

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**CITY AND COUNTY OF SAN FRANCISCO, THE
COUNTY OF SANTA CLARA, and THE CITY OF
LOS ANGELES, et al.,**

S168078

Petitioners,

v.

**MARK D. HORTON, in his official capacity as State
Registrar of Vital Statistics of the State of California
and Director of the California Department of Public
Health, et al.,**

Respondents.

**RESPONDENTS' PRELIMINARY RESPONSE TO PETITION FOR
EXTRAORDINARY RELIEF, INCLUDING WRIT OF MANDATE AND
REQUEST FOR IMMEDIATE INJUNCTIVE RELIEF**

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**TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE
OF CALIFORNIA, AND THE HONORABLE ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT:**

Pursuant to this Court's request dated November 12, 2008 and California Rules of Court, rule 8.490(g), respondents^{1/} submit this preliminary response to the Petition for Extraordinary Relief filed by petitioners City and County of San Francisco, et. al.

I.

INTRODUCTION

Three petitions seeking writs of mandate have been filed challenging Proposition 8 as an improper amendment of the California Constitution, including two petitions seeking stays of the initiative pending judicial review. The petitions raise issues of statewide importance,

1. The Attorney General is filing substantially-identical preliminary responses in *Strauss v. Horton*, No. S168047, *Tyler v. State of California*, No. S168066, and *City and County of San Francisco v. Horton*, No. S168078 ("CCSF"). In addition, the Attorney General is filing a separate response for the Secretary of State, who is named as a respondent solely in the *Tyler* matter. The *Strauss* and *Tyler* matters ask this Court to stay Proposition 8, the *CCSF* petition does not.

The respondents in *Strauss* and *CCSF* are Mark D. Horton, in his official capacity as State Registrar of Vital Statistics of the State of California of the California Department of Public Health; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; and Edmund G. Brown Jr., in his official capacity as Attorney General for the State of California. The respondents in *Tyler* are the Attorney General, the Secretary of State, and the "State of California."

implicating not only California's marriage laws but also the initiative process and the Constitution itself. It is appropriate for this Court to address these issues to provide certainty and finality in this matter.

Accordingly, respondents support the request that this Court accept these petitions and address these important issues.

Respondents oppose the issuance of a stay because a stay would change the status quo, allowing marriages that might later be invalidated, and would engender uncertainty about the legal status of same-sex marriages in California. The balance of hardships favors denying the stay request.

II.

FACTS RELEVANT TO THIS OPPOSITION

In *In re Marriage Cases* (2008) 43 Cal.4th 757, this Court concluded that Family Code sections 300 and 308.5 violated the equal protection clause of the California Constitution and the right to marry. The Court held that those statutes constituted sexual orientation discrimination, that sexual orientation is a suspect classification, and that the State lacked a compelling interest supporting the restriction on marriage. (*Id.* at pp. 783-785.) In light of these conclusions, the Court struck the limitation of marriage as being "between a man and a woman" from Family Code section 300 and struck down Family Code section 308.5 in its entirety. (*Id.* at p. 857.)

Although the Secretary of State has not yet certified the results of the November 4, 2008 General Election, it appears from the votes tabulated so far that the voters approved Proposition 8. Proposition 8 adds a provision to the California Constitution that is identical to former Family Code section 308.5. It states: "Only marriage between a man and a woman is valid or recognized in California." (Cal. Const., Art. I, § 7.5.) The Election Code gives county registrars of voters up to 35 days to report their final results to the Secretary of State. (Elec. Code, § 15375.) The Secretary of State's deadline for announcing final results is 39 days after the election. (Elec. Code, § 15501.) Thus, the results must be finalized by December 13, 2008. The Constitution provides that an initiative approved by the majority of voters is effective on the day after the election. (Cal. Const., Art. XVIII, § 4.)

III.

**THE PETITIONS PRESENT A LEGAL
ISSUE OF STATEWIDE IMPORTANCE,
AND A DECISION BY THIS COURT IS
APPROPRIATE**

The California Supreme Court has original jurisdiction in mandamus actions pursuant to article VI, section 10, of the California Constitution, and may exercise that jurisdiction in appropriate cases when the issues presented by the petitions are of great public importance and require prompt resolution. (*Clean Air Constituency v. California State Air Resources Board* (1974) 11 Cal.3d 801, 808.) The petition in this case meets the criteria for this Court's exercise of its original jurisdiction for the following two reasons.

