The Future of Same-Sex Marriage in California

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Abstract

This article will discuss in detail the issues relating to the rights of same-sex couples wishing to get married in California. First the article examines the history of same-sex marriage in California prior to the most recent *Perry v. Brown* ruling. The article then focuses on the named plaintiffs in this case, concentrating particularly on their history and how they became involved in the case. Next, the litigation process of *Perry v. Brown* and the recent decision handed down by Circuit Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit will be reviewed. Finally, the paper will focus on what is next for both *Perry v. Brown* and for the future of gay and lesbian marriages in California.
The Future of Same-Sex Marriage in California

We need consider only the many ways in which we encounter the word ‘marriage’ in our daily lives and understand it, consciously or not, to convey a sense of significance. We are regularly given forms to complete that ask us whether we are “single” or “married.” Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, “Will you marry me?”, whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see “Will you enter into a registered domestic partnership with me?”¹

Since the dawn of gay rights, many gay and lesbian couples have been fighting for the right to marry. For decades this marriage right has been met by extreme opposition. Many people argued, and still continue to argue, that for tradition and morality reasons, marriage should be saved for heterosexual couples only. Proponents of the “traditional” marriage justification also claim that a domestic partnership is either the same or the next best alternative for same-sex couples. Based on recent court cases and legislation though, it appears that more and more Americans are waking up to the idea that gays and lesbians have just as much a right to marry the person they love as heterosexual individuals do.

This paper will discuss in detail the issues relating to the rights of gay and lesbian couples who wish to get married in California. First it will examine the history of same-sex marriage in California prior to the recent Perry v. Brown ruling.² The paper will then focus on the named plaintiffs in this case, concentrating particularly on their history and how they became involved in the case. Next, the litigation process of Perry v. Brown and the recent decision handed down by Circuit Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit

¹ Perry v. Brown, 2012 WL 372713 at 14 (C.A.9 (Cal.)) (Feb. 7, 2012) (only the Westlaw citation is currently available). This case originally known as Perry v. Schwarzenegger (Perry IV), 704 F.Supp.2d 921 (N.D. Cal. Aug. 4, 2011.), was amended to Perry v. Brown when Governor Edmund Gerald “Jerry” Brown was appointed to office.
will be reviewed. Finally, the paper will focus on what is next for both *Perry v. Brown* and for the future of gay and lesbian marriages in California.

**History of Marriage Rights in California Prior to *Perry v. Brown***

California’s legal history with same-sex marriage rights began in 1971, when California eliminated its gender-based distinction for capacity to consent to marriage. As a result of this change, many same-sex couples began applying for marriage licenses, arguing that the statute permitted any two unmarried adults to enter into marriage. This new uprisng of same-sex couples caused the county clerks to ask the legislature to amend the Family Code section to provide explicit language restricting marriage as between a man and a woman. The legislature responded to their request in 1977 by adding the statutory language with Family Code section 300. This Family Code section codified marriage as a personal relation arising out of a civil contract “between a man and a woman.” As a result, same-sex couples were not permitted to marry.

In the 1980s, same-sex couples started getting rights and recognition in California. Domestic partnerships were born in both Berkeley and San Francisco. These partnership rights sought to define a legal relationship for same-sex partners other than marriage, from which they were barred, and to extend workplace benefits to domestic partners of city employees that were substantially equal to the benefits that were provided to employee spouses. These rights were revolutionary in the United States and continued to spread from city to city. In 1999, the

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3 Patricia A. Cain & Jean C. Love, *Six Cases in Search of a Decision: The Story of In re Marriage Cases*, in *Women and the Law Stories* 337, 359 (Elizabeth M. Schneider & Stephanie M. Wildman, eds., 2011). Many thanks to Professor Love for her assistance. Before this amendment, the age of consent for males was 21, whereas for females it was 18.

4 *Id.* at 359.


6 *See* Cain & Love, *supra*, at 358.
California legislature provided more rights to gays and lesbians by enacting a statute that granted statewide recognition to all same-sex couples that registered with the state as domestic partners and not just for state and city employees. By 2005, domestic partners enjoyed most of the same benefits and responsibilities as married spouses.\(^7\)

While domestic partnership rights improved, same-sex marriage rights remained at a standstill. On March 7, 2000, California joined the federal government and many states by passing Proposition 22, also known as the Knight Initiative.\(^8\) This initiative was California’s version of the federal Defense of Marriage Act (DOMA), which was enacted in 1995. The federal DOMA prohibited recognition of same-sex marriage at the federal level and declared that no state should be required under the Full Faith and Credit Clause to recognize a same-sex marriage from another state.\(^9\) California’s Proposition 22 language was simple: “Only marriage between a man and a woman is valid or recognized in California.” Some argued that this language was the same as Family Code section 300 because it just declared marriage as a union between a man and a woman, but in reality Proposition 22 declared that any same-sex marriage, even those legally performed outside of California, would be considered invalid in California.\(^10\)

Proposition 22, later codified as Family Code section 308.5, continued to be valid in California until San Francisco Mayor Gavin Newsom decided to provide the opportunity to legally wed same-sex couples. Shortly after his appointment as Mayor, Newsom heard President George W. Bush’s January 20, 2004 State of the Union Address. Mayor Newsom was outraged by the President’s statements regarding marriage between a man and a woman as an institution that needed to be protected against change and set out to make a difference. On

