PERRY V. SCHWARZENEGGER 9TH CIRCUIT ORAL ARGUMENT LIVEBLOG

Liberty & Justice by Mirko Ilic

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We're doing the standing question now. Defendant-Intervenor's Cooper is up. First question notes that the opinion they're relying on preceded another opinion which shot it down.

Judge asks for a federal precedent.

"Your honor, I don't have a case."

Are you aware of any CA law which states that proponents do have standing?

Cooper: Strauss.

Strauss doesn't talk about proponents as agent of the state.

Did you seek injunction to get AG to appeal?

Cooper: No.

If AG has power to do it wouldn't that have been a way to ensure your ability to seek standing.

Reinhardt: Didn't someone else do that?

Cooper: That wasn't us.

Cooper explains how NJ Supreme Court decision led to standing in another federal case, Forsythe, which is the argument he's making here.

Cooper: No one else would defend constitutionality of the statute in Strauss were these proponents. In that case, I hasten to add, CA SC denied intervention status to another group. In Strauss case, at Court of Appeals level, not in Strauss cases, marriage cases, the court of appeals denied intervention to a group that was not the official proponents but stated that "we make no ruling wrt whether under our law official proponents would be authorized in default of state officials would be authorized in representing state's interests in state statute."

Reinhardt: One more detail about court ruling—did court deny?

Cooper: I don't know.

Reinhardt: better to say you don't know than to guess.

Robert Tyler: Plaintiffs think justice served where appellate rule is frustrated.

Reinhardt: They're talking about procedural rules.

Start by talking about Dolores Kozinski is. She's the clerk.

Tyler: Deputy Clerk is a civil commissioner of marriage.

Anything in record to suggest she's acting w/the clerk's authority? The answer's no, right?

Tyler; Nothing. Declaration of Miss Vargas saying she has these responsibilities. In position to intervene, assume facts to be true.

What facts are in record to show that Vargas has any authority whatsoever.

Tyler: In her declaration.

You're repeating yourself now. Nothing in the record says she has authority, correct?

Tyler: She's appointed by Board of Supervisors.

All political functions remain vested in County

Officer who would continue to exercise them when present. Only be exercised by Deputy in name of or act of principal. So I'm again worried that this clerk can only act as agent of principal, and if clerk isn't here we have a problem.

Tyler: I disagree.

You disagree with Fout?

Tyler: Govt has ability to commission others.

Ability to act is what we're about here.

Tyler: Judge Walker's order binds her. Said all County Clerks under supervision.

Not true, I thought she was independent officer.

Tyler: Fact of matter is that Walker issued order.

Different question whether Walker thought she was bound, that may lead you to a different theory.

Are they state officers performing state functions.

Tyler: Local, individuals who are statutorily created under govt code.

How do I get around language in Locke that says they are state officers.

Tyler: State function, issuing of marriage licenses.

Tyler: What case turns on is whether or not her duties will be altered bc of this case.

Language in Locke: If however controlling rule of law requires official to carry out ministerial duty dictated by statute, unless and until determined to be unconstitutional. Such official cannot compel a court to rule on constitutionality of issue.

Tyler: Locke stands for important proposition. City and State of SF trying to violate the law. Imperial county trying to uphold the law.

Now using death penalty as analogy.

Reinhardt: When you're asked a question and don't know the answer, say so.

Two county clerks said they were comfortable with ruling. Could a Deputy Clerk in either LA or Alameda County come in and say "I don't agree w/my boss."

Tyler: If they have official duties.

How long do you think he would last?

Tyler: Maybe why we don't have other govtl defenders. We have a clerk.

You have a Deputy Clerk, we're left completely at mystery to know why the clerk is not before us.

We're wondering why there's not a single sentence in her affidavit saying she's acting on the authority of clerk.

Did you say Board of Sups appoints?

Tyler: I was mistaken, I was given a note, they're elected.

May delegate authority. Did you ask AG for authority to appear?

Tyler: We did not.

Did Judge Walker say your client was bound by injunction?

Tyler: Quavers.

You're not answering our question, you're using other people's time.

Tyler: Said Vargas had no authority to disregard.

