

United States District Court for the Northern District of California

*Perry v. Schwarzenegger*

704 F. Supp 2d. 921, 1003 (N.D. Cal. 2010)

Opinion of Judge Vaughn Walker

Proposition 8 is simple and straightforward. \* \* \* Proposition 8 is about preserving marriage; it's not an attack on the gay lifestyle. \* \* \* It protects our children from being taught in public schools that "same-sex marriage" is the same as traditional marriage. \* \* \* While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father.

\* \* \* If the gay marriage ruling [of the California Supreme Court] is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage. We should not accept a court decision that may result in public schools teaching our own kids that gay marriage is ok. \* \* \* [W]hile gays have the right to their private lives, they do not have the right to redefine marriage for everyone else.

California Voter Information Guide, California General Election, Tuesday, November 4, 2008

## **INTRODUCTION**

The following is a legal breakdown of the opinion issued by Judge Walker Vaughn on August 4, 2010 striking down the constitutionality of Proposition 8 as a violation of the Equal Protection and Due Process Clauses of the United States Constitution by the team at Prop 8 Films.

### **Who are the Plaintiffs?**

Kristin Perry & Sandra Stier:

- Reside together in Berkeley, CA, have 4 children together, seek to marry and have been denied marriage licenses by their respective county authorities

Jeffrey Zarillo & Paul Katame:

- Reside in Burbank, CA, seek to marry and have been denied marriage licenses by their respective county authorities

### **Who are the Defendants?**

In their official capacities: Governor of California, Attorney General, Director and Deputy Director of Public Health and the Alameda County Clerk-Recorder, LA County Registrar-Recorder/County Clerk, collectively known as the “government defendants.”

### **Who are the Proponents?**

Proponents in this case organized the official campaign to pass Proposition 8, known as ProtectMarriage.com or Yes on 8, which is a Project of California Renewal. After its success, Proponents intervened in this lawsuit to defend the constitutionality of Proposition 8. The defendants in this case did not defend the ballot initiative in their formal capacity in court.

### **Background: what happened before Proposition 8**

- November 2000: CA voters adopted Proposition 22, the California Defense of Marriage Act, through the initiative process which stated “only marriage between a man and a woman is valid or recognized in California” (Cal. Family Code Section 308.5).
- February 2004: Mayor of San Francisco, Gavin Newsom, and instructed county officials to issue marriage certificates to same-sex couples.

- March 2004: The California Supreme Court ordered San Francisco to stop issuing such licenses and later nullified the marriages licenses the same-sex couples had received.
- Shortly thereafter, San Francisco and various other groups filed a lawsuit claiming that the exclusion of same-sex couples from marrying under California law violated state constitution.
- These cases were consolidated into one case, known as *In re Marriage*, which was heard by the California Supreme Court, who invalidated Proposition 22 and stated that all California counties were required to issue marriage licenses to same-sex couples. Same-sex marriage became legal in California in May, 2008.
- The order went into effect on June 17<sup>th</sup>, 2008. From that day until November 4, 2008 when Proposition 8 passed, approximately 18,000 same-sex couples were married in the state of California.

### **What happened after Proposition 8**

- Opponents of Proposition 8 filed a lawsuit claiming that Proposition 8 violated the rules for amending the California Constitution.
- The California Supreme Court upheld Proposition 8 stating that it was properly enacted into the Constitution in *Strauss v. Horton*
- The Court also stated that their ruling did not impact the 18,000 couples that were married.
- Plaintiffs filed a lawsuit on May 22, 2009 in the federal court of the United States claiming that Proposition 8 is unconstitutional as a violation of the United States Constitution.
- A federal trial was held January 11-27, 2010 in San Francisco in front of Judge Vaughn Walker.
- Trial proceedings were recorded but now are under seal as part of the record.

### **The Proposition 8 Campaign**

According to the court, evidence presented at trial suggests that the key messages of Proposition 8 campaign as presented to voters were that the denial of marriage to same-sex couples:

- Preserves marriage
- Protects children
- Allows lesbians and gays to live privately without requiring others to recognize their existence

- Reinforces the idea that an ideal child-rearing environment is composed of one male and one female
- Reinforces the idea that the marriage of opposite-sex couples is superior to that of same-sex couples
- Redefines opposite sex couples marriage.

