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Ninth Circuit Rules Proposition 8 Barring Same-Sex Marriage Unconstitutional – An Employer Update

By Nancy Ober

On February 7, 2012, in a 2-1 decision a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled in *Perry v. Brown* that Proposition 8, a voter initiative that amended the California Constitution to provide, "Only marriage between a man and a woman is valid or recognized in California," violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The majority affirmed the judgment of the district court on narrow grounds not considered by the lower court, ruling that Proposition 8 had *taken away* from same-sex couples the right to marry that they already had under California law without a legitimate reason for doing so. The court emphasized that it was not deciding the broader constitutional question of whether a state may deny same-sex couples the right to marry in the first place.

The three-judge panel unanimously ruled that the proponents of Proposition 8 had standing to defend the law in court where state officials declined to do so, and that the district court did not abuse its discretion in refusing to set aside the judgment below based on the district court judge's undisclosed long-term relationship with another man.

Background to the Decision

In November 2000, California voters passed Proposition 22, an initiative measure that amended the California Family Code by providing that only marriage between a man and a woman is valid or recognized in California. In February 2004, San Francisco officials began issuing marriage licenses to same-sex couples. The California Supreme Court ordered the city to stop issuing such licenses in the absence of a judicial determination that Proposition 22 was unconstitutional. The court further ordered that the licenses that were issued and the marriages that were performed were null and void. In May 2008, the California Supreme Court held in *In Re Marriage Cases* that Proposition 22 violated the California Constitution by denying same-sex couples the fundamental right to marry and the equal protection of the laws and ordered local officials to issue marriage licenses to same-sex couples.

In November 2008, the voters passed Proposition 8, which became effective immediately and ended same-sex marriage in California. Opponents immediately challenged the initiative in the California Supreme Court, arguing that Proposition 8 violated the rules for amending the California Constitution. In May 2009, the California Supreme Court ruled in *Strauss v. Horton* that Proposition 8 was a permissible constitutional amendment which "exclusively affects access to

the designation of 'marriage' and leaves intact all of the other very significant constitutional protections afforded same-sex couples" under California law. The court did not, however, nullify the 18,000 same-sex marriages that took place during the 143 days between its May 2008 ruling in the *Marriage Cases* and the passage of Proposition 8.

Two same-sex couples who claimed that Proposition 8 violated the United States Constitution challenged the law. State officials declined to defend Proposition 8, and that role fell to a group of five private individuals and one organization that led the Proposition 8 campaign, who were allowed to intervene in the court proceeding. After a full trial in which the plaintiffs and the proponents of Proposition 8 presented evidence in support of their respective positions, the district court ruled that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and enjoined its enforcement.

The Ninth Circuit's Ruling on Proposition 8

The Ninth Circuit majority started from the premise that the California Constitution, as interpreted by the California Supreme Court in the *Marriage Cases*, had guaranteed same-sex couples the right to designate their relationship as a marriage, and that Proposition 8 took away from same-sex couples the "status and dignity" of the marriage designation. The court analogized Proposition 8 to an amendment to the Colorado Constitution passed by the voters of that state, Amendment 2, which prohibited the state and its political subdivisions from banning discrimination on the basis of sexual orientation. Amendment 2 was held by the U.S. Supreme Court in *Romer v. Evans* to violate the Equal Protection Clause of the United States Constitution because it withdrew legal protection from homosexuals as a class without any legitimate justification but to make them "unequal to everyone else." The Ninth Circuit majority rejected the proponents' argument that *Romer* was inapposite because Proposition 8, unlike Amendment 2, left intact all of the rights and protections afforded gays and lesbians under California law. The majority said that Proposition 8 was "even more suspect" because it had no practical effect except to take away from one group access to the "state-authorized and socially meaningful" designation of marriage. The court also rejected the proponents' argument that California, having gone beyond the limits of the United States Constitution by extending the right to marry to same-sex couples in the first place, was free to return to the previous standard. Once the right was extended, it could not be withdrawn from one group but not others except for a "legitimate reason."

