evangelatos v. Superior Court, supra*, 44 Cal.3d at p. 1209.) This principle applies equally to initiative measures approved by the voters. (*Id.* at p.1209 [applying presumption against retroactivity to Proposition 51]; *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 323 [following *Evangelatos*; Proposition 190, which amended state Constitution, not retroactive].) “Initiative measures are

subject to the same rules and canons of statutory construction as ordinary legislative enactments.” (*Rosasco v. Commission on Judicial Performance*, *supra*, 82 Cal.App.4th at p. 323.)

Proposition 8 states: “Only marriage between a man and a woman is valid or recognized in California.” There is no retroactivity clause, and retroactivity should not be inferred from such language. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 843 [ambiguity required statute to be read as unambiguously prospective].)

A retroactive application of Proposition 8 to existing same-sex marriages would overturn the settled expectations of couples who entered into these marriages in reliance on their understanding of the controlling California law at the time. Given the strong presumption against retroactive application, and the need for certainty and finality in these matters, the existing marriages should not be invalidated in the absence of clear direction from the voters. “In the interest of finality, uniformity and predictability, retroactivity of marital property statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest.” (*In re Marriage of Fabian* (1986) 41 Cal.3d 440, 450.)

CONCLUSION

Respondents have an interest in ensuring the uniformity, certainty and finality of California's marriage laws. Accordingly, they take no position on issues (1) and (2) articulated by this Court in its November 19, 2008 order. However, because issue (3) implicates the certainty and finality of the same-sex marriages performed before the enactment of Proposition 8, Respondents contend that Proposition 8 did not invalidate the marriages of same-sex couples performed before Proposition 8 became effective.

Date: December 19, 2008 MENNEMEIER, GLASSMAN & STROUD LLP
KENNETH C. MENNEMEIER
ANDREW W. STROUD
KELCIE M. GOSLING



Kenneth C. Mennemeier, Attorneys for
Respondents Mark B. Horton and Linette Scott

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using 13 point Times New Roman typeface. According to the "Word Count" feature in my WordPerfect software, this brief contains 1,676 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 19, 2008.

MENNEMEIER, GLASSMAN & STROUD LLP
KENNETH C. MENNEMEIER
ANDREW W. STROUD
KELCIE M. GOSLING



Kenneth C. Mennemeier, Attorneys for
Respondents Mark B. Horton and Linette Scott

Case Name: *Strauss v. Horton*

Case No: S168047

PROOF OF SERVICE

BY OVERNIGHT MAIL

I hereby declare:

I am a citizen of the United States and employed in Sacramento County, California; I am over the age of eighteen years, and not a party to the within action; my business address is 980 9th Street, Suite 1700, Sacramento, California 95814-2736. On December 19, 2008, I served the within documents:

**ANSWER TO AMENDED PETITION FOR WRIT OF MANDATE;
RETURN TO ORDER TO SHOW CAUSE**

by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and delivering to a Federal Express agent for delivery.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 19, 2008, at Sacramento, California.

Angela Knight
(Type or Print Name)


(Signature)

SERVICE LIST FOR *STRAUSS v. HORTON*

CALIFORNIA SUPREME COURT CASE NO. S168047

<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>Shannon Minter Catherine Pualani Sakimura Melanie Speck Rowen Shin-Ming Wong Christopher Francis Stoll Ilona M. Turner National Center For Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102</p> <p>Telephone: (415) 392-6257 Facsimile: (415) 392-8442</p>	<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>Gregory D. Phillips Jay Masa Fujitani David Carter Dinielli Michelle Taryn Friedland Lika Cynthia Miyake Mark R. Conrad Munger, Tolles & Olson, LLP 355 S. Grand Ave., 35th Floor Los Angeles, CA 90071</p> <p>Telephone: (213) 683-9100 Facsimile: (213) 687-3702</p>
<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>Jon W. Davidson Jennifer C. Pizer F. Brian Chase Tara Borelli Lambda Legal Defense and Education Fund, Inc. 3325 Wilshire Blvd., Suite 1300 Los Angeles, CA 90010</p> <p>Telephone: (213) 382-7600 Facsimile: (213) 351-6050</p>	<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>Alan L. Schlosser Elizabeth O. Gill ACLU Foundation of Northern California 39 Drumm Street San Francisco, CA 94111</p> <p>Telephone: (415) 621-2493 Facsimile: (415) 255-8437</p>

<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>Mark Rosenbaum Clare Pastore Lori Rifkin ACLU Foundation of Southern California 1313 W. 8th Street Los Angeles, CA 90017</p> <p>Telephone: (213) 977-9500 Facsimile: (213) 250-3919</p>	<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>John David Blair-Loy ACLU Foundation of San Diego and Imperial Counties 450 B Street, Suite 1420 San Diego, CA 92101</p> <p>Telephone: (619) 232-2121 Facsimile: (619) 232-0036</p>
<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>David C. Codell Law Office of David C. Codell 9200 Sunset Blvd., Penthouse Two Los Angeles, CA 90069</p> <p>Telephone: (310) 273-0306 Facsimile: (310) 273-0307</p>	<p>Representing Petitioners Karen L. Strauss, Ruth Borentein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmond Wu, James Tolen, and Equality California:</p> <p>Stephen V. Bomse Orrick, Herrington & Sutcliffe LLP 405 Howard Street San Francisco, CA 94105</p> <p>Telephone: (415) 773-5700 Facsimile: (415) 773-5759</p>
<p>Representing Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, & Protectmarriage.com:</p> <p>Andrew P. Pugno Law Offices of Andrew P. Pugno 101 Parkshore Dr., Ste 100 Folsom, CA 95630</p> <p>Telephone: (916) 608-3065 Facsimile: (916) 608-3066</p>	<p>Representing Respondent Edmund G. Brown Jr., Attorney General of the State of California:</p> <p>Christopher E. Krueger Senior Assistant Attorney General Office of the Attorney General 1300 I Street, Suite 125 PO Box 944255 Sacramento, CA 94244-2550</p> <p>Telephone: (916) 322-6114 Facsimile: (916) 324-8835</p>