First, whether Proposition 8 is an amendment or revision to our state's constitution is an important question of law that should be reviewed by California's highest court. This Court has often exercised its original jurisdiction in cases concerning the constitutionality of a proposition amending the California Constitution; more specifically, whether the "amendment" is a "revision." (*See Legislature v. Eu* (1991) 54 Cal.3d 492, 500; *Raven v. Deukmejian* (1991) 52 Cal.3d 336, 340; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 (*Amador Valley*)). A revision can be accomplished either by a two-thirds majority vote by the Legislature prior to approval by the voters or by the voters after adoption at a constitutional convention authorized by the voters. (Cal. Const., Art. XVIII, §§ 1, 2.) Based on the arguments raised in the petition, it appears that this Court's review will be limited in nature and will not have to "consider or weigh the . . . social wisdom or general propriety" of Proposition 8. (*Amador Valley, supra*, 22 Cal.3d at p. 219.) Rather, the court's sole function will be to "evaluate [the amendment] legally in the light of established constitutional standards." (*Ibid.*) These questions appear to be strictly legal in nature, and do not require fact-finding by a trial court.^{2/}

2. The Court's jurisprudence to date holds that "for a revision to be found, 'it must necessarily or inevitably appear *from the face of the challenged provision* that the measure will substantially alter the basic governmental framework set forth in our Constitution.'" (*Rippon v. Bowen* (2008) 160 Cal.App.4th 1308, 1317, original italics, quoting *Legislature v. Eu, supra*, 54 Cal.3d at p. 510.) Thus, "[i]f it does not necessarily or inevitably appear from the face of an initiative that the provisions will substantially alter the basic governmental framework, the change is not a revision to the constitution." (*Ibid.*)

Second, review by this Court is necessary to ensure uniformity of decision, finality and certainty for the citizens of California. The constitutionality of the change created by Proposition 8 impacts whether same-sex marriages may issue in California, and whether same-sex marriages from other states will be recognized here.^{3/} There is significant public interest in prompt resolution of the legality of Proposition 8. This Court can provide certainty and finality in this matter.

Accordingly, the respondents^{4/} support the petitioners' request that this Court exercise its original jurisdiction and accept review of the petitions.

IV.

A TEMPORARY STAY WOULD CHANGE THE STATUS QUO AND MAY CAUSE UNCERTAINTY WITH RESPECT TO POST-ELECTION SAME-SEX MARRIAGES

Under the California Rules of Court, a petition for an original writ may include a request for a temporary stay. (Cal. Rules of Court, rule 8.116.) A petition requesting a temporary stay must "explain the urgency" supporting the request. (Cal. Rules of Court, rule 8.490(b)(7).) In at least one case, this Court has temporarily stayed operation of a portion of an

3. Respondents do not oppose the petition for intervention filed by the Campaign for California Families

4. Petitioners have brought this action against two officials of the State Department of Public Health, Doctors Mark Horton and Linette Scott. Doctors Horton and Scott file this preliminary opposition while reserving their right to assert in subsequent pleadings that they are not proper parties to this action because county officials, rather than state officials, administer the issuance of marriage licenses.

initiative measure pending review of constitutional challenges. (*See Legislature v. Eu, supra*, 54 Cal.3d at p. 500 [temporarily staying operation of section 5 of Proposition 115, which imposed budgetary restrictions on the Legislature, pending review of the issues presented in original writ proceedings].)

Two of the three petitions pending before the Court seek an immediate stay or injunctive relief. In *Strauss v. Horton*, no. S168047, the petitioners ask the Court for “an immediate injunction or order staying the enforcement of Proposition 8 . . . and prohibiting Respondents from taking any acts to enforce or from directing any persons or entities to enforce Proposition 8 during the pendency of these writ proceedings.” (*Strauss Pet.*, pp. 9-10, ¶ 4.) In *Tyler v. Horton*, no. S168066, the petitioners request “an immediate stay . . . by which the State of California is to desist from recognizing the validity of, enforcing or maintaining section 7.5 of the Constitution, as adopted in Proposition 8, and shall continue to issue marriage licenses to same-sex couples who are otherwise qualified to issuance of such licenses.” (*Tyler Pet.*, p. 12, ¶3.)

“[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.” (*White v. Davis* (2003) 30 Cal.4th 528, 554.) “‘*The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause.*’” (*Ibid.*, original italics, quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.) “[T]hus a court faced with the question

whether to grant a preliminary injunction cannot ignore the possibility that its initial assessment of the merits, prior to a full adjudication, may turn out to be in error.” (*Id.* at p. 561.)

