Hollingsworth v. Perry: United States Supreme Court Grants Certiorari to Hear the "Prop 8" Case to Determine the Fate of Same-Sex Marriage in California

I. Introduction

A generation ago, the notion of a legal basis for same-sex marriage was so disregarded that the United States Supreme Court dismissed a case involving the issue without even writing an opinion.[1] On February 7, 2012, the United States Court of Appeals for the Ninth Circuit affirmed a decision striking down a ban on same-sex marriage in the nation's most populous state as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[2]

While forty years had passed between the two decisions, the controversy surrounding same-sex marriage in California lay dormant until 2004 when then-San Francisco Mayor Gavin Newsom became a prominent figure in the fight for marriage equality.[3] He was the driving force behind a protest described as "civil disobedience,"[4] issuing marriage licenses to same-sex couples. This protest, and the four thousand marriages that took place before a court injunction halted

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[1] Michael C. Dorf & Sidney Tarrow, *How the right helped launch same-sex marriage movement*, CNN (May 14, 2012), http://articles.cnn.com/2012-05-14/opinion/opinion_dorf-tarrow-same-sex-marriage_1_marriage-equality-doma-marriage-act (referencing Baker v. Nelson, 409 U.S. 810 (1972), which dismissed an appeal citing lack of a substantial federal question). *Baker* involved a same-sex couple who had been denied a marriage license in Minnesota and sued under state law, claiming that the denial of a marriage license violated the Fourteenth Amendment of the United States Constitution. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971). The Minnesota Supreme Court ruled that the "equal protection clause of the Fourteenth Amendment . . . is not offended by the state's classification of persons authorized to marry," *id.* at 313, and that there is a clear distinction between restrictions based merely upon race and those based on differences in sex. *Id.* at 315.

[2] Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) *reh'g en banc denied*, 681 F.3d 1065 (9th Cir. 2012). [hereinafter Perry].

[3] Erin Allday, *Newsom Was Central to Same-Sex Marriage Saga*, SAN FRANCISCO CHRONICLE (Nov. 6, 2008, 4:00 AM), www.sfgate.com/news/article/Newsom-was-central-to-same-sex-marriage-saga-3186381.php.

[4] *Id.*

them,[5] were the triggering events of an issue that has divided the state for the better part of the last decade.[6]

Those marriages led to a series of lawsuits culminating in a ruling by the California Supreme Court declaring the denial of same-sex marriages unconstitutional,[7] followed by a state constitutional amendment effectively reversing that ruling.[8] The controversy culminated in the Ninth Circuit's decision, discussed here.[9] Eight years and over seventy-three million dollars later,[10] this controversy seems to have been decided—at least for Californians—with the opinion in *Perry v. Brown*.[11]

The United States District Court for the Northern District of California was the first federal court to consider Proposition 8.[12] Judge Vaughn Walker issued his judgment for the plaintiffs, finding Proposition 8 unconstitutional based on the Equal Protection Clause of the Fourteen Amendment of the United States Constitution because Proposition 8 discriminated against same-sex couples without any rational reason for doing so.[13]

The Ninth Circuit has twice considered the issue of same-sex marriage. After the District Court's decision, a three-judge panel heard the appeal.[14] This opinion, authored by Judge Stephen Reinhardt, affirmed the District Court's conclusion that Proposition 8 violated the Fourteenth Amendment of the U.S. Constitution.[15] The majority agreed with the District Court that Proposition 8 violated the

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[5] *Id.*

[6] *Perry*, 671 F.3d at 1065-1067 (discussing the history of same-sex marriage in California, focusing on the issue since 2000).

[7] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

[8] CAL. CONST. art. I, § 7.5, *invalidated by Perry*, 671 F.3d at 1052. For simplicity's sake, I will refer to this amendment as Proposition 8, as this has been its designation in the media and how the amendment is colloquially known.

[9] *Perry*, 671 F.3d 1052.

[10] Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), www.nytimes.com/2008/11/06/us/politics/06ballot.html.

[11] *Perry*, 671 F.3d at 1096.

[12] Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010). [hereinafter Schwarzenegger].