## **Plaintiff's Case Against Proposition 8:**

### **Proposition 8 violates the Due Process Clause of the Constitution**

The Due Process Clause, part of the 14th Amendment of the US Constitution, states "No State shall deprive any person of life, liberty, or property, without due process of law."

Plaintiffs claim that the Due Process Clause of the United States Constitution was violated by Proposition 8 because:

- a) It prevents each Plaintiff from marrying the person of their choice
- b) That choice is sheltered from the states by the 14<sup>th</sup> Amendment
- c) Because California's domestic partnership laws are inferior to marriage

### **Proposition 8 violates the Equal Protection Clause of the Constitution**

The Equal Protection Clause, or the 14<sup>th</sup> Amendment of the United States Constitution, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Plaintiffs claim that Proposition 8 violates the Equal Protection Clause because the initiative

- a) Discriminates against gay men and lesbians by denying them a right to marry the person of their choice (whereas heterosexual persons can do as they please)
- b) Disadvantages a suspect class by preventing them from marrying.

#### **Additional Claims**

- a) Prop 8 should be subject to heightened scrutiny under the Equal Protection Clause because gays and lesbians constitute a suspect class.

b) Proposition 8 is irrational because it singles out gays and lesbians for unequal treatment, they alone may not marry the person they choose.

c) Proposition 8 discriminates on the basis of sexual orientation and sex.

Conclusion: Plaintiffs seek a declaration that Proposition 8 is invalid and an injunction against its enforcement

## **Proponents Defense of Proposition 8**

a) Proposition 8 maintains California's definition of marriage as excluding same-sex couples.

b) Proposition 8 affirms the will of CA citizens

c) Proposition 8 promotes stability in relationships between a man and a woman because they naturally produce children

d) Proposition 8 promotes "statistically optimal" child-rearing households.

### **Noted excerpts from the opinion:**

*Proponents argued that Proposition 8 should be evaluated based on its consistency with the "central purpose of marriage, in California and everywhere else... to promote naturally procreative sexual relationships and channel them into stable, enduring unions for the sake of producing children and raising the next generation." Marriage for same-sex couples is not implicit in the order of liberty and it doesn't deny them Equal Protection because of the existence of domestic partnership statutes.*

*At oral argument on proponents' motion for summary judgment, the court posed to proponents' counsel the assumption that "the state's interest in marriage is procreative" and inquired how permitting same-sex marriage impairs or adversely affects that interest. Counsel replied that the inquiry was "not the legally relevant question," but when pressed for an answer, counsel replied: "Your honor, my answer is: I don't know. I don't know."*

*Despite this response, proponents in their trial brief promised to "demonstrate that redefining marriage to encompass same-sex relationships" would effect some twenty-three specific harmful consequences. At trial, however, proponents presented only one witness, David Blankenhorn, to address the government interest in marriage. Blankenhorn's testimony is addressed at length hereafter; suffice it to say, that he provided no credible evidence to support any of the claimed adverse effects proponents*

*promised to demonstrate. During closing arguments, proponents again focused on the contention that “responsible procreation is really at the heart of society’s interest in regulating marriage.” When asked to identify the evidence at trial that supported this contention, proponents’ counsel replied, “you don’t have to have evidence of this point.”*

*Proponents’ procreation argument, distilled to its essence, is as follows: the state has an interest in encouraging sexual activity between people of the opposite sex to occur in stable marriages because such sexual activity may lead to pregnancy and children, and the state has an interest in encouraging parents to raise children in stable households. The state therefore, the argument goes, has an interest in encouraging all opposite-sex sexual activity, whether responsible or irresponsible, procreative or otherwise, to occur within a stable marriage, as this encourages the development of a social norm that opposite-sex sexual activity should occur within marriage. Entrenchment of this norm increases the probability that procreation will occur within a marital union. Because same-sex couples’ sexual activity does not lead to procreation, according to proponents, the state has no interest in encouraging their sexual activity to occur within a stable marriage. Thus, according to proponents, the state’s only interest is in opposite-sex sexual activity.*

## **THE TRIAL**

Plaintiffs presented 8 lay witnesses, including the 4 plaintiffs, and 9 expert witnesses.

