9TH CIRCUIT PUNTS ON PERRY PROP 8; CERTIFIES STANDING TO CALIFORNIA

Liberty & Justice by Mirko Ilic

We have unexpectedly quick news out of the 9th Circuit Court of Appeals on the *Perry v. Schwarzenegger* Proposition 8 marriage equality appeal. As you will recall, the case is in the 9th on appeal from the three week long evidentiary trial in the Northern District of California last January in front of Judge Vaughn Walker with closing arguments made on June 16 (summary of EW live coverage here) and Judge Walker's opinion finding such marriage discrimination unconstitutional was issued on August 4th. The current appeal had oral argument less than a month ago, on Monday December 6th.

Now we have the surprisingly fast first decision, if you can call it a "decision". It is really a disguised punt. The main opinion is in docket No. 10-16696, where the effective docket order reads:

> Filed Order for PUBLICATION (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and N. RANDY SMITH) for certification to California State Supreme Court. Before this panel of the United States Court of Appeals for the Ninth Circuit is an appeal concerning the constitutionality under the United States Constitution of Article I, § 7.5 of the California Constitution ("Proposition 8"). Because we cannot consider this important constitutional question unless the appellants before us have standing to raise it, and in light of Arizonans for Official English v. Arizona, 520 U.S. 43

> (1997) (“Arizonans”), it is critical that we be advised of the rights under California law of the official proponents of an initiative measure to defend the constitutionality of that measure upon its adoption by the People when the state officers charged with the laws’ enforcement, including the Attorney General, refuse to provide such a defense or appeal a judgment declaring the measure unconstitutional. As we are aware of no controlling state precedent on this precise question, we respectfully ask the Supreme Court of California to exercise its discretion to accept and decide the certified question below. (See order for full text).
>
> ….
>
> The case is withdrawn from submission, and further proceedings in this court are stayed pending final action by the Supreme Court of California. The parties shall notify the Clerk of this Court within three days after the Court accepts or rejects certification, and again within three days if the Court renders an opinion. The panel retains jurisdiction over further proceedings. IT IS SO ORDERED.

Now, as you will also recall, there were two cause numbers consolidated for oral argument and that, really, comprise the same effective case. In the second one, Docket No. 10-16751, the part of the action initiated by Imperial County attempting to intervene and provide governmental cover for standing on appeal, the effective corollary docket order reads:

> FILED PER CURIAM OPINION (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and N. RANDY SMITH) AFFIRMED; DISMISSED. The district court order denying the motion to intervene is AFFIRMED. Movants’ appeal of the district court order

> concerning the constitutionality of Proposition 8 is DISMISSED for lack of standing. The deadline for filing a petition for panel rehearing or rehearing en banc is hereby EXTENDED until the deadline for such petitions in No. 10-16696, which will be 14 days after an opinion is filed in that appeal. The Clerk is DIRECTED to stay the issuance of the mandate in this case until the mandate issues in No. 10-16696. AFFIRMED in part; DISMISSED in part. FILED AND ENTERED JUDGMENT.

In the second cause number, 10-16751, the court issued a 21 page *per curiam* (by the whole panel collectively) opinion addressing the Imperial county attempt at intervention. the court held:

> None of the Imperial County movants has demonstrated a "significant protectable interest" at stake in this action, as it was brought by Plaintiffs, and we affirm on that basis alone.

The court effectively laughed at the attempt to use Deputy County clerk Isabel Vargas as a mule for intervention, wondering why the hell a minion would be used instead of, you know, the actual County Clerk. A real valid question, and the court found no good answer. The court similarly found that the Imperial County Board of Supervisors was not a proper vehicle, stating "…the Board plays no role with regard to marriage, which is "a matter of 'statewide concern' rather than a 'municipal affair'". The court rounded out the fisking as follows:

> Moreover, the duties of the Supervisors themselves are not directly affected by this litigation, so they lack a significant protectable interest.
>
> Second, the County itself has failed to demonstrate any interest of its own, apart from those claimed by Vargas or

> the Board of Supervisors.

So, in a nutshell, the argument by Imperial County that they were entitled to intervene as a matter of right was denied in full. Oh, and the 9th also found that Vaughn Walker was correct in finding no necessary basis for permissive intervention by Imperial County as well, and affirmed that denial. So Imperial County, unless they get some appellate relief, which is unlikely, is toast.

And, so that completes the fun today, right? Oh no! We have more! The estimable Judge Stephen Reinhardt lodged a concurring opinion that is a little, shall we say, more interesting. I will excerpt a few key quotes, but this one is only ten pages long and is well worth the read. I think you will quickly understand why I have said Reinhardt is such a wonderful treasure as a judge.

