



## Proposition 8 (California)

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Proposition 8, also known as the California Marriage Protection Act, was the ballot proposition that amended the California state constitution to ban same-sex marriage. The passage of Proposition 8 sparked large demonstrations throughout California and inspired new grassroots activism on behalf of gay rights. After prolonged litigation in both state and federal court, it was finally struck down on June 26, 2013.

Passed on November 4, 2008, Proposition 8 added a new provision to the California constitution that declared that "only marriage between a man and a woman is valid or recognized in California." This wording is the same as Proposition 22, which is sometimes known as the Knight Initiative because it was proposed by homophobic state senator William "Pete" Knight. Proposition 22 was adopted in 2000 as a simple law and was invalidated by the 2008 California Supreme Court's ruling in *In re Marriages*, which legalized same-sex marriage in California.

In response to that ruling, proponents of "traditional" marriage launched a petition drive to place a constitutional amendment on the ballot that would end same-sex marriage in the state.

### Background

On February 12, 2004, San Francisco's Mayor Gavin Newsom announced that the city would begin issuing marriage licenses to same-sex couples. Literally overnight thousands of same-sex couples converged on city hall for their licenses. Riveting footage of couples waiting in line for hours and having their unions blessed on the steps of city hall brought national and international attention.

These marriages, however, were soon nullified by the California Supreme Court, which did not at that time address the substantive question of the constitutionality of banning same-sex marriage but ruled that Mayor Newsom lacked the authority to issue marriage licenses to same-sex couples.

In the litigation that followed the San Francisco marriages, advocates for same-sex marriage won an impressive victory at the trial court, which ruled that the ban on same-sex marriage is unconstitutional. This decision, however, was soon reversed by the California Court of Appeals.

On May 15, 2008, however, the California Supreme Court, in a 4-3 decision, ruled that the prohibition of same-sex marriage was unconstitutional. The Court struck down two state laws (including Proposition 22) that banned same-sex marriage and declared that the state's domestic partnership law, which was adopted in 2003 and subsequently augmented, was not sufficient to provide equal protection under the law to same-sex couples.

Writing for the majority, Chief Justice Ronald George declared that the right to marriage is a fundamental right that must be accorded to same-sex as well as opposite-sex couples. "The right to marry," he wrote, "represents the right of an individual to establish a legally recognized family with a person of one's choice



The signs at this rally in favor of Proposition 8 held on October 26, 2008 in Fresno, California reflect the religious roots of the proposition's support. Photograph by Richard Johnstone. Image appears under the Creative Commons Attribution ShareAlike 2.0 license.

and, as such, is of fundamental significance both to society and to the individual."

Basing its ruling on the equal protection clause of the state constitution, the Court also adopted a new standard of review in determining claims of discrimination based on sexual orientation. Rather than the "rational basis" test, the Court ruled that claims of discrimination on the basis of sexual orientation require "strict scrutiny."

Despite pleas from opponents of same-sex marriage and the attorneys general of eleven states, the Court refused to delay the effect of its decision, so on June 17, 2008, same-sex couples began marrying in California. Since California has no residency requirement, couples from out-of-state were also eligible to marry in the state.

### **The Campaign**

In response to the court ruling, a coalition of anti-gay activists began collecting signatures on a petition to amend the constitution to prohibit same-sex marriage. To qualify the amendment for the ballot, its proponents needed the signatures of almost 700,000 registered voters. On June 2, 2008, they submitted more than 1,100,000 signatures.

The California Supreme Court rejected pre-election challenges to the initiative by opponents, who contended that constitutional amendments must be ratified by the legislature, and challenges to the ballot summary and title by proponents of the amendment, who contended that the Attorney General's summary, which included a statement that the initiative would deprive same-sex couples of the *right* to marry, was prejudicial.

Finally, on August 11, 2008, Proposition 8 was certified for the November 4, 2008 election.

Proposition 8 was bitterly contested by extraordinarily well-financed campaigns, both for and against. The campaign for Proposition 8 raised almost \$40 million dollars, the largest donors to which were members of the Church of Jesus Christ of Latter Day Saints (Mormons) and the Roman Catholic Church.

The campaign against Proposition 8 raised slightly more than \$43 million.

Donations flooded into both campaigns from all fifty states and more than 20 foreign countries. The \$83 million spent in the campaign set a new record for money spent on any social policy initiative in American history.