[13] *Schwarzenegger*, 704 F.Supp.2d at 1003.

[14] *Perry*, 671 F.3d at 1052.

[15] *Id.* at 1064.

Fourteenth Amendment of the United States Constitution.[16] Finding no other basis than discrimination against same-sex couples as the motivation behind Proposition 8, the court determined that it was invalid.[17] The second time the Ninth Circuit weighed in on Proposition 8, it was to deny a request for a rehearing *en banc*.[18]

On December 7, 2012, the Supreme Court of the United States granted the writ of certiorari[19] requested by the defenders of Proposition 8. [20] Now titled *Hollingsworth v. Perry*,[21] the Supreme Court directed both parties to argue "[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and a woman"[22] and "[w]hether petitioners have standing under Article III, § 2 of the Constitution in this case."[23]

While the Ninth Circuit's ruling and subsequent denial for rehearing appears to be a victory for marriage equality,[24] the narrow holding of *Perry* had focused specifically on the validity of Proposition 8 as an amendment to the California Constitution, rather than on same-sex marriage as a fundamental right.[25] However, with the granting of certiorari to a case involving the Defense of Marriage Act,[26] it would appear that the Supreme Court will decide both cases on their merits and make a determination of the rights of same-sex couples to marry under the Fourteenth Amendment.

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[16] *Perry*, 671 F.3d at 1096 (affirming *Schwarzenegger*, which held Proposition 8 unconstitutional. *Id*. at 1003).

[17] *Id.*

[18] *Id.*

[19] Hollingsworth v. Perry, 2012 WL 3134429 (U.S. Dec. 7, 2012) (No. 12-144) [hereinafter Hollingsworth II].

[20] Perry v. Brown, 681 F.3d 1065 (9th Cir. 2012)[hereinafter Perry II], *petition for cert. filed sub nom*., Hollingsworth v. Perry, 2012 WL 3109489, at *3 (U.S. July 30, 2012) (No. 12-144)[hereinafter Hollingsworth I].

[21] *Hollingsworth II.*

[22] *Id*.

[23] *Id*.

[24] Bill Mears, *Judges open door for Supreme Court showdown over same-sex marriage*, CNN (June 6, 2012), www.cnn.com/2012/06/05/justice/california-proposition-8/index.html.

[25] *Perry*, 671 F.3d at 1064 (discussing how the broader issue of same-sex marriage would not be answered by this decision).

[26] United States v. Windsor, 12-307, 2012 WL 4009654 (U.S. Dec. 7, 2012).

To allow for a full understanding of the case now before the Supreme Court, this Case Summary covers both opinions by the Ninth Circuit Court of Appeals; that is, the initial three-judge decision and the subsequent denial for rehearing en banc.

II. Background

On May 15, 2008, California became the second state in the nation[27] to have its Supreme Court declare same-sex marriage a constitutional right.[28] Within eighteen days of that decision, opponents of same-sex marriage had gathered enough signatures for a ballot initiative that would amend the California Constitution to effectively overrule the court's decision and provide that "only marriage between a man and a woman is valid or recognized in California."[29] The proposition passed by a slim majority in the following November election and took effect the next day as article I, section 7.5 of the California Constitution.[30] Following its passage, proponents of Proposition 8 initially challenged its validity in the California court system.[31] The California Supreme Court held in *Strauss v. Horton* that Proposition 8 was a valid enactment of a constitutional amendment.[32] However, the eighteen thousand same-sex marriages which occurred prior to its enactment remained valid.[33]

Following the *Strauss* decision, two same-sex couples denied marriage licenses sought a writ of mandate preventing California officials from enforcing Proposition 8, claiming it violated the Fourteenth Amendment of the U.S. Constitution.[34] *Perry v. Schwarzenegger*[35] proceeded through a twelve-day bench trial before now-retired Judge Vaughn Walker.[36] However, despite being listed as defendants, nei-

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[27] Bob Egelko, *State's top court strikes down marriage ban*, S.F. CHRONICLE (May 16, 2008), www.sfgate.com/bayarea/article/State-s-top-court-strikes-down-marriage-ban-3213394.php.

