

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE**

CAMPAIGN FOR CALIFORNIA FAMILIES,

Petitioner and Appellant,

v.

GAVIN NEWSOM and NANCY ALFARO,

Defendants and Respondents,

and

DEL MARTIN,

Intervenor and Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND
AMICUS CURIAE BRIEF OF THE NATIONAL LEGAL FOUNDATION,
PACIFIC JUSTICE INSTITUTE, AND LIFE LEGAL DEFENSE
FOUNDATION IN SUPPORT OF PETITIONER AND APPELLANT
Urging Reversal of the Superior Court.

THE NATIONAL LEGAL
FOUNDATION
Brian Chavez-Ochoa
California Bar # 190289
Steven W. Fitschen
Douglas E. Myers
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
Telephone: (757) 463-6133
Fax: (757) 463-6055

PACIFIC JUSTICE INSTITUTE
Kevin T. Snider
California Bar #170988
P.O. Box 276600
Sacramento, CA 95827
Telephone: (916) 857-6900
Fax: (916) 857-6902

LIFE LEGAL DEFENSE
FOUNDATION
Katie Short
California Bar #117442
P.O. Box 2105
Napa, CA 94558

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE COURT:

Pursuant to the California Rules of Court, Rule 8.520(f), *Amici Curiae*, The National Legal Foundation, Pacific Justice Institute, and Life Legal Defense Foundation respectfully request permission to file the accompanying brief in support of the Petitioner and Appellant in *Campaign for California Families v. Newsom, et al.*

Amicus Curiae, The National Legal Foundation (“NLF”), is a 501(c)(3) non-profit public interest law firm based in Virginia Beach, Virginia. The NLF is dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has filed numerous amicus briefs in important cases on a wide variety of topics. The NLF has an interest, on behalf of its constituents and supporters, in particular those in California, in arguing to protect the status of *amici* and not have them susceptible to paying costs when they are not parties to an action. This Brief should aid the Court in reversing the order of the court below directing the Petitioner and Appellant Campaign for California Families to pay costs to the prevailing party.

Amicus Curiae, the Pacific Justice Institute (“PJI”), established in 1997, is a non-profit entity based in California and organized under 501(c)(3) of the Internal Revenue Code. PJI primarily provides legal

representation to individuals and other non-profit organizations on a pro bono basis, particularly in the area of rights under the First Amendment. To this end, PJI routinely files friend of the court briefs in state and federal courts throughout the country on issues that are within the organization's mission and goals. PJI has an interest in the matter before the Court to ensure that the line is not blurred between parties involved in litigation and *amicus curiae*. Assessing costs against nonparties will dangerously work to erode these distinctions and will have a chilling effect on filings in important matters of public interest.

Amicus Curiae, Life Legal Defense Foundation (“LLDF”) is a California-based not-for-profit corporation whose mission is to provide innocent and helpless human beings, particularly the unborn, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms, including through the filing of *amicus* briefs on its own behalf. Because of LLDF's extensive experience in free speech litigation, the topic of its *amicus* briefs is frequently the chilling effect of governmental policies, whether legislative, executive, or judicial, on the exercise of the rights of free speech and petition. Permitting the award of litigation costs against *amici curiae* such as LLDF would have the ironic effect of chilling its advocacy on behalf of free speech rights.

DATED: June 4, 2009

Brian Chavez-Ochoa
California Bar # 190289
Counsel of Record for Amicus Curiae
Steven W. Fitschen
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
Telephone: (757) 463-6133
Fax: (757) 463-6055
Email: nlf@nlf.net

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Amici hereby certify that they know of no entity or person that must be listed under the provisions of California Rules of Court, Rule 8.208.