\(^7\) See Cain & Love, supra, at 358.
\(^8\) Id. at 361. State Senator Pete Knight had sponsored this bill at least twice in the legislature.
\(^9\) Id. at 360
\(^10\) Id. at 361.
February 12, 2004, Mayor Newsom ordered the city clerks at San Francisco City Hall to begin issuing marriage licenses to same-sex couples.\footnote{Mayor Defends Same-Sex Marriages, CNN Justice, Feb. 22, 2004, http://articles.cnn.com/2004-02-22/justice/same.sex_1_marriage-licenses-couples-political-career?_s=PM:LAW.} He explained his decision by saying, "I took an oath of office to bear truth, faith and allegiance to the constitution of the state of California, and there is nothing in that constitution that says that I have the right to discriminate against people on any basis." He concluded by saying, “And I simply won't do that.”\footnote{Id.}

The response to Mayor Newsom’s decision was swift. Within twenty-four hours of the first same-sex weddings, two conservative groups, Campaign for California Families and Proposition 22 Legal Defense and Education Fund, brought suits against the city of San Francisco, seeking temporary restraining orders. Their injunction requests were denied because both groups failed to prove the issuance of marriage licenses to same-sex couples caused irreparable harm. Meanwhile thousands of same-sex couples from all over California and the United States were rushing to San Francisco’s City Hall to get married.\footnote{See Cain & Love, supra, at 339.} One of these couples, Kris Perry and Sandy Stier, could feel the positive effects of their marriage immediately. The couple became engaged before Mayor Newsom permitted the issuance of marriage licenses and rushed to City Hall with their kids to make their union legal. As a result of their marriage, the newlyweds felt a deeper union and their sons now felt like they were part of a defined, legally-recognized family. Needless to say, the couple was over the moon with happiness.\footnote{Telephone interview with Sandy Stier (March 29, 2012).}

On February 25, 2004 three taxpayers filed another petition, this time in the California Supreme Court, seeking a writ of mandate to compel the county clerk to cease and desist issuing marriage licenses to same-sex couples and requesting an immediate stay. Two days later,
Attorney General William Lockyer, per the request of then Governor Arnold Schwarzenegger, filed a similar action requesting the state’s Supreme Court to exercise original jurisdiction in this matter, to order compliance with the marriage laws as written, to invalidate all same-sex marriages performed to date, and to issue an immediate stay. Perhaps compelled by Governor Schwarzenegger’s request, the Supreme Court intervened and issued a stay to discontinue the issuance of same-sex marriage licenses until it made an absolute decision.\(^{15}\)

On August 12, 2004, the California Supreme Court announced its final decision in *Lockyer v. City and County of San Francisco*. The Supreme Court declared that all of the 4,037 marriages were considered void, explaining that Mayor Newsom did not have the power under the separation of powers doctrine to ignore the clear statutory law of California that had restricted marriage between a man and a woman.\(^{16}\) The Court left open the question of whether or not the statutory restrictions on marriage in the Family Code violated the California Constitution. As a result, six cases were filed in state court in order to determine the constitutionality of restricting marriage to one man and one woman. These cases were later consolidated and became collectively known as the *In re Marriage Cases*.\(^{17}\)

**In re Marriage Cases**

The consolidated case asked the question, ‘Is denial of marriage to same-sex couples valid under the California Constitution.’\(^{18}\) Judge Richard Kramer tried the case and ultimately decided to focus on the issue of whether Family Code section 300 and Family Code section 308.5 (the now codified Proposition 22) violated the California Constitution.\(^{19}\)

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\(^{16}\) *Id.* at 340.

\(^{17}\) *Id.*

\(^{18}\) *In re Marriage Cases*, 43 Cal.4th 757 (2008).

\(^{19}\) See Cain & Love, *supra*, at 364.
The trial court reviewed the expert witness testimony and arguments posed from both sides and found that the statutes violated California’s Equal Protection Clause because they contained a suspect, facial, sex-based classification based on sexual orientations and they frustrated the fundamental right to marry a person of one’s choice. Upon finding this suspect classification and fundamental right, Judge Kramer then focused on whether the state’s primary justification for the ban on same-sex marriage (that the “traditional” definition of marriage should be honored) served a legitimate governmental objective. Applying a low-level scrutiny, as the opponents of same-sex marriage requested, Judge Kramer held that “even under the rational basis standard, a statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time.” He further held that both Family Code sections were unconstitutional under a strict scrutiny analysis because the discrimination based on the “sexual orientation” suspect class served no compelling state interest, since there was no legitimate governmental purpose. Judge Kramer also denied the Attorney General’s argument that California’s entire statutory scheme did not violate the state’s Equal Protection Clause because the legislature had created two “separate, but equal” family institutions: marriage and registered domestic partnerships.

California’s First District Court of Appeal reversed the trial court’s equal protection ruling and held that the fundamental right to marry does not encompass the right to same-sex marriage. Justice William McGuinness, joined by Justice Joanne Parrilli, first took the position that the judiciary, unlike the legislature, simply did not have the authority to grant marriage to same-sex couples. He then determined that the Family Code sections did not violate California’s Equal Protection Clause on the basis of sex and were subject to the equal application defense

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20 Id. at 366.
21 Id. at 364.
because California’s opposite-sex definition of marriage did not discriminate against males or females and no evidence indicated that the statutes had been enacted in order to maintain discriminatory assumptions about gender roles. He was further unwilling to hold that a classification for equal protection purposes could be based on sexual orientation because no proof of the immutability of sexual orientation had been shown.\textsuperscript{22}