Proponents presented 2 expert witnesses

Although the evidence covered a range of issues, the direct and cross-examinations focused on the following broad questions:

### **WHETHER ANY EVIDENCE SUPPORTS CALIFORNIA’S REFUSAL TO RECOGNIZE MARRIAGE BETWEEN TWO PEOPLE BECAUSE OF THEIR SEX**

**Historian Nancy Cott** testified about the public institution of marriage and the state interest in recognizing and regulating it. She explained it is “a couples choice to live with each other, remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life.”

**Think tank founder David Blankenhorn** testified that marriage is a “socially-approved sexual relationship between a man and a woman to regulate filiations.”

Both **Cott** and **Blankenhorn** addressed marriage as a historical institution and both agreed that California would benefit if it were to resume issuing same-sex marriage licenses to same-sex couples. **Blankenhorn** testified that the state shouldn't recognize same-sex marriage because the benefits are not valuable and it could conceivably weaken the institution of marriage.

**Psychologist Letitia Anne Peplau** testified that couples benefit physically and economically when married.

**Economist Lee Badgett** testified that couples benefit economically if they are able to marry.

#### **WHETHER ANY EVIDENCE SHOWS CALIFORNIA HAS AN INTEREST IN DIFFERENTIATING BETWEEN SAME-SEX AND OPPOSITE-SEX UNIONS**

**Psychologist Gregory Herek** explained that homosexuality is a normal and that in their expression of human sexuality, a vast majority of people have little or no choice, therapeutic intervention has not been shown to work. Proponents didn't contradict this but questioned him on whether some people present fluidity in their sexual preference

**Psychologist Peplau** testified that same-sex couples are indistinguishable from opposite sex couples in relationship quality and stability.

**Economist Badgett** testified both are similar in economic and demographic respects.

**Social epidemiologist Ilan Meyer** testified about the harm lesbians and gays face because of Proposition 8 (which represents the state endorsement of private discrimination and increases the likelihood of negative mental and physical health of lesbians and gays)

**Psychologist Michael Lamb** testified that all evidence shows that children raised by same-sex couples are well adjusted and the gender of a parent is immaterial to whether an adult is a good parent.

**Blankenhorn** emphasized the importance of a biological link between parents and children although Judge Walker noted "none of the studies **Blankenhorn** relied on isolates the genetic relationship between a parent and a child as a variable to be tested."

**Lamb** testified that adopted kids and other non-biological children are just as likely to be well adjusted.

**Badgett** and others testified that gays and lesbians are less likely to enter into domestic partnership than marriage and that the states receive greater economic benefits from marriage than from domestic partnerships.

**Cott** explained domestic partnership doesn't have the same cultural and historical significance as marriage.

### **WHETHER THE EVIDENCE SHOWS PROPOSITION 8 ENACTED A PRIVATE MORAL VIEW WITHOUT ADVANCING A LEGITIMATE GOVERNMENT INTEREST.**

Testimony of several witnesses disclosed that a primary purposes of the Prop 8 campaign is to ensure that California promotes a policy of favoring opposite-sex couples over same-sex couples.

**Historian George Chauncey** testified there is a direct relationship between the prop 8 campaign and the 70s campaign targeting gays and lesbians that relied on stereotypical images and protecting children from an undisclosed danger that is culturally understood, the residue from the criminalization of gays and lesbians in the 20<sup>th</sup> century.

**Political scientist Gary Segura** gave examples in which private discrimination is manifested in laws and policies today.

**Political scientist Kenneth Miller** argued that gays and lesbians do experience political power at the state and national level.

**Proponent William Tam** testified about his role in the prop 8 campaign as the secretary for the America Return to God prayer movement, which encouraged voters to vote for Proposition 8 on the grounds that homosexuals are 12 times more likely to molest children.

### **Court's Conclusion on the Credibility of Witnesses**

Plaintiff witnesses: The court finds that all lay and expert witnesses presented by the plaintiffs are credible.

Proponent Witnesses: The court notes that the proponents withdrew most of their witnesses for fear of their public safety and harassment, despite the fact that they did not televise the proceedings.

Proponent witness David Blankenhorn: “the court determines that his testimony constitutes inadmissible opinion testimony that should be given essentially no weight. His opinion lacks reliability, as there is simply too great an analytical gap between the data and the opinion Blankenhorn proffered. He even stated “we would be more American on the day we permitted same-sex marriage than we were the day before.””

Proponent witness Kenneth Miller: “the court finds that Miller’s opinions on gay and lesbian political power are entitled to little weight and only to the extent they are amply supported by reliable evidence.”