Boies: Let me begin by answering court's question wrt getting AG to appeal. One sentence denial. Also like to be certain record is clear, permanent injunction issued by Walker relates only to official defense and persons under control.

So Walker was wrong about registrar controlling county clerks. If she's not bound by injunction how is she bound?

Boies: We don't believe she does.

So only clerks of LA and Alameda bound by this?

Boies: No, AG and Gov also bound.

What about clerks who issue licenses? Aren't they bound?

Boies: Marriage is state-wide concern.

Basically, Boies is trying to argue that Vargas isn't affected by Walker's ruling, but that the AG and Governor will now go to use the state courts to enforce law via county clerks. I sort of wonder whether this arg would have gone the same way if Brown hadn't won?

Boies: Had trial before Walker, Walker has enjoined gov and AG, all defendants.

And that phrase was makeup was chosen by plaintiff's counsel, chose only Alameda and LA. Made no effort to get defendant class certified, or plaintiff. That was a known factual choice.

Boies: We could have done that your honor. Just as plaintiff in Romer did not proceed via class act.

[Doesn't matter anyway, bc John Roberts is about to get rid of class action.]

As of now, nobody is bound except LA and Alameda. No other clerks.

Boies: But bc all clerks are ministerial officials who simply issue marriage licenses to whomever state decides is entitled to marriage licenses.

But then why did you need anything?

Boies: In absence of judicial determination wouldn't have done that. Both Gov and AG have continued to enforce the law. Could have tried to change the law in CA. They've not done that.

Question about that: my understanding that these particular initiatives could not have been vetoed. Leg could not even amend them unless approved by voters, I guess my problem is, in fact gov's actions have nullified efforts made by initiative to be placed on ballot.

Boies: I would disagree.

If they don't appeal and therefore no one can appeal, haven't they nullified affect?

Boies: Only insofar as every state case, if state doesn't appeal, it nullifies.

Boies: Do not appeal decision after trial finding it's unconstitutional.

By suggesting they won't appeal are they saying they won't enforce the initiative.

Boies: Because they're enforcing it right now.

You're suggesting they won't enforce.

Isn't AG in effect veto this by refusing to appeal it.

Smith brings up GInsberg's opinion knocking down Reinhardt's earlier ruling.

Boies: Fact that there's no one to defend does not give standing.

Now asking whether CA SC and SCOTUS determine whether there's standing.

Boies: In order to have jurisdiction of this court, must have particularized injury, nothing CA court could say that would provide Article III standing to these proponents. It doesn't matter whether CA wants to give standing under SCOTUS they don't have standing. SCOTUS said even members of Congress acting pursuant to grant of jurisdiction would not have standing bc no particularized injury.

Would you say that if CA SC said they had standing, you'd be back here making that argument.

If neither opponents have standing and therefore

dismiss appeal do we have power to address cope of injunction.

Boies: I do not believe so, your honor.

You're saying scope of injunction quite limited. You're counting on AG to go into state courts to expand injunction to other counties.

Boies: I wouldn't put it that way, but practical terms is that we do have to depend on AG and GOv.

You're lucky election came out the way it did. [hey I already said that]

Boies: Constitutional standing so important that you can't just get together and settle it. Where it is clear, it is crystal clear in this case these appellants don't have standing.

Hard to believe you didn't want to get a judgment throughout the state. Hard to believe that a lawyer w/your ability and fame and whatever you have—even if you lost to Mr. Olson—nevertheless it's hard for me to believe that. This marriage system we have is integrated system. They all act in concert in scheme to get two people married. They're all acting together. Doesn't injunction extend to all these people acting in concert?

Boies: Injunction itself did not go as broad as it might have under Rule 65.

Smith: How would clerk bring any case about what she's to do.

Boies: If court were to say I'm concerned about injunction, she would have narrow ability to ask court whether the injunction binds her. I agree that deputy clerk or even clerk if she were here, would not have standing to litigate the issue. Purely ministerial function.

Boies: I would try to end w/two points. Case at federal level of what happened to In Re marriage. State defendants and AG and Gov as respondents. Appellants here do not have particularized injury.

Cooper: In Karcher, what law did they have to defend?

Hawkins: In Karcher didn't Ag defend?

