

Case Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al., Petitioners,

v.

MARK B. HORTON, State Registrar of Vital Statistics, etc, et al., Respondents;
DENNIS HOLLINGSWORTH, et al., Intervenors.

ROBIN TYLER, et al., Petitioners,

v.

THE STATE OF CALIFORNIA, et al., Respondents;
DENNIS HOLLINGSWORTH, et al., Intervenors.

CITY AND COUNTY OF SAN FRANCISCO, et al., Petitioners,

v.

MARK B. HORTON, et al., Respondents;
DENNIS HOLLINGSWORTH, et al., Intervenors.

**APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND
BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS WATCH *ET*
AL. IN SUPPORT OF PETITIONERS**

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**APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND
STATEMENT OF INTEREST OF *AMICI CURIAE***

Pursuant to California Rule of Court 8.200(c), Human Rights Watch and the affiliated *amici curiae* request leave of this Court to file the attached *amicus curiae* brief in support of Petitioners. Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. It is the largest U.S.-based international human rights organization. Since its founding in 1978, Human Rights Watch has worked tenaciously to lay the legal and moral groundwork for deep-rooted change and has fought to bring greater justice and security to people around the world.

The Human Rights Watch California Committee North is a network of members and opinion leaders in the Bay Area, from a variety of backgrounds, who support Human Rights Watch's work. The committee is part of the Human Rights Watch Council, a network of committees across thirteen cities in Europe, Canada and the United States.

The Human Rights Watch California Committee South is an informed and engaged constituency of members who support Human Rights Watch in Los Angeles through outreach and advocacy. The California Committee South is part of the Human Rights Watch Council, a network of committees across thirteen cities in Europe, Canada and the United States.

Scott Long serves as the Director of the Lesbian, Gay, Bisexual, and Transgender Rights Program at Human Right Watch.

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The proposed *amicus* brief will assist the Court by providing important contextual information regarding the fundamental rights at issue in the case as viewed from a global perspective. Other nations with similar histories, legal traditions, and political cultures have recognized the fundamental nature of the rights at issue in this matter and the implications thereof: Foreign and international courts considering questions similar to those presented here have recognized the fundamental nature of the right to marry and have rejected laws that would exclude gays and lesbians from the institution of marriage. This Court should consider these international opinions.

Because this Court's decision will have a significant impact on the fundamental human rights of many citizens, both within California and through its potential impact as precedent around the world, *amici curiae* Human Rights Watch and the affiliated parties described above request leave to file the attached brief.

DATED: January 15, 2009

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By: 
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Inter-American Court of Human Rights, Advisory Opinion OC-4/84 (Jan. 19, 1984)	12
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BRIEF OF *AMICUS CURIAE*

I. INTRODUCTION

The question presented in this case is both clear and extraordinarily consequential: Can individuals falling within a suspect classification (here, gays and lesbians) be deprived of a fundamental right (here, the right to marry) by means of a voter initiative purporting to amend the state constitution? *Amici curiae* Human Rights Watch and affiliated parties respectfully submit that the principles of international law, as well as the precedents from other countries addressing the question of equality in civil marriage, require that this question be answered in the negative. Equality is a fundamental principle of human rights, and international law defines sexual orientation as a status protected against discrimination. A bare majority of voters should not be permitted to enshrine in a state constitution unjust discrimination that the law would not otherwise allow. The clear tendency of human rights protections is to ensure that marriage remains subject to strictures against discrimination, including discrimination based on sexual orientation.

II. DISCUSSION

A. **Equality is a Fundamental Principle of International Human Rights, and Sexual Orientation Is a Status Protected Against Discrimination**

Adopted in 1948, the Universal Declaration of Human Rights (“UDHR”) is the foundational document of the modern human rights

system, providing for “the promotion of universal respect for and observance of human rights and fundamental freedoms.” UDHR, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 12, 1948) (*available at* <http://www1.umn.edu/humanrts/instreet/bludhr.htm> (last accessed January 14, 2009)). Equality is fundamental to the values enshrined in the UDHR and in the subsequent human rights treaties and instruments. Thus Article 1 of the Declaration provides that “[a]ll human beings are born free and equal in dignity and rights.” *Id.* Article 2 of the UDHR provides that all human beings are “entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.*

Likewise, Article 2 of the International Covenant on Civil and Political Rights (“ICCPR”) commits each State party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” International Covenant on Civil and Political Rights, Art. 23(1), Dec. 19, 1966, 999 U.N.T.S. 172 (*available at* <http://www.hrweb.org/legal/cpr.html> (last accessed January 14, 2009)). Article 3 further mandates that States parties “undertake to ensure the equal right of men and women to the enjoyment of

all civil and political rights set forth in the present Covenant.” Id. Article 26 guarantees that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and that all persons are to be free from discrimination “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Id.

