

Case No. S147999

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE MARRIAGE CASES
JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365

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After A Decision of the Court of Appeal
First Appellate District, Division Three
Nos. A110449, A110450, A110451, A110463, A110651, A110652
San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038
Los Angeles Superior Court No. BC088506
Honorable Richard A. Kramer, Judge

**BRIEF OF *AMICUS CURIAE* EQUAL JUSTICE SOCIETY
IN SUPPORT OF PARTIES
CHALLENGING THE MARRIAGE EXCLUSION**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel certifies, pursuant to Rule 8.208 of the California Rules of Court, that he represents Equal Justice Society, which is an organization joining in the attached application and brief of *amicus curiae*:

Dated: September 26, 2007.



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Statement Of Interest

The Equal Justice Society is a national organization of scholars, advocates and citizens that seeks to promote equality and enduring social change through law and public policy, public education, and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Specifically, EJS works to ensure that antidiscrimination law and jurisprudence continue to address racial and societal inequities in a responsible fashion. Consistent with that mission, EJS works to confront all manifestations of invidious discrimination and second-class citizenship. Such threats to our collective dignity spring from a common source and endanger us all, no matter the context in which they arise.

Introduction

The Equal Justice Society respectfully submits this brief to respond to the vision of equality propounded by the State through the brief of the Attorney General. In its attempt to defend the discriminatory exclusion of same-sex couples from the state institution of civil marriage, the State offers an account of the concept of equality under the California Constitution, and of the judicial response that antigay discrimination should provoke under that charter, that is both misguided and disturbing. The protection of disfavored minorities against invidious, persistent, and long-standing discrimination is both a proper and a central function of judges in

our constitutional system of government. This Court has long defended that role, setting a worthy example in the elimination of state-mandated inequality in the modern era. The State urges this Court to adopt an approach to antigay discrimination that would distort the principles that have guided the protection of equal citizenship in this State. The Court should decline that invitation. For over half a century, both this Court and the Supreme Court of the United States have embraced, as one of their central functions, the elimination of caste and second-class citizenship from the American community. The present case calls squarely upon this Court to take up that role once again.¹

I. The State Fails to Understand the Function that the Judiciary Performs When it Protects the Equal Status of All Citizens.

The State places great weight upon arguments concerning the role of the judiciary and the importance of deferring to legislative or popular preferences. (See Answer Brief of State of California and the Attorney General to Opening Brief on the Merits (hereafter AG Brief) at pp. 43–54.) We agree that it is important to focus on the proper role of the judiciary in this case. The State’s discussion misconceives that role, attempting to lay emphasis on a “problem” of judicial legitimacy that this dispute does not

¹ In addition to the arguments set forth herein, the Equal Justice Society wishes to indicate its support for the arguments contained in the *amicus curiae* brief of the American Psychoanalytic Association. That brief addresses aspects of the principle of equality that are different from those explored here, but no less important.

present. This is a case about equality — about the ability of a disfavored minority of citizens to enjoy the same status under state law that is afforded to everyone else. The enforcement of equal status among all citizens is one of the central functions of the judiciary in the modern era.

A. The Respondents Do Not Seek to Restrict the Policy Options Available to the Legislature; Rather, They Seek to Participate in the Policy that the Legislature Itself has Chosen.

The judiciary performs different functions when it reviews the constitutionality of a law that applies to all people, on the one hand, and when it reviews the constitutionality of a law that singles out a minority of citizens for inferior treatment, on the other. It is the difference between being asked to foreclose a legislative policy option altogether and being asked to find that a policy, otherwise legitimate and within the powers of the legislature, must simply be applied equally to all citizens.

When a court is asked to review a law under one of those provisions of the Constitution that place categorical limitations on the types of policies that the legislature can enact — the right to privacy, for example, which may forbid restrictions on intimate or personal conduct, or the right to free speech, which may prohibit government from interfering with expression — it is being asked to determine whether the legislature may *ever* pursue the challenged policy. A finding that the law is unconstitutional under one of these provisions may permanently foreclose the legislature from utilizing

that particular policy solution. It is in such cases that invocations of judicial deference and modesty are most appropriate. Even then, principles of judicial deference only constitute the beginning of the analysis. Constitutions embody values, and those values sometimes warrant a declaration that a given type of law is, in fact, categorically prohibited — that the legislature may never regulate the people in a certain manner. But it is fair to say that, when such a declaration is what a litigant seeks, judges should be particularly mindful of the impact that their ruling will have upon the legislature's ability to respond to pressing social problems. Granting the requested relief may permanently constrain the options that the legislature can draw upon.

That is not this case.

When, in contrast, a court is asked to review a law that selectively makes rights, opportunities, or a preferred status available to only one class of citizens, while denying the benefits of that law to another class of citizens, a very different question is presented. A litigant who invokes the constitutional principle of equal protection is not asking the court to prohibit the legislature from pursuing a policy option altogether. Rather, the litigant is asking that the legislature be required to extend whatever policies it selects to all citizens in similar circumstances, rather than reserving its laws to one privileged group. Where it is such equality principles that are at stake, concerns over judicial deference and modesty

are less urgent. An equal protection claim does not pose any threat to the legislature's ability to craft whatever policy solutions it deems best for the people in its charge. It merely limits the legislature's ability to exclude one disfavored class of citizens from the policy solution it has chosen.

