Case ## 10-16696
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PERRY, APPELLANT

V.

SCHWARZENEGGER, APPELLEE

CITY AND COUNTY OF SAN FRANCISCO et al., Petitioners

V.

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

On Appeal from a Judgment of
Unites States District Court
for the Northern District
3:09-cv-02292-VRW
Vaughn R. Walker, Chief District Judge, Presiding

Brief of Amicus Curiæ Margie Reilly In support of Appellants Urging Dismissal with directions to trial court to vacate and dismiss and In the alternative reverse

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CORPORATE DISCLOSURE STATEMENT

There is no corporation involved with amicus.

STATEMENT OF THE ISSUES

1. In view of the Erie Doctrine and provisions for reviewing decisions of State Supreme Courts by the U.S. Supreme Court, do Plaintiffs/Appellees have standing to challenge in federal court Proposition 8?
2. In light of the Preambles of U.S. Constitution and of the Constitution of the State of California, are the People of the State of California the sovereignty of the State and members of the sovereignty of the United States?
3. In view of *Nashville, Chattanooga & St. Louis Ry. v. Browning* (1940) 310 U.S. 362; *Skinner v. Oklahoma* (1942) 316 U.S. 535, can Plaintiffs/Appellees show injury in view of their right to a civil union that gives them everything a marriage provides, except the possibility of having a child begotten and born by the partners of the union?

SUMMARY OF THE ARGUMENTS

4. In view of the Erie Doctrine and provisions for reviewing State Supreme Court by the U.S. Supreme Court, Plaintiffs/Appellees do not have standing to challenge in federal court Prop. 8.
5. In light of the Preambles of U.S. Constitution and of the Constitution of the State of California, the People of the State of California are the sovereignty of the State and members of the sovereignty of the United States.
6. In view of *Nashville, Chattanooga & St. Louis Ry. v. Browning* (1940) 310 U.S. 362; *Skinner v. Oklahoma* (1942) 316 U.S. 535, the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

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STATEMENT OF INTEREST[1]

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.

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,

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[1] Lead Counsel for Amici Curiae authored this brief in its entirety. No other 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".

life, and family which are worth embracing for the preservation of our society.

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 neither this Nation nor this State can long endure.

Finally, there is a strong public policy to protect children from exploitation, and have a DNA knowledge base should health concerns and transplants be required.

INTRODUCTION

A. HISTORY OF THE PROPOSITIONS

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.

B. THE IN RE MARRIAGE CASES

The In re marriage cases was decided on 4 to 3 vote.[3]

1. 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 as 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.)

2. 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

[3] This amicus did not participate.

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.

C. THE PROPOSITION 8 CASE

This case was decided on a 6 to 1 vote to up hold Proposition 8.[4]

Robin Tyler v. , 46 Cal. 4th 364, addressed whether or not Proposition 8 impermissibly amended, rather than revising, the California Constitution.

D. THE IMPLICATION ON FUTURE GENERATIONS

How, and who, raises children is a serious consideration in the debate. There are the DNA implications, and the psychological considerations.

At some future time, DNA evidence may facilitate health concerns, especially in the case of transplants. **Discovery, development, and current applications of DNA identity testing,** Rana Saad, PhD' From the Department of Pathology, Baylor University Medical Center, Dallas, Texas. Corresponding author: Rana Saad, PhD, Department of Pathology, Baylor University Medical Center, 3500 Gaston Avenue, Dallas, Texas 75246 (e-mail: ranas@BaylorHealth.edu). Presented at the Department of Pathology Fall Symposium, Baylor University Medical Center, November 23, 2004. The importance of this fact will be discussed below, but it is important to understand that where a sperm donor or a surrogate mother is used, the lack of a DNA trail can have profound impact on the life of a new born.

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[4] This amicus did participate in this case, interjecting two fundamental federal issues: 1. Sovereignty; 2. Federal case law indicating where two classes were different in fact and opinion, they are not entitled to the same treatment. See below.

There are also nurturing impacts, and bonding considerations.

Experimental psychologist can demonstrate in laboratory experiments that primates which undergo species deprivation during the critical period undergo behavioral problems at maturity to the extent of not being able to mate absent rehabilitation.[5]

The nursing studies point decidedly to the fact that life in an incubator, sensory deprivation, is not good for children.[6] See fn 3. The implications affecting marriages and civil unions will be discussed infra.

ARGUMENT

I.