DATED: June 4, 2009

Brian Chavez-Ochoa
California Bar # 190289
Counsel of Record for Amicus Curiae
Steven W. Fitschen
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
Telephone: (757) 463-6133
Fax: (757) 463-6055
Email: nlf@nlf.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... vii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 1

I. CAMPAIGN FOR CALIFORNIA FAMILIES SHOULD NOT BE SUSCEPTIBLE TO PAYING COSTS SIMILAR TO A NON-PREVAILING PARTY BECAUSE THEY HAD NO COMPANION OPPORTUNITY TO *RECEIVE* COSTS HAD THEY SUPPORTED THE PREVAILING PARTY. 1

II. *CONNERLY* GOVERNS THE INSTANT CASE BECAUSE THE LOGIC EMPLOYED IN DETERMINING AN AWARD OF ATTORNEYS’ FEES APPLIES WITH EQUAL FORCE IN DETERMINING COURT COSTS. 2

CONCLUSION 7

CERTIFICATE OF COMPLIANCE 8

PROOF OF SERVICE..... 9

TABLE OF AUTHORITIES

Cases:	Page(s):
<i>Connerly v. State Personnel Board</i> (2006) 37 Cal. 4th 1169.....	<i>passim</i>
<i>Lockyer v. City & County of San Francisco</i> (2004) 33 Cal. 4th 1055	2
<i>Ventas Finance I v. California Franchise Tax Bd.</i> (2008) 165 Cal. App. 4th 1207	3
 Statutes:	
California Code of Civil Procedure § 1021.5 (LEXIS through May 21, 2009)	3
California Code of Civil Procedure § 1032 (LEXIS through May 21, 2009)	1, 3
California Code of Civil Procedure § 1033.5 (LEXIS through May 21, 2009)	3
California Code of Civil Procedure § 1034 (LEXIS through May 21, 2009)	3
 Other:	
Petitioner’s Reply Brief.....	6
Respondents’ Corrected Brief	3

SUMMARY OF THE ARGUMENT

Your *Amici* make one argument not made by Campaign for California Families (“Campaign”) and expands on one argument previously made by Campaign. In particular, logic strongly suggests that the court below erred in assigning costs to Campaign because had Campaign been supporting the prevailing party in the suit, it would have not been able to recover those costs from the non-prevailing party. Furthermore, *Connerly v. State Personnel Board* (2006) 37 Cal. 4th 1169, should control this Court’s analysis of Campaign’s position relative to the payment of costs, and under *Connerly*, Campaign should not have been assessed costs as a non-prevailing party.

ARGUMENT

I. CAMPAIGN FOR CALIFORNIA FAMILIES SHOULD NOT BE SUSCEPTIBLE TO PAYING COSTS SIMILAR TO A NON-PREVAILING PARTY BECAUSE THEY HAD NO COMPANION OPPORTUNITY TO *RECEIVE* COSTS HAD THEY SUPPORTED THE PREVAILING PARTY.

Perhaps the most persuasive reason for reversing the court below is, strictly speaking, not legal but logical. If one were to imagine a case with the same facts as in the instant one, except for one key component—namely that Campaign was on the side of the prevailing party—a reasonable question follows. Would Campaign, along with the prevailing party, have any claim to recovery of costs under Code of Civil Procedure § 1032? Having been found to lack standing after the California Supreme Court

ruled in *Lockyer v. City & County of San Francisco* (2004) 33 Cal. 4th 1055, the answer for Campaign would have been “no,” and the Respondents (collectively referred to as “Newsom”) would surely have vehemently argued that point.

Obligations to pay costs to the prevailing party in a litigated matter arise out of an attempt to provide a remedy to the victor for the significant inconvenience caused him or her in either vindicating a right as a plaintiff or defending a right as a defendant. Viewed another way, the concept of taxing costs to the non-prevailing party forces parties to carefully evaluate the strength of their positions and, thus, assess the risk of incurring additional costs by prosecuting the litigation and losing. But with the *risk* of being assessed costs comes the *benefit* of receiving costs when the party does prevail. This arrangement of the winners receiving and the losers paying court costs illustrates the lower court’s error in assigning costs to Campaign—simply put, Campaign would not have been in line to receive payment from the losing parties had they been on the winning side of the litigation.

