

# 9TH CIRCUIT PROP 8 DECISION: EQUAL PROTECTION NOT AT THE END OF THE RAINBOW



Liberty & Justice by Mirko Ilic

The highly anticipated Ninth Circuit decision on the appeal from Judge Vaughn Walker's groundbreaking opinion in *Perry v. Schwarzenegger* (now captioned "*Perry v. Brown*") has arrived! IT IS A VICTORY for supporters of marriage equality and constitutional protection of sexual identity interests!

The full text of the decision is here. Authored by Judge Stephen Reinhardt, it is a long opinion discussing several key issues of law. Generally, they break down into three areas: 1) whether Vaughn Walker was qualified to sit as the trial judge in light of the fact he is an acknowledged homosexual, 2) whether or not the proponents of Proposition 8 (referred to in the trial court as "Defendant-Intervenors" or "D-I's") have standing to bring the appeal, and 3) whether or not the merits of Judge Walker's decision trial court decision to grant constitutional due process and equal protection status to the plaintiffs Perry, and thus find that Proposition 8 is unconstitutional, should be upheld. We will take those in order.

## **Vaughn Walker's Qualification**

The new Chief Judge in the Northern District of California, James Ware, wrote a very strong opinion finding it completely proper for Walker to sit as the trial judge in Perry. And the 9th Circuit had already slapped down an attempt by the Prop 8 Proponents (hereinafter "Proponents")

to disqualify Panel Judge Stephen Reinhardt because his wife worked for the ACLU. So, it would have been shocking for the 9th to bite off on the nonsense that Vaughn Walker could not impartially serve as trial judge for the case. There is no shock delivered today, the 9th has joined Ware in blasting this craven argument, in fact the court states that it adopts Ware's basis effectively in full.

### **Standing To Appeal**

The issue of standing is arguably the most critical in the appellate case. Since the State of California made the calculated decision not to appeal and give the nominal cover their participation would provide to Proponents, if the Proponents do not have individual standing, there is effectively no appeal. There are actually two parties that have sought standing, the Proponents, and Imperial County of California through its court clerk.

As to Imperial County, I, along with others on the ECF mailing list got accidental notice of the court's ruling yesterday when the 9th Circuit slipped up and transmitted the separate ruling on their motion to intervene in the appeal. It is denied as being untimely brought.

The Proponent's intervention was certainly not untimely though, and it was unanimously certified by the California Supreme Court as being proper on the merits. In light of the strong decision finding standing for proponents by the California Supremes, after the 9th Circuit had asked them to make the determination, it would be pretty hard for the 9th to not follow the certified advice and grant standing. And they have done exactly that:

It is for the State of California to decide who may assert its interests in litigation, and we respect its decision in holding that Proposition 8's Proponents have standing to bring this appeal on behalf of the state.

## Constitutional Merits Issues

The big kahuna, of course, is whether or not Vaughn Walker's meticulously laid out and reasoned decision granting protection to plaintiffs Perry under the Equal Protection and Due Process Clauses would be upheld. And, as I have consistently predicted would occur, the 9th has indeed upheld Judge Walker's ruling.  
WAH0000!

It is a narrower and shallower victory than I had hoped and predicted though.

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 designation of 'marriage,' which symbolizes state legitimization and social 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 opposite-sex couples. the Constitution simply does not allow for "laws of this sort." *Romer v. Evans*, 517 US 620, 633 (1996).

As I said, this is much narrower than hoped for. By basing on *Romer* instead of the full constitutional protections of due process and equal protection, the court has likely increased the odds the decision stands up to further appeal, but has done a disservice to those seeking true equality, both as to marriage and otherwise, for gays and lesbians. In short, it does not move the ball nearly as much as it should have, and was hoped for. The decision of the 9th does not go nearly as far as Vaughn Walker did, and wastes much of the meticulous taking of evidence, making of findings of facts and law, and crafting of his decision. It was hand tailored to go MUCH further, and that now

appears at least significantly squandered.

Also of note, it is a split decision, with Reinhardt and Mike Hawkins joining the majority, and N. Randy Smith dissenting. Although Smith is a Mormon, and reasonably conservative, the strength of his dissent is somewhat surprising compared to his seeming attitude at oral argument of the appeal.

So, where does that leave us? With a good decision for those same sex couples wanting to marry in California, and one more likely than a broader decision to stand up to appeal. But, it is by no means certain that even this narrow ruling will maintain; if the case was going to go to SCOTUS, it should go with all the gusto and Constitutional protection afforded that it can muster for all the same sex couples, in all the states, not just California. Today's decision falls shamefully short of that. It is somewhat of an embarrassment for one of the last great liberal lions like Steve Reinhardt actually. I have to believe he was choked somewhat by Mike Hawkins, but, frankly, such is surprising to me based on my knowledge of Hawkins, even though he is not nearly the wild eyed liberal Reinhardt is.

Not only is the decision disappointing, but it will likely also be stayed pending further review as well. so not even relief for those in California is in the offing anytime soon. Sigh.

[As always on these Prop 8 posts, 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.]