

Supreme Court Copy

SUPREME COURT
FILED

S168047/S168066/S168078

JAN 15 2009

IN THE SUPREME COURT OF CALIFORNIA **Frederick K. Ohlrich Clerk**

KAREN L. STRAUSS et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al,
Respondents.

ROBIN TYLER et al., Petitioners,
v.
STATE OF CALIFORNIA et al, Respondents.

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners,
v.
MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,
Respondents

On Petition for Extraordinary Relief Including Mandamus

Application to file, and, Brief of
Amicus Curiae Margie Reilly
In Support of Intervenors

SUPREME COURT
FILED

JAN 15 2009

Frederick K. Ohlrich Clerk

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IN THE SUPREME COURT OF CALIFORNIA

Case Name: **KAREN L. STRAUSS et al, Petitioners, v
MARK B. HORTON, as State Registrar of Vital
Statistics, etc., et al, Respondents;
DENNIS HOLLINGSWORTH et al., Intervcnors**

Supreme Court Case No.: **S168047**

**CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal: Rules of Court, Rule 8.208)**

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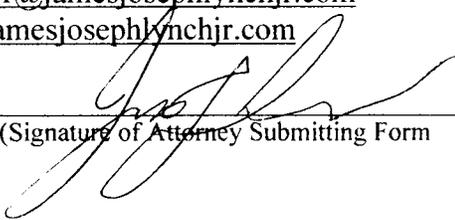
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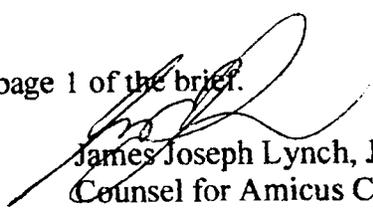
01/07/2008

Application for leave to file Amicus Curiae Brief

Margie Reilly applies for leave to file the attached amicus curiae brief on the grounds that it addresses cogent facts not considered in the In Re Marriage Cases.

It is short, only 7 pages, and should serve to assist the court on the issues of Separation of powers, whether Prop 8 is an amendment or revision of the California Constitution, and the legitimate differences that exists between the two forms of union.

The interest of Amicus is set out at page 1 of the brief.



James Joseph Lynch, Jr.
Counsel for Amicus Curiae

The Issues

The issues to be briefed and argued in these matters are as follows:

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.)

Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

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?

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STATEMENT OF INTEREST¹

Amicus is an individual activist seeking to preserve the basic tenet of the core values of American ideals, to wit that this State and Nation, should survive so long as its posterity endures.

Margie Reilly graduated from St. John's University, Jamaica, New York with a *summa cum laude degree* in Management. Number two in her class, Beta Gamma Sigma Business Honor Society. She is the granddaughter of a former United States Congressman John Rainey of Illinois, deceased. Most of her career has been with the Federal Government: Defense Logistics Agency, NYC, NY and McClellan AFB, N Highlands, CA as well as Social Security Administration where she retired early as a service representative. She is now employed as a substitute schoolteacher with San Juan Unified School District and Sacramento City School District where she takes K-12 assignments on a part time basis and specializes in preschool and Head Start early childhood programs.

Most recently, Margie has attended an eight week course given by the Diocese of Sacramento on "Theology of the Body". The course is preparation for teaching about marriage, family, sexuality and creation. In the midst of the dramatic clash between competing ideas that we face today, men's and women's call to life-giving communion in marriage is the center of a great struggle: It is a struggle for securing the well-being of our children, between the forces of life and death, between love and hatred.² It is her wish to join the struggle on the side of marriage as defined between a man and a woman, life, and family which are worth embracing for the preservation of our society.

¹ Lead Counsel for *Amici Curiae* authored this brief in its entirety. No person, entity, associates, supporters, or counsel, made a monetary contribution to the preparation or submission of this brief.

² Christopher West, John Paul II's Theology of the Body; West, Christopher , Theology of the Body for Beginners.

Margie believes that our civilization benefits from the gift of marriage and the family. Altering or watering down its essential life-giving, self-donating nature would destroy the very fabric of our society. While she has compassion for the struggles of her Non-Breeder brothers and sisters in society, she nonetheless believes that it is not in the best interest of society to compromise the essential goodness of the marital relationship to accommodate their unhappiness as it would destroy the deepest substratum of the social structure to assure that there will be future generations to survive the present generation.

Aside from the theological and spiritual side of every person, there is the practical political reality that without future generations, new births, then this Nation and this State cannot long endure.

