PROP 8 APPEAL TAKES A STEP FORWARD; BUT NOT THE BIG ONE IT SHOULD HAVE

Liberty & Justice by Mirko Ilic

Those of us watching and covering the Proposition 8 case, formally known as *Perry v. Brown*, got a cryptic notification from the court yesterday afternoon. The notice read:

> This is to inform you that a filing is expected on Tuesday, June 5, 2012, at approximately 10 a.m., in Perry v. Brown, case 11-16577, also know as the Proposition 8 case. The filing will be available from the Ninth Circuit Court of Appeals website, www.ca9.uscourts.gov/opinions. We are advised that this is not a large document. If you have difficulty downloading the filing, please contact us by email.

The fact the court said the document would appear in their "opinions" section seemed prophetic. It was. The opinion was just released and my prediction on it was right, it *did* signal a final opinion and a declination of en banc consideration.

Here is the order. The key takeaway language:

> The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is

> DENIED.
>
> The mandate is stayed for ninety days pending the filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

Notable is the sniping dissent lodged by Judges O'Scannlain, Bybee and Bea, and the broadside shot right back by Steve Reinhardt and Mike Hawkins, who were the accused when O'Scannlain said:

> Based on a two-judge majority's gross misapplication of Romer v. Evans, 517 U.S. 620 (1996), we have now declared that animus must have been the only conceivable motivation for a sovereign State to have remained committed to a definition of marriage that has existed for millennia, Perry v. Brown, 671 F.3d 1052, 1082 (9th Cir. 2012).

Interesting is the sniping back and forth, but ultimately of no moment. The ruling today is important, however, because the ultimate destination for the Prop 8 Perry case is now straight to the Supreme Court. As I explained when the original panel decision was issued, authored by Steve Reinhardt, it was different than expected:

> 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).
>
> 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.

That analysis of the panel decision in *Perry* still stands. The bigger problem is that many experts on this issue have been putting their eggs in the basket of the DOMA litigations. And the problem with that is that the biggest of the DOMA cases just got decided in the 1st Circuit last week, and it too is grounded on *Romer* and is painfully narrow and depressing as to hope for full extension of protected status to sexual orientation by individuals.

As Reuters explains:

> "The federalism aspect of the decision makes it a stronger case to bring some

conservatives along," said Paul Smith, a lawyer for the same-sex couples.

The Supreme Court has become increasingly concerned with states' rights over the past 10 years, striking down numerous federal laws that intrude on state authority, said New York Law School professor Arthur Leonard. The conservative justices have tended to defend traditional areas of state control. Justice Antonin Scalia, for example, criticized the majority decision in Romer for creating a new level of equal protection for gays and lesbians, but he based his argument on a defense of states' rights.

The DOMA litigation is clearly presented as a battle between federal and state powers. The plaintiffs only challenged the law's central provision that denies federal economic benefits to married same-sex couples. They left alone the part of the law that says a state doesn't have to recognize same-sex marriages performed in other states.

While the focus on states' rights could lead the Supreme Court to strike down DOMA, it could also make it more difficult for gay rights advocates to achieve their ultimate goal: making same-sex marriage a federal constitutional right.

The focus on federalism could also undercut arguments against state laws like Proposition 8 that ban same-sex marriage. Schowengerdt, the lawyer from the Alliance Defense Fund who is currently defending gay marriage bans in Hawaii and Oklahoma, said he plans to cite the recent Massachusetts ruling to support his position that the definition of marriage should be left up to the states.

> He pointed out that 31 states had passed constitutional amendments defining marriage as between a man and a woman. “At the end of the day, federalism helps proponents of traditional marriage,” he said.

By having both *Perry* and the 1st Circuit DOMA rely on the *Romer* paradigm, the main thrust of LGBT litigation is now set up under a states rights analysis as opposed to full equal protection status across the board and uniformly nationwide.

While many of the experts, pundits and lay people closely watching these cases may be cheering today, it seems a tad hollow. This is not the posture that Vaughn Walker worked so hard to put in place, the posture that the affected citizens deserve.

[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.]