The bitterly contested campaign included homophobic assertions that allowing same-sex couples to marry would destroy or redefine the institution of marriage, and that it would somehow harm children. Some religious leaders, such as Pastor Rick Warren of the Saddleback Community Church, who would later give the Invocation at the 2008 Inauguration of President Obama, compared homosexuality to pedophilia and bestiality.

Despite polls indicating that Proposition 8 would be rejected, on November 4, 2008 it passed by a margin of 52% for and 48% against. It is believed that the late emphasis by the proponents of Proposition 8 on the supposed dangers of teaching about same-sex marriage in schools may have turned the tide.

### **Aftermath of the Passage of Proposition 8**

After it became clear that Proposition 8 had been passed by the voters of California, a stunned and bitterly disappointed glbtq community took to the streets to protest the injustice of stripping away equality rights. Many of the protests were directed at Mormon, Catholic, and Evangelical Churches.

Other protests and boycotts were aimed at businesses whose owners had supported Proposition 8 and at some individual donors to the Proposition 8 campaign.

Large demonstrations against the passage of Proposition 8 were held in San Diego, Los Angeles, Sacramento, and San Francisco.

The passage of Proposition 8 may be said to have sparked a new grassroots activism. Many of the volunteers who worked in the campaign against Proposition 8 expressed their displeasure at established glbtq organizations, such as the Human Rights Campaign and Equality California, claiming that these organizations had failed to run an effective campaign.

Among the new activists spawned by the passage of Proposition 8 were Amy Balliett and Willow Witte, who on their blog [JoinTheImpact.com](http://JoinTheImpact.com) issued a call on November 7, 2008 to protest the passage of Proposition 8. The call, which spread like wildfire through the Internet, was answered dramatically. On November 15, demonstrations in support of glbtq equality were held in over 300 American cities.

The direct action group GetEqual was also formed in response to the passage of Proposition 8. Founded by Kip Williams, a Tennessee native who has been active in a number of progressive causes, and Robin McGehee, a self-styled "PTA-mom" from Fresno, California, GetEqual quickly became a pivotal player in grassroots protests against glbtq inequality.

Williams and McGehee co-organized the National March for Equality in October 2009 and were especially visible in the protests against the Don't Ask, Don't Tell policy.

Another organization that emerged in the wake of the passage of Proposition 8 is the Courage Campaign. Although the Courage Campaign was in existence before the Proposition 8 defeat and is not focused exclusively on gay rights or marriage equality, it has emerged as an important grassroots and netroots organizing tool. Founded by Rick Jacobs, the organization is dedicated to bringing full equality to California and the nation.

The defeat suffered by the glbtq community in the Proposition 8 campaign was a bitter one, but it also became the impetus for a new kind of activism, one that depends more on grassroots organizing and on direct action protests than on the lobbying practiced by more traditional groups.

### **Proposition 8 Upheld by the California Supreme Court**

Proposition 8 became effective the day after the election. Same-sex marriages were discontinued in California on November 5, 2008.

Even as the supporters of Proposition 8 were celebrating their victory at the polls, opponents announced that they were filing suit to declare Proposition 8 invalid. On November 19, the California Supreme Court accepted three lawsuits challenging Proposition 8 and consolidated them into one, *Strauss v. Horton*.

One of the suits argued that Proposition 8 should be declared invalid because it improperly attempted to undo the state constitution's core commitment to equality and deprives the courts of their essential role of protecting the rights of minorities.

According to this suit, the California constitution makes clear that a major change in the roles played by the different branches of government cannot be made by a simple majority vote through the initiative process, but must first go through the state legislature. Changes to the underlying principles of the constitution must be approved by two-thirds of both houses of the legislature before going to voters. Since this procedure was not followed by the proponents of Proposition 8, it should be declared invalid, the suit

urged.

Other lawsuits were filed by the City Attorney of the City of San Francisco (joined by his counterparts in the City of Los Angeles, the County of Los Angeles, and Santa Clara) and by Robin Tyler and Diane Olson. The suit by the city attorneys made a similar argument to that of the gay rights organizations, that Proposition 8 attempted to revise rather than amend the constitution.

The suit filed by Tyler and Olson, who were among the first couples to be married after the ruling by the California Supreme Court in May, argued that Proposition 8 introduced a contradiction into the California State Constitution because it violates the equal protection clause.

