

MEMORANDUM

To: All Interested Parties
From: American Foundation for Equal Rights
Re: *Perry v. Schwarzenegger*

“I just want to get married. I mean, it’s as simple as that. I love someone. I want to get married... My state is supposed to protect me. It’s not supposed to discriminate against me.”

– 1/11/10 Plaintiff Paul Katami testifying (Transcript Page 108, Line 11; Transcript Page 116, Line 25)

Judge: “I’m asking you to tell me how [marriage equality] would harm opposite-sex marriages....”

Pro-Proposition 8 Attorney Cooper: “Your Honor, my answer is: I don’t know. I don’t know.”

– 10/14/09 pretrial hearing rejecting defendant-intervenors’ request for summary judgment (10/14 Transcript Page 23, Line 10)

After three weeks of courtroom arguments, testimony and evidence presentation in January, Chief Judge Vaughn R. Walker of the U.S. District Court, Northern District of California, recessed *Perry v. Schwarzenegger* to review the trial record before hearing closing arguments on June 16. *Perry* is the federal court challenge to Proposition 8 led by the American Foundation for Equal Rights and argued by Theodore Olson and David Boies, the attorneys who argued against each other in *Bush v. Gore*.

As we approach closing arguments, and the subsequent decision, we wanted to provide you with a summary of the case by sharing this memorandum. No law is allowed to violate the U.S. Constitution, and our nation's Founders established the courts to protect every American's constitutional rights against unfair laws. Accordingly, we believe that we will ultimately prevail in this case.

At its core, this case is about equal justice under the law. Separate is never equal, and Prop. 8 violates Americans' constitutional rights by creating separate classes of people with different laws for each one.

Prop. 8 denies fundamental constitutional liberties, which harms adults and their children without due process and for no good reason – no compelling government interest is advanced through Prop. 8. It is wrong to deny people fundamental constitutional liberties, like equal protection under the law, simply because of who they are.

This case is about Americans like plaintiffs Kris Perry and Sandy Stier, who deserve the governmental recognition of their love and commitment that other families have. Kris and Sandy have been together for more than ten years. Both are in public service – Kris leads an early childhood health and education agency, Sandy works for a county health department. They have raised four boys, with two teenagers still at home, so they stay busy with the usual things – PTA meetings, soccer, music lessons – just like so many other parents. Kris and Sandy simply want the same rights as every other family, as do Paul Katami and Jeff Zarrillo, the other plaintiffs in the case.

This case is a historic one, and it is on the right side of history. The Supreme Court’s ruling in *Brown v Board of Education* ended “separate but equal.” *Loving v Virginia* ended bans on interracial marriage. This case is an extension of these and other cases that have defended the principles of liberty and equality upon which this nation was founded.

Background

California Voters enacted Prop. 8 in November of 2008. The measure stripped same-sex couples of their existing right to marry.

The American Foundation for Equal Rights assembled a legal team headed by Theodore Olson and David Boies (who notably faced-off in the *Bush v. Gore* case that decided the presidency), and filed suit on May 22, 2009. They filed suit on behalf of plaintiffs Kris Perry & Sandy Stier and Paul Katami & Jeff Zarrillo, two couples who wish to be married but cannot because of Prop. 8.

The suit states that Prop. 8 is unconstitutional because it:

- Violates the Due Process Clause by impinging on fundamental liberties
- Violates the Equal Protection Clause of the Fourteenth Amendment
- Singles out gays and lesbians for a disfavored legal status, thereby creating a category of “second-class citizens”
- Discriminates on the basis of gender
- Discriminates on the basis of sexual orientation

Kris Perry and Sandy Stier have been together for ten years and are the parents of four boys. Perry leads a state agency that promotes education and health for children under five. She holds a BA from the University of California, Santa Cruz and an M.S.W from San Francisco State University. Stier works for a county health department. She is originally from Iowa and is a graduate of the University of Iowa. Perry and Stier first tried to marry in 2004, after the City of San Francisco began issuing licenses. They live in Berkeley, California.

Paul Katami and Jeff Zarrillo have been together for nine years. Katami is a fitness expert and business owner who graduated from Santa Clara University before receiving his graduate degree from the University of California, Los Angeles. Zarrillo is a general manager for a movie theater company. A native of New Jersey, Zarrillo graduated from Montclair State University. Having wanted to marry each other for more than two years, they considered options including traveling to other states for a "civil union," but felt any alternative fell short of marriage. They live in Burbank, California.

Because of Prop. 8, the state denied marriage licenses to both couples .

The Trial

Over the course of the January proceedings, the attorneys demonstrated the unconstitutionality of Prop. 8 by making the following key points:

- Prop. 8 does irreparable harm to Americans
- Marriage has shed discriminatory restrictions over time
- Gay men and lesbians are entitled to the full protection of the 14th Amendment
- There is no good reason for Prop. 8's denial of fundamental rights

(Key testimony underscoring these points is provided later in this document.)

