

No. 10-16696

**United States Court of Appeals
for the Ninth Circuit**

KRISTIN PERRY, *et al.*,
Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, *et al.*
Defendants,

and

DENNIS HOLLINGSWORTH, *et al.*,
Defendant-Intervenors-Appellants.

Appeal from the United States District Court for the Northern District of
California
Civil Case No. 09-CV-2292 VRW (Honorable Vaughn R. Walker)

**BRIEF OF *AMICUS CURIAE*, EUGENE DONG,
IN SUPPORT OF THE INTERVENING DEFENDANTS-APPELLANTS**

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Corporate Disclosure Statement

Amicus Curiae is an individual and has no corporate ties.

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Introduction and Interest of Amicus Curiae

Amicus Curiae, Eugene Dong, is a published academic scientist, physician, and attorney whose legal career centered on applying his scientific background to legal issues. His analysis of this case concerning constitutional law and the biology of human sexual reproduction leads him to support reversal of the judgment of the district court. The parties have given leave to file this amicus brief

Argument

1. The State's Constitutional Provisions Are Consistent With Federal Constitutional Law.

California's constitutional declarations of the people's inalienable right to life, Cal. Const. Art. I. § 1, and the definition of marriage as between a man and a woman, Cal. Const. Art. I. § 7.5, are related biological concepts. As a standard college textbook on human biology puts it, the key characteristic of "life" is that living things grow and reproduce according to instructions from the organisms genetic material or "DNA". Starr and McMillan at 2. Or, more succinctly, as a best selling zoologist puts it, "the ability to reproduce is what makes living things different from rocks." Ridley at 5. And, of course, marriage between a man and a woman is all about producing human offspring.

The Supreme Court recognizes the same relationship by declaring that the

right to have offspring is basic “to perpetuation of the race.” *Skinner v. Oklahoma* 316 U.S. 535, 536 (1942). And when the Court declares that “Marriage is one of the basic civil rights of man, fundamental to our existence and survival,” *Loving v. Virginia*, 388 U.S. 1, 12 (1967) it can only be referring to heterosexual couples for we “exist” through past sexual relations between a man and a woman, and we can “survive” in the future or “perpetuate the race” through future sexual relations between a man and a woman.

Since the Supreme Court recognizes that the object of marriage is to perpetuate the race, a State Constitutional provision which defines the relationship which can accomplish that objective is not in violation of Federal law.

2. Heterosexual Couples are Disadvantaged by the Biologic and Economic Costs of Sexual Reproduction.

Sexual reproduction is process through which an offspring contains the genetic material of two diverse parents and any genetic changes called mutations. Since it was introduced two billion seven hundred million years ago, Barton at inside cover, our very existence in our bodily forms and mental capacities is the result of generations of subsequent living things successfully reproducing sexually.

“Human beings inherit tendencies to survive, to eat, to think, to speak, and so on. But above all they inherit a tendency to reproduce. Those of their predecessors that reproduced passed on their characteristics to their offspring; those that remain barren did not. Therefore, anything

that increased the chances of a person reproducing successfully was passed on at the expense of everything else.” Ridley at 4.

Humans have vastly increased their reproductive capacity and gained dominion over its environment by the development of the large adult human brain. We have the power of abstract thinking, of speech, of symbol manipulation, *etc.* But the woman’s pelvis size limits the size of the head/brain which can pass through at birth. So the majority of a child’s brain growth will necessarily take place after birth. Thus, from birth through 4 or 5 years, the child’s brain is so immature, that the child is unable to survive without the care of others, primarily its parents. And for another 15 or so years in our current society, the child continues to be nurtured and educated but less intensively by its parents.

In short, the heterosexual couple expends energy to provide not only for themselves, but to provide food, shelter, medical care, education, and entertainment for their children. Also included in the calculus would be costs to the mother of nurturing the fetus during pregnancy, providing health care for herself, and the risk of succumbing to the acute stresses of pregnancy and delivery and suffer potential post-partum health issues some associated damage during the birthing process and some associated psychological issues secondary to the enormous changes in hormone levels.

In contrast, not only is there no known biological benefit to society accruing from a pairing of same-sex individuals, the individuals of the pairing are in the economically beneficial positions of expending their biological energies on themselves or their already mature partner and pursuing their economic opportunities in tandem or individually without the physical and/or psychological restraint of immature children.

A state providing civil marital benefits to heterosexual couples under these circumstances advances the federal goal of improving the likelihood of perpetuating the race.

CONCLUSION

This Court should reverse the judgment of the district court, because the state's definition of marriage implements the Federal objective of perpetuating the race and provides benefits to heterosexual couples which may increase the chances for successful raising of the state's children.

Dated: September 24, 2010

Respectfully submitted,

s/ Eugene Dong
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Certificate of Compliance

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Amicus Brief is proportionally spaced, has a typeface of 14, points and contains 793 words as determined by WordPerfect x 4.

Dated: September 24, 2010.

s/ Eugene Dong
Eugene Dong

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 24, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Eugene Dong

Counsel for Amicus Curiae Eugene Dong