The Plaintiffs appealed to the Supreme Court of California, which reversed the Court of Appeal’s holding. On May 15, 2008, by a vote of 4-3, the highest court in the state of California determined that failing to designate the official relationship of same-sex couples as marriage violated the California Constitution.\textsuperscript{23} The majority, written by Chief Justice Ronald George, largely focused on whether Californians had a constitutional right to marry, and if so, whether the state violated the constitutional right when it granted the traditional designation of marriage to opposite-sex couples and had assigned a different designation – domestic partnership – to same-sex couples. Chief Justice George answered this question with the following words: “One of the core elements of this fundamental right [to marry] is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and statute as that accorded to all other officially recognized family relationships.”\textsuperscript{24} As a result, the current Family Code statutes posed a serious risk of denying to same-sex couples the equal dignity and respect that is at the core of the constitutional right to marry. By affording same-sex couples access only to the separate institution of domestic partnership, the Family Code sections in question impinged upon the right of these couples to have their family relationship accorded equal respect and dignity.\textsuperscript{25}

\textsuperscript{22} See Cain & Love, \textit{supra}, at 368.
\textsuperscript{23} \textit{Id.} at 370-371.
\textsuperscript{24} \textit{Id.} at 373.
\textsuperscript{25} See Cain & Love, \textit{supra}, at 375.
Ultimately, Family Code sections 300 and 308.5 were invalidated as a violation of same sex couples’ fundamental right to marry.

The California Supreme Court further held that the trial court’s sexual orientation classification was valid. Chief Justice George determined that a person’s sexual orientation is such an integral an aspect of one’s identity, it is not appropriate to require the person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment. The Court held that statutes that treat people differently on the basis of sexual orientation should be viewed as constitutionally suspect under California’s Equal Protection Clause. California’s Supreme Court was the first state high court to rule that sexual orientation is a suspect class, requiring strict scrutiny analysis.26 Many people rejoiced over this news because it meant that same-sex couples would be allowed to marry legally once again in California. In fact, over 18,000 marriages were performed in California shortly thereafter. Others, like the plaintiffs in Perry v. Brown were a little hesitant. Plaintiff Sandy Stier explained that she did not want to go through another marriage if it meant that it would again be taken away or no longer considered legal. In her words, “To marry your partner over and over because it is legal one day, and then not the next, is really weird and hurtful.”27

**Proposition 8**

The success of the In re Marriage Cases decision was short lived. On November 4, 2008, Californians faced Proposition 8, a ballot initiative to amend section 7.5 to article 1 of the California Constitution to provide “Only marriage between a man and a woman is valid or recognized in California.”28 Rather than adding a new statute as Proposition 22 did, Proposition

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26 *Id.* at 374.
27 Telephone interview with Sandy Stier (March 29, 2012).
8 aimed to amend the California Constitution. By a vote of 52% to 48%, the initiative won.\textsuperscript{29} Many people could not help be crushed by the news, for it meant that the state had taken another step back in providing marriage rights to same-sex couples. On November 5, 2008, the day the measure took effect, San Francisco City Hall county clerks notified same-sex couples applying for marriage licenses that same-sex marriage licenses were no longer being issued and City Hall could no longer perform civil marriage ceremonies for same-sex couples.\textsuperscript{30} Crushed by the news, same-sex couples filed a writ of mandate action in California’s Supreme Court, hoping to have Proposition 8 invalidated.

\textit{Strauss v. Horton}

In \textit{Strauss v. Horton}, opponents of Proposition 8 maintained that Proposition 8 exceeded the scope of California’s initiative power because it revised, rather than amended, the California Constitution. The opponents did not raise any federal constitutional challenge to Proposition 8 in the state court proceeding. Although state officials named as respondents refused to defend the measure, Proposition 8 Proponents were permitted to intervene. The Proposition 8 Proponents argued that the initiative was a valid constitutional revision and as a result, the constitutional amendment should remain in effect.\textsuperscript{31}

On May 26, 2009, the California Supreme Court determined that California’s constitutional provision denying recognition to same-sex marriages was not a constitutional revision from a qualitative standpoint, thus supporting the validity of its enactment by initiative, since the provision did not work a fundamental change in the basic governmental plan or framework established by the preexisting provisions of the California Constitution; the provision

\textsuperscript{29} \textit{Perry v. Brown}, 2012 WL 372713 at 5.
\textsuperscript{30} See \textit{Cain & Love}, \textit{supra}, at 377.
simply changed the substantive content of the state constitution's equal protection, due process, and privacy clauses in the specific subject area of access to the designation of “marriage,” without depriving the courts of their responsibility to enforce state constitutional provisions.  

Even though the California Supreme Court failed to find Proposition 8 unconstitutional, it did rule that the 18,000 marriages celebrated by same-sex couples in California between June 16 and November 5, 2008 were valid. The Court explained that Proposition 8 carved out a narrow and limited exception to the state constitutional rights that were articulated in the In re Marriages Cases, by reserving the official designation of the term ‘marriage’ for the union of opposite-sex couples, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple’s state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws. As a result, Proposition 8 was upheld, but the 18,000 marriages that were conducted following the In re Marriages Cases holding continued to be valid.

**Background of the Perry v. Brown Plaintiffs**

At about the same time that the California Supreme Court was issuing its Proposition 8 decision, two high profile lawyers, Ted Olson and David Boies, announced that they had filed suit in federal court challenging Proposition 8 under the United States Constitution. This case came about by pure happenstance. Chad Griffin and Christina Schake of the American Foundation for Equal Rights had been working on a “gay marriage project” and wanted to figure out a way to have the federal courts, as opposed to state courts, hear the issue of Proposition 8 and gay marriage rights. While eating lunch in Los Angeles’ Polo Club, a woman approached

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32 See Cain & Love, supra, at 442; West’s Ann. Cal. Const. art. 1, §§ 1, 7, 7.5, art. 2, § 8(b).
33 See Cain & Love, supra, at 377. These marriages were post In re Marriage Cases, but prior to the passage of Proposition 8.
them. She was the former sister-in-law of Ted Olson and had overheard the conversation that the two advocates were having. She thought that he would be the perfect lawyer for the case given his success in the courtroom and his libertarian views. Mr. Olson agreed to assist if his friend, and opponent in the courtroom, David Boies agreed to work on the case.\textsuperscript{35} This case, known as \textit{Perry v. Schwarzenegger}, asked the federal courts to consider whether a constitutional ban on same-sex marriage was valid.