The United Nations Human Rights Committee, which authoritatively interprets the ICCPR and evaluates states’ compliance with its provisions, has emphasized the importance of equal treatment as a norm running throughout the Covenant: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. . . . Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant.” U.N. Human Rights Committee (HRC), “CCPR General Comment No. 18: Non-discrimination,” 10 November 1989, at ¶¶ 1 & 2 (*available at* <http://www.unhcr.org/refworld/type,GENERAL,,453883fa8,0.html> (last accessed January 15, 2009)).

The Human Rights Committee has held that the mandate of equal protection applies to sexual orientation as a status protected under the Covenant’s provisions. In Toonen v. Australia, Communication No.

488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (*available at* <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5> (last accessed January 14, 2009).), the Human Rights Committee held invalid a statute in the Australian state of Tasmania outlawing consensual homosexual conduct. The Committee held that the law violated not only article 17 of the Covenant (protecting the right to privacy) but also its protections against discrimination. Toonen, at ¶¶ 9-11. The Committee determined that the reference to “sex” in articles 2 and 26 of the ICCPR should be taken to include sexual orientation. Id. at ¶ 8.7. Since that time, the Committee has reaffirmed this holding, both in subsequent decisions and in its recommendations to States.¹

In the Universal Declaration—again, the founding text of modern human rights—equality is closely tied to the Declaration’s conception of the dignity of human beings. The Preamble to the Declaration states that

¹ See, *inter alia*, U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Poland, 66th Session, U.N. Doc. CCPR/C/79/Add.110, at 23 (*available at* <http://www.unhchr.ch/tbs/doc.nsf/0/a61db0e519524575802567c200595e9c?Opendocument> (last accessed January 15, 2009).): the Committee urged the inclusion of constitutional protections against sexual-orientation-based discrimination. In the case of Trinidad and Tobago, the Committee urged that it “extend the provisions” of anti-discrimination legislation “to those suffering discrimination on grounds of age, sexual orientation, pregnancy or infection with HIV/AIDS.” Concluding Observations of the Human Rights Committee: Trinidad and Tobago, U.N. Doc. CCPR/CO/ 70/TTO, November 3, 2000, at 11 (*available at* <http://www1.umn.edu/humanrts/hrcommittee/tobago2001.html> (last accessed January 15, 2009).).

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The Declaration identifies in the Preamble the origins of the United Nations itself in the “faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.”

This linking of dignity with equality is testament to an evolving belief, underpinning the human rights system, that dignity no longer signifies (as it had in older lexicons) an “honorific, aristocratic valence of status, rank, and social worth” but instead denotes a valid claim of each human being to an equal measure of respect. Reva B. Siegel, “Dignity and the Politics of Protection,” 117 *Yale L.J.* 1694, n. 129 (2008). Two scholars write that, in the contemporary era, nations agreed to treat dignity as a “trait of all human beings and a marker of equality. Twentieth century human rights law embodies these premises through proclamations and agreements committing governments to respecting the dignity of all people.” Judith Resnik & Julie Chi-hye Suk, “*Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*,” 55 *Stan L Review*, note 118 at 1924 (2003).

These twin themes—the centrality of equality and its connection to dignity—are also reflected in the jurisprudence of many jurisdictions around the world. In its landmark decision in Maneka Gandhi, India’s

highest court found equality to belong within a complex of deep principles underlying the express protections of the Constitution:

Articles dealing with different fundamental rights . . . do not represent entirely separate streams of rights. . . . They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual). . . . Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection. Maneka Gandhi v. Union of India, Supreme Court of India, [1978] 2 SCR 621 (“Maneka Gandhi”) (*available at* <http://www.manupatrainternational.in/supremecourt/1950-1979/sc1978/s780133.htm> (last accessed January 14, 2009)).

Equality, the Court held, is “a founding faith of the Constitution” and “the pillar on which rests securely the foundation of our democratic republic”: “No attempt should be made to truncate its all-embracing scope and meaning for . . . [e]quality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.” Id.

Similar observations regarding equality as a critical value underpinning a range of rights protections—as well as equality’s essential link to human dignity—are found in the decision by the Constitutional Court of South Africa overturning that country’s apartheid-era laws against

