SUPREME COURT OF THE STATE OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)) **IN RE MARRIAGE CASES**	**Case No. S147999** Judicial Council Coordination Proceeding No. 4365 First Appellate District No. A110449 (Consolidated on appeal with case nos. A110540, A110451, A110463, A110651, A110652) San Francisco Superior Court Case No. 429539 (Consolidated for trial with San Francisco Superior Court Case No. 429548)

AMICUS CURIAE BRIEF BY PROFESSOR JESSE H. CHOPER IN SUPPORT OF PETITIONERS

The Honorable Richard A. Kramer
Superior Court for the City and County of San Francisco

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INTRODUCTION

The opinion of the Court of Appeal majority holding that the State's denial of marriage licenses to homosexual couples is constitutional suggests at several points a concern about the political ramifications of a ruling in the other direction. For example, as part of its application of rational basis review, the majority emphasized that marriage "is a social institution of profound significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature." *In re Marriage Cases*, 49 Cal.Rptr.3d 675, 723 (Cal. App. 1st Dist. 2006). The majority added: "Respect for the considered judgment of the Legislature and the voters is especially warranted where the issue is so controversial and divisive as is the question whether gays and lesbians should be permitted to marry their same-sex partners." *Id.* at 725. And in discussing the Massachusetts Supreme Judicial Court decision striking down that state's ban on marriage for homosexual couples, the majority repeatedly described that decision as "controversial." *See, e.g., id.* at 701 n.16, 703.

Some parts of the State's brief to this Court appear to express similar concerns. It asks the Court to rule in the State's favor in part "to avoid the social risks inherent in overly rapid change that rends the fabric of society in ways that cannot be readily assimilated and that may prompt backlash reactions." Answer Brief of the State of California and the Attorney General to Opening Briefs on the Merits ("A.G. Answer") at 2. *See also id.* at 44, 50, 51. The State also makes reference to the "consequences" of the controversy generated by past decisions such as *People v. Anderson*, 6 Cal.3d 828 (1972). A.G. Answer at 51 n.27.

As a longtime supporter of judicial independence, as well as judicial restraint in appropriate circumstances, amicus Professor Jesse H. Choper urges the Court to conduct its constitutional analysis without reference to these factors. Although amicus believes, as a doctrinal matter, that there is a strong argument in favor of treating homosexuals as a suspect class for equal protection purposes, he will leave that discussion for others. His purpose here is to emphasize that in our democratic system, in cases involving the constitutional rights of individuals, particularly individuals from minority groups, who are the beneficiaries of most constitutionally secured personal liberties, courts should apply constitutional doctrine objectively, without speculating about the popular response that a ruling may or may not create. A high court might sometimes consider the controversial nature of a case when deciding to deny review, but fear of controversy should not be used to deny constitutionally secured individual rights. For courts to treat public reaction as an element of substantive constitutional interpretation in this area would be flatly inconsistent with the politically neutral and principled decisionmaking role that supports the judiciary's counter-majoritarian existence in our democratic system.

DISCUSSION

Restraint is an essential attribute of an effective judiciary. Because of their counter-majoritarian nature, courts should avoid inserting themselves into controversial disputes when it is not necessary for them to do so. As Professor Alexander M. Bickel noted in the context of the federal system, "there is a natural quantitative limit to the number of major, principled interventions the Court can permit itself . . . A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the

function of constitutional adjudication." Bickel, The Supreme Court and the Idea of Progress 94-95 (1970).

It would thus be unrealistic to suggest that the judiciary should ignore the possibility that court rulings are potentially subject to popular hostility, or the possibility that such rulings may chip away at its institutional legitimacy. The challenge, however, comes in distinguishing between the types of controversies courts should avoid for this reason, and the types of controversies in which courts should decide without regard to any concern about popular reaction. Put another way: what are the areas of judicial review in which principled constitutional adjudication of the merits of cases brought to the courts is so essential that our democratic system should not sacrifice it? In contrast, what are the areas in which involvement of the courts is not necessary to the effective operation of our democracy? If the unnecessary controversies can be identified and avoided, the judiciary can fulfill its counter-majoritarian role from a position of greater strength and legitimacy.

In his writings on the role of the United States Supreme Court, Professor Choper has identified several key areas in which it should not intervene. For example, he argues that the Court should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states. Rather, the constitutional issue of whether federal action is beyond the authority of the central government should be treated as nonjusticiable. Judicial intervention in these cases is not critical because the states are forcefully represented in the national political process; our constitutional design thus tends to ensure that the political process will fairly reconcile the competing interests. By the same token, constitutional disputes between the states and the federal government often

generate significant controversy and strong feelings – particularly among the legislative and executive leaders of the governments involved. No matter how the Court decides such controversies, the result is likely to produce resentment from the losing side. But the displeasure is unnecessarily provoked, because the involvement of the judiciary in this area is not essential for a fair resolution of the constitutional issue.[1]

A second key area into which courts should avoid treading involves disputes *between* the political branches of government, and while Professor Choper has addressed this in the context of the federal system, he submits that it may well apply by analogy to most state systems. Each political branch – legislative and executive – has tremendous incentives jealously to guard its constitutional boundaries and assigned prerogatives. Or, as Alexander Hamilton put it, each has the "necessary constitutional means and personal motives to resist encroachments of the other." The Federalist, No. 51 at 225. Given that both branches have sufficient power in the constitutional scheme, they will participate meaningfully in defining the reach of their respective authorities – a process that promises trustworthy resolution without the expenditure of precious judicial capital.[2]

In contrast to the matters discussed above, resolution of alleged violations of individual constitutional rights is *the* central function of judicial review. The fact is that the processes of democracy ordinarily bode

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[1] *See generally* Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court, 171-259 (1980) (hereinafter "Choper").