\textit{Perry v. Schwarzenegger} was filed on May 22, 2009 in the United States District Court for the Northern District of California.\textsuperscript{36} Two same-sex couples brought civil rights action against then Governor of California Arnold Schwarzenegger, the Attorney General, the Director and Deputy Director of Public Health, and county clerks, challenging Proposition 8 by alleging a violation of due process and a violation of equal protection under the Fourteenth Amendment of the United States Constitution.\textsuperscript{37} The first couple was a lesbian couple named Kristin M. Perry and Sandra B. Stier. The second couple was a gay couple named Jeffrey J. Zarrillo and Paul T. Katami. While there are some differences in their stories, they share one common goal: the right to have their relationship legally recognized as a marriage in California.

\textbf{Kris Perry and Sandy Stier

Kristin Perry, known as Kris, and Sandra Stier, known as Sandy, are two working mothers of four boys.\textsuperscript{38} They first met in 1995 during a computer class Sandy was instructing. Sandy works as an information technology director for the Alameda County Behavioral Health Care Services Agency and one of her responsibilities is to teach computer lessons to her fellow

\textsuperscript{35} Telephone interview with Sandy Stier (March 29, 2012). As a point of interest, Ted Olson and David Boies acted as opposing counsel in the United States Supreme Court case, \textit{Bush v. Gore}.


\textsuperscript{37} \textit{Id}.

\textsuperscript{38} Telephone interview with Sandy Stier (March 29, 2012).
Alameda County employees. Kris, an executive director of First 5 California, a state agency that provides health and education services to children under age five, just happened to be one of those employees. Although they started out as close friends, they later fell in love in 2000. When Kris proposed to Sandy at Indian Rock in December 2003, not far from their Berkeley, California home, she obviously said “Yes!,” but could not help but ask, “What does that mean?” They would soon find out.

The couple married in February 2004 at San Francisco City Hall, during that brief period in time when Mayor Newsom began issuing marriage licenses to same sex couples. The fact that they were legally married was a fluke. They intended to have a traditional wedding with family and friends, without the marriage certificate, but jumped at the chance to make it legal when they heard Mayor Newsom’s announcement. They took their children out of school for the day so that they could celebrate their legal union and act as their witnesses. Tom and Frank, Sandy’s children from a previous marriage, were in Catholic school at the time and Frank was so scared he would get in trouble that he asked his mom to tell the school secretary that he had a doctor’s appointment. Sandy obliged, knowing it was worth it to have her sons be a part of the wedding. They later had a ceremony and reception with all of their friends in August of that year. After they were married, the couple could not help but feel the positive change in their relationship. During testimony before the Federal District Court, Sandy recalled that their

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40 Telephone interview with Sandy Stier (March 29, 2012).
41 Id.
42 Gumbel, supra note 39.
43 Telephone interview with Sandy Stier (March 29, 2012).
children started calling each other brothers and that the marriage gave the boys a common language with their friends.44

The legality of their marriage was short lived, unfortunately. Upon returning from their honeymoon in Italy, Kris and Sandy received a letter from the city of San Francisco stating that their marriage had been voided and that the couple had the option to be reimbursed their marriage license fee, or they could donate this fee to charity.45 The couple felt offended and humiliated.46 They continued on with their lives and almost married again after the In re Marriage decision, but Sandy knew that the holding would not last and wanted to wait until it was completely legal before they got married again. She thought the idea of having to marry her wife three times was both weird and hurtful.47

Following the passage of Proposition 8 on November 4, 2008, Sandy and Kris could not help but feel disappointed and heartbroken. Shortly after Proposition 8’s passing, Kris was having a work meeting with Chad Griffin. Griffin and Kris worked together on Proposition 10, a voter initiative that funded First 5 California. During the meeting, they started talking about the passage of Proposition 8. Griffin asked Kris if she and Sandy had married again after the In re Marriages decision, and Kris informed him that Sandy wanted to wait.48 Griffin told her about the gay marriage project he was working on for the American Foundation for Equal Rights and

44 Telephone interview with Sandy Stier (March 29, 2012).
45 Id.
46 Id.
47 Id.
48 Had they remarried following the In re Marriages decision, Kris and Sandy’s marriage would be considered valid after the Strauss v. Horton decision.
asked if she and Sandy wanted to get involved. After discussing it with their children and thinking about it for weeks, the couple told him that they were interested in participating.

The women initially thought their names would be used and they would not participate too much. Although they believed that the issue would be settled at an administrative hearing, but soon enough they were in the middle of a huge federal case. They used all of their vacation time to assist with the trial and their lives were thrown into the public arena. Although their lives were now under scrutiny, and some of their friends and family became a little more distant and started showing how they truly felt about same-sex marriage, Sandy was proud to participate in the trial and found it absolutely fascinating. She loved watching the expert witnesses discuss discrimination and felt privileged to be a part of a case that could impact so many peoples’ lives.

Paul Katami and Jeffrey Zarrillo

Paul Katami, a Santa Clara University graduate who works as a fitness expert in Santa Monica, and Jeffrey Zarrillo, a general manager of a theater exhibition company, wove their own tapestry into the case. Unlike Kris and Sandy, Paul and Jeffrey never tried to marry. The couple, who have been together for over a decade, considered marriage several times, including traveling to other states for a civil union, but ultimately decided to put their plans on hold until they knew their fundamental rights were protected federally. The idea of having their potential marriage invalidated seemed too much for them to deal with both emotionally and financially. On top of this concern, their jobs could require them to relocate and they did not want to worry

49 Gumbel, supra note 39.
50 Telephone interview with Sandy Stier (March 29, 2012).
51 Gumbel, supra note 39.
53 Id.; Gumbel, supra note 39;
about moving to a state where their marriage might not be recognized.\textsuperscript{54} For all of these reasons, the couple decided that marriage could wait a little bit longer.

