

MAY 22 2008

Frederick K. Ohlrich Clerk

Case No. S147999

Deputy

IN THE
Supreme Court of the State of California

In re MARRIAGE CASES

Judicial Council Coordination Proceeding No. 4365

After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Consolidated on Appeal with Case Nos.
A110449, A110450, A110451, A110463, A110652
San Francisco Superior Court Case Nos. 503943, 428794
Honorable Richard A. Kramer

**PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND'S
PETITION FOR REHEARING**

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INTRODUCTION

Pursuant to Rule 8.536 of the California Rules of Court, Respondent Proposition 22 Legal Defense and Education Fund (the “Fund”) respectfully requests that this Court grant hearing on the limited issue of the remedy contained in its *In re Marriage Cases* decision.¹ Alternatively, pursuant to Rule 8.532(c) of the California Rules of Court, the Fund respectfully requests that this Court modify the remedy contained in its *In re Marriage Cases* decision. The Fund asks this Court to stay the effectiveness of its decision until after the Secretary of State compiles the results of the November 4, 2008, election and determines whether the voters have approved an amendment to the California Constitution stating that “[o]nly marriage between a man and a woman is valid or recognized in California” (referred to hereinafter as the “Marriage Initiative”). In essence, the Fund is asking this Court to maintain the *status quo* pending the outcome of the November 4, 2008, election.

Permitting this decision to take effect immediately—in light of the realistic possibility that the people of California might amend their constitution to reaffirm marriage as the union of one man and one woman—risks legal havoc and uncertainty of immeasurable magnitude. This Court should act prudently by staying the effectiveness of its *In re*

¹ Attorneys for the Fund have been contacted by a representative from a state Attorney General’s Office who indicated an intention to file an *amicus curiae* brief in support of this Petition for Rehearing.

Marriage Cases decision until after the Secretary of State has compiled the results of the November 4, 2008, election. At that point, the people of California will have definitively expressed their will on the issue of marriage, and that oft-debated issue will be settled once and for all in this State—settled by the proper voice in a constitutional democratic government, *i.e.*, that of the people.

BACKGROUND

California statutory law defines “[m]arriage” as “a personal relation arising out of a civil contract *between a man and a woman*.” (Fam. Code, § 300, subd. (a) [emphasis added].) California law similarly provides that “[o]nly marriage between a man and a woman is valid or recognized in California.” (Fam. Code, § 308.5.) On May 15, 2008, this Court filed its *In re Marriage Cases* decision, in which it held that the California statutes limiting marriage to the union of one man and one woman violated principles embedded in the state constitution. (*In re Marriage Cases* (May 15, 2008, No. S147999) __ Cal. 4th __ [2008 WL 2051892, at p. 57].) To remedy this purported constitutional violation, this Court ordered “that the language of section 300 limiting the designation of marriage to a union ‘between a man and a woman’ . . . must be stricken from the statute” (*Id.* at p. 58.) This Court also concluded that the other statutory provision at issue—section 308.5—“can have no constitutionally permissible effect” and therefore “cannot stand.” (*Ibid.*)

The Court then described, in somewhat unclear terms, the means for implementing this remedy. The Court “remanded to [the Court of Appeal] for further action consistent with [the] opinion,” and declared that the “[p]laintiffs are entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate [the] ruling” (*In re Marriage Cases, supra*, 2008 WL 2051892, at p. 58.)

The omission of a specific time frame for effectuating the decision makes it unclear whether county clerks and other local officials must begin issuing “marriage” licenses to same-sex couples as soon as this decision becomes final, which occurs 30 days after its May 15, 2008, filing (*see* (Cal. Rules of Court, rule 8.532(b)(1)), or whether county clerks and other local officials must refrain from issuing “marriage” licenses to same-sex couples until a later date such as, for example, after the Court of Appeal issues its writ of mandate, or after “the appropriate state officials” complete “all actions necessary to effectuate [the] ruling.” Regardless of which approach the Court intended by its directions, it is likely that as soon as the decision becomes final, some county clerks will begin issuing “marriage” licenses to same-sex couples. By that time, many same-sex couples will have obtained “marriage” licenses from the State of California, and presumably will be entitled to all the benefits and obligations of that institution.

