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PROP 8 IS DECLARED UNCONSTITUTIONAL! What the Decision Says and Means

By Attorney Emily Dudak Taylor

Judge Walker's Decision

On August 4, 2010, in a case called *Perry v. Schwarzenegger*, Judge Vaughn Walker of the U.S. District Court for the Northern District of California declared Proposition 8 unconstitutional.

Prop 8 is the amendment to the California Constitution that was enacted into law by California voters during the November 2008 presidential election (similar to the constitutional amendment Wisconsin voters enacted in 2006). It reads as follows: "Only marriage between a man and a woman is valid or recognized in California."

The plaintiffs in the case are two same-sex couples who reside in California and wish to marry. Each couple applied for a marriage license after Prop 8 went into effect and was denied. The couples then filed a lawsuit against the State of California. Interestingly, California refused to defend the constitutionality of Prop 8. Instead, the religious groups behind Prop 8 (hereafter "the proponents of Prop 8") moved to "intervene" in the case, so that they could defend Prop 8's constitutionality. The Court allowed the proponents to intervene.

A two and half week trial ensued in January 2010. Judge Walker heard testimony from the plaintiff-couples, psychologists, sociologists, a social epidemiologist, a marriage historian, anthropologists, and an economist. The plaintiff-couples called eight lay witnesses and nine expert witnesses. The proponents of Prop 8 called only two "expert" witnesses, claiming their other "experts" were unwilling to testify due to "safety concerns" with the trial broadcasted publicly. Judge Walker also admitted into evidence numerous studies on parenting and the mental health and economic effects of discrimination.

In his 136-page decision, Judge Walker held that the totality of the evidence presented at trial showed conclusively, "that Proposition 8 enacts, without any [rational justification], a private moral view that same-sex couples are inferior to opposite-sex couples." He said Prop 8 is about one group imposing their religion on others. Pure and simple. And clearly, Judge Walker said, such a law violates the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution.

Judge Walker began his decision by discussing the well-established right to marry. The right to marry has been recognized as a “fundamental right” by the U.S. Supreme Court case law for decades. “Fundamental rights” are heavily guarded in American case law. Laws that infringe upon them are subjected to harsh constitutional analysis. To get around this tough standard, the proponents of Prop 8 argued to Judge Walker that same-sex marriage is different from the historical concept of marriage protected in the case law. The question for Judge Walker therefore became: is same-sex marriage a new right or an extension of the historically protected right to marry?

Based on testimony from historians, Judge Walker found that same-sex marriage is not a new right. It is the same right that has been protected by the U.S. Supreme Court for years. He explained how marriage has undergone a series of transformations in our nation’s history, with courts removing racial restrictions and the concept of “coverture” (through which a woman’s legal and economic identity was taken over by her husband upon marriage). Judge Walker explained how the concept of marriage has evolved parallel to civil rights movements, tracking society’s incremental demands for equality. He found that even though marriage has changed, it is still the same basic concept. When the U.S. Supreme Court held that African Americans and Caucasians must be allowed to marry each other, a new brand of marriage was not born; the concept of marriage had simply evolved.

In his decision, Judge Walker also examined each and every defense of Prop 8 put forth by its proponents at trial. The proponents of Prop 8 offered up the following justifications for their constitutional amendment and California’s unequal treatment of gays and lesbians: (1) to promote “procreative” marriages, which supposedly are superior to all other relationships and produce better children; (2) to proceed with caution when implementing social change; (3) to promote opposite-sex parenting over same-sex parenting; (4) to protect the religious and child-rearing freedom of those who oppose marriage for same-sex couples; and (5) to preserve the tradition of marriage as a union between one man and one woman.

Addressing the first argument, Judge Walker found that there is no rational reason to use sexual orientation as a proxy for fertility, when there is no rational reason to limit marriage to fertile people. Supposedly, the proponents argued, if children are born into marriage and they are biologically related to both spouse-parents, their home will be more stable and therefore the populace more governable. The proponents offered no evidence in support of this contention, while the plaintiff-couples offered numerous studies and experts to contradict it. The Judge dismissed this argument.

Addressing the proponents’ second argument, Judge Walker found that same-sex marriage is not a sweeping legal or social change, especially in California. The State already has a very strong partnership (“DP”) law and marriage was legal for several months in 2008 and 18,000 licenses were issued. State and county officials even testified that administratively speaking, they are ready and able to start issuing marriage licenses to same-sex couples immediately.

Addressing the proponents' third argument, in a holding especially dear to our law firm, the Judge found that there is absolutely no evidence that opposite-sex parents are better than same-sex parents. "Indeed," the Judge said, "the evidence shows beyond any doubt that parents' genders are irrelevant to children's development outcomes." Furthermore, the Judge noted, even if California had a legitimate interest in preferring opposite-sex parents to same-sex parents, which it does not, the proponents' argument does not make sense: Prop 8 does not make it any more likely that opposite-sex couples will marry in more frequency and raise offspring within a marriage.

Addressing the proponents' fourth argument, the Judge summarily dismissed the notion that allowing same-sex marriage in California would infringe on the religious rights of California residents who disapprove of homosexuality. If Prop 8 was overturned, and marriage equality in California was restored, nothing would require a church to recognize or solemnize a same-sex marriage. The concept of marriage at issue is a secular, governmental institution, the Judge said, not a religious one.