Although the couple always supported gay rights, they really took a stand after watching a television advertisement called “Gathering Storm” which they believed misrepresented the truth on gay rights and gay marriage. In response to this advertisement, they made a short public service announcement video explaining their opinion on the “Gathering Storm” advertisement and posted it to YouTube. This video received quite a bit of feedback and spurred them to do even more. Through a series of concentric circles of people, their PSA video led them to Griffin and Schake. The two American Foundation for Equal Rights board members were intrigued by the couple and asked if they wanted to get involved. After discussing the idea together, they informed both Griffin and Schake that they were interested in participating, and ultimately became plaintiffs in the \textit{Perry v. Brown} case.\textsuperscript{55}

\textbf{Legal Threads}

On May 22, 2009, the American Foundation for Equal Rights filed its complaint on behalf of the two couples over the couples’ right to marry. To overturn Proposition 8, the Plaintiffs were required to prove that Proposition 8 violated the United States Constitution’s equal protection marriage rights. The Defendants, including the Proposition 8 campaign Proponents and government officials, were required to show that California should reserve marriage to heterosexual couples because of the procreative purpose behind marriage.\textsuperscript{56} The lawsuit also targeted the two-tiered system of marriage that existed in California, following the \textit{Strauss v. Horton} decision. The California Supreme Court, in upholding Proposition 8 in 2009,

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  \item \textsuperscript{54} Gumbel, \textit{supra} note 39.
  \item \textsuperscript{55} Gumbel, \textit{supra} note 39.
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left intact more than 18,000 gay marriages licensed before Proposition 8 went into effect and the Plaintiffs requested that the court determine what California should do regarding this two-tiered system.  

**Trial Court**

On January 11, 2010, Chief Judge Vaughn R. Walker of the District Court for Northern California began the trial by hearing over twelve days of testimony on the issue of whether Proposition 8 was constitutional. Originally, Judge Walker intended to video tape the trial court testimony and make it available for public viewing on YouTube. However, on the morning of the opening day of argument, the United States Supreme Court stepped in and temporarily blocked the arrangement, thus overruling the Plaintiffs’ argument that the videotaping advanced democratic transparency. Opponents of same-sex marriage found the block on the video taping to be a victory, for they were concerned for their witnesses’ safety if the video streamed online. The U.S. Supreme Court solidified this temporary holding on January 13, 2010, when it held in a five to four decision that the video camera was banned from the courtroom. The Supreme Court held that the District Court had not allowed enough time for public commentary, and as a result, had not followed proper procedure.

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57 Mintz, *supra* note 56; *In re Marriage, supra*, invalidated Proposition 22, which held that marriage was to be between a man and a woman; *Strauss v. Horton*, 46 Cal. 4th 364 (2009).


59 *Id.* As a side note, the Court of Appeals for the Ninth Circuit agreed with the Supreme Court when it held that the trial video recording in the district court should remain sealed in *Perry v. Brown*, 667 F.3d 1078 (2012).
Trial Court Testimony

During the first nine days of testimony, Plaintiffs called eight lay witnesses and nine expert witnesses to support their arguments. Plaintiffs’ first argued that Proposition 8’s ban on gay marriage violated the Due Process Clause of the United States Constitution because it deprived same-sex couples the fundamental right to marry the person of one’s choice. This argument was novel because it had never been raised in any prior state court proceeding and aimed to show that “domestic partnership” was not the same as “marriage.” Plaintiffs Kris and Sandy provided their opinion on the distinction when they testified about the difficulty they experienced because “domestic partnership” did not adequately describe their relationship. When Sandy took the stand, she elaborated on the domestic partnership name issue by explaining, “We’re not business partners. We’re not social partners. We’re not glorified roommates.”

Plaintiffs also called University of California, Los Angeles psychologist Letitia Anne Peplau to the stand to support their argument that “domestic partnership” and “marriage” were not synonymous. She testified about the benefits, social and psychological, that same-sex couples enjoy when they are allowed to marry, and about the stability of those relationships. During cross-examination, the Defendants “tipped their hand” on how they intended to show that same-sex relationships were different from heterosexual relationship by bringing up a study Peplau had done twenty-seven years prior to her testimony that showed gay men tended to not be

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60 Perry v. Schwarzenegger (Perry IV), 704 F.Supp.2d 921, 932 (2010). It should be noted that unlike the Plaintiffs, the Proposition 8 Proponents took only three days and called two witnesses.
61 Perry IV at 928. No case has made the argument that Constitutional rights under the United States’ Constitution were violated. All other cases related to violations of rights under various state constitutions.
sexually exclusive. In response, Peplau explained that twenty-seven years ago people could have engaged in different types of relationships and could have valued a relationship differently. She further supported her position by stating that many heterosexuals pledge to be monogamous and are not.\textsuperscript{63}