On April 24, 2008, less than one month prior to this Court’s filing of its *In re Marriage Cases* decision, a California organization known as ProtectMarriage.com submitted a voter-signed initiative to allow the people of California to enact a constitutional amendment providing that “[o]nly marriage between a man and a woman is valid or recognized in

California.”² An initiative to amend the constitution requires signatures amounting to at least 8% of the total votes cast for governor in the last gubernatorial election (Cal. Const., art. II, § 8, subd. (b); Elec. Code, § 9035), which under the present circumstances equates to 694,354 signatures (*see* Motion for Judicial Notice Exh. A). Even though the proponents of the Marriage Initiative needed only 694,354 valid signatures for the initiative to be placed on the November 4, 2008, ballot, they acted out of an abundance of caution and submitted 1,120,590 signatures—approximately 426,000 more than needed. (*See* Motion for Judicial Notice Exh. A.)

On May 6, 2008, the Secretary of State determined that the submitted petitions contained at least 1,120,590 signatures, and notified the county election officials to begin the signature verification process. (*See* Elec. Code, § 9030, subd. (c).) California law allows county election officials thirty days after this notification, excluding weekends and holidays, to validate a “random sample” of submitted signatures. (*See* Elec. Code, § 9030, subd. (d).) Given the current timeline, election officials must complete their verification of the Marriage Initiative no later than June 18, 2008. (*See* Motion for Judicial Notice Exh. A.)

The Marriage Initiative will be certified for the ballot if the results of the random-sample verification project that more than 110% of the required

² “The initiative is the power of the electors to propose . . . amendments to the Constitution and to adopt or reject them.” (Cal. Const., art. II, § 8, subd. (a).)

number of petition signatures are valid. (*See* Elec. Code, § 9030, subd. (g).) As previously noted, the proponents need to present 694,354 valid signatures, and 110% of that threshold number is 763,790. Therefore, if the random-sample verification projects that more than 763,790 of the total 1,120,590 signatures (or 68.16%) are valid, the Marriage Initiative will be placed on the November 4, 2008, ballot. Thus, the target percentage of signature verification is 68.16%.

County officials have begun reviewing the submitted signatures, and thirty-seven of California's fifty-eight counties have already completed their review. (*See* Motion for Judicial Notice Exh. A.) At the present time, with nearly two-thirds of the counties having completed their random-sampling review, the average percentage of signatures validation is 83.42%, well above the required 68.16%. (*Ibid.*) Indeed, not a single county has reported a percentage lower than 70%. (*Ibid.*) All remaining counties must complete their review by June 18, 2008. (*Ibid.*) At that time, barring abysmal validation results in the remaining counties, the Secretary of State will certify the Marriage Initiative for the November 4, 2008, ballot. (*See* Elec. Code § 9013; Cal. Const., art. II, § 8, subd. (c) [requiring that an initiative must qualify at least 131 days before the next statewide election at which it is to be submitted to the voters]).

If the voters approve the Marriage Initiative by a majority vote at the November 4, 2008, election, the language of the Marriage Initiative—

“[o]nly marriage between a man and a woman is valid or recognized in California”—will become part of the California Constitution. Enactment of the Marriage Initiative will alter the California Constitution in a manner that will obviate the basis for the writ ordered in this Court’s decision.

ARGUMENT

I. This Court Has The Authority To Order Rehearing Or Modify Its Remedy To Protect Important Public Interests.

This Court has the authority to order rehearing on the limited issue of the remedy provided in its *In re Marriage Cases* decision. The California Rules of Court state that “[t]he Supreme Court may order rehearing as provided in rule 8.268(a).” (Cal. Rules of Court, rule 8.536(a).) Rule 8.268(a)(1) provides that “a reviewing court may order rehearing of any decision that is not final in that court on filing.” (Cal. Rules of Court, rule 8.268(a)(1).) A Supreme Court decision does not become final until “30 days after filing.” (Cal. Rules of Court, rule 8.532(b)(1).) This Court filed its decision in the present case on May 15, 2008; thus it will not become final until June 14, 2008. Because the date of finality, June 14, 2008, is a Saturday, this Court has until June 16, 2008, to order rehearing. (*See* Cal. Rules of Court, rule 8.268(a)(2) [“If the clerk’s office is closed on the date of finality, the court may file the order on the next day the clerk’s office is open.”].)

Alternatively, this Court has the authority to modify the remedy contained in its *In re Marriage Cases* decision. The California Rules of Court state that “[t]he Supreme Court may modify a decision as provided in rule 8.264(c).” (Cal. Rules of Court, rule 8.532(c).) Rule 8.264(c)(1) provides that “[a] reviewing court may modify a decision until the decision

is final in that court.” (Cal. Rules of Court, rule 8.264(c)(1).) As previously noted, this decision will not become final until June 14, 2008, and because that date of finality is a Saturday, this Court has until June 16, 2008, to modify its decision. (See Cal. Rules of Court, rule 8.264(c)(1) [“If the clerk’s office is closed on the date of finality, the court may modify the decision on the next day the clerk’s office is open.”].)