[28] *In re* Marriage Cases, 183 P.3d 384, 435 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* Strauss v. Horton,207 O.3d 48, 1224, (Cal.2009).

[29] CAL. CONST. art I, § 7.5, *invalidated by Perry*, 671 F.3d at 1096.

[30] *Perry*, 671 F.3d at 1067.

[31] Strauss v. Horton, 46 Cal.4th 364, 398-99 (2009).

[32] *Strauss*, 207 P.3d at 122.

[33] *Id.* at 121.

[34] *Schwarzenegger*, 704 F. Supp. 2d at 928.

[35] *Id.* at 921.

[36] *Perry*, 671 F.3d at 1069.

ther then-Governor Arnold Schwarzenegger nor Attorney General Jerry Brown would defend Proposition 8.[37] Five California residents who had filed the Proposition 8 paperwork with the Secretary of State (collectively "Proponents") moved to intervene and argue on behalf of the proposition and defend its validity in court.[38] That motion was granted.[39]

The District Court made eighty findings of fact,[40] among them: (1) marriage benefits society by organizing individuals into cohesive family units, developing a realm of liberty for intimacy and free decision making, creating stable households, legitimating children, assigning individuals to care for one another, and facilitating property ownership; (2) marriage benefits spouses and their children physically, psychologically, and economically, whether the spouses are of the same or opposite sexes; (3) domestic partnerships[41] lack the social meaning associated with marriage; (4) permitting same-sex couples to marry would not affect the number or stability of opposite-sex marriages; (5) the children of same-sex couples benefit when their parents marry, and they fare just as well as children raised by opposite-sex parents; (6) Proposition 8 stigmatizes same-sex couples as having relationships inferior to those of opposite-sex couples; (7) Proposition 8 eliminated same-sex couples' right to marry but did not affect any other substan-

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[37] *Id.* at 1068.

[38] *See Perry*, 671 F.3d at 1067. The Proponents were Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson. These five were the California residents who formally filed with the California Secretary of State for Proposition 8 to be submitted to the voters. *See* Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011) [hereinafter Brown]. While the district court granted their motion to defend Proposition 8, the three-judge panel did not initially certify their standing. The Ninth Circuit Court of Appeals requested that the California Supreme Court make a determination as to Proponent's standing based on California State law. It was not until the California Supreme Court decision that Proponents were given standing to defend Proposition 8 before the three judge panel.

[39] *Id.*

[40] *Perry*, 671 F.3d at 1069.

[41] CAL. FAM. CODE § 297(a) (Westlaw 2012) ("Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."). Numerous domestic partnership and civil union laws have been passed nationwide in an attempt to provide legal protection for same-sex couples. *See GLAAD Media Reference Guide - Appendix,* GLAAD, www.glaad.org/reference/laws (last visited Sept. 25, 2012).

tive rights they enjoyed; and (8) the campaign in favor of Proposition 8 relied upon stereotypes and unfounded fears about same-sex couples.[42]

Judge Walker concluded that Proposition 8 violated the Equal Protection Clause,[43] as there was no rational basis for denying same-sex couples the right to enter into a relationship with an official designation of "marriage."[44] That same day, Proponents filed their notice to appeal to the United States Court of Appeals for the Ninth Circuit.[45]

III. The Ninth Circuit's Analysis

There were two parts to the Ninth Circuit's decision. The first part was the adoption of the California Supreme Court's opinion concerning the ability of non-elected citizens to defend state laws.[46] The second, and more controversial, was the affirmation of the District Court's decision finding Proposition 8 unconstitutional based on the Equal Protection Clause,[47] albeit on narrower grounds.[48] This decision upheld the District Court's ruling that the basis behind Proposition 8 was not rationally related to a legitimate state interest.[49] However, the court did not delve in the most controversial issue surrounding the case—whether same-sex marriage was a constitutional right.[50]

A. California Citizen Standing to Defend California Initiatives

Before the Ninth Circuit reached the merits of this case, it first had to establish whether the Proponents had standing to defend Proposition 8.[51] As the issue of who may speak for the state is a question of

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[42] *Perry*, 671 F.3d at 1069 n.4.

