

STATE OF LOUISIANA
COURT OF APPEAL, FOURTH CIRCUIT

CASE NO. 2004-CA-1473

FORUM FOR EQUALITY PAC, a registered Louisiana political
action committee, LAURENCE E. BEST, JEANNE M. LEBLANC
and WILLIAM A. SCHULTZ

VERSUS

CITY OF NEW ORLEANS and THE HONORABLE
W. FOX MCKEITHEN, in his official capacity
as SECRETARY OF STATE OF LOUISIANA only,
and not individually

ON APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS,
CASE NO. 04-11324, DIVISION C, SECTION 6,
THE HON. CHRISTOPHER J. BRUNO, JUDGE *PRO TEMPORE* PRESIDING

APPELLEES' BRIEF IN RESPONSE

CIVIL PROCEEDING

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STATEMENT OF THE CASE

Since Appellant McKeithen and Interveners filed their Briefs, the Trial Court has entered its Judgment and Reasons for Judgment granting a Permanent Injunction. Appellees attach those documents in the Appendix to this Brief in Response. That Judgment resulted from a trial on the merits held last Friday, August 20, 2004. This Court ordered the Trial Court's reporter to file the transcript of that trial with this Court no later than 10:30 this morning, sending a clear signal that this Court intends to consider not only the merits of the Preliminary Injunction issued on August 13, 2004, but also the merits of the Judgment and Permanent Injunction issued on August 20, 2004.

APPELLEES' ANSWER TO APPEAL

Simultaneously with their Brief in Response, Appellees are filing their Answer to the Appeal, raising the following two additional Assignments of Error:

Appellees' Assignment of Error No. 1

WHETHER THE TRIAL COURT ERRED IN FAILING TO DECLARE HOUSE BILL 61, ALSO KNOWN AS ACT NO. 926, ACTS OF LOUISIANA 2004, TO BE UNCONSTITUTIONAL FOR ALIENATING AND VIOLATING RIGHTS PRESERVED IN ARTICLE 1, SECTION 1, CONSTITUTION OF LOUISIANA, ALSO KNOWN AS THE LOUISIANA DECLARATION OF RIGHTS

Appellees' Assignment of Error No. 2

WHETHER THE TRIAL COURT ERRED IN FAILING TO DECLARE THE PROPOSED CONSTITUTIONAL AMENDMENT UNCONSTITUTIONAL FOR VIOLATING THE PREFILING REQUIREMENTS OF ARTICLE XIII, SECTION 1, CONSTITUTION OF LOUISIANA

ARGUMENT

Appellant McKeithen has raised two Assignments of Error. Interveners have raised an additional Assignment of Error challenging the Trial Court's overruling of the Peremptory Exceptions of No Right and No Cause of Action. In so doing, Interveners violated the admonition of Article 1094, Louisiana Code of Civil Procedure, that Interveners accept (and cannot expand) the pleadings of the parties.

Even though Interveners have acted improperly, Article 927, Louisiana Code of Civil Procedure, gives this Court the authority to notice both of the Peremptory Exceptions on the Court's own Motion. Accordingly, Appellees will argue the correctness of the Trial Court's overruling of the Exceptions.

Peremptory Exceptions of No Right and No Cause of Action

a. Right of Action

If anyone has a right to bring this lawsuit, Appellees do. They rely upon the trial testimony of Appellees LeBlanc and Schultz, the expert attorney trial testimony of John J. Sullivan, Esquire and Glenn J. Reames, Esquire, and the Affidavits in the record from Appellee Best and from the Executive Director of Appellee Forum for Equality PAC.

b. Cause of Action

Articles 1871, 1872, 1875 and 1881, Louisiana Code of Civil Procedure, make it clear that Appellees have a cause of action and do not have to wait until after the election to obtain a Declaratory Judgment. Those four (4) Articles state:

1871. Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree.

1872. A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

1875. The enumeration in Articles 1872 through 1874 does not limit or restrict the exercise of the general powers conferred in Article 1871 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

1881. Articles 1871 through 1883 are declared to be remedial. Their purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and they are to be liberally construed and administered.