The majority concluded that there was no legitimate reason for Proposition 8. It found that Proposition 8 did not promote any of the interests put forward by the proponents: furthering the state's interest in responsible procreation and childrearing; proceeding with caution before making significant changes to marriage; protecting religious freedom; and preventing children from being taught about same-sex marriage in school. Proposition 8 did not affect California's interest in responsible procreation and childrearing, the majority said, because both before and after Proposition 8 opposite-sex and same-sex couples had identical rights to form families and raise children. The court likewise rejected the proponents' argument that Proposition 8 furthered the state's interest in encouraging responsible procreation, finding that there was no rational reason for believing that withdrawing access to marriage for same-sex couples would encourage opposite-sex couples to procreate more responsibly. Proposition 8 was also inconsistent with the "proceed with caution" argument, according to the majority, as it did not simply suspend same-sex marriage while the matter was given further study, but according to the voters' information pamphlet on the measure, was intended to eliminate same-sex marriage altogether. Finally, the court concluded that Proposition 8 did not affect California's existing protections for religious liberty, nor did it affect schools' control over their curriculum or the right of parents to control their children's education. The "inevitable inference," said the majority, was that Proposition 8 had no purpose but to impose on gays and lesbians "a majority's private disapproval of them and their relationships." Therefore, Proposition 8 violated gays and lesbians' constitutional rights to equal protection of the laws.

The dissent argued that as a legislative enactment, Proposition 8 was entitled to a presumption of validity, noting that the California Supreme Court had already found it to be valid under the California Constitution. The dissent argued that *Romer v. Evans* was not controlling, as Colorado's Amendment 2 was a far reaching measure repealing and prohibiting legal protections for gays and lesbians, whereas Proposition 8, as explained by the California Supreme Court in *Strauss v. Horton*, left all legal protections in place and only denied the designation of marriage. The dissent disagreed with the majority's conclusion that there was no legitimate basis for Proposition 8, and that it was solely motivated by animus against a disfavored group. The dissent "was not convinced" that there was no rational relationship between Proposition 8 and a legitimate governmental interest. The dissent argued that the voters might have believed that by withdrawing the designation of marriage from

same-sex couples, Proposition 8 would promote responsible procreation and optimal parenting (*i.e.*, that married biological parents are best for children) – which could be legitimate governmental interests – and that that was sufficient to survive rational basis review.

What's Next?

The Ninth Circuit left in effect its earlier stay of the district court's judgment, which means that same-sex marriages will not be performed in California until further appeals are exhausted. The Proposition 8 proponents may ask the Ninth Circuit for a rehearing *en banc*, before 11 Ninth Circuit judges, or may choose to appeal directly to the United States Supreme Court.

Even if the court's ruling is upheld, it is likely to have limited effect on employers so long as federal law does not recognize same-sex marriage. California law already extends all of the same rights and obligations to registered domestic partners as to spouses, including, for example, the right to take family leave due to the serious illness of a domestic partner. AB 2208, which became effective in 2005, requires health and other insurance issuers to provide equal coverage for registered domestic partners and spouses, and effective January 1, 2012, SB 757 extends that requirement to out-of-state insurers issuing insurance to California residents. Self-insured health plans and retirement plans that are subject to federal law, the Employee Retirement Income Security Act (ERISA), would not be required to extend benefits to same-sex spouses so long as the federal Defense of Marriage Act (DOMA) limits federally recognized marriage to the union of one man and one woman. As in the case of domestic partners, health benefits provided to same-sex spouses would be taxable under federal law (but not under California law).

Legal Challenge to DOMA

DOMA, in July 2010, was declared unconstitutional by a Massachusetts federal district court in two companion cases: *Gill v. Office of Pers. Mgmt*, 699 F. Supp. 2d 374 (D. Mass. 2010), and *Massachusetts v. United States Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass 2010). The court held that Section 3 of the statute, defining marriage to exclude same-spouse spouses, violates the Equal Protection Clause of the Fifth Amendment, imposes an unconstitutional condition on the receipt of federal funding and interferes with state regulation of marital status, an attribute of state sovereignty. Appeals are pending before the First Circuit Court of Appeals, with a decision expected later this year, likely followed by a request for review to the United States Supreme Court. If DOMA is struck down, federal law spousal benefits would be extended to same-sex spouses, and same-sex spouses would be able to receive employer-provided health benefits tax-free.

Same-Sex Marriage in Other States

Six other states – Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont – and the District of Columbia currently recognize same-sex marriage. These jurisdictions may shortly be joined by the State of Washington, where the legislature on February 8 passed a same-sex marriage bill, which the governor has announced she supports.

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