Cooper: He was willing to reserve wrt attorney's fees. Only indivs who took notice of appeal to 3rd Circuit. I bring you exactly same law as Karcher. I bring you Strauss case. If you do not agree we have standing, I urge you to ask CA SC.

10 minute recess, we'll return for second hour.

Cooper: People of CA and throughout the country, meaningful debate about definition of marriage. Words of SCOTUS, fundamental to existence and survival of human race. This fundamental question: whether definition of marriage is one for the people themselves to resolve through democratic process, or whether it takes that out of their hands and decides it for them.

HAwkins: Could the people of CA reinstitute segregation.

Cooper: Inconsistent w/US Constitution.

Hawkins: But they probably could have done that in 1870s 80s or 90s. How's this different?

Cooper: Nothing like the for example, the racial restrictions at issue in Loving. There is simply no legitimate rational basis whatsoever on any purpose of marriage to deny right of mixed race couple. On every basis on which one can identify purpose of marriage, mixed race

Smith: Baker has absolute right to prescribe conditions of marraige.

Cooper: Not absolute. Limited by whatever restrictions US constitution places on it.

Cooper: SCOTUS said that racial restriction violated fundamental meaning.

Smith: Turner v. Safley?

Cooper: Case dealing w/prison inmates

Smith: Warren?

Cooper: What we want to advance here is this. Distinguishing characteristics of opposite sex couples

Smith: Are you arguing that enough for rational basis for federal court to get involved?

Cooper: Arguing rational basis, if any rational basis for opposite sex def of marriage that def must be upheld, only if nothing to say in favor of the def of marriage that has prevailed in this country and all places at all times since time immemorial, there's no rational basis for it. That is the test that we submit that applies, your honor. We believe rational basis justifying rational basis of marriage. Key reason existed at all is that sexual relationships between men and women naturally produce children. Society has no particular interest in platonic relationship between man and woman. When relationship becomes sexual one, society has vital interest. Needs creation of new life for next generation. Society's vital interests threatened by unintentional pregnancy will mean child born out of wedlock raised by mother alone that directly implicates society's general interests. Immediate interests, society will have to step in, and assist that single parent in raising of that child, but as well, in undeniable fact that children raised in that circumstance.

Smith: Sounds like good arg for prohibiting divorce. [laughter] how does it relate to two males or two females from forming household.

Cooper: Point is whether CA has rational reason for drawing distinction between same-sex couples who cannot w/o intervention of 3rd party opposite sex, and couples who can procreate unintentionally and create unwanted pregnancies. Not phenom that exists w/same sex.

Smith: Rational basis for initiative, CA law says homosexual couples have all rights, what is rational basis if in fact homosexual couples have all the rights that heterosexual couples have. We're left w/a word, marriage. What is

rational basis for that.

Cooper: A word, a word that is, essentially, the institution, if you redefine the institution, redefine the word, you change the institution. You cannot separate the two. Name of marriage effectively institution. Issue whether be redefined to be genderless institution that bears little or no relationship to history of marriage.

Hawkins: Why not defined by Romer? Exactly what prop in CO did?

Cooper: In Romer, court dealing w/sweeping law that placed undifferentiated burdens on homosexuals.

Hawkins: If you take away a bunch of rights, that's bad, but if you take away just one right, that's okay?

Cooper: Not about taking away rights?

Hawkins: Did or did not homosexuals have right to marry before Prop 8.

Cooper: Court did, then people reversed it.

Hawkins: In CO, wanted to extend preferred status, voters said you cannot do that. stop doing that.

Cooper: Amendment 2 rendered homosexuals strangers to the law. Ordinary pursuits of civic law, as court put it. Sweeping, undifferentiated, isolated class, strangers to the law altogether. Unprecedented in our jurisprudence. Traditional def of marriage anything but unprecedented.

Cooper: Your question governed by Crawford case. Constitution

Hawkins: Cannot reinstitute racial segregation. Harlan's dissent in Plessy. Kennedy: Constitution neither knows or tolerates classes. Aren't you flying in face of that.

Cooper: If no rational reason to distinguish between citizens.

Hawkins: proponents said all they were doing was leveling playing field.

Hawkins: Is it preference of proponents, assume you have standing.

