



WATCHING (AND LISTENING) TO HISTORY IN THE MAKING: THE CALIFORNIA SUPREME COURT HEARS ORAL ARGU- MENTS IN THE CALIFORNIA MARRIAGE CASES

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On March 4, 2008, the California Supreme Court heard oral arguments in the California Marriage Cases. In recognition of the extraordinary level of interest in the case, the Court took the unusual step of televising the arguments, as well as providing both a video and audio stream of the arguments over the internet. This allowed thousands of people to gather outside of the courtroom to watch and listen as the historic case was argued.

The Arguments

The proponents of ending the ban on same-sex marriage included representatives of 15 named same-sex couples, Equality California, the Our Family Coalition, and the City and County of San Francisco. Their position was supported by an extraordinary 30 friend-of-the-court briefs from groups as diverse as the NAACP, the Mexican American Legal Defense and Educational Fund, the California Council of Churches, and more than 20 California municipalities.

With clarity and eloquence, the proponents made four arguments:

- ◆ The ban violates the fundamental right to marry the person of one's choice, a right recognized by the California Supreme Court in the pivotal case of *Perez v. Sharp* (1948). This case struck down California's anti-miscegenation laws almost 20 years before the U.S. Supreme Court did so on a national level in *Loving v. Virginia* (1967).

The proponents argued, and Chief Justice George seemed to agree, that the right established in *Perez* should be interpreted broadly as the right to marry the person of one's choice rather than only the right of one man and one woman to engage in the institution of marriage.

- ◆ By allowing opposite-sex couples to marry while precluding same-sex couples from accessing the same legal status, the State is violating the guarantee of equal treatment for all of its citizens proscribed in the California Constitution.
- ◆ Because the ban only affects same-sex couples, it discriminates on the basis of sexual orientation, which is specifically prohibited by the Unruh Civil Rights Act (Cal. Civil Code § 51 (b)).
- ◆ Because a female can marry a male but cannot marry another female, the ban also amounts to discrimination on the basis of sex, another category explicitly protected by the Unruh Act.

When questioned by the Justices, the proponents also argued that the title "marriage" indicates a unique expression of love and commitment in our society in a way that no other title can do.

The opponents included the California Attorney General's Office (AG), attorneys for the Governor and the Director of Vital Statistics, and two private groups who oppose same-sex marriage. These parties responded with arguments that included the following:

- ◆ Because marriage was and had "always been" a union between one man and one woman, the fundamental right to marry established in the *Perez* case can only be understood as the right of one man and one woman to engage in the institution of marriage.
- ◆ The statute at issue in the *Perez* case restricted marriage on the basis of race, a specifically protected class. This classification meant that the Court was required to use the more stringent "strict scrutiny" level of review. Since homosexuals are not a similarly protected class, the opponents argued, the Court may only determine whether there is any "rational basis" for the State to ban same-sex marriages.

The opponents argued that there is a rational basis for the state to adhere to the "common and traditional definition of marriage" because this definition "pre-dates our State."

Justice Kennard took issue with this argument by pointing out that other "long-standing tradition(s)," such as barring interracial marriages and "treating the wife as the property of the husband" have been struck down by the Court.

- ◆ The private party opponents took an even more archaic stance when they argued that it is rational for the State to continue the prohibition on same-sex marriage because marriage is primarily intended as a vehicle for procreation and that the best "family" in which to raise children is one with a mother and a father.

Although this argument has carried some weight in other states, it has no credibility in California where there is an automatic presumption of parentage when a child is born to same-sex registered domestic partners and where the state specifically permits same-sex couples to adopt children.

- ◆ Domestic partner registration insures the equal treatment of same-sex couples required by the California Constitution because it confers the same state rights, benefits, and obligations on same-sex domestic partners as are granted to opposite-sex spouses.

While this may be generally correct, the opponents were hard pressed to explain how this present-day example of a "separate but equal" institution actually results in full equality for all California citizens.

A Ruling and The Ramifications

There are three possible outcomes for this case.

First, the Court may conclude, as we hope it does, that the current ban on same-sex marriages is unconstitutional in California. This decision could be based on a determination by the Court that the ban violates the fundamental right of each Californian to marry the person of her or his choice. The Court could also find that the ban on same-sex marriage amounts to discrimination on the basis of sex, as discussed above, and that there is no rational justification for the State to continue the ban. In either case, the State would be required to remove the words "between a man and a woman" from California Family Code Section 300(a) and replace them with words that make marriage available to any two consenting adults, irrespective of either party's gender.

Alternately, the Court could find, as the opponents argued, that there is adequate justification for excluding same-sex couples from the institution of marriage. This outcome would mean that there would be no change to the existing statute and the ban on same-sex marriage would continue in California.

Another possibility is that the Court could determine that while the California Constitution requires the provision of equal rights, benefits, and obligations to all Californians, the decision about the appropriate name of the legal status for people who want access to those rights, benefits, and obligations should be left to the discretion of the state legislature. While this approach has been used in other states, experts believe that this outcome is unlikely in California because during the 2005 and 2007 legislative sessions, the California legislature has passed a bill that would allow same-sex couples to marry. In each case, the Governor vetoed the bill, and in his statement about the 2007 veto, Gov. Schwarzenegger indicated that he believed it is the Court's role to alter the current definition of marriage in California.

And Now We Wait...

The Court must issue its ruling within 90 days of the oral arguments unless the Court requests additional briefing on the matter. This latter step is unlikely because the parties already provided additional briefing before the arguments. Accordingly, we hope to have a final ruling on or before June 2nd.

If you did not have a chance to watch or hear the oral arguments when they were made, they are available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/>. A more in-depth examination of the arguments by Jon Davidson, Executive Director of Lambda Legal, is available at <http://data.lambdalegal.org/audio-files/ca-marriage-conference-call-3-4-2008.mp3>.

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