[43] *Schwarzenegger*, F. Supp. 2d at 991-1003.

[44] *Id.*

[45] Defendant-Intervenors-Appellants' Opening Brief at 26, *Perry*, 671 F.3d 1052 (No. 10-16696), 2010 WL 3762119, at *8.

[46] *Perry*, 671 F.3d at 1070.

[47] *Id.* at 1096.

[48] *Id.* at 1076.

[49] *Id.* at 1095.

[50] *Id.* at 1096.

[51] *Id.* at 1070.

state law,[52] and one that had never been answered in California, the Ninth Circuit certified the question to the California Supreme Court.[53]

Ten months later, it had an answer. The California Supreme Court held that the official proponents of a voter-approved initiative are authorized to appear and assert the state's interest in the law's validity and to take up any appeals concerning that validity when the public officials normally responsible for doing so, the governor or attorney general, refuse to do so.[54] Because both Governor Brown and Attorney General Kamala Harris declined to defend Proposition 8, the sponsors of the initiative could represent the People of California in their place.[55] Plaintiffs attempted to raise an issue concerning third-party standing, but the court rebuffed that argument because the Proponents were no more third parties to the suit than the state officials who would have normally filled the role of defender.[56]

Consequently, over a year after initially defending Proposition 8 in district court, a court held that Proponents had standing to defend Proposition 8 in the appeal of that decision.[57] The court acknowledged the lengthy delay,[58] but determined it was required for the full and thoughtful consideration of the issue. The Ninth Circuit then turned to the merits of the argument.

B. Purpose Behind the Enactment of Proposition 8

The first two arguments brought by the plaintiffs were that Proposition 8 violated their Due Process rights by depriving them of the right to marry and their rights under the Equal Protection Clause by excluding them from the institution of marriage while allowing op-

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[52] *Id.* at 1072.

[53] *Id.* at 1070. ("Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official Proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with the duty refuse to do so.").

[54] *Id.* *See also Brown*, 265 P.3d at 1007.

[55] *Perry*, 761 F.3d at 1073.

[56] *Id.*

[57] *Id.* at 1070.

[58] *Id.* at 1070 n.8.

posite-sex couples that right.[59] These arguments formed the basis of the District Court's decision finding Proposition 8 unconstitutional.[60] However, the Ninth Circuit was more persuaded by the plaintiff's third and most narrow argument: that same-sex couples were being singled out as a minority group when a specific right was taken from them without any legitimate purpose.[61] It was on this basis that the court made its conclusion, without going into the broader questions presented; i.e., whether same-sex couples had a fundamental, affirmative right to marriage and whether a state was required to grant that right.[62]

The seminal Supreme Court case *Romer v. Evans*[63] controlled the Ninth Circuit's analysis in *Perry*.[64] *Romer* involved the State of Colorado's adoption of a constitutional amendment that prohibited the state from providing any protection against discrimination based on sexual orientation.[65] Applying only rational basis review,[66] the United States Supreme Court invalidated the amendment, as it violated the Equal Protection Clause by infringing on the rights of a minority group with no other purpose than animosity towards the persons affected.[67]

The Ninth Circuit recognized there were several differences between Proposition 8 and the law in *Romer*, but nevertheless determined these differences did not make *Romer* any less of a binding precedent.[68] Therefore, if the court could find that the purpose behind Proposition 8 had a rational relationship to a legitimate state interest, the law would remain valid.[69]

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[59] *Id.* at 1076.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1082.

[63] Romer v. Evans, 517 U.S. 620 (1996). *Romer* involved an enacted state constitutional amendment (Amendment 2) prohibiting the state of Colorado from providing any protection against discrimination on the basis of sexual orientation. The Supreme Court held that Amendment 2 violated the Equal Protection Clause because it was enacted "not to further a proper legislative end but to make [homosexuals] unequal to everyone else." *Id.* at 635.

[64] *Perry*, 671 F.3d at 1081.

[65] *Id.* at 1080 (citing *Romer*, 517 U.S. 620).

[66] *Romer*, 517 U.S. at 631-32 (rational basis review, the lowest level of constitutional scrutiny, asks whether a law bears a rational relationship to a legitimate government purpose).