Another suit was filed by several civil rights organizations, including the Asian Pacific American Legal Center, the California State Conference of the National Association for the Advancement of Colored People, the NAACP Legal Defense and Educational Fund, the Equal Justice Society, and the Mexican American Legal Defense and Educational Fund. This suit emphasized the danger that all minorities would face if the equal protection clause is subject to weakening by initiatives passed by a mere majority.

Still another suit was filed by feminist organizations.

In the aftermath of the election, it was not clear how the passage of Proposition 8 affected the legal status of the 18,000 same-sex marriages performed between June 17 and November 4, 2008. The Attorney General of California, Jerry Brown, issued an opinion that the marriages are valid and must continue to be honored by the state of California. However, this opinion was challenged by the supporters of Proposition 8, who pointed out that the language of the proposition clearly stated that California would "recognize" only marriages between a man and a woman.

On the basis of the questions asked during oral arguments in March 2009, many observers predicted that the Court would uphold Proposition 8, but that it would not invalidate the same-sex marriages performed between June 17, 2008 and the passage of Proposition 8 in November 2008.

That, in fact, was the decision that the California Supreme Court handed down on May 26, 2009. In a 6-1 decision, written by Chief Justice George, the Court upheld the ban on same-sex marriage, while also narrowing the issue to a dispute about a mere word. The ruling rejected all the arguments put forward by those challenging Proposition 8.

The Court emphasized that the state, through the domestic partnership law, gives gay and lesbian couples the ability to "choose one's life partner and enter with that person into a committed, officially recognized and protected family relationship that enjoys all of the constitutionally based incidents of marriage."

Asserting the Court's continuing commitment to subject laws affecting sexual orientation to "strict scrutiny," the decision characterized Proposition 8 as merely "carving out a narrow and limited exception" to the state's protection of same-sex couples, reserving the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law."

Whereas in the earlier ruling, the Court had emphasized the significance of the word marriage, in this ruling the Court minimized its importance, in effect reducing the dispute to a matter of vocabulary.

The tone of the majority decision was curiously apologetic. Indeed, in emphasizing that domestic partnerships are the equivalent of marriage in all but the name, the ruling may have strengthened the domestic partnership law, making it possible for same-sex couples, for example, to refuse to testify against each other and claim other rights that married couples assume but that are not specified in the domestic partnership law.

The decision let stand the 18,000 existing marriages because, the Court said, Proposition 8 did not include language specifically saying it was retroactive.

In a spirited dissent, Justice Carlos Moreno deplored the majority ruling, saying that Proposition 8 "strikes at the core of the promise of equality that underlies our California Constitution." Upholding it, he said, "places at risk the state constitutional rights of all disfavored minorities."

### **Federal Challenge to Proposition 8**

Soon after the announcement of the California Supreme Court's decision upholding the constitutionality of Proposition 8, acclaimed litigators Theodore Olson and David Boies, who had opposed each other in the bitterly contested *Gore v. Bush* Supreme Court case that decided the 2000 Presidential election, announced that they would take the battle for marriage equality to federal court.

Their announcement was initially greeted less than enthusiastically by some gay legal organizations and experts, who judged the move risky and premature, but the attorneys soon convinced most glbtq groups and individuals of their commitment.

One of the most intriguing aspects of the Boies-Olson suit was that it may have helped make the cause of marriage equality less partisan than it had previously been perceived, since Olson, a former Solicitor General, is a prominent conservative Republican, while Boies is a well-connected liberal Democrat.

The Olson-Boies case was supported by the American Foundation for Equal Rights, which had been formed by activist-actor-director Rob Reiner and political consultant (and later president of the Human Rights Campaign) Chad Griffin specifically to mount a challenge to Proposition 8 in federal court. To fund the lawsuit, which they hoped would ultimately establish same-sex marriage as a fundamental right throughout the country, they initially reached out to a handful of like-minded millionaires with an interest in equal rights, including Norman Lear, Steve Bing, and David Geffen, who provided approximately five million dollars in seed money. Others joining the effort were producer Bruce Cohen and screenwriter Dustin Lance Black--who had collaborated on *Milk*, the Oscar-winning biopic about pioneering gay-rights advocate Harvey Milk.

The suit was brought on behalf of one lesbian couple, Kris Perry and Sandy Stier, who have four children, and a gay male couple, Paul Katami and Jeff Zarrillo. Because the nominal defendants in the case include the Governor of California and one of the plaintiffs is named Perry, the case was initially known as *Perry v. Schwarzenegger*. (In the appellate process it ultimately became known as *Hollingsworth v. Perry*.)