Following this rule, this Court in *White v. Davis* overturned a preliminary injunction that barred expenditure of public funds by the State Controller during a budget impasse. (*White v. Davis, supra*, 30 Cal.4th at pp. 561-562.) Noting the potential harm to others, including state employees, this Court found that “the balance of harms dramatically favored denial of the preliminary injunction.” (*Id.* at p. 561.)

In *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, this Court recognized that uncertainty in the legal status of marriages pending subsequent legal rulings could cause irreparable harm. In *Lockyer*, this Court invalidated thousands of same-sex marriages that had been registered by local public officials. (*Id.* at pp. 1113-1119.) Rejecting requests to delay a decision on the validity of these marriages, this Court warned that such action “might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm.” (*Id.* at p. 1117.) Additionally, this Court expressed concern about “creating uncertainty and potential harm to others who may need to know whether the marriages are valid or not.” (*Id.*, at p. 1118.)

The concerns expressed by this Court in *Lockyer* bear directly on the request for a temporary stay made by the *Strauss* and *Tyler* petitioners. A stay of Proposition 8 pending the outcome of these proceedings would inevitably lead to uncertainty concerning the legal status of post-election same-sex marriages that take place solely due to the

issuance of a temporary stay. This uncertainty would be present regardless of the final outcome of these proceedings. For example, during the pendency of these proceedings, persons who take advantage of a stay to enter into same-sex marriages would be left uncertain as to the ultimate legal standing of their marriages. And, if this Court upholds Proposition 8, questions would inevitably arise concerning the decision's effect on these marriages.^{5/} Moreover, depending on the outcome of these proceedings, difficult questions may arise concerning the effect of Proposition 8 on couples who obtain out-of-state same-sex marriages during an interim stay. Given the significant legal consequences that follow the marital relationship, such concerns weigh against a temporary stay.

“Where . . . a plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest *must* be considered.” (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1471, original italics, internal brackets and quote marks omitted.) The broader public concerns implicated by the uncertainty that would be caused by a temporary stay counsel that this Court should exercise caution in responding to the request of the *Strauss* and *Tyler* petitioners. For the reasons stated above, the public interest would be best served not by issuing a temporary stay but by an expedited resolution of the important issues raised by the petitions.

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5. Although the Attorney General opposes the issuance of a stay order, nothing in this preliminary opposition should be construed to suggest that the Attorney General questions the validity of any same-sex marriage that occurred after the effective date of this Court's decision in *In re Marriage Cases*, but before November 5, 2008.

V.

CONCLUSION

In this preliminary response, Respondents agree that this Petition presents issues of sufficient public importance to warrant the exercise of original jurisdiction by this Court. But, due to the potential uncertainty that may be caused in important legal relationships by a temporary stay, the public interest would be better served by allowing Proposition 8 to remain in effect while expediting briefing and decision on these writ petitions.

Dated: November 17, 2008

Respectfully submitted,

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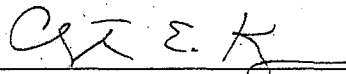
CERTIFICATE OF COMPLIANCE

(CALIFORNIA RULES OF COURT, RULE 8.208 (c) (1))

I hereby certify that:

Pursuant to California Rules of Court, Rule 8.208 (c) (1), in reliance upon the word count feature of the software used, I certify that the attached **RESPONDENTS' PRELIMINARY RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, INCLUDING WRIT OF MANDATE AND REQUEST FOR IMMEDIATE INJUNCTIVE RELIEF** contains 2190 words.

Dated: November 17, 2008



CHRISTOPHER E. KRUEGER

DECLARATION OF SERVICE BY FACSIMILE AND OVERNIGHT MAIL

Case Name: **City and County of San Francisco, et al. v. Mark B. Horton, et al.**

Case No.: **S168078**

I declare:

am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with **Golden State Overnight and FedEx**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business. My facsimile machine telephone number is (916) 324-8835.

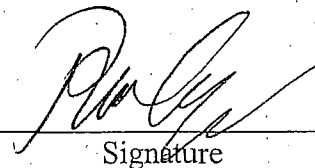
On November 17, 2008, I served the attached **Respondents' Preliminary Response to Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(g)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

PLEASE SEE THE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 17, 2008, at Sacramento, California.

Rowena A.R. Aquino

Declarant



Signature

SERVICE LIST FOR CITY AND COUNTY OF SAN FRANCISCO v. HORTON

CALIFORNIA SUPREME COURT CASE NO. S168078

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