Addressing the proponents' fifth and final argument, Judge Walker cited the well-established principle in constitutional law that "tradition alone ... cannot form a rational basis for a law." The Judge noted, a bit sarcastically, how different the proponents' arguments were in court versus outside of court. The proponents were unwilling to make their religious, false fear-mongering arguments on the record, in open court, subject to cross-examination. He then dismantled the proponents' traditional marriage argument: he observed that the only reason they could have for wanting to preserve "traditional" marriage is a moral and/or religious one. Nothing else made sense. They may not be willing to say it in court, but their actions – and their emails and television ads during the 2008 election, which were introduced as evidence at trial – belie their true motivations, he said. And a moral and/or religious disapproval of homosexuality is not a proper basis on which to legislate.

Judge Walker concluded:

Proponents' purported rationales [for Prop 8] are nothing more than post-hoc justifications. While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn. Here, the purported [rational bases] fit so poorly with Proposition 8 that they are irrational What is left is evidence that Proposition 8 enacts a moral view that there is something 'wrong' with same-sex couples. The evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples.

After dissecting and dismissing all of these arguments, Judge Walker found that the right to marry for same-sex couples is the same fundamental right discussed in the case law and that no rational basis exists to infringe on that right or to classify gays and lesbians and disadvantage

their right to marry. Without a rational basis for Prop 8, it fails the well-established tests for constitutionality under the Due Process and Equal Protection Clauses. “That a majority of California voters supported Prop 8 is irrelevant, as ‘fundamental rights may not be submitted to a vote; they depend on the outcome of no elections,’” he said.

Having found that Prop 8 violates the U.S. Constitution, Judge Walker turned to the argument that California’s DP law satisfies the State’s due process and equal protection obligations to allow same-sex couples to marry. He found that DPs do not satisfy those obligations. The Judge admitted that the legal and economic incidents of marriage and DP may be similar, especially under California’s strong DP law (versus Wisconsin’s relatively weak DP law), but he found that the “symbolic disparity” and the “culturally superior status” assigned to marriage, makes the two institutions unequal. Marriage is about symbolism and societal recognition, he found based on the extensive sociological and anthropological evidence presented at trial. Judge Walker therefore held that everyone must have the right to participate in the same institution.

This last finding is very significant. It means that under the U.S. Constitution, attaching a different name to a concept similar or identical to marriage, for instance, DPs or civil unions, violates the U.S. Constitution. As with schools, separate is not equal in marriage, according to Judge Walker.

What the Decision Means

The Prop 8 decision means that gays and lesbians must be able to marry. DPs and civil unions are not enough. And states may not simply amend their state constitutions to ban gay marriage. The Prop 8 decision was based on the U.S. Constitution. It found a *state* constitutional amendment to be unconstitutional under *federal* law. Under the Supremacy Clause of the U.S. Constitution, federal law is supreme. Therefore, if the Prop 8 decision is upheld on appeal, this case could be the case to invalidate not only Prop 8, but all state bans on same-sex marriage.

What is the practical effect of Prop 8 being found unconstitutional? On the last page of the decision, Judge Walker declared the appropriate remedy to be a permanent injunction against Prop 8’s enforcement, meaning that same-sex couples cannot be denied marriage licenses in California.

However, on August 4, the same day the decision was issued, Judge Walker temporarily “stayed” the effectiveness of his decision, namely the injunction. Prop 8 is therefore still operating in California to forbid same-sex marriage. The stay will likely remain in effect until the intermediate appellate court, the U.S. Court of Appeals for the Ninth Circuit, decides whether to keep the stay in place pending appeal. (Yes, the proponents of Prop 8 appealed the decision the day after it was issued.) If the stay does not remain in effect, same-sex marriage in California will be legal again.

The road ahead on appeal will be long and slow. It is scary to think that this could be *the* marriage case. What if we lose? But what if we win? We are cautiously optimistic. The intermediate appellate court, the U.S. Court of Appeals for the Ninth Circuit, is a very “liberal” court, arguably the most liberal Court of Appeals in the country. It is no coincidence that this case was filed in a trial court within its appellate jurisdiction.

No matter what happens at the Ninth Circuit, the case will surely be appealed to the U.S. Supreme Court. Review by the Supreme Court is not automatic, however. The Supreme Court must grant “certiorari” by four justices agreeing to hear the case. Currently, there are four “liberal” justices on the Supreme Court, four “conservative” justices, and one “swing” justice. The “swing” justice, Justice Anthony Kennedy, swung to the left in *Lawrence v. Texas* (the case that invalidated state criminal bans on sodomy) and broke the tie on the Court in favor of gay and lesbian rights. He even authored the opinion.

We strongly encourage you to read the decision, all 136 pages of it. It is absolutely brilliant, in its holding and in the way it gets there. It is a decision written with a meticulous eye toward appeal. It is littered with technical details which will make it difficult for the Ninth Circuit and the Supreme Court to overturn the decision, for instance, with the structure and number of its findings of fact and witness credibility determinations (which are almost impossible to overturn on appeal) and with its application of a constitutional analysis called “rational basis,” instead of the harsher, more controversial “strict scrutiny.”

The plaintiffs in this case and their attorney presented a strong case on behalf of the LGBT community.