The case was filed in May 2009 in the Federal District Court for Northern California and was assigned to the court's Chief Judge, Vaughn R. Walker, who was appointed to the bench by President George H. W. Bush in 1989.

The trial began on January 11, 2010. Because Governor Schwarzenegger and California Attorney General Jerry Brown declined to defend Proposition 8, with Brown declaring that he considered Proposition 8 unconstitutional, the ban on same-sex marriage was defended by the proponents of Proposition 8, ProtectMarriage.com, led by chief counsel Charles Cooper.

In the course of the trial, which spanned twelve days in January and two days in June 2010, Olson and Boies systematically built their case around the history of marriage, the harm that denial of marriage rights does to gay and lesbian couples and their children, and the irrationality of the ban. Introducing a massive amount of evidence, they demonstrated that the ban was enacted out of animus against homosexuals and that it causes great harm to gay men and lesbians for no rational governmental purpose.

The defense was stymied by the fact that they were unable to argue against same-sex marriage on religious

grounds or on the inferiority of homosexuals, which they used effectively in the campaign for Proposition 8, since such arguments would not be admissible as appropriate governmental reasons for denying a fundamental right. Instead, they were reduced to arguing that the only purpose of marriage is procreation and that permitting same-sex couples to marry would in some unspecified way contribute to the "deinstitutionalization" of marriage.

Whereas the opponents of Proposition 8 called a number of leading experts, such as distinguished Harvard historian Nancy Cott, to argue in favor same-sex marriage, the proponents called only one self-described "marriage expert," David Blankenhorn, who, it was revealed, has no Ph.D. in a relevant field and has published only a single peer-reviewed scholarly article, and that article had nothing to do with marriage.

Most damagingly for his reputation as an expert, Blankenhorn was cross-examined by David Boies, who sliced-and-diced his testimony to a fare-thee-well.

Despite having asserted over and over again in various speeches and publications that allowing gay men and lesbians to marry would harm the institution of marriage, under oath a tongue-tied Blankenhorn could not articulate what this damage would be. Nor could he cite any harm that the institution of marriage had suffered in those jurisdictions where same-sex couples have been allowed to marry for more than a decade. Nor could he explain straightforwardly his social science methodology.

On August 4, 2010, Judge Walker issued his decision. His 136-page opinion demolished the credibility of the defendants' witnesses (pointedly remarking, for example, that "None of Blankenhorn's opinions is reliable"), systematically outlined 80 findings of facts established by the plaintiffs, and concluded unambiguously that Proposition 8 is unconstitutional.

Judge Walker declared that "the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional."

Judge Walker endorsed the contention of Olson and Boies that the ban on same-sex marriage violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

In reaching this conclusion, he found that, although sexual orientation is entitled to heightened scrutiny, Proposition 8 fails to survive even rational basis review. He further found that the ban discriminates on the basis of sex as well as sexual orientation. He described domestic partnerships as a "substitute and inferior institution."

Judge Walker emphatically rejected the defendants' argument that the purpose of marriage is procreation, observing that "states have never required spouses to have an ability or willingness to procreate in order to marry."

He described the exclusion of same-sex couples from marriage "as an artifact of a time when the genders were seen as having distinct roles in society and in marriage," and declared, "That time has passed."

The judge dismissed the idea that a referendum of voters is somehow sacrosanct. The referendum's outcome was "irrelevant," he said, because "fundamental rights may not be submitted to a vote."

In his findings of fact, Judge Walker established that same-sex couples are identical to opposite-sex couples in their ability to form successful marital unions and raise children.

The editorial page of the *New York Times* described Judge Walker's decision as both "an instant landmark in American legal history" and also "a stirring and eloquently reasoned denunciation of all forms of irrational discrimination, the latest link in a chain of pathbreaking decisions that permitted interracial marriages and decriminalized gay sex between consenting adults."

### **Appeal to the Ninth Circuit**

Judge Walker's historic ruling was quickly appealed to the Ninth Circuit Court of Appeals. On August 16, 2010, the Ninth Circuit Court of Appeals stayed Judge Walker's decision pending review by the appellate court. It expedited consideration of the appeal and ordered that briefs address the question of whether proponents of Proposition 8 have standing to appeal.

On December 6, 2010, a three-judge panel of the Ninth Circuit heard oral arguments in the case. The judges asked both sides to discuss not only the substantive issues at dispute, but also the question of standing.