The Plaintiffs further argued that bias against gays and lesbians formed the foundation for Proposition 8. As a result, Proposition 8 was due to a history of discrimination against the gay and lesbian community and not backed by any government interest. This position also supported the Plaintiffs’ ultimate argument that homosexuality should be considered a suspect class, thus requiring strict scrutiny analysis.\textsuperscript{64} Plaintiffs called several expert witnesses in order to prove this point, including Yale professor George Chauncey. Chauncey testified about the history of discrimination and harassment of gay people in the United States. The decision to use Chauncey was a bold move by the Plaintiffs because Chauncey wrote an amicus brief that the United States Supreme Court largely relied upon in its 2003 \textit{Lawrence v. Texas} holding. In his \textit{Lawrence} brief, Chauncey stated that, “The governmental project of classifying and discriminating against certain citizens on the basis of their homosexual status is an unprecedented project of the twentieth century, which is already being dismantled,” thus showing that the United States did not make it a habit to discriminate against homosexuals.\textsuperscript{65} Justice Kennedy relied on this brief when he wrote the \textit{Lawrence} opinion, which struck down Texas’ anti-sodomy law.\textsuperscript{66}

The defense used this amicus brief to counter any opinions that were proffered by Chauncey during his testimony. They countered that based on his \textit{Lawrence} brief, it would be


\textsuperscript{64} \textit{Perry IV}, 704 F.Supp.2d at 929.

\textsuperscript{65} \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).

\textsuperscript{66} Talbot, \textit{supra} note 63.

\textsuperscript{66} \textit{Id.}
impossible for him to say that America had a history of discrimination against citizens based on their homosexual status. For this reason, Chauncey was largely instructed to focus primarily on the fact that gays were politically weak and that public opinion is not in favor of same-sex marriage, thus supporting the position that homosexuality qualifies as a suspect class.67

The Plaintiffs also called Hak-Shing William Tam, one of the original five sponsors of Proposition 8 and an intervenor in the Perry case. Plaintiffs decided to put him on the stand to show that Proposition 8 was motivated by irrational animus and not connected to a legitimate state purpose.68 The Plaintiffs introduced a letter written by Tam to supporters of Proposition 8 weeks before the November election. In this letter, Tam stated that the San Francisco government was “under the rule of homosexuals. They lose no time in pushing the gay agenda – after legalizing same-sex marriage, they want to legalize prostitution. What will be next? On their agenda list is: legalize having sex with children.”69 Tam, fearing for his life, refused to testify at trial. As a result, Plaintiffs were allowed to show his videotaped deposition, where Tam also stated that if gay people were allowed to marry, more and more children would decide to become homosexuals.

To support its position that Proposition 8 was constitutional, the defense called just two witnesses. The first expert to testify was Kenneth Miller, an associate professor of government at Claremont College, followed by David Blankenhorn, the author of the 1995 book “Fatherless America,” and the head of the Institute for American Value.70 Miller was used as an expert by the defense to explain the relationship between the gay community and political power. The

67 Talbot, supra note 63.
69 Talbot, supra note 68.
defense aimed to show that gays were not politically powerless, and as a result, could not be considered a suspect class. To prove this point, Miller provided evidence that the entertainment industry has generally supported the gay rights movement and Proposition 8 citing celebrities such as Lucas Films, Brad Pitt, and Stephen King. In his cross-examination, Plaintiff’s attorney Boies countered Miller’s position by asking him if gays and lesbians were underrepresented among elected statewide officials in California. The answer was yes, as not one openly gay or lesbian person has ever been elected a statewide officer in California. He also asked Miller if DOMA and the “Don’t ask, don’t tell” policies had been repealed, and the only answer Miller could give him was “No.” In the end, the court gave little weight to Miller’s testimony.\textsuperscript{71}

The Proposition 8 Proponents introduced Blankenhorn as an expert witness to show that allowing same-sex marriage would further erode traditional marriage. Blankenhorn stated that re-defining marriage to include gay and lesbian couples would eliminate entirely in law, and weaken still further in culture, the basic idea of a mother and father for every child. During heated testimony, in which Boies and Blankenhorn often looked to Judge Walker for help in controlling one another, Boies was able to get Blankenhorn to acknowledge the compelling claims to equal treatment of gays and lesbians and that it would be more American to permit same-sex marriage.\textsuperscript{72}

On January 26, 2010, both sides rested until closing arguments could be heard. Judge Walker had informed the court that before hearing closing arguments, he wanted to review all the evidence and the testimony that had occurred over the past twelve days. The closing arguments were not heard until June.

\textsuperscript{71} Perry IV, 704 F.Supp.2d at 952.
Trial Court Decision

Judge Walker’s did not issue his decision until August 4, 2010. In the 138-page opinion, the court held that Proposition 8 violated the Due Process Clause of the Fourteenth Amendment because no compelling state interest justified denying same-sex couples the fundamental right to marry. The court also held that there was a violation of the Equal Protection Clause because the court could find no rational basis for limiting the designation of ‘marriage’ to just opposite-sex couples. In his opinion, Judge Walker noted that the Proposition 8 Proponents failed to build a credible factual record to support their claim that Proposition 8 served a legitimate government interest.

The court held that Proposition 8 violated the Due Process Clause of the United States Constitution because the freedom to marry is recognized as a protected fundamental right. Since the California voter-enacted constitutional amendment restricting valid marriage as one between a man and a woman was not narrowly tailored to meet the compelling governmental interest requirement, it failed to meet the required strict scrutiny analysis. The Proposition 8 Proponents could not show a fundamental government reason explaining why the arbitrary governmental intrusion into the Plaintiffs’ life, liberty, and property was warranted. Same-sex couples sought to exercise a fundamental right to marry, and availability of domestic partnerships to same-sex couples did not satisfy the fundamental right to marry.