The proposed constitutional amendment, House Bill 61, passed both Houses of the Legislature and was enrolled as Act No. 926, Acts of Louisiana 2004, giving it the status of a statute. Act No. 926 would at the least call into question the validity of Appellee City of New Orleans' Domestic Partnership Registry Ordinance.* The Louisiana Declaration of Rights is a franchise. In all of these ways the proposed constitutional amendment falls under the Declaratory Judgment Articles when they are liberally construed and administered.

The Petition also states a cause of action under the Injunction Articles of the Louisiana Code of Civil Procedure. Article 3601 states in pertinent part:

An injunction shall issue in cases where irreparable injury, loss, or damages may otherwise result to the applicant, or in other cases specifically provided by law;

Note that the test is whether irreparable damage **may** occur. Certainly if this amendment goes forward on the ballot, Appellee Schultz **will** suffer irreparable loss of his right to vote for one of his strongly held beliefs without voting against another one of his strongly held beliefs. All other Appellees **may** suffer irreparable damage

by having their legal relationships and the New Orleans ordinance invalidated. That damage will be irreparable, since a Court decision weeks, months or years after the election cannot go back and cure the damage already done. All documents now in force would be of questionable validity during the pending of a post-election challenge to the constitutional amendment.

This is precisely the sort of situation where the Declaratory Judgment Articles, liberally construed and administered, will prevent otherwise irreparable injury, loss and damage from occurring and will remove uncertainty from the law. The Trial Court correctly overruled the Peremptory Exceptions of No Right and No Cause of Action.

* During the floor debate on what became Act No. 926, its lead sponsor conceded that it will invalidate the New Orleans ordinance. *See*, Exhibit P-3, hearing, August 13, 2004.

Assignment of Error No. 1

WHETHER THE DISTRICT COURT ERRED IN
GRANTING THE PRELIMINARY INJUNCTION

“A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights.” *Latour v. State*, Case No. 2000-CA-1176 at 5 (Louisiana 1/29/01), 778 So.2d 557, 560 (citation omitted). The same standard applies to deciding whether a party has standing to challenge the constitutionality of a proposed constitutional amendment. Each Plaintiff has alleged sufficient facts in the Petition to show how this proposed constitutional amendment directly affects that Plaintiff’s rights.

Ordinarily the issuance of an injunction requires a showing of “irreparable injury,” but there are two exceptions to that rule. Both exceptions apply here. “Irreparable injury is not a prerequisite for an injunction when the law specifically affords that remedy or when the conduct sought to be restrained is unconstitutional. *City of New Orleans v. Board of Commissioners of Orleans Levee District*, Case No. 93-C-690 at 30 (La. 7/5/94), 640 So.2d 237, 253-54 (citations omitted). If the Court grants relief through the Petition Objecting to Election upon Proposed Constitutional Amendment, the requested injunction is provided by law, Louisiana Revised Statutes 18:1409. If the Court grants relief through the Petition for Declaratory Judgment and Injunctive Relief, the Court will do so by declaring that the proposed constitutional amendment violates the Constitution of Louisiana.

Technically, of course, the Preliminary Injunction is now moot and any opinion on its validity would be an advisory one. Under these extraordinary circumstances, however, and in the spirit of the mandate to this Honorable Court of Appeal from our Supreme Court, Appellees both assume and ask that this Court address on its merits

the Judgment rendered last Friday, August 20, 2004, granting the Preliminary Injunction.

Appellant McKeithen's and Interveners' argument that Appellees have an adequate remedy after the election is a hollow one. Certainly Appellee Schultz will suffer irreparable damage if forced to vote against one set of his strongly held beliefs in order to support another set of his strongly held beliefs. For that proposition one only need read the quotations from *Graham v. Jones*, 198 La. 507 3 So.2d 761 (La. 1941) that Appellees have quoted *in extenso* in the Brief that they have filed in Case No. 2004-CA-1432. And, as both attorney expert witnesses' Affidavits and trial testimony made painfully clear, **the moment this proposed constitutional amendment wins the election**, assuming that it does, **every contractual and documentary relationship for every same sex couple in Louisiana will be in jeopardy**. A ruling months or years down the road deciding that the proposed amendment was just one big mistake will hardly give solace to those surviving partners whose deceased partners' family members will have used this amendment to wrest (or attempt to wrest) the couple's home, business and children from the surviving partner.

At trial Appellee McKeithen objected to Messrs. Sullivan's and Reames' testimony concerning the effect they foresaw the proposed constitutional amendment having on their same sex coupled clients' legal arrangements. The Trial Court overruled the objection. The Trial Court was right.