## **CONCLUSION**

*For the reasons stated in the sections that follow, the evidence presented at trial fatally undermines the premises underlying proponents’ proffered rationales for Proposition 8. An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters. When challenged, however, the voters’ determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.*

*Proposition 8 fails to advance any rational basis to deny gays and lesbians a marriage license. It does nothing more than enshrine in the CA Constitution the notion that opposite-sex couples are superior to same-sex couples. Prop 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis and is therefore unconstitutional.*

## **Conclusions of Law**

Proposition 8 unconstitutionally burdens the exercise of fundamental right to marry and creates an irrational classification on the basis of sexual orientation.

## **DUE PROCESS**

Due Process protects people from deprivation of life, liberty or happiness by the State. When legislation burdens a fundamental right, the government must show the intrusion withstands strict scrutiny. Proposition 8 is unconstitutional because it

denies plaintiffs a fundamental right without a legitimate (much less compelling) reason.

The right to marry protects an individual's choice of marital partner regardless of gender

- Freedom to marry is recognized as a fundamental right. To determine if a right is fundamental, the court looks at whether the right is rooted “in our Nation’s history, legal traditions, and practices.”
- The State regulates marriage because it creates stable households, never has it inquired into the procreative capacity of a couple.
- Race restrictions on marital partners were once common in most states but are now seen as archaic, shameful or even bizarre. When the Supreme Court invalidated race restrictions in *Loving*, the definition of the right to marry did not change. Instead, the Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.
- The evidence shows that the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage. The evidence did not show any historical purpose for excluding same-sex couples from marriage, as states have never required spouses to have an ability or willingness to procreate in order to marry. Rather, the exclusion exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.”
- Race and gender restrictions helped shape marriage during eras of race and gender inequality but these restrictions were never a part of the historical core of the institution of marriage. Marriage under law is a union of equals.
- Plaintiffs do not seek a new right, rather they ask California to recognize their relationships for what they are: marriages.

Domestic partnerships do not satisfy California's obligation to allow plaintiffs to marry

- Domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. Proponents do not dispute the “significant symbolic disparity between domestic partnership and marriage.”
- Domestic partnerships were created specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples.

Proposition 8 is unconstitutional because it denies plaintiffs a fundamental right without a legitimate (much less compelling) reason

- Because marriage is a fundamental right, the proposition is subject to strict scrutiny. The evidence shows that Proposition 8 is not narrowly tailored to meet a compelling government interest.

**EQUAL PROTECTION**

Equal Protections provides that no state shall deny anyone the equal protections of the law. Proposition 8 violates the Equal Protection Clause because it does not treat people equally.

Sexual orientation or sex discrimination

- Evidence at trial shows the gays and lesbians experience discrimination based on unfounded stereotypes and prejudices specific to sexual orientation. Gays and lesbians have been historically targeted for discrimination because of their sexual orientation.
- Prop 8 targets gays and lesbians in a manner specific to their sexual orientation specifically due to sex.
- The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect, as the evidence shows, that California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation. Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review so the court need not address whether proposition 8 is subject to heightened review because equal protection renders it unconstitutional under any standard of review.
- Excluding same-sex couples is simply not rationally related to a legitimate state interest.
- Proponents put forth several rationales for Proposition 8, which the court now examines in turn. They are (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest

- Many of these purported interests identified by proponents are nothing more than fear or unarticulated dislike of same-sex couples. Those interests that are legitimate are unrelated to the classifications drawn by Proposition 8. Evidence shows that by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead as partners, parents and citizens, opposite-sex couples and same-sex and same-sex couples are equal.
- In the absence of a rational basis, what remains of proponent's argument is an inference that same-sex couples simply aren't as good as opposite-sex couples. Whether this belief is based on moral disapproval of homosexuality or animus towards gays and lesbians or simply a belief that a man and a woman is better than 2 men or 2 women, this is an improper basis on which to legislate.
- The evidence at trial uncloaks the most likely explanation for the passage of proposition 8: a desire to advance the belief that opposite sex couples are better than same-sex couples. Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. Evidence shows that Prop 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples. Because Prop 8 disadvantages gays and lesbians without any rational justification, Prop 8 violates the Equal Protection clause of the 14<sup>th</sup> Amendment of the United States Constitution