Cooper: I accept that assumption.

Hawkins: Do you want us to get to merits of issue here, do you want us to sidestep Baker?

Cooper: I believe Baker binding on this court. Opening legal point would have been that this is not the first court to take up and deal with the 14th Amendment issues. In fact there have been 8 appellate courts, state and federal, insofar as they relate to traditional marriage all 8 have upheld, rejected 14th amendment claims, one of those is Baker.

Reinhardt: Some difference, before Romer, didn't deal with taking away rights.

Hawkins: CA SC said, sir, that's what the Constitution said.

Cooper: Said that this is what Constitution says. All the people retain sovereign power, have authority to reverse it. Came to people of CA same way it came to people, on revision of CA Court of Appeals.

Reinhardt: Question is can you amend, is there valid reason to amend Constitution under standards we follow?

Cooper: Point of Crawford is that the people are free to reverse.

Reinhardt: Well, not everything as question Hawkins points out, you can't reverse segregation.

Cooper: Federal Constitution would prohibit that quite apart. If CA Constitution had provided that there will be racial segregation in connection w/schools, the federal constitution would outlaw that and it wouldn't matter if intervening decision also outlawing it. If Prop8 had been enacted before CA SC invalidated traditional marriage, it could have been enacted

before that, same as Prop 8. Under Crawford, people retain authority to reverse unless federal Constitution.

Reinhardt: If you're taking away right from particular class and done for reason only directed at a class in manner, I won't say invidious—a biased manner, that sometimes you can derive from action in itself. Here you have take into all circumstances. You had all the aspects of marriage other than title. What reason to take title away from people who have enjoyed it. Constitutional question.

Cooper: Our submission to you, people of CA needed no reason beyond they disagreed that their constitution ordained that result.

Reinhardt: Why isnt' that true of Romer? Doesn't have to be in federal constitution, has to be rational can't be related to bias.

Cooper: If Prop8 coming to you w/o previous period in which CA had approve same sex marriage would come to you as it comes to you now.

Hawkins now probing the limit of Cooper's claim that marriage is somehow different, basically distance between Cooper and Romer.

Cooper: They would be able to take away civil unions unless constitution affords same sex couples civil unions.

Reinhardt: they took away things that are not required by Constitution.

Smith: Couple of questions I am particularly worried about. Some states have not provided domestic partner rights to homosexuals. Do they have stronger right to deny marriage than CA. It seems to be arg could be made as to rational basis if not all sorts of rights already given.Do they have a stronger arg for rational basis than CA?

Cooper: it would be quite perverse if CA, by enacting domestic partnership, going far as state can do short redefining marriage, state insisted it not redefine marriage. Reserve it

for purposes it has always served.

Smith: My worry is, this is what I'm really worried about in your arg. I'm trying to find rational basis, when CA has gone as far as it has, what is rational basis that they have. I'm wondering if it's not just to market marriage, promote special relationship in society.

Cooper: "I believe" it's to preserve purpose it has always had.

Smith: I'll skip my last question. My last question was: do you think this rationale would fulfill the more searching form of rational basis that Justice OConnor found?

Cooper: We think it does satisfy heightened scrutiny. Essential proposition that main objection to infertile couples are nonetheless allowed to marry. No society has ever insisted that marriage produce children. Then becomes how would society draw that line, it would have to have Orwellian measures to police fertility, annul marriages that are childless, would undoubtedly violate rights of indivs involved.

Smith: He indulged me, I hope it didn't aggravate him.

Olson: It is important to focus on fundamental fact that CA has engraved discrimination into its fundamental charter, label given in official pamphlet, it eliminates right of homosexuals to marry. Access to what SCOTUS repeatedly said most important relation in life.

Reinhardt [softball]: difference between taking right away?

Olson: Yes, going back to 60s on housing. That is what SCOTUS said in Romer. I don't think it would be different if enacted before In Re Marriage, SCOTUS has said taking away enhances effect of purported constitutional change.

Reinhardt: Case Cooper referred to several times.

Olson: Crawford. To extent not required by

constitution remedies could be restricted, that doesn't change anything. I heard Cooper mention Crawford five times, doesn't say an initiative rises above 14th amendment.