Article 704, Louisiana Code of Evidence, states in its first sentence:

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact.

Messrs. Sullivan and Reames were well within the bounds of appropriate expert opinion when they testified to how the proposed constitutional amendment will impair the contracts and other legal documents that they have prepared for Lesbian and Gay couples.

c. Conclusion

The Trial Court was right the first time when it entered the Preliminary Injunction. The Trial Court was right the second time when it entered its Judgment granting the Permanent Injunction.

Assignment of Error No. 2

WHETHER THE DISTRICT COURT ERRED IN RULING THAT
SEPTEMBER 18, 2004, IS NOT A “STATEWIDE ELECTION”
WITHIN THE MEANING OF ARTICLE XIII, SECTION 1,
CONSTITUTION OF LOUISIANA

In *East Baton Rouge Parish School Board v. Foster*, Case No. 2002-Ca-2799
(La. 6/6/03) 851 So.2d 895, our Supreme Court stated a standard rule of constitutional
interpretation:

If at all possible, constitutional provisions should be
construed to allow each provision to stand and be given
effect. Case No. 2002-CA-2799 at 23, 851 So.2d at 1000
(citation omitted).

That rule of constitutional interpretation is consistent with the standard rule of
statutory interpretation stated by our Supreme Court in *Sultana Corporation v.*
Jewelers Mutual Insurance Company, Case No. 2003-C-0360 (La. 12/3/03), 860
So.2d 1112:

It is presumed the Legislature acts with full
knowledge of well-settled principles of statutory
construction. It is also presumed that **every word**, sentence
or provision in a statute **was intended to serve some useful
purpose**, that some effect be given to each such provision,
and that **the Legislature used no unnecessary words or
provisions**. Case No. 2003-C-0360 at 9, 860 So.2d at 1119
(citations omitted) (boldface supplied)

The 1973 Constitutional Convention deserves the same presumption. Many of
the Delegates were legislators, lawyers or both. All Delegates fully appreciated the
gravity attached to their work and the importance of every word in our State’s
foundational document. When they said “statewide” in Article XIII, Section 1(A),
they meant it.

Appellee McKeithen has gone to great lengths to quote from statutes,
regulations and budgets to explain what the constitutional phrase “statewide election”
means. Those sources can be of some help in explaining an ambiguous phrase. This

constitutional provision, however, has only one logical meaning. If the Legislature does not set a special election on a proposed constitutional amendment (as permitted by the last sentence of Article XIII, Section 1(A)), then **only an election that is already statewide can be used for a proposed constitutional amendment.**

The record from last Friday's trial includes an Affidavit from The Hon. Dorothy M. Lundin (before her recent marriage better known to us as Dot Chevalier) confirming that there was never any need for an election in Plaquemines Parish for September 18, 2004, except the proposed constitutional amendment. It is undisputed among the parties that at least two other Parishes, East Carroll and Richland, had **NOTHING** to vote on **BEFORE** qualification took place during the first week of this month. (As the result of uncontested races, perhaps another half dozen Parishes now have nothing to vote on but the proposed constitutional amendment.)

If an election on a proposed constitutional amendment is automatically a statewide election (because all voters in the State have an opportunity to vote in it), then the word "statewide" is both tautological and superfluous. But the requirement of Article 9, Louisiana Civil Code, that when a writing "is clear and unambiguous and its application does not lead to absurd consequences" it "shall be applied as written" applies with equal force to laws and constitutional provisions. It is easy to give full meaning to the word "statewide" as used in Article XIII, Section 1(A), Constitution of Louisiana, simply by requiring that except when a special election is called a **proposed constitutional amendment can only be considered at an election that already has one or more contests in every precinct in Louisiana.**

A good policy explanation for interpreting a provision is not required but is frequently helpful. The September 18 ballot itself demonstrates a good policy reason for considering proposed constitutional amendments only when (a) they are the only item(s) on the ballot of a special election or (b) there is already a contest or contests

of statewide interest and impact on the ballot. Next month there will be nothing on the ballot in Plaquemines Parish, assuring a relatively low turnout there. But there will be hotly disputed school board races next door in Orleans Parish, assuring a relatively high voter turnout there. By contrast, on November 2, 2004, when all four (4) of this year's other proposed constitutional amendments go before the voters of Louisiana, every single voter will already have on his or her ballot a contest for President and Vice President of the United States and a contest for United States Senator, assuring a relatively high voter turnout statewide. More importantly, because November 2 is a true statewide election we can anticipate a **uniformly even** voter turnout across Louisiana, as opposed to an uneven turnout on September 18.