[2] *See generally* Choper at 260-379. *See also* Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 Const. Commentary 335 (2001).

ill for the security of personal rights, and, as experience has shown, such constitutionally guaranteed liberties are not infrequently endangered by popular majorities. Accordingly, the custodianship of these individual rights should be assigned to the governing bodies most insulated from political responsibility and least beholden to self-absorbed and excited majoritarianism. As Justice Robert H. Jackson stated in the context of the federal system, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Indeed, "most sophisticated societies have been willing – and have thought it socially useful – to acknowledge the predicament of the individual who is making a claim for fair and equal treatment, not only against his fellows, but against a government itself. They have set up, in the person of judges, individuals specially trained and deputed to do justice even in the face of society's very hostility, and to apply the policy which the society has preordained for the case." Louis L. Jaffe, Judicial Control of Administrative Action 475 (1965).

Because protection of individual constitutional rights is the quintessential purpose of judicial review in our democratic system, it is not appropriate for courts to take political considerations into account when deciding such issues. For a court to decline protection until popular attitudes have reached that point of consensus at which its decisions will be readily accepted is to shirk its essential duty and contradict its critical function as the government agency of last resort for the guardianship of constitutional liberties. In individual rights cases, courts must apply constitutional doctrine rigorously and objectively. Absence of objective

judicial review risks rendering the constitutional rights of minorities little more than grandly stated admonitions.

To be sure, decisions protecting the constitutional rights of minorities have the potential to be controversial. Although courts can often take action in behalf of individual liberty "without ever making a dent in the public consciousness,"[3] it is also true that a degree of hostility will sometimes be provoked. But the impact of controversial rulings can be less than the initial public reaction might suggest. It cannot be forgotten that the people, albeit sometimes discontentedly, usually heed judicial appeals to conscience and selflessness; a high court's message can have a proselytizing and sobering effect, converting an impetuous popular mind into one more receptive to reason. Unconstitutional policies invalidated by court rulings often cannot muster sufficient political backing for reinstatement, even if they may have originally enjoyed popular support for enactment. One example would appear to be the decision of the Massachusetts Supreme Judicial Court on this very issue. *See* City and County of San Francisco's Consolidated Reply Brief at 29-30.[4]

It is true that the judiciary's public prestige and institutional capital is exhaustible. Consequently, courts should decline to enter certain constitutional controversies that do not involve individual rights, such as

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[3] Kenneth M. Dolbeare, *The Public Views the Supreme Court*, in Law, Politics and the Federal Courts 194, 211 (Herbert Jacob ed., 1967).

[4] Conversely, a ruling that defers to discriminatory popular sentiment can serve to entrench that sentiment. "Today's declaration of constitutionality will not only tip today's political balance but may add impetus to the next generation's choice of one policy over another." Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 131 (1962).

constitutional conflicts between the executive and legislative branches. Avoiding such controversies serves to ease the task of judicial review in cases of individual constitutional liberties, preserving the judiciary's institutional capital and its ability to serve its most vital role – a role that no other organ of government can trustworthily perform on a regular basis.[5]

There are also serious practical problems with a court placing a thumb on the scales in favor of popular opinion when adjudicating individual rights cases. Judges are, generally speaking, not trained to make social-scientific predictions, and even those who are so trained will often get it wrong. Again, the reaction over the past several years of the citizens of Massachusetts to their high court's ruling on the right of homosexuals to marry would appear to be an example. "[I]t is easy to misjudge or distort the impact of a Court pronouncement, and guesses about that impact are treacherous sources of precepts for Court behavior." Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 8 (1964).

Finally, rulings by a high court in favor of the government that are motivated by concern about popular reaction would not merely harm the individuals whose constitutionally protected personal liberties are at stake. It would threaten to damage the legitimacy and independence of the judiciary in a way that a principled yet controversial ruling would not. Were the judiciary to simply become another political branch, it would diminish the likelihood that in future cases the other branches, and society

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[5] For a more thorough discussion of the essential role of the judiciary in safeguarding constitutionally protected minority rights and the need to preserve institutional capital for decisions on such matters, see generally Choper at 60-170.

at large, will respect its rulings as the final, authoritative word on the constitutional principles that form the bedrock of stability in our democracy.

CONCLUSION

For these reasons, amicus urges the Court to decide this case through an objective application of constitutional doctrine, without regard to concerns about controversy and adverse reactions by the populace.

Dated: September 26, 2007

By: _____
JON B. STREETER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,067 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 26, 2007.

By: _____
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PROOF OF SERVICE

I, MARIA CANALES, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. My address is 710 Sansome Street, San Francisco, California, 94111.

On September 26, 2007, I served:

***AMICUS CURIAE* BRIEF BY PROFESSOR JESSE H. CHOPER IN SUPPORT OF PETITIONERS**

on the interested parties in said action, by placing a true copy thereof in sealed envelopes addressed as follows:

ATTACHED SERVICE LIST

and served the named document on the parties as set forth on the attached list in the manners indicated below:

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☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelopes and caused such envelopes to be delivered by hand at the above locations by a professional messenger service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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