The standing issue was important because neither the Governor nor the Attorney General of California believed Proposition 8 to be constitutional and refused to appeal on behalf of the state.

During the December 6 hearing, it appeared that the panel was searching for a way to render a narrow ruling applicable to the particular set of circumstances in California rather than to issue a broad ruling about marriage rights generally.

On January 4, 2011, the panel issued a unanimous ruling to certify to the California Supreme Court the question of whether Proposition 8's proponents have standing to pursue the case.

The certification process enables federal courts to defer to state courts on questions of state law. The question here is whether California law recognizes the right of the proponents of a ballot initiative to defend its constitutionality if state officials decline to do so.

At the same time, the Ninth Circuit affirmed the lower court's ruling that one of the appellants, Imperial County, lacked standing. Thus, the issue of whether the official proponents have standing would determine whether there could be a viable appeal.

The Ninth Circuit was expected to issue its ruling in early 2011. However, the certification to the California Supreme Court delayed the ruling for some eight months.

When the California Supreme Court voted unanimously to accept the certification, they outlined a schedule of briefings and oral arguments that extended to September 2011.

In response to this schedule, the legal team representing the plaintiffs filed a motion on February 23, 2011 requesting that the Ninth Circuit Court of Appeals lift the stay on Judge Walker's ruling and allow same-sex marriage to resume in California.

Co-lead attorney Theodore Olson contended that the Appeals Court's request of the California Supreme Court to rule on the standing of the proponents of Proposition 8 created an untenable delay in a case that was supposed to be expedited.

He argued that, "Having prevailed at trial, having demonstrated that they had a fundamental right to marry, and having shown beyond dispute that Proposition 8 works irreparable harm upon gay and lesbian Californians by denying them that right, it is simply intolerable for this Court to continue to deny them that right and to perpetuate their pain for such a length of time--especially given that this Court itself has recognized that Proponents may well have no right to appeal at all."

The request to lift the stay on Judge Walker's decision was denied.

Finally, on November 7, 2011, the California Supreme Court decided that the proponents of voter-enacted legislation should have the right to defend such legislation in cases where the state declines to do so.

Although the ruling by the California Supreme Court was not binding on the Ninth Circuit, the panel was expected to accept the state court's recommendation on the question of standing. The court scheduled additional briefing on the question by December 2, 2011.

Meanwhile, the proponents of Proposition 8 moved that Judge Walker's decision be vacated on the grounds that he should have recused himself since he is gay and in a relationship. That argument was rejected by the District Court, but was accepted by the Ninth Circuit panel and consolidated with the main case.

Finally, on February 7, 2012, in a narrowly focused decision, the three-judge panel ruled on a 2-1 vote that Proposition 8 is unconstitutional.

In the majority opinion written by Judge Stephen Reinhardt, the Court declared, "All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the term 'marriage,' which symbolizes societal and state recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for 'laws of this sort.'"

The Court rejected the claim that Judge Vaughn Walker should have recused himself because he is a gay man in a relationship and held that ProtectMarriage had standing to defend Proposition 8 when the Attorney General and Governor of California declined to do so.

The decision on the merits of the case relied heavily on *Romer v. Evans*, the landmark United States Supreme Court ruling in 1996 that invalidated a Colorado constitutional amendment that prohibited municipalities and state agencies from granting lesbians and gay men "protected status." In the decision written by Justice Anthony Kennedy, the Supreme Court concluded that the Colorado amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."

Justice Reinhardt's decision in the Proposition 8 case stressed the similarity between Proposition 8 and the Colorado amendment struck down by *Romer v. Evans*: both "single out a certain class of citizens for disfavored legal status" and both withdraw from that class of citizens an existing legal right.

His decision emphasized the importance of the name "marriage" and concluded that the entire purpose of Proposition 8 was to deny same-sex couples the right to use that term to describe their relationships. Since Proposition 8 accomplished none of the ex post facto rationalizations of the initiative, such as encouraging childrearing and responsible procreation by heterosexuals, or even "proceeding with caution" in making marriage law or preventing children from being taught about same-sex marriage in school, it was enacted, the Court inferred, to express disapproval of homosexuals and their relationships.

The decision evaded the question of whether same-sex couples have a fundamental right to marry and purposely declined to address many of the questions raised by Judge Walker's more expansive decision. Rather, it focused narrowly on the unique legal situation in California in which the right of same-sex partners was extended by the California Supreme Court and then rescinded by a plebiscite.