PLAINTIFFS/APPELLEES DO NOT HAVE STANDING

This court ordered briefing on standing in light of *English v. Arizona*,

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[5] Harry Harlow, Ph.D., Wisconsin; Brownfield, ISOLATION (1965) Shultz, SENSORY RESTRICTION (1965); Siffre, SENSORY DEPRIVATION (1964); Siffre, HORS DU TEMPS (1963); Vernon, INSIDE THE BLACK ROOM (1963); Zuckerman, STRESS AND HALLUCINATORY EFFECTS OF PERCEPTUAL ISOLATION AND CONFINEMENT (1962); Baunach, MOTHERS IN PRISON (1985); Stanton, WHEN MOTHERS GO TO JAIL (1980); Bauman, PSYCHIATRIC REHABILITATION IN THE GHETTO (1974); Brownfield, THE BRAIN BENDERS (1972); Hess, THE PHYSICAL AND MENTAL GROWTH OF PREMATURELY BORN CHILDREN (1934).

[6] Hutchinson, THE BOOK OF FLOATING (1984); Jason, PARENTING YOUR CHILDREN (1989); Saltzman, CARING FOR THE PREMATURE BABY (1951); Stearns, LIVING THROUGH PERSONAL CRISIS (1985); Biermann, *Macht und Ohnmacht im Umgang sit Kindern/Power and Powerless in dealing with children*, 33(6) Praxis der Kinderpsychologie und Kinderpsychiatrie 206-13 (1984); Burns, *Use of oscillating waterbeds and rhythmic sounds for premature infant stimulation*, 19(5) Developmental Psychology 746-51 (1983); Katz, *Auditory stimulation and development behavior of the premature infant*, 20(3) Nursing Research 196-201 (1971); Kramer, *Extra Tactile Stimulation of the premature infant*, 24(5) Nursing Research 324-34 (1975); Segall, *Cardiac responsivity to auditory stimulation in premature infants*, 21(1) Nursing Research 15-19 (1972); White, *The effects of tactile and kinesthetic stimulation on neonatal development in the premature infant*, 9(6) Developmental Psychobiology 569-77 (1976); Wigg, *The life cycle: 0-3 years*, 5(4) Australian Journal of Family Therapy 293-96 (1984).

520 U.S. 43, 66 (1997)[7] [Hereinafter, *English*].

Amicus believes that Plaintiffs/Appellees do not have standing and thus this court ought to dismiss with directions to the trial court to vacate its decision and dismiss because plaintiffs:

> Are estopped from litigating on grounds of collateral estoppel by the decision of the California judgment affirmed by the California Supreme Court;
>
> Plaintiffs waived the issue because they did not seek a petition for writ of certiorari. A federal trial court ordinarily is not the court to tell a State Supreme Court that their decision on California law is wrong.
>
> Plaintiffs cannot show injury in view of their right to a civil union that gives them everything a marriage provides, except the possibility of having a child begotten and born by the partners of the union.

In *English*, the court found lack of standing, directed the 9th Circuit to dismiss the appeal, with directions to the trial court to dismiss the case. This case has the same fact pattern, thus it is a viable alternative effective. Amicus suggests, for reasons stated below that is the most efficient means of disposing of the case.

English observed that:

> "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court. See Rescue Army, 331 U.S.,

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[7] The Court also observed that legislators had standing as representatives of the People in protecting laws enacted by the legislative branch. However that may be, we are not speaking here of legislation by the legislative branch, but of a constitutional provision enacted by the People, who, under our scheme of things, see below, are the Sovereign, thus standing to protect Constitutional provisions on the same basis that legislators have standing to protect acts of the legislative branch.

> at 573 -574. "Speculation by a federal court about the meaning of a state statute **in the absence of prior state court adjudication** is particularly gratuitous . . . that state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring). [Emphasis added.]
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> "Blending abstention with certification, the Ninth Circuit found "no unique circumstances in this case militating in favor of certification." 69 F. 3d, at 931. Novel, unsettled questions of state law, however, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures. Those procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions. See supra, at 31. Taking advantage of certification made available by a State may "greatly simplif[y]" an ultimate adjudication in federal court. See Bellotti, 428 U.S., at 151 ."

The fact of the matter is that the California Court found Prop 8 Constitutional, and therefore it is settled California Law. Under the *Erie Doctrine,* Prop 8 is the law of the State, which federal courts are required to respect, so long as it is not offensive to clearly established fundamental rights.[8] *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996). The defendants' remedy was to seek a petition for *writ of certiorari* in the U.S.