Reinhardt: Are you suggesting gay marraige required by constitution.

Olson: Fundamental right of citizens to marry. SCOTUS has never said man and women. 14 cases, in context of abortion, of prisoners, of contraception, and of divorce, right to marry is aspect of right to liberty privacy association, and identity.

REinhardt: Is your arg in response to Crawford that there is right to gay marriage. Taking away constitutional right.

Olson: Are taking away right recognized by state of CA. That by itself makes it unconstitutional. But I would also say, not gay marriage, any more than SCOTUS called it interracial marraige, it's a right of liberty association

Reinhardt You can say whatever you want. We're entitled to know whether answer to Crawford is yes you can't take away Constitutional right and this is taking away constitutional right.

Olson; Yes.

Reinhardt: Depending on finding that taking away.

Olson: Right to marriage right of indiv. Cooper talks about society's interest in procreation. Not rights of CA, not rights of voters, rights under 14th amendment. If CA could insist that procreation be engraved on marriage, this is a fundamental indiv right, reason I'm emphasizing this, if you look at it from standpoint of two indivs, it was marriage, it was their right to get together. [Reads from Griswold]

Reinhardt: Trying to find out how far we have to go if we are to accept your view of this case. Certainly if we start from assumption that everyone can marry. But as you well know, we are advised not to reach constitutional q unless we

have to. I was not planning on reaching that question to you that early in the discussion, how we distinguish Crawford. Whether you are saying it's necessary to take position, that only thing you can't take away.

Olson: two questions. 1) how far you have to go: Romer. Taking away constitutional rights of indivs who are homosexuals bc they're homosexuals. This is clearest case of heightened scrutiny. Additional answer wrt Crawford, Crawford, yes citizens can change non-constitutionally required remedies for constitutional case. I'd be happy to put Crawford against Romer< Lawrence, Loving, Griswold. Intimate sexual contact is protected. How can marriage be taken away from CAs because engaged in Constitutionally protected activity? It cannot exist. If you put Lawrence w/marriage cases, you can't take that right away. It's a right of all citizens. to have association they select, to live life of privacy, self-identification, that right cannot be taken away from indivs in this state bc of sexual orientation. Discrimination on basis of sex, and of sexual orientation. Prop 8 proponents came up w/various different reasons. Necessary to protect our children from thinking that gay marriage was OK. Protect our children from thinking that gay marriage is okay. Retreated from that proposition on 107-108 of their brief. Prop 8 needs to be enacted bc it'll make children prematurely preoccupied w/issues of sexuality. If that was justification would equally warrant in comic books, video games, and conversations w/other children.

Hawkins: In deciding whether rational basis saves, what would we look to? Record in district court. Or imagine whether there's any conceivable rational basis.

Olson: Too attenuated, just to imagine something from sky that someone can imagine. Reasons must make sense, can't be motivated by fear of people we don't like or minorities. That's why I was looking at reason they've advanced. 1) protect

our children.

Hawkins: Assume for purpose of q this "accidental pregnancy" basis. Have proponents given up that argument bc of args made in political process.

Olson: Look at context in which prop was passed. Concept of rational procreation. No way that Prop 8 prevents, has anything to do w/hetero marriage. Same sex marriage not going to discourage opposite sex from getting married, prevent from getting divorced, children. Evidence clear from witnesses in this case, that there would be harm. Cooper said, I don't know. What he was saying was that we don't know impact of same sex marriage. Means a great deal.

Hawkins: People in pop election campaigns make all sort of nonsensical args.

Olson: I haven't heard that. [laughter]

Hawkins: Matters not what people say. If we can conceive and argue there's a rational basis, that satisfies test.

Olson: That says that instead of witnesses who talked about damage done, people don't choose to become gay. wrt to immutability, all of plaintiffs and experts, this is characteristic immutable. Long history of discrimination which Cooper stipulated to. All requires heightened scrutiny. If imagine that it articulates in what you've said, what can we imagine. What conceivable thing can we imagine that would justify doing damage we have done.

Smith: Do you believe that distinguishing marriage from DPs in name only, in order to promote as vehicle for procreation. Inclusion of one group, children most likely to thrive when raised by father and mother. Would that survive rational basis.