Judge Reinhardt framed the issue this way: "The Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. . . . Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from

declining to extend that designation in the first place. . . The action of changing something suggests a more deliberate [invidious] purpose than does the inaction of leaving it as it is."

Judge Reinhardt made explicit the fact that the Court did not address the question of a right to marriage: " We therefore need not and do not consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so. Further, we express no view on those questions."

By relying on the *Romer v. Evans* precedent, the Court was able to reach its decision by applying a "rational basis" analysis. In doing so, it evaded the question of whether sexual orientation discrimination requires " heightened scrutiny."

The biggest disappointment in the long-awaited ruling was that it was not unanimous. Although he concurred with the two judges in the majority on the questions regarding standing and the recusal of Judge Walker, Judge N. Randy Smith, one of the most conservative judges in the circuit, dissented from the ruling on the merits of the case.

Judge Smith's dissent was weak and vacuous, saying in effect that almost any possible reason, no matter how implausible, would satisfy the "rational basis" standard.

However, same-sex weddings did not resume in California immediately. The proponents of Proposition 8 sought an en banc review by the Ninth Circuit. When that was denied, they then sought review by the Supreme Court of the United States.

Most observers thought that the Supreme Court would deny review and that same-sex marriages would quickly resume in California. However, in something of a surprise, on December 7, 2012, the Supreme Court announced that it would hear the case, now known as *Hollingsworth v. Perry*.

The Court indicated that among the issues it would consider in the Prop 8 case was the question of standing, i.e., whether the proponents of the Proposition even had the right to defend it after the Governor and Attorney General declined to do so.

On February 21, 2013, attorneys Olson and Boies filed their main brief in the case. In their 63-page brief, the attorneys told the Court that the case is about marriage and equality. They built a sweeping argument for same-sex marriage as a fundamental right, while also arguing more narrowly that Proposition 8, which banned same-sex marriage in California, is unconstitutional because it serves no legitimate government interest and was motivated by animus.

Olson and Boies also eviscerated the argument put forward by the proponents of Proposition 8 that marriage is exclusively about procreation.

"Proponents," they wrote, "accuse Plaintiffs (repeatedly) of 're-defining marriage.' But it is Proponents who have imagined (not from any of this Court's decisions) a cramped definition of marriage as a utilitarian incentive devised by and put into service by the State--society's way of channeling heterosexual potential parents into 'responsible procreation.'"

They pointed out that "In their 65-page brief about marriage in California, Proponents do not even mention the word 'love.' They seem to have no understanding of the privacy, liberty, and associational values that underlie this Court's recognition of marriage as a fundamental, personal right. Ignoring over a century of this Court's declarations regarding the emotional bonding, societal commitment, and cultural status expressed by the institution of marriage, Proponents actually go so far as to argue that, without the potential for procreation, marriage might not 'even . . . exist[ ] at all' and 'there would be no need of any institution concerned with sex.'"

On March 26, 2013, the Supreme Court heard oral arguments pertaining to Proposition 8. The most striking impression left by the arguments was how weak the justification for Proposition 8 remained. The proponents of California's ban on same-sex marriage could articulate no compelling reason for denying equal rights to gay and lesbian citizens. On the other hand, the hearing also left unclear whether the Supreme Court had the courage to make a definitive ruling that would establish same-sex marriage as a fundamental right across the country.

In his oral argument, Theodore Olson emphasized that marriage is a personal individual liberty and a fundamental right. In a bid for a broad decision by the Court, he said that any ban on same-sex marriage violates due process.

Olson forcefully described the effects of Proposition 8: "It walls off gays and lesbians from marriage, the most important relation in life," he said, "thus stigmatizing a class of Californians based upon their status and labeling their most cherished relationships as second-rate, different, unequal and not O.K."

Solicitor General Donald Verrilli appeared before the Court to argue on behalf of the Obama administration that Proposition 8 should be subjected to heightened scrutiny. However, very little time was devoted to the question of scrutiny.

Most of the hearing was devoted to the question of standing and to the scope of a possible ruling invalidating Proposition 8.

On the basis of the oral arguments, most Court watchers predicted that marriage equality would soon return to California. The real question, however, was whether Proposition 8 would be invalidated on the basis of a lack of standing or some other procedural question or as the result of a broad decision that extended the fundamental right of marriage to same-sex couples throughout the nation.