In the past, this Court has modified the remedies contained in its decisions. (See, e.g., *Market St. Ry. Co. v. Railroad Commission* (1946) 28 Cal.2d 363, 373 [171 P.2d 875] [granting a motion for modification of a Supreme Court order and amending the Court’s prior order to grant a different remedy than that which was originally issued]; *Perine v. Lewis* (1900) 128 Cal. 236, 241-42 [60 P. 772] [granting a motion for modification of a Supreme Court judgment and “striking out of it the amount thereof which was given upon the assessment for that portion of the work done”].)

“It is a familiar doctrine that . . . the manner [in which a court] mould[s] its remedies[] may be affected by the public interest involved.” (*United States v. Morgan* (1939) 307 U.S. 183, 194 [59 S. Ct. 795] [citing *Central Kentucky Natural Gas Co. v. Railroad Comm’n of Kentucky* (1933) 290 U.S. 264, 271 [54 S. Ct. 154]].) When fashioning a remedy in response to a motion for modification, this Court has recognized that it has “the power and the responsibility” to “protect[] . . . the public whose interests

are affected by the final disposition” of the case. (*Market St. Ry. Co. v. Railroad Commission, supra*, 28 Cal.2d at p. 367.) Under these circumstances, this Court is “free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an . . . unjust result.” (*Ibid.*)

Here, this Court must consider the public interests affected by its remedy. Less than five months after this decision becomes final, the people of California will decide whether to enact a constitutional definition of marriage. Great public harm and mischief, as outlined herein, will result from permitting same-sex “marriages” for a five-month period, only to later change the law by returning marriage to its traditional definition. It would thus be wise for this Court to stay the implementation of its decision, and first allow the voters to define the institution of marriage for themselves.

II. It Is Unclear How This Court’s Remedy Will Be Implemented.

This Court ordered “that the language of section 300 limiting the designation of marriage to a union ‘between a man and a woman’ . . . must be stricken from the statute,” and that section 308.5 “can have no constitutionally permissible effect” and therefore “cannot stand.” (*In re Marriage Cases, supra*, 2008 WL 2051892, at p. 58.) But it is unclear, from the face of this Court’s decision, how and when this remedy should be implemented.

This Court “remanded to [the Court of Appeal] for further action consistent with [the] opinion,” and declared that the “[p]laintiffs are entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate [the] ruling” (*In re Marriage Cases, supra*, 2008 WL 2051892, at p. 58.) This mandate can be read in many different ways. First, it might mean that this Court chose to “judicially reform” the statutory code and that its statutory rewriting will become effective immediately upon this decision’s finality, which will occur on June 16, 2008. Second, it might mean that the mandates contained in this Court’s opinion will become effective only after remittitur to the Court of Appeal and that court’s issuance of a writ of mandate. Third, it might alternatively mean that county clerks must refrain from issuing “marriage” licenses to same-sex couples until after that “appropriate state officials,” acting per the terms of the Court of Appeal’s writ of mandate, complete “all actions necessary to effectuate [this Court’s] ruling.”

The opinion, as currently written, has caused concerns among various county clerks as to the timing of when they must begin issuing “marriage” licenses to same-sex couples. (*See* Motion for Judicial Notice Exh. B (Benjamin, *Gay-marriage Ruling Divides Valley Couples, Church Groups*, Fresno Bee (May 15, 2008) [Fresno County Clerk’s statement that same-sex couples will have to wait to get “marriage” licenses until the courts provide further guidance]); Motion for Judicial Notice Exh. C (*San*

Diegans React To Court Ruling On Gay Marriage, 10News.com (May 15, 2008) [San Diego County Assessor-Recorder's statement that the Supreme Court's decision requires the courts of appeal to create rules, regulations, and forms for the fifty-eight counties to follow when issuing "marriage" licenses to same-sex couples].)

Some clerks are eager to issue "marriage" licenses to same-sex couples, and they plan to begin issuing those licenses on the morning of June 16, 2008. (See Motion for Judicial Notice Exh. D (Renaud, *Officials Says L.A. County Will Be Ready For Gay Marriages*, Los Angeles Times (May 20, 2008) [Los Angeles County Clerk's statement that his office will be ready to issue "marriage" licenses to same-sex couples on June 16, 2008].) Yet, other clerks are more leery of the procedural details that dictate when they must begin issuing licenses to same-sex couples, and they have expressed uncertainty and indecision regarding their legal duties as outlined in this Court's *In re Marriage Cases* decision. (See Motion for Judicial Notice Exh. B (Benjamin, *Gay-marriage Ruling Divides Valley Couples, Church Groups*, Fresno Bee (May 15, 2008).)