Olson: Flatly inconsistent w/evidence in this case.

Smith: If you only accept that evidence in record is what is in the record. Rather than

that legs do things for reasons and judges decide whether rational basis. Marriage, in name only, children likely to thrive, that is rational.

Olson: Yes, in first place, Cooper said name is institution. Witnesses that were willing to be cross examined and plaintiffs talked about what marriage meant, what it means in this society, nothing said children thrive better in those rels, Blankenhorn, defendants witness, the children would be better off. Easy to say children better w. mother and father, restricting marriage doesn't mean there won't be people in same sex marriages. Something like 30,000 people in same sex marriages today. Easy to say children better off, if you have hetero rels in CA, and marriages between same sex. Child is between man and woman. I think Reinhardt would be to prohibit divorce. Not something CAs interested in doing.

Reinhardt: Anything besides rational basis?

Olson: yes.

Olson: CA has built a fence around its gay and lesbian citizens. WRT marriage, citizens w/in that one fence, denied access to what every other citizen has access to.

Reinhardt: Broadest should be avoided, narrowest should be adopted. Free to do anything besides CA repeal of initiative? Closing speech would require holding that any state that did not permit gay marriage violate constitution. But could be Prop 8 withdrawal is unconstitutional under circumstances that they enjoyed that right, every other aspect of marriage. Are we free to go beyond a holding, can we go farther than that.

Olson: You mentioned that I was involved in that case. You could decide on narrow ground that Romer gives you, in conjunction w/InRe. But nothing that suggests you can't look at larger constitutional rights. What has CA done? Taken class and put in separate category. That act, no doubt, that it is discrimination, Only question

is, can it be justified. Cannot be justified. AT lowest standard, have to know what is rational. All args my opponent is making, are not rational when it comes to question of why did you draw that line. Hetero people are different. But that does not mean you can classify them—to use Kennedy in Romer—and exclude them from this part of society. Has to go to justification for exclusion. That's where rational basis falls down. If you're saying they can't participate in a right, you have not only due process, but equal protection. That's the decision I'd like to see this court issue.

Stewart: Circumstances in context of CA.

Hawkins: Label?

Stewart: Yes.

Hawkins: A state allows everything short of a label, better to enact Prop 8 than a state that has none of it.

Stewart: We agree w/plaintiffs, treating same sex differently is unconstitutional across the board. Underscores irrationality of measure.

How?

Stewart: Family law recognizes that gay people do procreate, assisted reproduction, recognizes that both hetero and sadly gay people as well can be irresponsible. State's interest is exactly the same.

Smith: If just vehicle for procreation, does it not survive rational basis.

Stewart: same sex couples do procreate, they don't do it the old-fashioned way. CA doesn't discourage that or say one is preferable from another. If you think that excluding same sex couples would make heteros more likely, only way to get there is assume that association of gay men and women taints marriage. Not rational. Fact that Prop 8 largely symbolic, makes insult obvious. Prop 8 is state commanding we call gay relationships different even though it treats them the same. Court doesn't have to infer

animus. Campaign demonstrated that proponents would avoid gays and lesbians bc it would demean the institution. Campaign didn't say to voters, well gee, court got that wrong, it said we need children to recognize that gay couples not okay. Opposite sex as ideal and gay couples as a lifestyle that should be kept in private. Let me just close w/this. Proponents say that to affirm this court must find that majority are bigots. Prejudice is not always born of hatred. May be simple want of careful reflection or instinct to guard against people we think are different than ourselves. Equal protection does not allow state to enact measure based on proposition that some people are unworthy.

Cooper: We know that if Loving was two men, it wouldn't come out the same way. We think Olson is simply wrong that Baker was just gender. The Loving case would have been on all fours, sorry Baker would have been on all fours w/Loving.

Smith: Do you have case or is that just good argument?

Cooper: Both.

Smith: Well, I guess I'd like the case.

Cooper: Upheld distinctions based on distinguishing characteristics. Romer. Passage from Romer: Amendment 2 does more than rescind, it prohibits all judicial designed to protect named class, a class we should call homosexual persons. It was unconstitutional, would have been if singled out any class of persons.