> Today's two orders involve a procedural question known as "standing." The public may wonder why that issue is of such great importance, and what the significance of our standing decisions is. For that reason, while I agree entirely with our two dispositions, both of which are filed in the names of all three of us who are considering the appeals and both of which represent our unanimous views, I believe it desirable to set forth a few explanatory remarks of my own.
>
> The standing problem arises out of a trend in our judicial system over the past few decades. It is a trend that emphasizes technical rules over deciding cases on the merits, and indeed over the merits themselves.

Reinhardt's disdain for the avoidance of meritorious claims on technical standing issues just drips off the pages. Indeed he cites his

own previous tomes on just this subject in a prominent footnote (See footnote 3 for the cites). But as to the instant case, Reinhardt acidly remarks:

> All I can say now is that the issues concerning standing were wholly avoidable in this case.

He goes on to take a crystal clear shot directly at the broadside of Ted Olson and David Boies for filing their action, and obtaining their relief, against one two of the 58 counties in California:

> Whether Plaintiffs are correct or not, it is clear that all of this would have been unnecessary and Plaintiffs could have obtained a statewide injunction had they filed an action against a broader set of defendants, a simple matter of pleading. Why preeminent counsel and the major law firms of which they are a part failed to do that is a matter on which I will not speculate.

Ouch. Reinhardt then goes on to blast Schwarzenegger and Jerry Brown, the Governor and Attorney General at the time respectively, for not giving the intervenors appellate cover (as I have consistently carped about as well) and Imperial County for the incredibly lame effort of trying to appear through a common deputy clerk. Reinhardt is spot on in each of these regards.

The last paragraph from Steve Reinhardt's concurring opinion summarizes where the case stands, and is likely to do so better than I could, so I am going to let him speak:

> None of this means that ultimately there is no standing in this case. Because of a United States Supreme Court ruling regarding the availability of standing to proponents of initiatives, Arizonans for Official English v. Arizona, 520

> U.S. 43 (1997), we have certified to the Supreme Court of California the question of an initiative proponent's authority and interests under California law. Although that matter must be decided by the Supreme Court of California, Proponents advance a strong argument on this point. Thus, in the end, there may well be standing to maintain this appeal, and the important constitutional question before us may, after all, be decided by an appellate court — ours, the Supreme Court, or both — and may apply to California as a whole, instead of by being finally decided by a trial court, or by default, in only two counties or in none. As a result, the technical barriers and the inexplicable manner in which the parties have conducted this litigation may in the end not preclude an orderly review by the federal courts of the critical constitutional question that is of interest to all Americans, and particularly to the millions of Californians who voted for Proposition 8 and the tens of thousands of same-sex couples who wish to marry in that state. In the meantime, while we await further word from the Supreme Court of California, I hope that the American public will have a better understanding of where we stand today in this case, if not why.

The one last parting thought I have is that this California Supreme Court certification process is likely to take some time. Six months would be a miracle, a year is far more likely. First off, the California Supreme Court does not have to accept consideration, and there will be a briefing process on whether they even should do that. Assuming they then accept consideration on the merits, and I do think it extremely likely they will, there will then be a full briefing schedule on the merits before any decision.

It would have been expected that the Court under Chief Justice Ron George (very nice article here) would take this up, but he just left and the new Chief Justice, Tani Cantil-Sakauye, literally was just sworn in yesterday. She is known as being cautious and moderately conservative, but fair and open minded. Which, really, is probably a fair description of Ron George, so there may not be that much of a change at the top of the California Supremes.

I still look for the California Supreme Court to certify this issue, and my best guess is they will find standing, the case will be sent back to the 9th Circuit for a merits decision and the 9th will uphold Vaughn Walker. Assuming all that is the case and plays out accordingly, it will sure eviscerate much of the ability of the US Supreme Court to avoid the merits on standing (which I think they otherwise would do). The bad news is this is going to take well over a year, and could easily be two years if there is an *en banc* process as well in the 9th. An attempt to repeal Proposition 8 will almost certainly be on the ballot for the 2012 election and if it gets repealed, this case is moot. That would not be so bad, as it would reinstate marriage equality in California. However if it fails, and Barack Obama loses in 2012, and there is a very early opening on the Supreme Court, the resulting extreme rightward shift would be very detrimental. There are a lot of ways this could go in the future, stay tuned!

UPDATE: Here is Judge Reinhardt's collateral final order on the earlier motion to disqualify him that he previously denied long before oral argument.

[The absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]