[67] *Id.* at 633-34.

[68] *Perry*, 671 F.3d at 1081.

[69] *Id.* at 1082.

Proponents set out four reasons why Proposition 8 was enacted: "(1) furthering California's interest in childrearing and responsible 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 schools."[70]

After analyzing each argument, the court concluded that none of these reasons could have been the rational basis behind this measure,[71] and that the only logical motive behind Proposition 8 was mere disapproval of same-sex couples.[72] As such, the Ninth Circuit declared Proposition 8 unconstitutional under the Equal Protection Clause.[73]

The court first weighed the Proponents' primary argument—that Proposition 8 advanced California's interests in responsible procreation and childrearing.[74] This argument was divided into two parts. First, children are better off with two biological parents, which is more likely to occur if only potential biological parents are allowed to marry.[75] Second, Proponents argued that traditional marriage provides an incentive for a man and woman to wed, thus preventing out-of-wedlock pregnancies.[76]

The Ninth Circuit rejected both of these arguments.[77] First, the ability of same-sex couples to become parents and raise children was not affected in any way by Proposition 8.[78] Second, the court rejected the argument that the marriage of a same-sex couple would have any effect on the choice of opposite-sex couples to marry in order to form a stable family unit.[79] It was implausible that denying a same-sex couple the right to marry would bolster the stability of opposite-sex couples.[80]

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[70] *Id.* at 1086.
[71] *Id.*
[72] *Id.* at 1093.
[73] *Id.* at 1096.
[74] *Id.* at 1086.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id. Perry*, 671 F.3d at 1088.
[80] *Id.* at 1089.

The court also rejected Proponents' remaining arguments.[81] The court found that the argument that Proposition 8 was enacted to proceed with caution prior to changing marriage was "not credible"[82] on examination of the initiative's own words, which stated that the purpose and effect of Proposition 8 was "to *eliminate* the right of same-sex couples to marry in California."[83] Likewise, Proposition 8 only invalidated the State's authority to perform same-sex marriages after eighteen thousand same-sex couples had been legally married, thereby undermining the Proponents' "proceed with caution" argument.[84]

The final two arguments, which had not been advanced by Proponents but by *amici curiae*, were similarly dismissed.[85] Finding that Proposition 8 "in no way addressed" religious freedom,[86] nor prevented children from being taught about same-sex marriage in school,[87] the court rejected both arguments.[88]

The court did find that Proposition 8 had accomplished only one purpose—to restore marriage to its traditional definition as between a man and a woman.[89] However, as the court pointed out, tradition is not enough to satisfy the rational basis standard adopted in *Romer*.[90]

Finally, the court addressed the Proponents' motion to vacate the District Court's decision based on the fact that Judge Walker was in a same-sex relationship when he presided over the case in District Court.[91] The motion to vacate was originally heard by Judge Ware, who held that Judge Walker was under no obligation to recuse himself and there was no basis to vacate the ruling.[92] The Ninth Circuit reviewed Judge Ware's ruling for any abuse of discretion and, finding none, affirmed the decision.[93]

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[81] *Id.* at 1086.
[82] *Id.* at 1090.
[83] *Id.* (emphasis in original) (quoting from the Voter Information Guide).
[84] *Id.*
[85] *Id.* at 1091.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 1092 (quoting *Strauss*, 207 P.3d at 76).
[90] *Id.*
[91] *Id.* at 1095.
[92] *Id.* at 1095-96.
[93] *Id.* at 1096.

With Proponents' arguments rejected, the court found there was no legitimate purpose behind Proposition 8 and that "the inevitable inference" was that it was enacted out of "animosity towards" or mere disapproval of "the class of persons affected."[94] Consequently, Proposition 8 was held unconstitutional as a violation of the Equal Protection Clause.[95]