Our Supreme Court transferred this case to this Court of Appeal to consider the Trial Court's granting of a Preliminary Injunction on the narrow grounds that September 18 is not a statewide election. The sole dissenting Justice stated as grounds for her dissent:

Because of the time constraints involved in this matter concerning an important issue of statewide concern, I would consider the case under this Court's supervisory jurisdiction. Considering the matter under supervisory jurisdiction, I find the preliminary injunction goes outside the scope of relief requested in the petition and would vacate the preliminary injunction. *Forum for Equality PAC v. City of New Orleans*, Case No. 04-CA-2104 (La. 8/17/04) ___ So.2d ___ (Knoll, J. dissenting).

Neither that Justice nor the rest of our Supreme Court had the benefit of the hearing transcript for the Preliminary Injunction. This Court does. It shows that all parties agreed on the Record that three Parishes had nothing on the September 18 ballot before the office qualification period except the proposed constitutional amendment, and that at least nine (9) Parishes will have nothing on the September 18 ballot except the proposed constitutional amendment. Therefore, by mutual consent the parties expanded the pleadings to include the evidence.

Even were the dissenting Justice correct in the grounds for her dissent, the parties have completely changed those grounds since the Supreme Court ruled. The second Affidavit of Wade O. Martin, III, goes to great lengths with several bulky attachments to address the statewide election issue. Both Appellant McKeithen and the Interveners went to equally great lengths in their Memoranda in Opposition to the Permanent Injunction to argue the statewide election issue without reserving the right to challenge whether that issue was properly before the Trial Court.

On the statewide election issue, the Trial Court was correct both times.

ARGUMENT ON ANSWER TO APPEAL

Appellees' Assignment of Error No. 1

WHETHER THE TRIAL COURT ERRED IN FAILING TO DECLARE HOUSE BILL 61, ALSO KNOWN AS ACT NO. 926, ACTS OF LOUISIANA 2004, TO BE UNCONSTITUTIONAL FOR ALIENATING AND VIOLATING RIGHTS PRESERVED IN ARTICLE 1, SECTION 1, CONSTITUTION OF LOUISIANA, ALSO KNOWN AS THE LOUISIANA DECLARATION OF RIGHTS

Appellees have previously briefed this issue extensively in their "Appellants' Original Brief" filed in Case No. 2004-CA-1432 with this Honorable Court of Appeal. Appellees respectfully rely here upon the arguments made there. Appellees would add, however, the observation that nowhere in their arguments have Appellant McKeithen or Interveners so much as once ever mentioned the words "inalienable" and "inviolable." Those two imperative words deserve some discussion.

Every school child knows (or should know) the eighteenth century word "unalienable" which in modern usage we now pronounce and spell "inalienable." "Unalienable" appears in one of the greatest phrases of American history:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness.

The Kansas City Court of Appeals for the State of Missouri quoted that immortal language with approval in *Morrison v. State*, 252 S.W.2d 97 (Mo. App. 1952), and then went on to say:

Inalienable is defined as incapable of being surrendered or transferred, at least without one's consent. Webster's New Int. Dictionary, Second Ed. Vol. 2, page 1254. 252 S.W.2d at 101.

Inalienable's companion word, Inviolable, is used in the Constitution of Kentucky in describing the right to trial by jury. In *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104, the Supreme Court of Kentucky stated:

The constitutional term “inviolable” means that the right to trial by jury is unassailable. Henceforth, legislation and civil rules of practice shall be construed strictly and observed vigilantly in favor of the right and it is not to be abrogated arbitrarily by the courts. The constitutional right to a jury trial cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action.

The trial jury provision of our state constitution has been held in similar light in *Commonwealth v. Jones*, 73 Ky. (10 Bush) 725, 756 (1874), wherein Judge Lindsay emphasized:

That the rule of construction, whether applied to the constitution or to a statute, which will preserve unimpaired the ancient mode of trial by jury, is the rule which should always govern in interpreting laws involving the forfeiture of a civil or political right, seems to us to be apparent upon the mere statement of the proposition.