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[8] "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. ... 'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.' . . . . The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938). *See also,* Breyer, Active Liberty (2009) [A judge should not substitute his "juster" for the law as written.] "Under the *doctrine of Erie R. Co. v. Tompkins*, 304 U.S. 64, federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996).

Supreme Court. Evidently, rather than seek certiorari, they chose a trial court. They waived their rights to further litigation on the issue because it is *res judicata*.

Furthermore, Plaintiffs cannot show injury in view of their right to a civil union that gives them everything a marriage provides, except the possibility of having a child begotten and born by the partners of the union. See infra, p. ___

Amicus suggests that this Court dismiss this appeal, with directions to the Court below to vacate its judgment and dismiss that action.

II.

THE VALIDITY OF PROPOSITION 8

In *Strauss v. Horton* (*Hollingsworth*) (2009) 46 Cal.4th 364 (Prop 8 Case), the court had before it the question: "Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to the California Constitution? (See Cal. Const., Art. II [9] and Art. XVIII, §§ 1- 4.)"

Amicus argued in the California Court that:

"The People are the sovereign of both the national government and of the State of California. U.S. Constitution, Preamble;[10] 10th Amendment[11];

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[9] ARTICLE 2 VOTING, INITIATIVE AND REFERENDUM, AND RECALL

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.

[10] "We, the People of the United States, … do ordain and establish this constitution …"

[11] "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."

California Constitution, Preamble[12], 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 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; 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

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12 "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."

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.”

The court held, in summary, “ . . . . Prop 8 carves 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.”

The court went on to hold that Prop 8 was valid, and that it did not infringe on the equal rights of those wishing to engage in “a same sex marriage.” Prop 8, at 390.

As the final pronouncement of California Law, federal courts are bound to abide by that decisions, unless clearly erroneous under the *Erie Doctrine*. Erie RR v. Tompkins, 304 U.S. 64 (1938).

This court, should dismiss with directions to the trial court to vacate its judgment and dismiss the case with prejudice for lack of standing.

III.

PROP 8 DOES NOT VIOLATE THE “EQUAL RIGHTS” OF THOSE DESIRING “A SAME SEX FAMILY LIFE”

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, where propagation is not possible, or to have sex with the opposite sex, where

propagation of the family is possible, 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.

It is obvious as a factual matter the two classes are different, one to breed[13], the other not to breed, [14] and it is common knowledge that the general opinion is that they are different relationships.

Hence, there is no affront to the 1st Amendment, 14TH Amendment, or any discriminatory laws of the United States.

CONCLUSION

WHEREFORE, *Amicus Curiæ* Reilly prays that this court find that

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[13] That the same sex union can go outside the Union to adopt, or use a surrogate mother, or use a sperm donor is not relevant. The marital union produces its children within the union. Same sex unions must go outside the union to find a suitable third party raising serious questions relating to DNA and a future need to know for hereditary diseases. See footnote 9, below. Moreover, as Harry Harlowe, PhD, observed, the failure to bond can have serious consequences in later life. In the heterosexual union, sons can imprint on fathers, and daughters can imprint on mothers, and both learn how to interact. In same sex unions, a child is denied the opportunity to know and understand the heterosexuality of society, thus missing a key ingredient in growing into a healthy member of society with the ability of making a knowing, intelligent, and voluntary choice as to their life style, and producing posterity that society may endure. See, Lynch, "*Posterity: A constitutional Peg for the Unborn*," 45 AJJ 401 (1995).

[14] The U.N. Convention on the Rights of the Child provides for the human identity rights of the newborn infant in articles 7, 8 and 9.

Proposition 8 is a valid exercise of the sovereign, and such other and further relief as the court deems just under the circumstances.

Dated: 9/22/2010

Respectfully submitted,

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

Certificate of Length
FRAP, R. 28,1(e)(2)(A)(1) [14000 words]; R. 29(d)[1/2]

I hereby certify that Microsoft Word reports that there are 3300 words in this document.

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

CERTIFICATE OF SERVICE

I, the undersigned, am not a party to the above action, and over the age of 18. My business address is POB 215802, Sacramento, Ca 95821-8802.

I am depending on the CM\ECF filing and automatic service to complete service on all parties.

I declare under penalty of perjury under the Laws of the United States that the foregoing is true and correct and that this declaration was executed on September 22, 2010.

JAMES JOSEPH LYNCH, JR.
Declarant