It would thus be prudent—especially given the great importance of this issue—for this Court to clarify the means and timing regarding the implementation of its decision. This existing uncertainty is likely to result in inconsistent implementation of the Court's decision, thereby breeding statewide confusion.

III. The Impending Vote On The Marriage Initiative Justifies This Court In Temporarily Staying Its Decision.

The United States Supreme Court has observed that the pendency of a voter initiative involving an important constitutional question justifies a court in “stay[ing] its hand temporarily”: “[T]he fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification . . . for a court . . . to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to [the relevant constitutional questions] are pending and will be submitted to the State’s voters at the next election.” (*Lucas v. Forty-Fourth General Assembly of State of Colo.* (1964) 377 U.S. 713, 737 [84 S. Ct. 1459].) On November 4, 2008, the people of California will decide whether to constitutionally define the institution of marriage. This impending initiative justifies this Court in staying the implementation of this decision temporarily, just long enough to allow the people to speak on this important issue.

Other state high courts that have addressed the issue of same-sex “marriage” have stayed their decisions for a finite period of time to allow the people’s voice to be heard through their elected officials. (*See e.g., Goodridge v. Department of Public Health* (2003) 440 Mass. 309, 343 [798 N.E.2d 941] [“Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this

opinion.”]; *Lewis v. Harris* (2006) 188 N.J. 415, 463 [908 A.2d 196] [“To bring the State into compliance with [the state constitution] so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision.”]; *Baker v. State* (1999) 170 Vt. 194, 229 [744 A.2d 864] [“The effect of the Court’s decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.”]. Likewise this Court should temporarily stay its decision to permit the people of California to amend their constitution, thereby expressly and unambiguously conforming the state constitution to the will of the voters on the issue of marriage.

The issue of marriage belongs to the people and their elected representatives; thus this Court should temporarily stay its ruling and allow the people’s voice to be heard on this important constitutional question. This Court has repeatedly recognized, and did so in its *In re Marriage Cases* decision, that the people and their representatives have “full control of the subject of marriage and may fix the conditions under which the marital state may be created or terminated.” (*In re Marriage Cases, supra*, 2008 WL 2051892, at p. 30 [quoting *McClure v. Donovan* (1949) 33 Cal. 2d 717, 728 [205 P.2d 17]]; accord *In re Gregorson’s Estate* (1911) 160 Cal. 21, 24 [116 P. 60] [“Whether a marriage of the kind under

consideration should be treated as entirely void . . . is purely a question of policy for the Legislature.”].) This Court should defer to these well-established democratic principles and permit the California voters to exercise their “full control” over the issue of marriage by allowing them to constitutionally define the marital relationship. Accordingly, this Court should stay its decision pending the results of the November 4, 2008, election.

IV. Permitting This Decision To Take Effect Immediately Would Create The Risk Of Innumerable Legal Questions And Administrative Hardships.

By not staying this decision, this Court would permit a situation to develop in which the State of California would reform its marriage laws to include unions of same-sex couples even though there exists a very real possibility that the marriage laws might be returned to their traditional construct (*i.e.*, one man and one woman) just five months later. This likely scenario would create innumerable complex legal questions and administrative hardships—all of which can be avoided by staying this decision pending the outcome of the November 4, 2008, election.

If this Court does not stay its decision, and subsequently, the people approve the Marriage Initiative in November of this year, this State (and more particularly this Court) would unnecessarily be forced to grapple with complex legal questions of immense importance. California courts would be asked to consider whether those same-sex couples who received

“marriage” licenses prior to the approval of the Marriage Initiative would still be entitled to the benefits and obligations of their “marital” relationships. Los Angeles County Counsel Ray Fortner has noted that the validity of same-sex “marriages” performed prior to the enactment of the Marriage Initiative would become an important issue for the California courts to decide. (*See* Motion for Judicial Notice Exh. E (Anderson, *County Officials Brace For Gay Marriage Boom*, Whittier Daily News (May 20, 2008).)

Some state officials believe that the enactment of the Marriage Initiative will retroactively invalidate “marriage” licenses issued to same-sex couples. (*See* Motion for Judicial Notice Exh. F (McKinley, *California Ruling on Same-Sex Marriage Fuels a Battle, Rather Than Ending It*, New York Times (May 18, 2008) [San Francisco Mayor Gavin Newsom’s statement that enacting the Marriage Initiative amounts to “taking something away that [same-sex couples have] already enjoyed”].) In support of this view, the plain language of the Marriage Initiative, which expressly states that only opposite-sex marriages will be “recognized” in California, strongly implies that previously obtained same-sex “marriages” would no longer be recognized for any purpose. Under this interpretation of the Marriage Initiative, the granting of these “marriage” licenses would have been, for all intents and purposes, a futile act.