INTRODUCTION

In 2000, California voters passed Proposition 22 stating that “only marriage between a man and a woman is valid or recognized in California.” In May 2008, the California Supreme Court held, in *In Re Marriage Cases* (2008) 43 Cal. 4th 757 that the statute enacted by Proposition 22 violated the equal protection and inalienable rights provisions of the California Constitution. On November 6, 2008, proposition 8 passed to amend the California Constitution by adding Art. VIII, § 4 defining marriage.

THE IN RE MARRIAGE CASES

Majority Opinion

In its 2008 discussion, the Court took pains to state that its prior opinion only challenged the legality of issuing marriage licenses to same sex persons....the legality of whether the law was constitutional was not at issue. It then held that by virtue of *Perez v. Sharp* (1948) 32 Cal.2d 711, that the ban on inter-racial marriages had been found unconstitutional, marriage was a fundamental right

requiring strict scrutiny, and denial of marriage to same sex marriages was unconstitutional, notwithstanding that both traditional marriages and civil unions, otherwise had the same rights and privileges.

Thus the argument centered on a label, to wit, marriage, and that the right to marriage and procreation are recognized as fundamental constitutionally protected interests. (See, e.g., *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 161 (Valerie N.)

Minority Opinion

Writing for the minority, Justice Baxter noted that "I cannot join the majority's holding that the California Constitution gives [43 Cal.4th 861] same-sex couples a right to marry. In reaching this decision, I believe, the majority violates the separation of powers, and thereby commits profound error. Moreover, I endorse the majority's interpretation of California's Domestic Partnership Act (DPA; Fam. Code, § 297 et seq.). As the majority makes clear, the DPA now allows same-sex partners to enter legal unions which "afford . . . virtually all of the [substantive] benefits and responsibilities afforded by California law to married opposite-sex couples." (Maj. opn., ante, at p. 807; see also Fam. Code, § 297.5). As the majority further correctly observes, California has done all it can do with regard to providing these substantive rights, benefits, and responsibilities to same-sex partners. (Maj. opn., ante, at pp. 806-807) fn. 1.

I.

THE VALIDITY OF PROPOSITION 8

Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to the California Constitution? (See Cal. Const., Art. II ³ and Art.

³ ARTICLE 2 VOTING, INITIATIVE AND REFERENDUM, AND RECALL

XVIII, §§ 1- 4.)

The People are the sovereign of both the national government and of the State of California. U.S. Constitution, Preamble, ⁴ 10th Amendment⁵; California Constitution, Preamble⁶, Art. II, Section 1. *Generally, Scott v. Sanford* (1857) 60 U.S. (How.) 392; Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005). The power of the court is limited:

“In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” Code of Civil Procedure, section 1858; Breyer, *supra*, at 17 (“judge is not to substitute his juster will for that the of the People.”)

The California Constitution neither defines “amend” nor “revise”, but we are not without precedent. The Congress proposed amending of the Articles of Confederation, and what the constitutional convention brought back was a revision, having started from scratch and instead of a compact between the states, it became a compact between “We the People.” See generally, Farrands, *The Constitutional Debates, passim*.

A dictionary definition of “Amend” is “to make better by some change;

SECTION 1. All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.

⁴ “We, the People of the United States, ... do ordain and establish this constitution ...”

⁵ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

⁶ “We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.”

improve, correct errors, to supply deficiencies, to alter.” Webster’s New Twentieth Century Dictionary (Unabridged), p. 57 (1964); *accord*, Black’s Law Dictionary (Revised 4th ed 1968). On the other hand, “Revised” means “to review alter and amend; as to revise statutes.” Webster’s, p. 1552. It would appear, from the definitional approach that the difference is without a distinction. Yet from Art. II, section 1, the people have the right to “alter or reform” government when the public good may require. With Proposition 8, there is no alteration or reform of the government, but the addition of a definition for the word, “marriage”, thus an amendment to clarify the meaning of marriage in California, and not a revision of government, therefore an amendment.

II.

THE SEPARATION OF POWERS DOCTRINE

Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

There is no affront to the separation of powers doctrine in this case, because it is the Sovereign Will that has spoken, not a coordinate branch of the government. *Generally*, Constitution of the United States of America: analysis and interpretation, Senate Document 103-6 (1992) pp. 63 – 73; Rotunda, 1 Treatise on Constitutional Law: Substance and Procedure (2nd 1992) § 3.12 The Separation of Powers Principle.

