

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his
official capacity as governor of
California; EDMUND G BROWN JR, in
his official capacity as attorney
general of California; MARK B
HORTON, in his official capacity
as director of the California
Department of Public Health and
state registrar of vital
statistics; LINETTE SCOTT, in her
official capacity as deputy
director of health information &
strategic planning for the
California Department of Public
Health; PATRICK O'CONNELL, in his
official capacity as clerk-
recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as registrar-
recorder/county clerk for the
County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM, MARK A
JANSSON and PROTECTMARRIAGE.COM -
YES ON 8, A PROJECT OF
CALIOFORNIA RENEWAL, as official
proponents of Proposition 8,

Defendant-Intervenors.

No C 09-2292 VRW
QUESTION FOR CLOSING
ARGUMENTS

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The court provides the following questions to the parties in advance of closing arguments. What follows is by no means an exhaustive list of questions, but is intended simply to assist the parties in focusing their closing arguments.

If the parties wish, they may answer any question in writing on or before June 15, 2010 at 12 PM PDT. Alternatively, the parties should be prepared to address the questions during closing arguments. While the court has directed certain questions to certain parties, any party can if it wishes choose to answer any question.

To Plaintiffs:

1. Assume the evidence shows Proposition 8 is not in fact rationally related to a legitimate state interest. Assume further the evidence shows voters genuinely but without evidence believed Proposition 8 was rationally related to a legitimate interest. Do the voters' honest beliefs in the absence of supporting evidence have any bearing on the constitutionality of Proposition 8? See Hernandez v Robles, 855 NE2d 1, 7-8 (2006) ("In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the common-sense premise that children will do best with a mother and a father in the home.").
2. What evidence supports a finding that maintaining marriage as an opposite-sex relationship does not afford a rational basis for Proposition 8?

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1 3. Until very recently, same-sex relationships did not enjoy
2 legal protection anywhere in the United States. How does this
3 fact square with plaintiffs' claim that marriage between
4 persons of the same sex enjoys the status of a fundamental
5 right entitled to constitutional protection?
6

7 4. What is the import of evidence showing that marriage has
8 historically been limited to a man and a woman? What evidence
9 shows that that limitation no longer enjoys constitutional
10 recognition?
11

12 5. What does the evidence show regarding the intent of the
13 voters? If the evidence shows that Proposition 8 on its face
14 and through its consequences distinguishes on the basis of
15 sexual orientation and sex, of what import is voter intent?
16

17 6. What empirical data, if any, supports a finding that legal
18 recognition of same-sex marriage reduces discrimination
19 against gays and lesbians?
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21 7. What evidence supports a finding that recognition of same-sex
22 marriage would afford a permanent - as opposed to a transitory
23 - benefit to the City and County of San Francisco? To
24 California cities and counties generally?
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1 8. What is the relevance, if any, of data showing that state and
2 local governments would benefit economically if same-sex
3 couples were permitted to marry? Does that relevance depend
4 on the magnitude of the economic benefit?

5
6 9. What are the consequences of a permanent injunction against
7 enforcement of Proposition 8? What remedies do plaintiffs
8 propose?

9
10 10. Even if enforcement of Proposition 8 were enjoined,
11 plaintiffs' marriages would not be recognized under federal
12 law. Can the court find Proposition 8 to be unconstitutional
13 without also considering the constitutionality of the federal
14 Defense of Marriage Act?

15
16 11. What evidence supports a finding that the choice of a person
17 of the same sex as a marriage partner partakes of
18 traditionally revered liberties of intimate association and
19 individual autonomy?

20
21 12. If the evidence of the involvement of the LDS and Roman
22 Catholic churches and evangelical ministers supports a finding
23 that Proposition 8 was an attempt to enforce private morality,
24 what is the import of that finding?

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To Proponents:

1. Assuming a higher level of scrutiny applies to either plaintiffs' due process or equal protection claim, what evidence in the record shows that Proposition 8 is substantially related to an important government interest? Narrowly tailored to a compelling government interest?
2. Aside from the testimony of Mr Blankenhorn, what evidence in the record supports a finding that same-sex marriage has or could have negative social consequences? What does the evidence show the magnitude of these consequences to be?
3. The court has reserved ruling on plaintiffs' motion to exclude Mr Blankenhorn's testimony. If the motion is granted, is there any other evidence to support a finding that Proposition 8 advances a legitimate governmental interest?
4. Why should the court assume that the deinstitutionalization of marriage is a negative consequence?
5. What evidence in the record shows that same-sex marriage is a drastic or far-reaching change to the institution of marriage?
6. What evidence in the record shows that same-sex couples are differently situated from opposite-sex couples where at least one partner is infertile?