II. CONNERLY GOVERNS THE INSTANT CASE BECAUSE THE LOGIC EMPLOYED IN DETERMINING AN AWARD OF ATTORNEYS’ FEES APPLIES WITH EQUAL FORCE IN DETERMINING COURT COSTS.

Newsom argues that *Connerly* should not govern the instant case because *Connerly* addressed the question of imposition of attorneys’ fees

under Code of Civil Procedure § 1021.5 rather than the imposition of costs under §§ 1032 and 1034, as is the case here. (Resp'ts' Corrected Br. at 6.) Newsom's view, however, is unpersuasive.

Code of Civil Procedure § 1032 is not simply a stand-alone statute authorizing payment of court costs by a non-prevailing party. Rather, § 1032, when combined with §§ 1033.5 and 1034, becomes a comprehensive cost- and fee-shifting scheme, that authorizes assessment of a wide variety of costs and fees on a non-prevailing party. In particular, § 1033.5(a)(10)(B) allows payment of “attorney fees” under § 1032, provided the fees are authorized by statute. Because the attorneys' fees at issue in *Connerly* were also statutorily authorized, for analytical purposes, costs or fees arising out of §§ 1032 and 1033.5 are analogous to fees allowed under § 1021.5.

In sum, the issue is not whether the instant case involves the same kind of costs or fees addressed in *Connerly*.¹ Nothing about the court's opinion in *Connerly* woodenly restricts its analysis to § 1021.5, as Newsom suggests. (Resp'ts' Corrected Br. at 6.) Instead, Campaign rightly asks this

¹ Your *Amici* are aware that §§ 1021.5 and 1032, *et seq.* do not use equivalent terms and would perhaps require separate analyses for certain issues, such as determining whether a prevailing party under § 1032 is the same as a successful party under § 1021.5. (*See Ventas Finance I v. California Franchise Tax Bd.* (2008) 165 Cal. App. 4th 1207, 1233-34.) Such definitional analysis is unnecessary for the view of *Connerly* that *Amici* advocate—namely, that the same factors that shielded a litigant from paying fees under § 1021.5 are equally present in the instant case, and that the court's logic in *Connerly* applies here with equal force.

Court to see what the Supreme Court saw in *Connerly*—namely that imposition of costs are inappropriate unless the litigants are

either real parties in interest that ha[ve] a direct interest in the litigation, *the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation*, or [are] codefendants with a direct interest intertwined with that of the principal defendant. In no case [where § 1021.5 fees were awarded] did the opposing party have only an ideological or policy interest typical of an *amicus curiae*.

(*Connerly*, 37 Cal. 4th at 1181 (emphasis added).)

With one important exception, Campaign fits none of the categories discussed in *Connerly* above. Campaign was not a real party in interest with a direct interest in the litigation. Campaign’s interest was political, not personal; indeed they were not seeking or being denied marriage licenses. The furtherance of Campaign’s interest (guarding a longstanding, traditional view of marriage) was, again, on the opposite side of the “policy or practice that gave rise to the litigation” (preventing issuance of marriage licenses to same-sex couples, contrary to the law of California). (*Id.*) Neither was Campaign a “codefendant with a direct interest intertwined with . . . the principal defendant.” (*Id.*) Campaign was, however, an “opposing party” with “only an ideological or policy interest typical of an *amicus curiae*.” (*Id.*)