Plaintiffs' Witnesses (17 total)

- Kris Perry & Sandy Stier and Paul Katami & Jeff Zarrillo, two couples who wish to be married but cannot because of Proposition 8.
- Author Helen Zia; the Republican Mayor of San Diego, Jerry Sanders; and Ryan Kendall, who was forced to undergo NARTH “conversion therapy” intended to change him from gay to straight, presented compelling, first-hand testimony as to the harm of Prop. 8 and its role in the long and continuing history of discrimination against gay men and lesbians.

- Nine eminent experts, including professors from Yale, Harvard, Stanford, Columbia, Cambridge, and UCLA who are recognized internationally as leading scholars in history, economics, psychology, sociomedical science, political science, and more. The testimonies, research, and findings of each stood up to several hours of cross-examination from the defendant-intervenors.
- William Tam, an Official Proponent of Prop. 8, whose testimony revealed the discriminatory motivations of the initiative and how the Prop. 8 campaign used him and others to deliver messages about disease, incest, polygamy, and pedophilia in support of their overall “protect children” message.

Documents and videos presented by the Olson and Boies team also revealed that the Prop. 8 campaign paid for broadcasts that sought to link marriage equality to incest, polygamy, bestiality, and pedophilia to justify the elimination of people’s rights. This evidence clearly points to the discriminatory motivations and unconstitutionality of the initiative.

Defendant-Intervenors’ Witnesses (Six designated originally, only two testified)

The defendant-intervenors cut their witness list from six to only two after those experts made several statements damaging to the defense and in support of the plaintiffs’ case during their depositions. Olson and Boies also presented to the court the depositions of the four expert witnesses that the defendant-intervenors dropped from their witness list.

The defendant-intervenors’ own experts stated under oath in their depositions that:

- Marriage equality would increase family stability and improve the lives of children
- Sexual orientation is not something that can be changed
- Gay men and lesbians have faced a long history of discrimination including violence – discrimination that continues today and that includes Prop. 8
- There is broad scientific and professional consensus in favor of marriage equality

Under questioning from Boies, the credibility of the defendant-intervenors’ two remaining witnesses was thoroughly undermined on the stand. It was revealed that political science professor Kenneth Miller, called by the defendant-intervenors to assert that gay men and lesbians are *not* politically vulnerable, has written only one peer-reviewed publication regarding gays and lesbians and the political process – and that the article (published only in France) deals with Prop. 8, which, of course, is a strong blow to gays and lesbians.

Furthermore, Miller admitted his testimony was based in large part on materials provided to him by the attorneys defending Prop. 8. Later it was revealed that Miller could not remember whether attorneys had provided at least 65 percent of the materials he based his testimony on, totaling well over 200 documents and articles.

“Looking at the institution of marriage, the state does treat heterosexual couples differently than same-sex couples,” Miller testified. He also admitted that lesbians face greater bias than straight women.

Miller also made multiple admissions that bolster the plaintiffs’ case, including that Prop. 8 at least in part passed because of “anti-gay stereotypes” and “prejudice,” and that initiatives like Prop. 8 “can be and have been used to disadvantage minorities.”

The defendant-intervenors’ star witness, David Blankenhorn, admitted on the stand that he has written only two peer-reviewed publications in his life, none of which are relevant to this case; does not hold a doctorate and that his master’s thesis centered on Victorian cabinetmakers; has never conducted any scientific research on same-sex marriage; and has not read the U.S. Supreme Court rulings that deal with marriage as a fundamental right.

Blankenhorn admitted that “Adopting same-sex marriage would be likely to improve the well-being of gay and lesbian households and their children,” and would be “a victory for the worthy ideas of tolerance and inclusion” and “a victory for, and another key expansion of, the American idea.” He also testified that it would result in fewer children growing up in state institutions and instead being raised by loving parents and would in fact reduce the divorce rate; reduce promiscuity; improve the stability of couples’ relationships; increase wealth for families and reduce government costs; and a decline in “anti-gay prejudice” and “anti-gay hate crimes.”