Ensuring the equal status of all citizens before the law is one of the central functions of the judiciary in the modern era — so much so that the principle of “Equal Justice Under Law” is inscribed above the entrance to the building of the Supreme Court of the United States. (See <http://www.supremecourtus.gov/about/westpediment.pdf> [as of Sept. 22, 2007].) “The Equal Protection Clause,” the Supreme Court has written, “was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.” (*Plyler v. Doe* (1982) 457 U.S. 202, 213 [102 S.Ct. 2382, 72 L.Ed.2d 786].) The Court reaffirmed this proposition in the opening passage of the very first decision in which it recognized the imperative for judges to ensure the equal status of gay men and lesbians.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” (*Plessy v. Ferguson* (1896) 163 U.S. 537, 559 [16 S.Ct. 1138, 1146, 41 L.Ed. 256] (dis. opn.).) Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

(*Romer v. Evans* (1996) 517 U.S. 620, 623 [116 S.Ct. 1620, 134 L.Ed.2d 855]; see also *Davis v. Passman* (1979) 442 U.S. 228, 235 fn.11 [99 S.Ct.

2264, 60 L.Ed.2d 846] [finding that equal protection claim by congressional staffer claiming sex discrimination is justiciable because such an equal protection claim “falls within the traditional role accorded courts to interpret the law, and does not involve a ‘lack of respect due [a] coordinate branch of government’” under the political question doctrine (quoting *Baker v. Carr* (1962) 369 U.S. 186, 217 [82 S.Ct. 691, 7 L.Ed.2d 663])].)

The application of these principles to the present dispute is straightforward. The litigants in this case do not challenge the constitutionality of marriage. They do not seek to place any limitations on the power of the legislature to craft general marriage policies for the people of California, nor to shape the rights, duties and obligations of marriage to respond to contemporary needs and priorities. The constitutional claim in this case will not restrict in any way the ability of the legislature to experiment with different solutions to intractable or unexpected problems in family law, now or in the future. The respondents seek only to be included in the marriage laws that the legislature has already adopted for the rest of the population.

B. The Authorities Relied Upon by the State Reaffirm the Proper Role of this Court in Ensuring Equal Justice Under Law.

The brief of the Attorney General conspicuously fails to recognize this basic distinction between the role of a court in prohibiting the

legislature from utilizing a challenged policy altogether and the role of a court in requiring only that the policy be applied equally to all citizens. The cases that the State relies upon in discussing the issue of judicial deference all involve categorical challenges to the constitutionality of contested policies. They are cases in which the plaintiffs have sought a declaration that a controversial law — a restriction on defamation remedies, or a law prohibiting physician-assisted suicide, or an abortion restriction, or the death penalty — was prohibited altogether. (See AG Brief, *supra*, at pp.49–51 [discussing *Washington v. Glucksberg* (assisted suicide), *Werner v. Southern California Associated Newspapers* (defamation), *Roe v. Wade* (abortion) and *People v. Anderson* (death penalty)].) The State cites no authority that has applied the extravagant principle of judicial deference that it invokes to a law that discriminates against a disfavored minority.

More telling still, the State invokes the dissenting opinion of Justice Frankfurter in *Baker v. Carr*, *supra*, 369 U.S. 186. *Baker* is indeed instructive. In that landmark equality case, the *majority* of the Supreme Court concluded that courts had a duty to ensure equal representation in federal legislative districts, overruling its own recent precedents to the contrary and rejecting Justice Frankfurter’s arguments about judicial deference. Frankfurter’s limited view about the role of the judiciary in enforcing equal citizenship rights did not carry the day. Indeed, this Court has already rejected the abdication of the judicial role that Justice

Frankfurter advocated in equality cases, and it did so in a case that involved sex discrimination, just as this case does. (See *Goesaert v. Cleary* (1948) 335 U.S. 464, 466 [69 S.Ct. 198, 93 L.Ed. 163] (lead opn. of Frankfurter, J.) [deferring to “legislative judgment” in upholding discriminatory law that excluded women from employment as bartenders]; declined to follow, *Sail’er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 17 fn.15 [95 Cal. Rptr. 239] [rejecting *Goesaert* and finding that sex discrimination requires strict judicial scrutiny].)

The State also cites then-Judge Ginsburg’s scholarly criticisms of *Roe v. Wade*, arguing that her writings are relevant to this Court’s consideration. We agree. Judge Ginsburg’s criticism did not lie with the Court’s decision to strike down the offending law in that case. Rather, it lay precisely with the failure of the Supreme Court of the United States to ground its reproductive rights decision on the principle of equal citizenship for women — a principle, Judge Ginsburg wrote, that would have offered a more clearly legitimate basis for exercising judicial power and hence would have strengthened the Court’s decision significantly. (See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade* (1985) 63 N.C. L. Rev. 375, 386 [“Overall, the Court’s *Roe* position is weakened, I believe, by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective.”].) Chief Justice Traynor, another authority upon

whom the State relies, was correct when he criticized those who carelessly respond to constitutional arguments with the “misbegotten catchphrase” of “judicial activism.” (Roger J. Traynor, *The Limits of Judicial Creativity* (1978) 29 Hastings L.J. 1025, 1030.)