C. The Dissent Would Have Found a Rational Basis Behind the Enactment of Proposition 8

Although Judge N. Randy Smith's dissent agreed with portions of the majority opinion, it vigorously disagreed with the bulk of the holding.[96] Mirroring the majority's analysis, the dissent determined that Proposition 8 could have been rationally related to Proponents' primary argument that its purpose was to further California's interest in childrearing and responsible procreation.[97] Even if that underlying assumption were erroneous, courts must only look toward the ends of the measure and not the means it used to achieve those ends.[98] If the People of California believed that denying same-sex couples the right to marry would result in promoting responsible procreation and optimal parenting, the court should not have held that Proposition 8 was "wholly irrelevant" to those interests.[99] With that in mind, the dissent would have held Proposition 8 to be a valid law and satisfying the Equal Protection Clause.[100]

IV. Appeal for an En Banc Rehearing by the Court of Appeals for the Ninth Circuit

An appeal by Proponents for a rehearing before a full panel of the Ninth Circuit was denied.[101] Although such a denial is not unusu-

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[94] *Id.* at 1093.
[95] *Id.* at 1076.
[96] *Id.* at 1096-97.
[97] *Id.* at 1109 (Smith, J., concurring in part and dissenting in part).
[98] *Id.* at 1112 (Smith, J., concurring in part and dissenting in part).
[99] *Id.* (Smith, J., concurring in part and dissenting in part).
[100] *Id.* at 1112-14 (Smith, J., concurring in part and dissenting in part).
[101] *Perry II*, 681 F.3d 1065 (9th Cir. 2012).

al, the concurring and dissenting remarks[102] issued in this denial are notable.[103]

Judge Diarmuid O'Scannlain, joined by two others, dissented from the denial and referenced President Obama's support for same-sex marriage and hope for a respectful conversation on the issue.[104] The dissent felt that a full appeal would fulfill the President's desire for a respectful conversation.[105]

The concurring opinion expressed surprise as to the dissent's reliance on the President's statement, especially because the President did not address the issue on which the original decision was based—whether a state's population may take away a minority group's right out of simple animosity.[106]

With the appeal to an *en banc* hearing in the Ninth Circuit denied, Proponents petitioned the United States Supreme Court for certiorari.[107]

V. Granting of Certiorari by the Supreme Court of the United States

The long judicial process of Proposition 8 is seemingly coming to a close with the granting of certiorari by the Supreme Court. Based on the Rules of the Supreme Court, a decision will most likely come toward the end of the 2012-13 term. Starting with the date the petition was granted, the petitioner has 45 days to file a brief on the merits.[108] Following that filing, the respondent has an additional 30 days to file a response.[109] The petition then has an additional 30 days to file a brief

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[102] Chief Judge Kozinski has advocated these types of dissents from denial of rehearing en banc be labeled "dissentals". ("Dissent" + "Denial" = "Dissental"). *See* Shaun Martin, *In Re Corrinet (9th Cir. – July 19, 2011)*, calapp.blogspot.com/2011/07/in-re-corrinet-9th-cir-july-19-2011.html.

[103] *Id.*

[104] *Id.* (O'Scannlain, J., dissenting from denial of rehearing en banc) (referring to an interview President Obama gave on May 9, 2012 in which he expressed his support for same-sex marriage).

[105] *Id.*

[106] *Id.* (Reinhardt, Hawkins, JJ., concurring).

[107] *Perry II*, 681 F.3d 1065, *petition for cert. filed sub nom.*, Hollingsworth v. Perry, 2012 WL 3109489 (U.S. July 30, 2012) (No. 12-144).

[108] U.S.Sup.Ct. Rule 25 (2010).

[109] *Id.*

replying respondent's brief.[110] This has led to the scheduled date of March 26, 2013 as the day the Supreme Court will hear the oral arguments.[111] Until that final determination, the status of same-sex marriage in California remains in legal limbo.[112]

At that time, with the Supreme Court agreeing to hear the two different questions,[113] their decision could have far-reaching implications for not only same-sex marriage but the standing of private citizens to defend state and local laws.

The legality of same-sex marriage itself is the more-publicized implication of *Perry*. With the Ninth Circuit's holding focused solely on California law, the court effectively stated only that the people of California cannot take away a previously existing right from a minority group absent a rational basis for doing so.[114] If the Supreme Court adopts this reasoning, it will be seemingly extending its own decisions concerning LGBT rights, albeit concerning marriage rather than just protection employment discrimination and anti-sodomy laws.[115] This could put into question all laws prohibiting same-sex marriage, which have been adopted in 37 states.[116] If these states are required to justify the ban based on a legitimate state interest, it is possible one or more of those laws may be overturned. That would lead to same-sex

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[110] *Id*.