Judge Walker further held that the ban on same-sex marriage did not pass even the most minimal scrutiny under equal protection law because it denied the fundamental right to marry the

73 Perry IV, 704 F.Supp.2d at 991-95.
74 Id. at 997-1003.
75 Id. at 930.
76 Id. at 991; U.S.Const. amend. XIV, § 1.
77 Perry IV, 704 F.Supp.2d at 995; U.S.Const. amend XIV § 1; U.S.Const. art 1, § 7.5.
person of one’s choice without a “legitimate (much less compelling) reason.” He rejected tradition as an argument because marriage has changed in all sorts of ways and sometimes traditions wear out their welcome. He also rejected the argument that the state was helping to protect marriages between opposite-sex couples because no reliable evidence was presented that showed that allowing same-sex couples to marry would negatively affect society or the institution of marriage. Lastly, the court held that the argument justifying the banning of same-sex marriage since it promoted child welfare failed because the evidence indicated that gay and lesbian parents were just as effective at raising children as heterosexual parents were. The court noted that gays and lesbians were already raising children, biological or not, and allowing same-sex couples to marry could only help those families.

The Plaintiffs and same-sex marriage advocates rejoiced. Moments after Proposition 8 was overturned, same-sex couples rushed to San Francisco’s City Hall to be married, many holding hands while singing “Chapel of Love.” Unfortunately, they were turned away because the decision had immediately been stayed pending an appeal by the Proposition 8 Proponents. The immediate appeal request by the Proposition 8 Proponents demonstrated to the Plaintiffs and same-sex marriage supporters just how much more work needed to be done before a final resolution could be reached.

**Court of Appeals**

Following the Plaintiffs’ victory in district court, the Proposition 8 Proponents immediately appealed to the United States Court of Appeals for the Ninth Circuit. After an

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78 *Perry IV*, 704 F.Supp.2d at 994-995.
79 *Id.* at 998.
80 *Id.* at 999-1000.
expedited briefing schedule, the three-judge panel heard oral arguments on December 6, 2010, that were broadcast live on television and the Internet. The oral arguments were the most watched appellate court proceeding in American history.\textsuperscript{82}

On January 4, 2011, the Ninth Circuit issued an order certifying a question to the California Supreme Court concerning the rights under state law of the official proponents of a ballot initiative. The Governor and Attorney General of California declined to appeal Chief Judge Walker’s decision, but Proponents still wanted to have the case heard before the Ninth Circuit. As a result, the Ninth Circuit required clarification as to whether the Proposition 8 Proponents possessed legal “standing” to maintain their appeal. California’s Supreme Court issued its decision on November 17, 2011, stating that the Proposition 8 Proponents did in fact have standing. The Supreme Court held that when public officials decline to challenge a state law, the official proponents of a voter-approved initiative measure are authorized to assert the state’s interest.\textsuperscript{83} Now that the Proponents could proceed, the Court of Appeals allowed the case to continue.

**Ninth Circuit Decision**

On February 7, 2012, the Court of Appeals issued its opinion. The opinion, written by Circuit Judge Stephen Reinhardt, started out by explaining that the court must review not only Chief Judge Walker’s decision, but also a new, third argument put forth by the Plaintiffs. Plaintiffs now asserted that Proposition 8 singled out same-sex couples for unequal treatment by taking away from them alone the right to marry. This action of taking away the right to marry

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amounted to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason.\textsuperscript{84}

Instead of focusing on the fundamental right to marry and whether a denial of this right was a violation of same-sex couples’ rights under the Equal Protection Clause, the court chose to focus primarily on the third, narrowest question presented by the Plaintiffs. This put the focus on whether Proposition 8 had violated the Equal Protection Clause for California residents specifically.

After hearing arguments from both sides, the Ninth Circuit ultimately agreed with the Plaintiffs. The Court held that while Proposition 8 did not affect the rights, protections, and benefits that both same-sex and opposite-sex couples shared, it did take away the designation of ‘marriage’ from lifelong same-sex partnerships. Proposition 8 further took away the state’s authorization of that official status of ‘marriage’ for same-sex couples and the societal approval that comes with it. The court noted the extreme significance this ban had on same-sex couples, especially since the designation of marriage is the name that society gives to the relationship that matters most between two adults. Judge Reinhardt waxed poetically that “a rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of ‘registered domestic partnership’ does not.”\textsuperscript{85}

In determining whether California had a legitimate justification for withdrawing from gays and lesbians the constitutional protection with respect to the official designation of ‘marriage,’ the Ninth Circuit used the test found in \textit{Evans v. Romer}.\textsuperscript{86} In \textit{Romer}, the United

\textsuperscript{84} \textit{Perry v. Brown}, 2012 WL 372713 at 12.
\textsuperscript{85} \textit{Id.} at 14.
States Supreme Court held that the government could take away a right for some sort of legitimate reason, a reason that overcomes the “inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”87 In answering this question, the Ninth Circuit considered the four possible reasons offered by Proposition 8 Proponents to explain the purpose of Proposition 8’s enactment: (1) furthering California’s interest in childrearing and procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in school. The court concluded that because Proposition 8 did not further any of these interests, these justifications could not have been rational bases for Proposition 8, whether or not they were even legitimate state interests.88

The court denied the Proponents’ first argument that children are better off when raised by two biological parents and that society can increase the likelihood of that family structure by allowing only potential biological parents to marry. It also denied the argument that marriage reduced the threat of “irresponsible procreation” by providing an incentive for couples engaged in potentially procreative sexual activities to form stable family units. The court held that these arguments were not rationally related to Proposition 8 because the initiative had no effect on the ability of same-sex couples to become parents or the manner in which children were raised in California. Further, Proposition 8 did not alter California’s adoption laws and California’s policies that recognize that gay individuals are fully capable of responsibly caring for and raising children.89 Ultimately, the court held that given the realities of California law, and of human

89 *Id.*
nature, Proponents’ primary rational simply had no footing in the realities of the subject addressed by the legislation and thus could not be credited as a rational justification.\(^90\)