Indeed, in the very decision of this Court upon which the State relies most heavily for its judicial deference argument — *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121 [216 P.2d 825] — Justice Traynor himself drew a clear distinction between the limits of the judiciary’s role in placing categorical constraints on legislative policies, on the one hand, and the continuing importance of the judiciary in ensuring equal protection of the laws to all citizens, on the other. The passage of *Werner* that the State quotes at such length in discussing the need for “judicial modesty” is contained within the Court’s extended response to a *Lochner*-style argument that the plaintiff made in that case. (See *id.* at p. 130; AG Brief, *supra*, at p. 49.) Erwin Werner had asked this Court to strike down the special damages requirement contained in California’s defamation law, arguing that the statutory hurdle to recovery undervalued the financial worth of a person’s reputation. Werner filed his claim in the late 1940s, when the Supreme Court of the United States had only recently repudiated the *Lochner* line of cases and ended the country’s long nightmare with aggressive judicial review of purely economic legislation. Justice Traynor used the dispute in *Werner* as an occasion for adding this

Court's voice to that repudiation. Invoking one of Justice Holmes's classic *Lochner*-era dissents, Justice Traynor made it clear that the California Constitution could not be used to revive the discredited "*Adair-Coppage* line of cases" that had done such harm in preventing states from "legislat[ing] against what are found to be injurious practices in their internal commercial and business affairs." (*Werner, supra*, 35 Cal.2d at p.129 [quoting *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.* (1949) 335 U.S. 525, 536–37 [69 S.Ct. 251, 93 L.Ed. 212]]; see also *id.* [discussing *Baldwin v. Missouri* (1930) 281 U.S. 586, 595 [50 S.Ct. 436, 74 L.Ed. 1056] (dis. opn. of Holmes, J.)].) It was in response to this type of interference with legislative policymaking that the *Werner* Court issued the pronouncements that the State relies upon, refusing to second guess the process of "trial and error" that is an inevitable feature of the legislature's selection of general regulatory policies. (*Id.* at p.130.)

But Erwin Werner also asserted an equal protection claim: He argued that the extension of certain privileges to the press and not to other speakers denied equal protection to defamation plaintiffs — specifically, to those who were harmed by defamation contained in radio and newspaper stories, as opposed to those harmed by some other communication. The Court rejected this argument on the merits (which is hardly surprising, since it is unclear whether "individuals defamed in radio or newsprint" even constitute a distinct class of people). But the treatment that the Court gave

to Werner's equality claim differed dramatically from its treatment of his *Lochner* claim. Gone was the language cited by the State that the Court had deployed in refusing to entertain Werner's economic due process argument. Where the equal treatment of citizens was concerned, the Court engaged deeply with the merits of the claim, explaining that "[a] classification is reasonable . . . only if there are differences between the classes and the differences are reasonably related to the purposes of the statute." (*Werner, supra*, 35 Cal.2d at p.131; see also *id.* ["The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free."].) Although the particular statute at issue in *Werner* was able to pass muster under the low level of scrutiny that applied in that case, the majority made a clear commitment to give serious and thorough attention to Werner's equality claim, drawing a contrast to its categorical rejection of his *Lochner*-style economic due process claim that was both sharp and deliberate. This Court has gone on to describe *Werner* as "the definitive statement of the subject . . . of the equal protection provisions of our state Constitution," *Hays v. Wood* (1979) 25 Cal.3d 772, 790 [160 Cal. Rptr. 102]— a decision embodying the principle that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." (*Id.* at pp. 786–87;

see also *id.* at p. 787 [explaining that, even when a classification provokes only rational-basis review, this Court’s “function is, as we have recently indicated, to conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals”] [citations].)

In short, the State has failed to understand the import of *Werner*. The decision constitutes a strong affirmation of the judiciary’s role in securing the equal status of all people in California before the law. The *Werner* Court used the rejection of a different, inappropriate and discredited form of judicial review as the means of highlighting the continuing role of judges in enforcing equality principles.

II. The State’s Approach to Equal Protection is Inconsistent with Established Precedent and Presents a Vision of Equality Doctrine that this Court Should Reject.

The State’s misconception about the role of the judiciary in enforcing equality principles is coupled with a deep misunderstanding of the content of those principles. The State asserts that, with the recent enactment of laws that have begun to recognize the equal citizenship of gay people in California, all remaining acts of discrimination against gay citizens under California law may now be treated as a matter of little judicial concern and can be validated with minimal constitutional scrutiny. (AG Brief, *supra*, at pp. 24–38.) This proposition is as wrong as it sounds. Just as classifications based on race, sex, and religion continue to be