[111] Howard Mintz, *Proposition 8: Backers of same-sex marriage ban make arguments to Supreme Court*, SAN JOSE MERCURY NEWS, January 22, 2013, http://www.mercurynews.com/samesexmarriage/ci_22426982/californias-proposition-8-backers-same-sex-marriage-ban

[112] *Perry II*, 681 F.3d 1065.

[113] Concerning the standing of petitioners under Art. III, § 2 of the Constitution and whether the Equal Protection Clause allows California to ban same-sex marriage.

[114] *Id.*

[115] *See Romer*, 517 U.S. at 635; Lawrence v. Texas, 539 U.S. 558 (2003) (holding that anti-sodomy laws were unconstitutional as they furthered no legitimate state interest).

[116] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (last visited Dec. 10, 2012). The 37 states are Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming.

marriage being recognized in an increasing number of states nationwide.

The second, less-reported implication of this decision, concerns the legal defense of a state law. Before the California Supreme Court's decision concerning this standing[117] it was unclear whether an initiative supporter could defend an initiative's validity in court,[118] although courts had routinely let them act as either interveners or real parties in interest.[119] Now, the California Supreme Court has clearly held that those who support and fund an initiative in California have the legal right to defend it in lieu of state officials who refuse to do so.[120] While the California Supreme Court opined that the Proponents had standing under California State law, with both the District Court and Ninth Circuit Court of Appeals allowing Proponents to defend the law, the United States Supreme Court is not so quickly convinced.

Issues may only be litigated in federal courts if they are actual cases or controversies.[121] This standing is a constitutional requirement[122] and not so easily met through an interpretation of state law. Standing requires a plaintiff to demonstrate a personal stake in the outcome of a case.[123] Typically, to establish standing, a plaintiff must show they have personally suffered some actual or threatened injury as a result of the illegal conduct of the defendant, that injury can be traced back to the challenged action, and a favorable decision by a court would remedy that injury.[124]

Most Supreme Court precedents focus on the *plaintiff's* standing and gloss over the *defendant's* standing.[125] However, when addressed,

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[117] *Brown*, 265 P.3d 1002 (Cal. 2011).

[118] *Id.* at 1006.

[119] *Id.*

[120] *Id.* at 1072.

[121] U.S. CONST. art. III, § 2, cl 1.

[122] *Id.*

[123] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 498 (1975).

[124] *See* Valley Forge Christian Coll. v. Americans United for Separation of Church & States, Inc., 454 U.S. 464, 472 (1982); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984).

[125] For a thoughtful and thorough analysis on the standing of intervenor-defendants see Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012). In particular, Mr. Hall references the ability of Proponents to defend Prop 8. *Id.* at 1579-84.

the Supreme Court has stated that to standing to defend on appeal demands that the litigant possess a direct stake in the outcome.[126] By granting certiorari on this issue, the Supreme Court will determine if individual citizens have sufficient Article III standing to defend voter induced legislation. Either decision would have far reaching consequences.

If the Supreme Court were to accept the decision of the California Supreme Court, the power of those normally tasked with defending California laws[127]—the Attorney General and the Governor—would be diminished and it would be simultaneously placing this power in the hands of those who supported a law that elected officials believe to be unconstitutional.[128] As with Proposition 8, there have been occasions when voters have enacted legislation through initiatives that have later been held unconstitutional.[129] If private citizens were allowed to defend these laws further than state governments were willing, it could prevent those who were being unconstitutionally discriminated against from receiving any type of judicial remedy until the appeals process is extinguished. One needs look no further than the Prop 8 controversy itself. The original decision declaring it unconstitutional was in 2010,[130] and yet the case goes on.

On the other hand, the denial of this citizen standing would grant elected officials the power to "veto" a voter enacted initiative simply by declining to defend it. Along those lines, the belief of the elected officials on the constitutionality of a particular law should not limit the right of those voters who enacted it to defend it in court as

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[126] Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997); Diamond v. Charles, 476 U.S. 54, 69 (1986).