1 7. Assume the evidence shows that children do best when raised by
2 their married, biological mother and father. Assume further
3 the court concludes it is in the state's interest to encourage
4 children to be raised by their married biological mother and
5 father where possible. What evidence if any shows that
6 Proposition 8 furthers this state interest?
7

8 8. Do California's laws permitting same-sex couples to raise and
9 adopt children undermine any conclusion that encouraging
10 children to be raised by a married mother and father is a
11 legitimate state interest?
12

13 9. How does the Supreme Court's holding in Michael H v Gerald D,
14 491 US 110 (1989) square with an emphasis on the importance of
15 a biological connection between parents and their children?
16

17 10. Assume the evidence shows that sexual orientation is socially
18 constructed. Assume further the evidence shows Proposition 8
19 assumes the existence of sexual orientation as a stable
20 category. What bearing if any do these facts have on the
21 constitutionality of Proposition 8?
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11. Why is legislating based on moral disapproval of homosexuality not tantamount to discrimination? See Doc #605 at 11 ("But sincerely held moral or religious views that require acceptance and love of gay people, while disapproving certain aspects of their conduct, are not tantamount to discrimination."). What evidence in the record shows that a belief based in morality cannot also be discriminatory? If that moral point of view is not held and is disputed by a small but significant minority of the community, should not an effort to enact that moral point of view into a state constitution be deemed a violation of equal protection?

12. What harm do proponents face if an injunction against the enforcement of Proposition 8 is issued?

1 To Plaintiffs and Proponents:

- 2
- 3 1. What party bears the burden of proof on plaintiffs' claims?
4 Under what standard of review is the evidence considered?
5
- 6 2. Does the existence of a debate inform whether the existence of
7 a rational basis supporting Proposition 8 is "debatable" or
8 "arguable" under the Equal Protection Clause? See Minnesota v
9 Clover Leaf Creamery Co, 449 US 456, 469 (1981); FCC v Beach
10 Communications, Inc, 508 US 305, 320 (1993).
11
- 12 3. What does the evidence show the difference to be between gays
13 and lesbians, on the one hand, and heterosexuals on the other?
14 Is that difference one which the government "may legitimately
15 take into account" when making legislative classifications?
16 See City of Cleburne v Cleburne Living Center, 473 US 432, 446
17 (1985).
18
- 19 4. What does the evidence show the definition (or definitions) of
20 marriage to be? How does Professor Cott's proposed definition
21 of marriage fit within Mr Blankenhorn's testimony that
22 competing definitions of marriage are either focused on
23 children or focused on spousal affection? See Cott, Tr 201:9-
24 14 and 222:13-17; Blankenhorn, Tr 2742:9-18 and 2755:25-
25 2756:1.
26
- 27 5. What does it mean to have a "choice" in one's sexual
28 orientation? See e g Tr 2032:17-22; PX 928 at 37.

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- 1 6. In order to be rooted in "our Nation's history, legal
2 traditions, and practices," see Washington v Glucksberg, 521
3 US 702, 710 (1997), is it sufficient that a practice has
4 existed historically, or need there be an articulable purpose
5 underlying the practice?
6
- 7 7. If spouses are obligated to one another for mutual support and
8 support of dependents, and if legal spousal obligations have
9 no basis in the gender of the spouse, what purpose does a law
10 requiring that a marital partnership consist of one man and
11 one woman serve?
12
- 13 8. The California Family Code requires that registered domestic
14 partners be treated as spouses. Cal Fam Code § 297.5.
15 Businesses that extend benefits to married spouses in
16 California must extend equal benefits to registered domestic
17 partners. See Koebke v Bernardo Heights Country Club, 36 Cal
18 4th 824, 846 (2005) ("We interpret [Cal Fam Code § 297.5(f)]
19 to mean that there shall be no discrimination in the treatment
20 of registered domestic partners and spouses."). If, under
21 California law, registered domestic partners are to be treated
22 just like married spouses, what purpose is served by
23 differentiating - in name only - between same-sex and
24 opposite-sex unions?
25
- 26 9. What evidence, if any, shows whether infertility has ever been
27 a legal basis for annulment or divorce?
28

- 1 10. How should the failure of the Briggs Initiative (Proposition 6
2 in 1978) or the LaRouche Initiative (Proposition 64 in 1986)
3 be viewed in determining whether gays and lesbians are
4 politically powerless?
5
- 6 11. What are the constitutional consequences if the evidence shows
7 that sexual orientation is immutable for men but not for
8 women? Must gay men and lesbians be treated identically under
9 the Equal Protection Clause?
10
- 11 12. How many opposite-sex couples have registered as domestic
12 partners under California law? Are domestic partnerships
13 between opposite-sex partners or same-sex partners recognized
14 in other jurisdictions? If appropriate, the parties may rely
15 on documents subject to judicial notice to answer this
16 question.
17
- 18 13. Do domestic partnerships create legal extended family
19 relationships or in-laws?
20
- 21 14. What does the evidence show regarding the difficulty or ease
22 with which the State of California regulates the current system
23 of opposite-sex and same-sex marriage and opposite-sex and
24 same-sex domestic partnerships?
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1 15. If the court finds Proposition 8 to be unconstitutional, what
2 remedy would "yield to the constitutional expression of the
3 people of California's will"? See Doc #605 at 18.
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6 IT IS SO ORDERED.

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9 VAUGHN R WALKER
10 United States District Chief Judge
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