That question was answered on the final day of the Supreme Court's term, when it released its rulings on cases challenging the Defense of Marriage Act and California's Proposition 8.

The Proposition 8 decision was, paradoxically, both a major victory for marriage equality and a disappointing failure by the court to declare a fundamental right to marry the person one loves. Rather than reach the merits of the case, the Supreme Court, in a decision written by Chief Justice Roberts and joined by an unusual coalition of Justices Scalia, Ginsburg, Breyer, and Kagan, ruled that the proponents of Proposition 8 lacked standing to appeal Judge Walker's opinion. The ruling focused specifically on issues of standing, with the result that Judge Walker's opinion was upheld and same-sex marriages resumed in the nation's largest state.

The Chief Justice noted early in his opinion, "Federal courts have authority under the Constitution to answer such questions [of constitutionality] only if necessary to do so in the course of deciding an actual 'case' or 'controversy.' . . . It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives."

In order for the proponents of Proposition 8 to have standing to appeal in federal court, they would have had to demonstrate "a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision."

Chief Justice Roberts pointed out that the District Court had not ordered the proponents to do or refrain from doing anything. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law, and they were neither agents of the state nor authorized to represent the state. "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so

for the first time here."

The Court concluded, "Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction."

Thus, Judge Walker's historic decision declaring Proposition 8 unconstitutional is the governing decision in regard to Proposition 8. Since the decision is from a District Court rather than an appellate court, it applies only to California and will have only limited precedential value. Still because the decision is carefully considered and based on a thorough trial, it is likely to be influential in future legislation challenging state bans on same-sex marriage.

The litigation over Proposition 8 did not lead to the broad ruling that the American Foundation for Equal Rights had hoped. It did not establish a fundamental constitutional right to same-sex marriage. However, Chief Justice Roberts' ruling did validate a point that marriage equality activists have made over and over again: allowing gay and lesbian couples to marry harms no one. Even the most ardent opponents of same-sex marriage sustain no real injury when gay and lesbian couples are allowed to marry.

Moreover, the long battle against Proposition 8 served the important purpose of educating the public about marriage equality generally. The exhaustive trial conducted by Judge Walker demonstrated clearly the harm caused by the discriminatory proposition and also the irrationality of the discrimination. The fact is that the proponents of Proposition 8 could not find a rational basis to justify the exclusion of gay and lesbian couples from civil marriage.

Most importantly, the litigation succeeded in nullifying the discriminatory Proposition. As a result of the prolonged legal battle, same-sex marriage returned to California after almost five long years of the ban imposed by Proposition 8.

Shortly after the Supreme Court ruling was announced, California Governor Jerry Brown declared that "the district court's injunction against Proposition 8 applies statewide and that all county clerks and county registrar/recorders must comply with it."

Although there is a 25-day window during which a petition for rehearing can be filed with the Supreme Court by the proponents of Proposition 8, California Attorney General Kamala Harris asked the Ninth Circuit Court of Appeals to lift the stay of Judge Walker's ruling so that same-sex marriages could resume in the state immediately.

To the surprise of many observers, the Court of Appeals quickly complied with Attorney General Harris's request. On June 28, 2013, the first couples to marry after the nullification of Proposition 8 were wed. Appropriately, they were the plaintiffs who challenged Proposition 8 in federal court.

The first same-sex marriage following the Court's action occurred in San Francisco just before 5:00 p.m. Kris Perry and Sandy Stier were married by Attorney General Harris at City Hall before a hastily assembled crowd.

The other plaintiffs in the landmark lawsuit, Paul Katami and Jeffrey Zarrillo, were married in Los Angeles an hour later by Mayor Antonio Villaraigosa.

On June 28, Governor Brown also clarified that registered domestic partners in California could be issued marriage licenses and that same-sex couples legally married in another jurisdiction "will be considered already legally married under California marriage licensing and certification laws and they should not be issued a new marriage license."

A desperate attempt to halt or at least delay the resumption of same-sex marriages through an emergency motion filed with the Supreme Court by the proponents of Proposition 8 failed when the motion was denied without comment.

The resumption of same-sex marriage in the nation's largest state energized the annual Pride celebrations in California and throughout the nation. It also galvanized the national movement for marriage equality.

Last-ditch and desperate attempts to revive Proposition 8 through appeals to the California Supreme Court failed on August 14, 2013, when the Court rejected without comment the argument that only an appellate court could overturn a statewide law.

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