Further enunciated therein was that everything in the Bill of Rights “is declared to be excepted out of the general powers of government and to remain forever inviolable.” 908 S.W. 2d at 108 (citations omitted) (*italics in original*).

The redactors of our 1974 Convention were fully aware of the sweeping scope of those two words. When Delegate Dunlap introduced the Committee’s proposed language for Article I, Section 1, Delegate Lanier immediately rose with a question:

Mr. Lanier Mrs. Dunlap, I am concerned about the words, “inalienable and inviolable.” I assume these will not be construed to mean that you cannot waive these rights.

Mrs. Dunlap I would think so.

Mr. Lanier In other words, your intent by saying that “these rights are inalienable and shall be preserved inviolable” does not mean that say, you could not waive your right to a trial by a jury or your right to an attorney. These are rights, if done the proper way, you can waive.

Mrs. Dunlap This section, you know, **this type of language prevents state action.**

Mr. Lanier To waive an individual right.

Mrs. Dunlap Well, to take them away from you.

Mr. Lanier **Right**, but it does not preclude an individual under the proper circumstances to waive his own rights?

Mrs. Dunlap Right.

Mr. Lanier O.K. (Proceedings, Constitutional Convention, Vol. 6, p. 999) (boldface supplied).

Later in the floor debate, the Convention Delegates accepted exactly the same definition of “inalienable” that the Missouri Court used in *Morrison, supra*:

Mr. Pugh How did you define inalienable?

Mr. Lanier Inalienable in Websters Seventh New Collegiate Dictionary, means incapable of being alienated, surrendered, or transferred. (Proceedings of Constitutional Convention, Vol. 6, p. 1015).

Earlier on the same page, the floor debate transcript quotes Delegate Lanier defining this phrase in response to a question:

Ms. Zervigon Mr. Lanier, in Section 1, the final sentence would then read, if your amendments were accepted, if I’m correct, “the right to enumerate* in this article are inalienable by the state and shall be preserved inviolate by the state”?

Mr. Lanier Yes, ma’am.

Ms. Zervigon What is the phrase, “the right to enumerate* in this article are inalienable by the state”? **Does that mean the state cannot alienate the rights of the people?**

Mr. Lanier **The state is incapable of alienating, surrendering, or transferring these rights.** *Ibid.* (Boldface supplied).

* Transcriber’s error. In both places the phrase “right to enumerate” should read “rights enumerated.” Note also the amendment author’s intent to have his phrase “by the state” modify both “inalienable” and “preserved inviolate.”

Appellees' Assignment of Error No. 2

WHETHER THE TRIAL COURT ERRED IN FAILING TO DECLARE
THE PROPOSED CONSTITUTIONAL AMENDMENT
UNCONSTITUTIONAL FOR VIOLATING THE PREFILING
REQUIREMENTS OF ARTICLE XIII, SECTION 1,
CONSTITUTION OF LOUISIANA

Appellees have already briefed this issue extensively in their "Appellants' Original Brief" filed with this Court in Case No. 2004-Ca-1432. They respectfully rely upon their full written argument stated there.

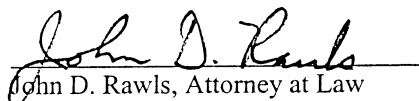
CONCLUSION

The Trial Court was correct insofar as it went. The Trial Court erred by not ruling in Appellees' favor on the remaining issues before it.

Accordingly, Appellees ask the Court to:

1. Declare the Preliminary Injunction to have been appropriately granted, or in the alternative refrain from doing so on the grounds that the Preliminary Injunction is now moot;
2. Overrule McKeithen's Appeal, thereby sustaining the Trial Court on those grounds;
3. Reverse the Trial Court on the issues raised in Appellants' Answer to Appeal and for all of Appellees' stated grounds declare House Bill 61, also known as Act No. 926, Acts of Louisiana 2004, to be unconstitutional; and
4. Enjoin Appellant McKeithen, in his official capacity, only from proceeding forward with placing that proposed constitutional amendment on the ballot for September 18, 2004.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellees' Brief in Response has been served upon

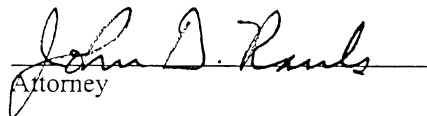
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