TRADITIONAL MARRIAGE UPHELD IN CALIFORNIA

ACLJ SUMMARY

***Strauss v. Horton,* No. S168047, *Tyler v. State of California,* S168066, *City & County of San Francisco v. Horton,* S168078, slip op. (Cal. May 26, 2009)**

On May 26, 2009, the California Supreme Court, in a 6-1 decision, vindicated the right of California voters to prohibit same-sex marriage through a constitutional amendment. Shortly after the Court found Proposition 22 unconstitutional in June 2008,[1] California voters again spoke through Proposition 8 ("Prop. 8") on the November 2008 ballot. Prop. 8 became the focus of the next round of California same-sex marriage litigation when the plaintiffs in the case challenged the form of enactment, arguing that Prop. 8 had been unconstitutionally enacted as a "revision" rather than an "amendment" to the California Constitution. *Slip. Op.* at 5.

The ACLJ filed an *amicus curiae* or "friend of the court" brief at the California Supreme Court arguing that Prop. 8 was properly construed as an amendment to the California Constitution because it did not substantially change the constitution. The ACLJ explained that Prop. 8 constituted only a minor change by simply and unambiguously providing that "[o]nly marriage between a man and a woman is valid or recognized in California." The California Supreme Court agreed.

[1] Proposition 22 was a California statute enacted through voter initiative that also prohibited same-sex marriage. *See In re Marriage Cases*,183 P.3d 384 (Cal. 2008). The Court's May 2008 decision became effective June 16, 2008.

***THE QUESTION PRESENTED*:**

The question presented before the California Supreme Court addressed "[w]hether Proposition 8, under the governing provisions of the California Constitution, constitute[d] a permissible change to the California Constitution, and—if it [did]—[the Court was] faced with the further question of the effect, if any, of Proposition 8 upon the estimated 18,000 marriages of same-sex couples that were performed before that initiative measure was adopted." *Id*. at 2-3. "[T]he principal issue before [the Court] concern[ed] the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution." *Id*. at 3-4.

***THE CALIFORNIA SUPREME COURT CALIFORNIA VINDICATES VOTERS' RIGHTS*:**

The California Supreme Court previously found Prop. 22 unconstitutional by a 4-3 vote in the *Marriage Cases*, 183 P.3d 384 (Cal. 2008), based on the California Constitution as written at the time. Significantly, when considering the constitutionality of Prop. 8, all but one member of the Court recognized their constitutional duty to apply judicial restraint in light of separation of powers principles before overturning a clear expression of popular will on fundamental issues. The majority also acknowledged their duty, where possible, to resolve doubts in favor of upholding initiative enactments so that the will of the people is given effect: "[T]he governing California case law uniformly emphasizes that 'it is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process' and that 'we are required to resolve any reasonable doubts in favor of the exercise of this precious right.'" *Id*. at 103 (internal quotation marks omitted).

The Court emphasized the critical role that voters play under California law and their power to create discrete, popular and sociological amendments to the California Constitution:

> [T]he question whether a proposed constitutional change constitutes a constitutional amendment or instead a constitutional revision does not turn upon whether *a court* is of the view that the proposal "will effect an improvement" or will "better carry out the purpose" of the preexisting constitutional provisions; the numerous constitutional amendments that have altered prior constitutional rulings of this court demonstrate that *the people* may amend the Constitution through the initiative process when *they* conclude that a judicial interpretation or application of a preexisting constitutional provision should be changed.

Id. at 104.

In upholding Prop. 8, the Court, however, refused to invalidate 18,000 same-sex marriages legally performed after the Court previously struck down Proposition 22 ("Prop. 22"), whereas the Court found that Prop. 8 contained no retroactive language.[2]

[2] Although the California Supreme Court did not invalidate 18,000 "marriages" of same-sex couples occurring in California between June 2008 (when the California Supreme Court issued its opinion in the *Marriage Cases*, holding that the prohibition of same-sex "marriage" violated the California Constitution) and November 2008 (when

***REVISING / AMENDING THE CALIFORNIA CONSTITUTION*:**

In California, changes to the State Constitution are deemed either amendments or revisions. Amendments are relatively minor changes or modifications to the constitution that add nothing new to the existing governmental framework of the state. Revisions, on the other hand, are substantial alterations to the whole of the constitution or to the basic governmental plan of the state.