On the other hand, some attorneys involved in this case have stated that, notwithstanding the enactment of the Marriage Initiative, “once somebody is legally married, [the State cannot] undo that.” (See Motion for Judicial Notice Exh. G (Mintz, *California Gay-Marriage Fight Could Propel Issue To U.S. Supreme Court*, The Mercury News (May 17, 2008) [Attorney Shannon Minter’s statement noting that the State of California would “be in unchartered legal territory”].) In support of this position, it is important to note that the Marriage Initiative does not expressly state whether its implied prohibition on same-sex “marriages” applies retroactively. But, regardless of which interpretation of the Marriage Initiative is legally correct, it is almost certain that if this Court refuses to stay its decision, this difficult legal issue would be repeatedly and rigorously litigated throughout courts in California.

Another set of difficult legal issues would arise in instances where same-sex couples revoke their state-recognized domestic partnership in reliance on the fact that they have been “married” under the laws of the State of California. If the voters subsequently approve the Marriage Initiative, then the “marriages” entered into by same-sex couples might become invalidated. In order to maintain their state-recognized relationships, those couples might argue that the revocations of their domestic partnerships are void because of the subsequent invalidation of their “marriages,” and contend that their domestic partnerships remain in

full effect. This is just one of the countless legal issues that would needlessly arise if this Court does not stay its decision.

These complex legal issues would not be confined to California courts. For example, numerous same-sex couples who live in other states are likely to travel to California to get married. The question will then arise whether the couple's home state must recognize their "marriage." This issue has been litigated by courts throughout the country. (*See, e.g., Martinez v. County of Monroe* (2008) 850 N.Y.S.2d 740 [50 A.D.3d 189] [finding that the State of New York must recognize a Canadian same-sex "marriage"].) But a novel legal issue would arise if the State of California (*i.e.*, the issuing state) no longer recognized the validity of the "marriage" license that it previously issued to the couple. Courts in other states would be forced to grapple with this complicated legal question.

All of these legal issues, and undoubtedly countless more, will result if this Court does not stay its decision. These issues amount to much more than theoretical debates in which the courts will engage. These issues affect real people, their legal rights, and governmental recognition of their relationships. Accordingly, this Court must carefully consider the legal chaos and uncertainty that will result and, for that reason, should stay the effectiveness of its decision pending the results of the November 4, 2008, election.

In *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, this Court expressed its unwillingness “to leave the validity of . . . marriages [between same-sex couples] in limbo . . . 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.” (*Id.* at p. 1117.) The *Lockyer* Court did “not believe it would be responsible or appropriate” to leave the couples in a state of uncertainty because such legal ambiguity “might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm.” (*Ibid.*) This Court should heed its wisdom in *Lockyer*. If this Court does not stay its decision, scores of couples will make important legal decisions that are likely to create future difficulties for both the individuals and the state. In light of this epic opportunity to protect the interests of the public for many years to come, this Court should act prudently to prevent this legal confusion from developing.

Additionally, if this Court does not stay its decision, the State of California would face innumerable administrative hardships and incur many unnecessary administrative costs. State government officials will incur no small administrative expense in completing all the tasks necessary to implement this decision. For example, state government officials will create and print new “marriage”-license forms to be completed by same-sex

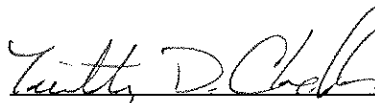
couples. Yet, in response to the enactment of the Marriage Initiative, the government officials will need to duplicate all their work in order to undo all that was originally done to implement this Court's decision. The ripple effect of this minor example will spread throughout the state government. Of course, all of these unnecessary and duplicative administrative tasks can be avoided simply by staying this decision. These administrative concerns provide an additional reason for this Court to stay the effectiveness of its decision pending the outcome of the November 4, 2008, election.

CONCLUSION

For the foregoing reasons, the Fund respectfully requests that this Court order rehearing on the limited issue of the remedy provided in its decision. Alternatively, the Fund respectfully requests that this Court modify the remedy by staying the effectiveness of its decision until after the Secretary of State determines whether the voters have approved the Marriage Initiative.

Dated: May 22, 2008

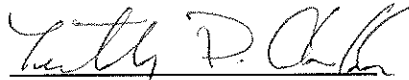
Respectfully submitted,


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RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for the Fund hereby certifies that the Petition for Rehearing is proportionately spaced, has a typeface of 13 points or more, and contains 4,404 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.


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