[127] Voter enacted laws are not limited to California. Currently, there are twenty-four states with an initiative process similar to California. Eighteen of those allow for constitutional amendments while twenty-one allow for legislative enactments. *See Signature, Geography Distribution and Single Subject (SS) Requirements for Initiative Petitions*, INITIATIVE REFORM INSTITUTE AT THE UNIV. OF S. CAL., *available at* www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf.

[128] *Perry*, 671 F.3d at 1072.

[129] *See* CAL. FAM. CODE, § 308.5, *invalidated by In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); COL. CONST. art. II, § 30b, *invalidated by* Romer v. Evans, 517 U.S. 620 (1996).

[130] *Schwarzenegger*, 704 F.Supp.2d at 991-1003.

those courts, and the judges who write the opinions, make the actual determination whether a law is constitutional.

With the Supreme Court seemingly hesitant to grant Article III standing to just anyone,[131] it may be they hold Proponents did not have standing to defend Prop 8. If that is the case, then all of the litigation in which Proponents were the defendants would be deemed invalid. As neither Governor Schwarzenegger nor Governor Brown defended Prop 8 at any point in this controversy, this decision would essential reverse every decision made by the Ninth Circuit on Prop 8. In theory, that would mean Prop 8 would revert back to being a constitutionally permitted law on the California Constitution.

However, with the Supreme Court granting certiorari on the DOMA case, officially United States v. Windsor,[132] it would appear they are prepared to rule on the constitutionality of prohibitions on same-sex marriage. With that seemingly the case, there may be two options for the Supreme Court to take. They could either decide that the Proponents had standing and get to the merits, or they could reject their standing and send *Perry* back down to the lower courts. While this would mean that every court decision in which Prop 8 was not defended by a public official was invalid – including the initial decision by the District Court holding Prop 8 unconstitutional – the Supreme Court's decision in *Windsor* (the DOMA case) may make *Perry* moot. If *Windsor* is decided on the merits and it is found that prohibitions on same-sex marriage violate the Equal Protection Clause, then same-sex marriage advocates may lose the battle in *Perry* but reach their ultimate goal by having the Supreme Court recognize that the government cannot prohibit the right of same-sex couples to marry.

VI. Conclusion

The legality of same-sex marriage has been a nationwide hot-button issue since Massachusetts first judicially recognized same-sex marriage in 2003,[133] and the issue has only become more controversial with the repeal of "Don't Ask, Don't Tell"[134] and the President's refusal

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[131] *See* Hall 80 FORDHAM L.REV. at 1570.

[132] United States v. Windsor, 133 S.Ct. 786 (2012).

[133] Goodridge v. Dept. of Pub. Health, 798 N.E. 2d 941 (Mass. 2003).

[134] Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES, July 23, 2011, at A13, available at www.nytimes.com/2011/07/23/us/23military.html.

to defend the Defense of Marriage Act before the U.S. Supreme Court.[135]

However, the Ninth Circuit ducked that hot-button issue in *Perry* by basing its decision on narrow grounds.[136] Without going into the issue of a fundamental right of marriage for same-sex couples, the court held that because the California Supreme Court had determined that same-sex couples had a right to marry, a majority of voters could not take that right away without a valid reason.[137] With that said, *Perry* was highly relevant to Californians, despite its narrow holding, as it allows for same-sex marriages to be recognized in the state.[138] Now, with the Supreme Court agreeing to hear the case, the issue of same-sex marriage is firmly in their control and they will have the last word on the rights of all same-sex couples intending to marry.

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[135] Daniel Foster, *Breaking: Obama Administration Declares DOMA Unconstitutional, Won't Defend it in Court*, NATIONAL REVIEW ONLINE (Feb. 23, 2011), *available at* www.nationalreview.com/corner/260494/breaking-obama-administration-declares-doma-unconstitutional-wont-defend-it-court-dani.

[136] *Perry*, 671 F.3d at1064.

[137] *Id.* at 1096.

[138] *Id.* at 1065.