When one looks deeper at what persuaded the *Connerly* Court, it becomes apparent that those same characteristics that shielded the litigants

from paying attorneys' fees are present in the instant matter. In *Connerly*, several public interest groups (the "interest groups") initially received permission to appear as *amici* when the Governor of California sought a writ of mandate attempting to invalidate a number of statutes that arguably could be categorized as "affirmative action" statutes. (*Id.* at 1172-73.) An initial threshold issue was the justiciability of the writ, resulting in the Governor's attempt to join the interest groups as real parties in interest and name them as defendants. (*Id.* at 1173.) The interest groups resisted being named in the suit, not because a desire for non-involvement, but rather because the justiciability question disappeared with the existence of a real party in interest. (*Id.*) The interest groups quickly became very active in the litigation—seeking removal to federal court, seeking peremptory challenge against the trial judge, and initiating discovery (including a motion to compel). (*Id.* at 1173-74.) After the trial court eventually invalidated one of the statutory schemes, the interest groups filed an appeal. (*Id.* at 1174.) In fact, the interest groups "acted in many respects as lead counsel on the litigation." (*Id.* at 1182.) Yet after all that, the California Supreme Court noted, among other things, that

although the [interest groups'] role in the litigation was greater than that of the typical *amicus curiae*, its basic function was the same: to advocate a position not out of a direct interest in the litigation but from its own views of what is legally correct and beneficial to the public interest.

(*Id.* at 1183.) Similarly, that was Campaign’s role here. No matter what its designation was at any given point of the case, Campaign was always in reality an *amicus* at heart, arguing what it believed was legally correct and in the public’s best interest.

As Campaign pointed out in its Reply Brief, this case was much bigger than Campaign, and, like the events giving rise to *Connerly*, took on a life of its own as a struggle over a major policy and constitutional question in California. (Pet’r’s Reply Br. at 4.) This is not a case of a public interest organization filing a suit and simply being dismissed for lack of standing. This case was a cultural battle, extending well beyond the parties to the instant case, and flowing into the maelstrom which was Proposition 8. If the “real party in interest” in *Connerly* was appropriately shielded from fees despite its extensive efforts in the litigation, so to should such a shield be provided Campaign for its efforts, which were similar, but not as extensive as, the *Connerly* litigants.

CONCLUSION

For the foregoing reasons and those set out in Campaign's Briefs, this Court should reverse the court below ordering Campaign's payment of costs.

Respectfully submitted this 4th day of June 2009.

Brian Chavez-Ochoa
California Bar # 190289
Counsel of Record for Amicus Curiae
Steven W. Fitschen
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
Telephone: (757) 463-6133
Fax: (757) 463-6055
Email: nlf@nlf.net

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface, containing 1,467 words, including footnotes. In making this certification, I have relied on the word count function of Microsoft Office 2007.

Brian Chavez-Ochoa
California Bar # 190289
Counsel of Record for Amicus Curiae
Steven W. Fitschen
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
Telephone: (757) 463-6133
Fax: (757) 463-6055
Email: nlf@nlf.net

PROOF OF SERVICE

I, Andrea Fitschen, declare: I am a resident of the State of Virginia and over the age of eighteen years, and not a party to the within action; my business address is 2224 Virginia Beach Boulevard, Suite 204, Virginia Beach, Virginia 23454.

On June 4, 2009, I served the following document(s):

1. APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER AND APPELLANT URGING REVERSAL OF THE SUPERIOR COURT.

on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

and served the document(s) in the manner indicated below:

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Virginia Beach, Virginia, addressed as set forth below.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.
Executed on June 4, 2009, at Virginia Beach, Virginia.

Andrea Fitschen

SERVICE LIST FOR CASE NO. A123634

Shannon P. Minter
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102

Attorneys for Respondents

Francesca Rosanna Gessner
OFFICE OF THE CITY ATTORNEY
City Hall Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102

*Attorneys for City and County
of San Francisco*

Richard D. Ackerman
ACKERMAN, COWLES & ASSOCIATES
29975 Technology Drive
Murrieta, California 92563

Attorneys for Petitioners

California Supreme Court
350 McAllister Street
San Francisco, California 94102

The Honorable Richard A. Kramer
San Francisco Superior Court
400 McAllister Street, Dept. 304
San Francisco, California 94102