Justice Baxter’s position with respect to Coordinate branch of government was, and perhaps should be reconsidered by the court as a whole, the more sound approach in the *In re Marriages Cases* because in fact there is a difference between breeders (heterosexual marriage) and non-breeders (same sex marriages), such that the court ought to have given respect to a coordinate branch of government dealing with two separate classes of persons in a rational manner..

Reliance by the majority opinion on the *Perez* and *Valerie* cases is misplaced. *Perez* and *Valerie* were compelled by the federal constitutional imperative citing as it did the First Amendment privacy rights, and U.S. Supreme Court cases on the right to interracial marriage, procreation, and whose decision to have children, all recognized as fundamental, constitutionally protected interests, protected as well in the California Constitution." Thus, they are within the concept of liberty protected against arbitrary restrictions by the Fourteenth Amendment.

However, the strict scrutiny applies, if at all, only in those situations in which it is an unalterable state of the person, i.e. race, color, sex, national origin, or religion. *Skinner v. Oklahoma* (1942) 315 U.S. 535, ("marriage and **procreation** are among "the basic civil rights of man."); *Loving v. Virginia* (1967) 388 U.S. 1. Whether to have sex with the same sex, or the other sex is not unalterable; it is a choice of the individual, thus not a fundamental right. In fact, current thinking from various sources suggests that there are "breeders" and "non-breeders". Biologically speaking, procreation occurs between heterosexuals in an act of begetting or generating, whereas mere fornication by non-breeders is incapable of producing offspring. And that difference is substantive. The constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. *Nashville, Chattanooga & St. Louis Ry. v. Browning* (1940) 310 U.S. 362; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 545.

III.

THE EFFECT, IF ANY, ON MARRIAGES PRIOR TO ADOPTION OF PROP 8

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?

Even the people we denominate as "gay" have parents. They are the result

of a conception between a male sperm and a female egg. They are thus human beings entitled to respect, so long as their conduct conforms to the minimum requirements of society. It is also true that the law does not favor retroactive legislation that makes conduct done when legal, no longer legal. U.S. Constitution, Art. I, section 9, cl. 3.

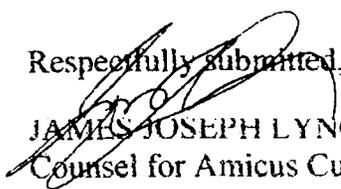
Under the circumstances, the best thing to do would be to issue a mandate that all marriage certificates issued to same sex persons be traded in for a civil union certificate without cost to the couples affected, upon application.

CONCLUSION

WHEREFORE, amicus curiæ Reilly prays that this court find that the passage of Proposition 8 is a valid exercise of the sovereign, that all marriage licenses issue prior to the decision in this court is valid, subject to being traded in for a civil union license without costs, and such other and further relief as the court deems just under the circumstances.

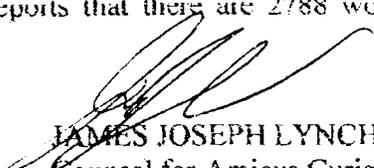
Dated: 12/17/2008

Respectfully submitted,


JAMES JOSEPH LYNCH, JR.
Counsel for Amicus Curiae
Margie Reilly.

Word Count

I hereby certify that Microsoft Word reports that there are 2788 words in this brief.


JAMES JOSEPH LYNCH, JR.
Counsel for Amicus Curiae Margie
Reilly.

PROOF OF SERVICE

I, the undersigned, am not a party to the above action, and over the age of 18. My business address is 4144 Winding Way, Suite 106, Sacramento, Ca 95841-4413.

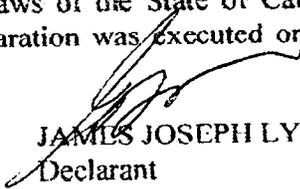
On December 17, 2008, I served upon each of the parties the following:

Application to file, and, Brief of Amicus Curiae Margie Reilly

By mailing two true copies thereof by placing them into a self addressed, postage prepaid, envelope, sealing the envelope and placing it in a faculities of the U.S. Postal Service addressed to the following LAW OFFICES: see Service list, next page.

For the convenience of the Court and the Parties, a copy has been posted to the Internet as follows: <http://www.jamesjosephlynchjr.com/Prop8Cases/indcx.htm>.

I declare under penalty of perjury under the Laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 17, 2008.


JAMES JOSEPH LYNCH, JR.
Declarant

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