



Written by [Dave Bohon](#) on December 7, 2010

## Federal Appeals Court Hears Case Against California Marriage Amendment

California's Proposition 8, a state constitutional amendment passed by voters in 2008 that defines marriage as between a man and a woman, went before a three-judge panel of the federal Ninth Circuit Court of Appeals December 6, as pro-family champions appealed an earlier lower court ruling that the amendment is unconstitutional. How the higher court decides the case could dramatically impact the laws and constitutional amendments in the scores of states that have come down on the side of traditional marriage. Currently only five states recognize "marriage" between homosexuals as valid, but should the appeals court uphold the lower court's ruling that could change.



The challenge to Prop. 8 came last August when U.S. District Judge Vaughn Walker, an [acknowledged homosexual](#), struck down the amendment as unconstitutional, ruling that it discriminates against homosexuals. But pro-family forces who worked hard to see the amendment pass in the first place, said they have no intention of allowing narrow special interests to determine the moral future of both California and the nation.

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[ProtectMarriage.com](#), the coalition of pro-family and religious groups behind Proposition 8, contends that Walker's ruling "defames as anti-gay bigots not only seven million California voters, but everyone else in this country, and elsewhere, who believes that the traditional opposite-sex definition of marriage continues to meaningfully serve the legitimate interests of society — from the current President of the United States, to a large majority of legislators throughout the nation, both in statehouses and in the United States Congress, and even to most of the scores of state and federal judges who have addressed the issue."

"It was a very vigorous argument," Jordan Lorence, senior counsel for the pro-family Alliance Defense Fund, said of the two-hour question and answer session between the judges and the attorneys for both sides of the issue. He said that the attorneys defending the amendment before the panel "did an excellent job explaining why this was a rational [and] constitutional decision by the voters to define marriage as between one man and one woman." Nonetheless, added Lorence, the judges were "all over the place" in their questioning of both sides in the debate, making it very difficult to predict how the court will ultimately rule on the appeal.

Observers said that questioning by the panel appeared to follow each judge's ideological bent, with Stephen Reinhardt, a Carter appointee, and Michael Daly Hawkins, appointed by President Clinton,



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asking Charles Cooper, an attorney with ProtectMarriage.com, to differentiate between California's Prop. 8 and a state constitutional amendment passed by Colorado voters in the mid-1990s that effectively prevented the enforcement of laws protecting homosexuality. The U.S. Supreme Court overturned the Colorado amendment in the 1996 case *Romer v. Evans*.

In answering the query, Cooper defended traditional marriage on the basis of its inextricable ties to procreation and the continuation of sound society. "The key reason that marriage has existed at all in any society and at any time is that sexual relationships between men and women naturally produce children," said Cooper. "Society has no particular interest in a platonic relationship between a man and a woman, no matter how close, how committed it may be... But when a relationship between a man and a woman becomes a sexual one, society immediately has a vital interest in that."

Cooper argued that not only does society need "the creation of new life for the next generation," but "its vital interests are actually threatened by the possibility that an unintentional and unwanted pregnancy will mean that the child is born out of wedlock and is raised by, in all likelihood, its mother alone." In such cases, he said, "society will have to step in and assist that single parent, in all likelihood."

Asked by Reinhardt how his argument was relevant to homosexual marriage, Cooper noted the "distinguishing characteristics" that differentiate heterosexual and homosexual couples — characteristics, he argued, that require different treatment from the state.

Chief among the distinguishing characteristics is the issue of procreation, which, Cooper argued, goes to the heart of the rationality behind passage of the California amendment protecting marriage. "The question is whether the state of California has a rational reason for drawing a distinction between same-sex couples who cannot — without the intervention of a third party of the opposite sex — procreate, and opposite-sex couples who not only can procreate but can do so unintentionally and create unwanted pregnancies," Cooper said. "That is not a phenomenon that exists with respect to same-sex couples."

For their part, proponents of legalizing homosexual unions argued that the California amendment effectively writes discrimination against homosexuals into the state's constitution. Theodore Olson, an attorney arguing for overturning Prop. 8, said that in passing the ballot initiative the people of California had "engraved discrimination on the basis of sex and sexual orientation into its fundamental governing charter." He argued that the amendment has "marginalized and stripped over a million gay and lesbian Californians of access to what the Supreme Court of the United States has repeatedly characterized as the most important relation in life."

Olson testified that the U.S. Constitution guarantees the "fundamental right of its citizens to marry" and pointed to the U.S. Supreme Court's 1967 *Loving v. Virginia* decision — which struck down statutes prohibiting marriage between whites and blacks — as also applying to marriages between persons of the same sex. "California has built a fence around its gay and lesbian citizens, and has built a fence around the institution of marriage, which the Supreme Court says — not based upon sex or procreation or anything else — is the most important relation in life." He called Prop.8 a "violation of the Equal Protection Clause [and a] violation of the Due Process Clause."

But Cooper countered that had Mr. Loving sought to marry someone of his own sex, "the case would not have come out the same way," and pointed to the 1972 *Baker v. Nelson* case in which the High Court struck down an argument for homosexual "marriage" for what it said was a lack of "substantial federal question."



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Before hearing arguments as to the legality of the amendment, the judges first had to look at whether Prop. 8 proponents could even legally defend the ballot initiative in the first place. While the complaint against the amendment names Governor Arnold Schwarzenegger and Attorney General (and Governor-Elect) Jerry Brown as defendants, early on the two politicians refused to defend the amendment, prompting others to step up to the task. If the Ninth Circuit Court were to decide that proponents of the amendment could not legally defend it, Prop. 8 could conceivably be subject to an automatic veto by both Schwarzenegger's and Brown's refusal to defend it.

Early in the appeal process, Prop. 8 proponents had requested that Judge Reinhardt recuse himself from the case, because his wife, as executive director of the American Civil Liberties Union of Southern California, had been part of the legal team arguing against Prop. 8. While in the past Reinhardt, considered one of the most liberal federal judges in the nation, had excused himself from cases involving the ACLU, in this case he refused to do so.

Nonetheless, Reinhardt, who has seen many of his decisions overturned on appeal by the U.S. Supreme Court, has insisted that he will be able to rule impartially in the Prop. 8 appeal. The ADF's Jordan Lorence said that if Reinhardt actually holds true to his word, Prop. 8 proponents may win their appeal. "We believe that if he gives a fair reading of the Supreme Court precedent that he will see that he has binding precedent on him as a lower-court judge to affirm Prop. 8, said Lorence, "and that there is no basis in the case law to invalidate Prop. 8 the way that the district court did in this case."

While the judges gave no indication as to when they would issue a ruling in the case, observers predict their decision will come early in the new year, with a strong likelihood that the case would eventually go all the way to the U.S. Supreme Court for resolution.



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