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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
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Perry v. Brown, 10-16696, 11-16577

Opinion Filed: 2/7/12

Panel: Reinhardt (author) Hawkins N. Smith (concurring in part and
dissenting in part)

The panel majority affirmed the judgment of the district court and held that Proposition 8, which amended the California Constitution to eliminate the previously guaranteed right of same-sex couples to marry, violated the Fourteenth Amendment of the United States Constitution. The panel majority held that by using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.

The panel majority held that in this particular case it did not need to decide whether under the United States Constitution same-sex couples may ever be denied the right to marry because under California's statutory law pertaining to "domestic partnerships" same-sex couples had all the rights of opposite-sex couples, regardless of their marital status. Proposition 8's only effect was to take away that important and legally significant designation of "marriage," previously recognized by the California Supreme Court, while leaving in place all of its incidents.

The panel majority determined that in taking away the designation of "marriage," while leaving in place all the substantive rights and responsibilities of same-sex partners, Proposition 8 could not have reasonably been enacted to promote childrearing by biological parents, to encourage responsible procreation, to proceed with caution in social change, to protect religious liberty, or to control the education of schoolchildren. The panel majority concluded that Proposition 8 served no purpose, and had no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationship and families as inferior to those of opposite-sex couples. The panel

majority determined that it need not and did not consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so.

The panel held that proponents of Proposition 8 had standing to bring this appeal on behalf of the state. The panel accepted the determination of the California Supreme Court that the official proponents of an initiative have the authority to assert the State's interest in defending the constitutionality of that initiative, where the state officials who would ordinarily assume that responsibility choose not to do so.

The panel affirmed the denial of the motion by the proponents of Proposition 8 to vacate the judgment entered by former Chief Judge Walker, on the basis of his purported interest in being allowed to marry his same-sex partner. The panel held that Chief Judge Ware did not abuse his discretion by finding that Chief Judge Walker was not obligated to recuse himself on the basis that he could be affected by the outcome of the proceeding.

Judge N.R. Smith concurred in part and dissented in part from the majority opinion. Judge Smith agreed with the majority's analysis that proponents had standing to bring this appeal and that the motion to vacate the judgment should be denied. Judge Smith dissented from the majority's analysis regarding the constitutionality of Proposition 8. He wrote that he was not convinced that Proposition 8's withdrawal from same-sex couples of the right to access the designation of marriage was not rationally related to furthering the interests of promoting responsible procreation and optimal parenting.

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