Proposition 8 Proponents’ second motivation, that California had an interest in “proceeding with caution” when considering changes to the definition of marriage, was also found to have no connection to the reality of Proposition 8. Judge Reinhardt reasoned that because the amendment was enacted after California had provided same-sex couples the right to marry and after more than 18,000 couples had married, the State could not use “proceeding with caution” as a justification. Had Proposition 8 imposed not a total ban on same-sex marriage but rather a time-specific moratorium on same-sex marriages, during which the Legislature would have been authorized to consider the question in detail or at the time of which the People would have had to vote again to renew the ban, the amendment might plausibly have been designed to “proceed with caution.” Unfortunately for the Proponents, neither of these possibilities occurred. The court determined that a permanent ban on same-sex marriage could not be rationally related to an interest in proceeding with caution.\(^91\)

The Ninth Circuit also considered the third rationale: protecting religious liberty. This justification was not raised by Proponents, but rather offered by amici curiae. According to the Proponents, Proposition 8 decreased the likelihood that religious organizations would be penalized, under California’s antidiscrimination laws and other governmental policies concerning sexual orientation, for refusing to provide services to families headed by same-sex spouses. The court dismissed this justification because Proposition 8 did nothing to affect those antidiscrimination laws relating to religious liberty. The court determined that the argument should be read as an appeal to the Legislature, seeking reform of California’s antidiscrimination

\(^91\) Id. at 23.
laws to include greater accommodations for religious organizations. Ultimately, it was held that protecting religious liberty could not be a justification for explaining why Proposition 8 was initiated.  

The fourth and final justification put forth by the Proponents provided that Proposition 8 protects children from being taught in public schools that same-sex marriage is the same as traditional marriage. The court found this to be an inadequate rationale because schools, both before and after the passage of Proposition 8, were never required to teach anything about same-sex marriage. Further, schools and individual teachers were always prohibited from giving any instruction that discriminates on the basis of sexual orientation. The court determined that because Proposition 8 did not strengthen the rights of schools to control their curricula and of parents to control their children’s education, the fourth argument by Proposition 8 Proponents failed.  

The court further held that without any other justification, tradition alone could not be enough to take away from gays and lesbians the right to use the designation of marriage. The court determined that laws may be repealed and new rights may be taken away if they had unintended consequences or if there is some conceivable affirmative good that revocation would produce, but new rights may not be stripped away solely because they are new. Absent any legitimate purpose for Proposition 8, the Ninth Circuit held that it was left with the “inevitable inference that the disadvantage imposed was born of animosity toward or … mere disapproval of, the class of persons affected.” The inference that Proposition 8 was born of disapproval of gays and lesbians was obviously heightened by evidence of the context in which the measure

93 *Id.* at 24-25.
94 *Id.* at 26.
95 *Id.* at 27.
was passed, for according to the trial court, “the campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.”

By singling out certain classes of citizens without a legitimate justification, the court held that Proposition 8 operated with no apparent purpose but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them and their relationships. By taking away from gays and lesbians the official designation of ‘marriage’ with its societally recognized status, Proposition 8 was found to violate the Equal Protection Clause. As a result, the Ninth Circuit upheld the lower court’s decision by finding Proposition 8 unconstitutional. Many people rejoiced at the news, for it meant that gays and lesbians were now one step closer to being able to marry the ones they loved in California. Governor Jerry Brown even supported the decision, stating, “The court has rendered a powerful affirmation of the right of same-sex couples to marry. I applaud the wisdom and courage of this decision.”

**Perry v. Brown and Beyond**

Now that the Ninth Circuit has found Proposition 8 to be a violation of gays and lesbians’ equal protection rights, what remains? Following the appellate court decision, the Proposition 8 Proponents petitioned the Ninth Circuit, requesting en banc review of Judge Reinhardt’s opinion. This petition put an automatic stay on the issuance of marriage licenses to same-sex couples. The petition argues that the Ninth Circuit holding conflicts with Supreme Court and Ninth

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97 *Perry v. Brown* at 28.
98 *Id.* at 29.
Whether the Ninth Circuit will decide to hear the case en banc is still under review. The attorneys for Plaintiffs believe that the court will decline to take the case en banc and will instead leave it up to the United States Supreme Court. The Plaintiffs’ position makes sense given the fact that fellow Ninth Circuit judges decided the case and en banc review is granted infrequently. Others believe that the Court of Appeals will take the case en banc given the enormity of the decision. The United States Supreme Court has said on more than one occasion that the Ninth Circuit should handle its own outlier cases and this case is definitely one of them. Whatever the Court of Appeals decides, the case will most likely go to the United States Supreme Court on a writ of certiorari.

Should this go to the United States Supreme Court, it will be interesting to see what the Court ultimately decides. Some constitutional law scholars, including Erwin Chemerinsky, believe that Justice Anthony Kennedy will be the deciding vote in this decision, as may of the other justices have already made their opinions on the issue of same-sex marriage clear. Ultimately, Justice Kennedy will have to decide whether or not to hold the ban on same-sex marriage unconstitutional. Should he find it unconstitutional, Justice Kennedy will then have to decide whether to adopt Judge Walker’s broad point of view, or whether to agree with Judge Reinhardt’s limited point of view. Should he adopt Judge Walker’s view, he would effectively ban all laws requiring marriage as only between a man and a woman. If he embraces Judge

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101 Telephone interview with Sandy Stier (March 29, 2012).
Reinhardt’s point of view, only California’s constitutional amendment banning same-sex marriage would be considered unconstitutional. At the end of the day, a conclusion to this case is anxiously awaited because it will dramatically change the lives of hundreds of thousands of same-sex couples and families.