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Proposition 8 Oral Arguments

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Proposition 8 Oral Arguments

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Three advocates addressed the Supreme Court today in *Hollingsworth v. Perry*, the Prop 8 case. The audio of the arguments is available on Supreme Court [website](#), under the *Hollingsworth v. Perry* tab. The first advocate argued on behalf of the petitioners, maintaining that same-sex and opposite-sex couples are not “similarly situated” for Equal Protection purposes. The second argued on behalf of the respondents, arguing that denying same-sex couples the ability to marry violated their constitutional rights. The third advocate argued on behalf of the United States as amicus, proposing that the decision to allow inclusive domestic partnerships but not the label of marriage be limited to states. While each advocate attempted to begin his argument with a grand statement about the importance of this case, each was reminded to address the standing issue first.

Petitioners argued that homosexuality should not be viewed as an immutable characteristic. The foundation of this argument was the notion that same-sex couples are not capable of procreation, a characteristic that separates them from heterosexual couples. The state has an interest, petitioners argued, in promoting marriage as the optimal environment for procreation and raising children. Petitioners further argued that the same sex marriage “experiment” is still new and that there is limited data on the potential harms and benefits of such arrangements on society.

The biggest challenge to petitioners’ argument came from Justice Kagan, who inquired about the underinclusivity of this argument. Justice Kagan asked if infertile heterosexual couples should be allowed to marry. Justice Kagan, herself born in 1960, then asked if heterosexual couples over 55 should be allowed to marry. Those couples, she explained, would not likely be capable of bearing children.

The thrust of this argument is that the state cannot moderate who marries based on their procreative ability. Clearly, the Court explained, a regulation requiring couples to submit to fertility questionnaires before being granted a marriage license would be unconstitutional. Fertility is a requirement that the state simply cannot enforce.

Respondents argued that same sex couples were a protected class, as homosexuality represents an immutable characteristic. Respondents maintained that restricting marriage to heterosexual couples denied to same-sex couples rights that heterosexual couples enjoy. Respondents also mentioned the rights of the children of same sex couples, who are denied the opportunity to have two parents whose relationship is acknowledged under the law as legitimate.

Justice Scalia presented the biggest challenge to respondents’ argument. Justice Scalia, known to base many of his findings on historical and traditional definitions of the law, inquired about the history of marriage. In its broadest articulation, marriage has been a union between a man and a woman since its inception, and indeed before the Constitution was written. Justice Scalia asked when denial of marriage to same sex couples became unconstitutional, which sparked a back and forth debate that seemed to frustrate both Justice and advocate.

Respondents first addressed this question with another question, asking when antimiscegenation laws became unconstitutional, but Justice Scalia had a quick response: when the Fourteenth Amendment passed. Respondents then proposed that when homosexuals were recognized as a protected class, forbidding them rights became unconstitutional. Justice Scalia then inquired when that took place, to which respondents had no answer. Justice Scalia ended his questioning by asserting that the court could not make a determination, given the uncertainty of this event.

Finally, the Solicitor General addressed the court as amicus on behalf of the United States government. The government’s position was assertedly limited, affecting only the eight states

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that allow for essentially all the state benefits of marriage through domestic partnerships, and merely restrict the use of the word "marriage." The United States asserted that denial of this title is unconstitutional, as there is no rational basis to deny it when the domestic partnership status affords all the rights of marriage.

A few justices challenged this proposition, mainly because it is somewhat confusing on its face. The government's position suggests that offering *more* rights to a class might actually be less constitutionally valid than offering fewer rights to that class. Indeed, the government argued that the states not offering domestic partnerships would be unaffected by this ruling.

The argument is not as perplexing as the justices proposed. The government's position is merely limited to the facts of this case. California offers domestic partnerships with all the benefits of a marriage but without the title. The government's position is that California's formulation, specifically, is invalid, not that other states' laws are alternatively valid. As amicus explained, the issue of a broader, more fundamental right to marriage should be left to another case.

It is unclear how this case will be determined. As anticipated, the more conservative justices appeared critical of respondents, while more progressive justices appeared critical of petitioners. But this is not the end of the discussion. There is still the issue of standing to contend with, and a few of the justices, Justice Kennedy in particular, questioned the wisdom of granting certiorari in the first place. It is still possible that the case will be determined not on the merits, but on the issue of standing. If that is the case, the battle for same-sex marriage will be saved for another day.

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