

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

FILE COPY

Harold Donald Standhardt, a single man; Tod) 1 CA-SA-03-0150
Alan Keltner, a single man,)
Petitioners,) Maricopa County Superior Court
)
vs.)
)
Superior Court of the State of Arizona, in and)
for the County of Maricopa, Michael J. Jeanes,)
the Clerk of the Court,)
)
Respondents,)
)
and)
)
State of Arizona,)
)
Respondent – Real)
Party in Interest.)
_____)

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF
ARIZONA AND THE AMERICAN CIVIL LIBERTIES UNION

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members that is dedicated to the principles of liberty and equality embodied in the federal and state constitutions. The Arizona Civil Liberties Union/Foundation is one of its state affiliates. This case involving marriage between persons of the same sex raises questions of liberty and equality that are of profound importance to the ACLU and its members. The ACLU and its members also have a strong interest in ensuring that the courts have a full and proper opportunity to address significant constitutional claims such as those raised by this case, a concern that leads the ACLU to submit this brief addressing solely the procedural context in which such issues should be decided.

ARGUMENT

Amici Curiae respectfully submit that this Court should dismiss this special action for want of jurisdiction. The complex issue of the constitutionality of Arizona's ban on marriage by same-sex couples should be addressed in the first instance by a trial court, which will be able to consider the complicated factual issues that are necessarily a part of weighing this important constitutional question.

Arizona law gives appellate courts jurisdiction over special actions in order to ensure that parties with no other remedy have a forum to seek relief. But special actions are the exception rather than the rule, and they are available only when there is no “equally plain, speedy, and adequate remedy by appeal.” Ariz. R. P. Spec. Action 1(a). Where another forum is available to the plaintiff, especially where that other forum would allow the development of complicated factual issues, appellate courts should not take jurisdiction over the special action, but should defer the matter to a trial court able to hold a hearing and consider all the evidence. *See, e.g., Graham v. Ridge*, 107 Ariz. 387, 489 P.2d 24 (Ariz. 1971) (no special action jurisdiction where appeal from trial court proceeding provided alternative remedy); *Armstrong v. City Ct. of the City of Scottsdale*, 578 P.2d 1022 (Ariz. App. 1978) (same). Here, the appropriate course of action is for petitioners to bring a declaratory judgment action before a trial court that can consider all the evidence. The fact that petitioners have alternative – and more appropriate – remedy deprives this Court of special action jurisdiction.¹

¹ While bringing a new action in the trial court would inevitably involve some delay, the mere fact of additional delay and even expense does not prevent an alternative remedy from being “plain, speedy, and adequate” for purposes of Special Action Rule 1(a). *See Rhodes v. Clark*, 92 Ariz. 31, 373 P.2d 348 (Ariz. 1962) (“A remedy does not become inadequate merely because more time will be consumed by pursuing it through its prescribed course than would be required in the use of the writ.”); *Walker v. District*

Amici respectfully submit that the question of same-sex marriage presents complicated questions of fact and law that can only be properly addressed after all parties to such a case have the opportunity to develop their arguments and factual positions before a trial court. Other cases addressing the constitutionality of a restriction on same-sex marriage have started in a trial court with plenary jurisdiction rather than before an appeals court on a writ procedure. *See, e.g., Morrison v. O'Bannon*, No. 49D13-0211-PL-001946 (Ind. Super. Ct., Marion County May 7, 2003) (trial court rejecting claim for same-sex marriage); *Goodridge v. Dep't of Public Health*, 14 Mass. L. Rptr. 591 (Mass. Super. 2002) (same), *appeal pending*, No. SJC-08860 (Mass.); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (state supreme court ruling on case initiated in trial court); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1990 WL 88743 (Alaska Super. Feb. 27, 1998) (trial court addressing claim for same-sex marriage), *superseded by state constitutional amendment*, Alaska Const. art. I, § 25; *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (same).

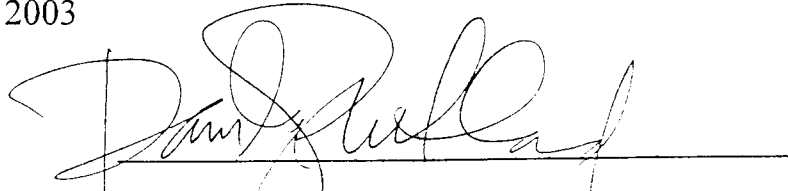
That is no accident, since there are many factual question that affect the constitutional issues involved. Factual issues ranging from the changes in

Ct. of Pinal County, 4 Ariz. 249, 35 P. 982 (Ariz. 1894) (“The mere fact that [a] trial and . . . appeal necessitate[] an expense and some delay” does not justify entertaining a writ proceeding/special action); *Caruso v. Superior Ct.*, 100 Ariz. 167, 171, 142 P.2d 463, 466 (Ariz. App. 1966) (“Of course, there is expense and delay in being put to a trial and then an appeal. But these facts alone will not justify issuing the writ.”).

the definition of marriage throughout history, to the varying approaches religions take to the issue of same-sex unions, to the state's justifications for limiting marriage to a man and a woman all have been developed through evidentiary showings, either at a trial or on summary judgment. *See, e.g., Goodridge*, 14 Mass. L. Rptr. 591 (upholding restriction on marriage to one man and one woman after extensive factual presentation on cross-motions for summary judgment); *Baker*, 744 A.2d at 848 n.1 (addressing right of same-sex couples to equal benefits under state constitution after extensive factual presentation in trial court); *Brause*, 1990 WL 88743 (setting hearing to consider factual issues regarding reasons for state's ban on same-sex marriage); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding case to trial court for evidentiary hearing regarding reasons for state's ban on same-sex marriage); *Baehr v. Miike*, 1996 WL 694235 (results of that hearing). Addressing these constitutional issues without the proper factual context and background risks deciding questions of the utmost importance without adequate foundation.

For these reasons, *Amici* respectfully request that the Court dismiss the petition for want of jurisdiction.

Dated: Tucson, Arizona
August 18, 2003

A handwritten signature in black ink, appearing to read 'Pamela K. Sutherland', is written over a horizontal line.

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