

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 10-16696

(Argued Dec. 6, 2010)

U.S. District Court

Case No. 09-cv-02292 JW

**PLAINTIFF-INTERVENOR-APPELLEE
CITY AND COUNTY OF SAN FRANCISCO'S
SUPPLEMENTAL BRIEF**

On Appeal from the United States District Court
for the Northern District of California

The Honorable Chief District Judge James Ware

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The City and County of San Francisco joins Plaintiffs' supplemental brief arguing that, notwithstanding the ruling of the California Supreme Court that initiative proponents are authorized to assert the State's interest in initiatives when elected officials do not appeal adverse judgments, *Perry v. Brown*, No. S189476, 2011 WL 5578873 (Cal. Nov. 17, 2011), Proponents here lack standing to pursue their appeal of the district court's judgment because they cannot demonstrate they satisfy Article III's requirements.

In the event this Court disagrees and determines that Proponents in fact have standing to invoke the Court's appellate jurisdiction, then the Court should consider the effect of the California Supreme Court's decision not merely on the jurisdictional issue but on the merits of Proponents' appeal. San Francisco writes separately to discuss these implications.

If Proponents may assert the *State of California's* interest in Proposition 8—as opposed to the interests of a group of activist citizens who fought to pass a constitutional amendment reflecting their private religious and moral beliefs—then they surely may not rely on propositions and assertions that are wholly inconsistent with California law. The California Supreme Court has authoritatively construed Proposition 8 to leave intact all substantive rights that California's Constitution previously conferred on same-sex couples: the right to enter into officially recognized family relationships and the right to have and rear children. *Strauss v. Horton*, 207 P.3d 48, 75-76, 102 (Cal. 2009). Nor did Proposition 8 repeal any of the manifold protections for same-sex couples' family rights that pervade California's statutory and decisional law.

Yet Proponents' defense of Proposition 8 relies on arguments that are squarely at odds with California law. For instance, Proponents argue that California promotes responsible procreation by reserving the most favored

relationship designation for opposite-sex couples (whether they are fertile or not). This assertion belies California law in two ways. First, far from favoring married opposite-sex couples as parents, California affirmatively disavows that marital status is related to the establishment of parentage, that sexual orientation relates to one's fitness to be a parent, or that there are different gender roles that parents should fulfill. Cal. Fam. Code § 7602; *Elisa B. v. Superior Court*, 117 P.3d 660, 664 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 285 n.7 (Ct. App. 1998); *Carney v. Carney*, 24 Cal.3d 725, 736-37; *see also* Plaintiff-Intervenor-Appellee CCSF's Response Brief at pp. 11-17. Second, Proponents' argument ignores the fact that Proposition 8 did not *bestow* a distinction on one group of Californians but instead *removed* a distinction from another group. *Strauss v. Horton*, 207 P.3d 48, 63 (Cal. 2009) (holding that Proposition 8 "carv[ed] out an exception" to the privacy and due process clauses of the California Constitution). Proponents have yet to articulate a justification for why removing an honor from lesbians and gay men relates to California's interest in responsible procreation.

In another instance, Proponents have argued that in passing Proposition 8, Californians were entitled to rely on purported uncertainty about whether lesbian and gay couples are equally worthy parents as opposite-sex couples biologically related to the children they rear. This is not an argument that can credibly be made on behalf of California, which discards the notions that sexual orientation or biological ties between parent and child relate to parental fitness—and Proposition 8 said nothing to the contrary. *Strauss*, 207 P.3d at 75-76 (holding that Proposition 8 did not alter constitutional rights that it did not expressly repeal); *see also* Plaintiff-Intervenor-Appellee CCSF's Response Brief at pp. 6-7.

Thus, if Proponents are to stand in the shoes of the State, they should not advance arguments at odds with the State's law and policy. Perhaps equally important, they should be held accountable to the arguments that they made to voters in support of Proposition 8. *Perry v. Brown*, No. S189476, slip op. at 42 (official proponents were likely to "be ... viewed by those whose votes secured the initiative's enactment" as "reliable and vigorous advocates"). In the election, Proponents submitted a series of arguments to the voters favor of the measure in the official voter information guide. ER 1032-33; Cal. Elec. Code § 9067. These official ballot arguments included that Proposition 8 was necessary to preserve opposite-sex marriage and to prevent children from being taught that "there is *no difference* between gay marriage and traditional marriage" and that "gay marriage is okay." ER 1032-33. The official ballot arguments also proclaimed that "[g]ays and lesbians have the right to live the *lifestyle* they choose," ER 1032 (emph. added), but not the right to "*redefine marriage* for everyone else." *Id.* (emph. in original). The notion that being gay is merely a "lifestyle" choice has no legal or empirical support whatsoever, *see Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (internal quotation marks omitted) ("[s]exual orientation and sexual identity are immutable" and "[h]omosexuality is as deeply ingrained as heterosexuality") (internal quotation marks omitted); Plaintiffs-Appellee's Response Brief at pp. 62-65, yet the ballot arguments relied on this long-discredited and offensive stereotype. Proponents have acted as "vigorous advocates" in this case, but they have not been "reliable ... advocates" for the reasons they employed to persuade voters to adopt Proposition 8. They have "abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010). They have similarly abandoned arguments that sexual

orientation is merely a "lifestyle" that gay people choose and that children must be "protected" from learning about lesbian and gay relationships. But having persuaded a majority of voters in California on these arguments to adopt Proposition 8, Proponents at a minimum should explain how such arguments are rooted in anything other than "[a] purpose to discriminate against" lesbians and gay men for its own sake. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). The only conclusion that logically can be drawn is that their attempt to distance themselves from the arguments they made to the voters in 2008 reflects their recognition that those arguments were nothing but an appeal to naked prejudice that will not withstand equal protection scrutiny. This Court should not permit Proponents to hide from their official ballot arguments. If the Court agrees that they are acting as representatives of the people of California and are proper parties to invoke appellate jurisdiction, it should treat the campaign and ballot arguments made by Proponents as the State's own statement of its interests in enacting Proposition 8—and should hold that those interests are not legitimate state interests under even the least demanding test.

Dated: December 2, 2011

Respectfully submitted,

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