The source of contention for the plaintiffs in this case lay in a procedural deficiency for enacting a constitutional revision. *Id.* at 5. The California Constitution provides that a constitutional amendment

> *may be proposed* either *by two-thirds of the membership of each house of the Legislature* (Cal. Const., art. XVIII, § 1) or *by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for all candidates for Governor in the last gubernatorial election* (Cal. Const., art. II, § 8, subd. (b); *id.*, art. XVIII, § 3), and further specifies that, once an amendment is proposed by either means, the amendment becomes part of the state Constitution *if it is approved by a simple majority of the voters who cast votes on the measure at a statewide election*. (*Id.*, art. XVIII, § 4.)

Id. at 4. The revision process, however, is more arduous. A revision is "the kind of wholesale or fundamental alteration of the constitutional structure that appropriately could be undertaken only by a constitutional convention, in contrast to the category of *constitutional amendment*, which include[s] any and all of the more discrete changes . . . ." *Id.* at 6. In addition to revision by constitutional convention, the California Constitution now provides that revisions may also be made through legislative proposals. *Id.* Article XVIII of the California Constitution provides that there are two ways the document may be revised: 1) through a constitutional convention, convened by the legislature, or 2) agreement of 2/3 of both houses of the legislature as to a proposed revision, which is then supported by a majority vote of California's citizens.

The Court resolves disputes as to whether a constitutional alteration constitutes a revision or an amendment by carefully assessing "(1) the meaning and the scope of the constitutional change at

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a majority of voting citizens in California voted in favor of Prop. 8), the ACLJ presented a contrary argument to the Court in its *amicus curiae* brief. As the ACLJ explained in its brief, whatever status those unions may have held previously, the only common-sense reading of Proposition 8, giving effect to the natural and ordinary meaning of its terms, is that no subdivision of the State of California may legally recognize those unions as "marriages." This reading was made clear not only on the face of Prop. 8 but also in the Ballot Pamphlet for the November 2008 General Election, distributed to all California voters. Specifically, the pamphlet included the explanation that Proposition 8 "means that only marriage between a man and a woman *will be recognized* in California, *regardless of when or where performed*." (emphasis added). Thus, citizens were on notice that the intended result of Prop. 8 was that no same-sex unions, including those performed in California between June and November 2008, would be legally recognized in the state as "marriages." The same holds true for same-sex couples "married" in another state. In light of the above, the ACLJ argued, the clear intent of Prop. 8 is that no same-sex couples "married" in another state may have their union legally recognized in the State of California as a "marriage."

issue, and (2) the effect—both quantitative and qualitative—that the constitutional change will have on *the basic governmental plan or framework* embodied in the preexisting provisions of the California Constitution." *Id*. In this case, the Court resolved the dispute in favor of the voters who enacted Prop. 8, finding no fundamental alteration to the State's equal protection clause. Additionally, the Court rejected the argument that Prop. 8 entirely abrogated a same-sex couple's right to privacy or due process:

> Instead, [Prop. 8] carve[d] out a narrow and limited exception to these state constitutional rights, reserving the official *designation* of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws.

Id. at 7. The Court explained that, "[a]s a quantitative matter . . . Proposition 8 . . . adds but a single, simple section to the Constitution [and] does not constitute a revision. As a qualitative matter, the act of limiting access to the designation of marriage to opposite-sex couples does not have a substantial or, indeed, even a minimal effect on *the governmental plan or framework of California* that existed prior to the amendment." *Id*. at 8.

***THE ACLJ'S POSITION REGARDING IMPACT OF PROP. 8 ON CALIFORNIA CITIZENS*:**

The passage of Proposition 8 and the California Supreme Court's decision upholding it mean that the proper weight has been given to the will of the people, in whom all power of government in the state of California ultimately resides. What we have seen is the democratic process at work and recognition by the California Supreme Court of its duty to "jealously guard" the initiative power of the people of California.