Key Testimony

PROP. 8 DOES IRREPARABLE HARM TO AMERICANS

*****Stigma and Discrimination*****

- SANDY STIER, a plaintiff, testified, “I’m just trying to get the rights that the Constitution already says I have.” (Transcript Page 178, Line 13)
- KRIS PERRY, a plaintiff testified “I want to marry Sandy. I want to have a stable and secure relationship with her that then we can include our children in,” she testified. “And I want the discrimination we are feeling with Proposition 8 to end and for a more positive, joyful part of our lives to begin.” (Transcript Page 141, Line 22)
- JEFF ZARRILLO, a plaintiff, testified “The word ‘marriage’ has a special meaning. ...If it wasn’t so important, we wouldn’t be here today,” he testified. “I want to be able to share the joy and the happiness that my parents felt, my brother felt, my friends, my co-workers, my neighbors, of having the opportunity to be married. It’s the logical next step for us.” (Transcript Page 80, Line 6)

“When someone is married, and whether it’s an introduction with a stranger, whether it’s someone noticing my ring, or something of that nature, it says to them these individuals are serious; these individuals are committed to one another; they have taken that step to be involved in a relationship that one hopes lasts the rest of their life.” (Transcript Page 81, Line 11)

- PAUL KATAMI, a plaintiff, testified, “When you find someone who is not only your best friend but your best advocate and supporter in life, it’s a natural next step for me to want to be married to that person,” he testified. “I can safely say that if I were married to Jeff, I know that the struggle that we have validating ourselves to other people would be diminished and potentially eradicated.” (Transcript Page 88, Line 19; Page 90, Line 24)
- MAYOR JERRY SANDERS (R-San Diego) testified, “If government tolerates discrimination against anyone for any reason, it becomes an excuse for the public to do exactly the same thing.” (Transcript Page 1276, Line 11)
- ILAN H. MEYER, Ph.D., associate professor of clinical sociomedical sciences at Columbia University’s Mailman School of Public Health, testified that Prop. 8 treats gay men and lesbians as if they are “not seen as equal... not respected by my state or by my country, by my fellow citizens.” (Transcript Page 847, Line 7)

“As I described stigma earlier, I would say that law, and certainly a constitutional part of the law, would be a very strong part of, as I described, the social structures that define stigma, that define access. In a very simple way, you can think of it as a block or gate toward a particular institution, toward attaining a particular goal. So, in that sense, it is very much fitting in the definition of structural stigma,” Meyer testified. “[Prop. 8 imposes stigma] by the fact that it denies them access to the institution of marriage. As I said, people in our society have goals that are cherished by all people. Again, that’s part of social convention, that we all grow up raised to think that there are certain things that we want to achieve in life. And, in this case, this Proposition 8, in fact, says that if you are gay or lesbian, you cannot achieve this particular goal.” (Transcript Page 826, Page 2)

- GREGORY HEREK, Ph.D., a professor of psychology at the University of California at Davis testified that “social stigma” gives “a level of permission to attack” gay men and lesbians. (Transcript Page 2053, Line 10)

Economic Harm

- M.V. LEE BADGETT, Ph.D., a professor of economics at the University of Massachusetts, Amherst, testified, “Prop. 8 has inflicted substantial economic harm on same-sex couples and their children who live here in California.” (Transcript Page 1330, Line 14)
- EDMUND EGAN, Ph.D., Chief Economist for the City and County of San Francisco, testified that Proposition 8 is a drain on government budgets, and that legalizing same-sex marriage would generate significant revenues and increase personal wealth, and would also reduce the burden on government services from people without health insurance and other benefits.

“It’s clear to me that Proposition 8 has a negative material impact,” he testified. (Transcript Page 718, Line 22)

No Substitute for Marriage

- NANCY COTT, Ph.D., the Jonathan Trumbull Professor of American History at Harvard University, testified that “the fact that the state is involved in granting these kinds of benefits and legitimacy to the marital family tends to lend a prestige, a status to that institution that no informal marriage has ever approximated.” (Transcript Page 225, Line 4)
- STIER: “Certainly nothing about domestic partnership as an institution — not even an institution, but as a legal agreement — indicates the love and commitment that are inherent in marriage, and it doesn’t have anything to do for us with the nature of our relationship and the type of enduring relationship we want it to be. It’s just a legal document,” she testified. (Transcript Page 171-8)
- LETITIA ANNE PEPLAU, Ph.D. professor of psychology at the University of California, Los Angeles, testified that she has “great confidence that some of the things that come from marriage, believing that you are part of the first class kind of relationship in this country, that you are — that you are in the status of relationships that this society most values, most esteems, considers the most legitimate and the most appropriate, undoubtedly has benefits that are not part of domestic partnerships.” (Transcript Page 611-1)
- HELEN ZIA, an Asian-American author and a lesbian, testified about her experiences with discrimination, the effects of being denied the right to marry and the importance of being able to be married in 2008.

“My mother is an immigrant from China. ... She really doesn’t get what partner is,” she testified. “Marriage made it very clear that I was family, that we are family, and where we stand.” (Transcript Page 244, Line 15; Page 247, Line 21)

- MEYER testified that domestic partnership is not an adequate substitute for marriage, and said he doubted that society places any value on domestic partnership. “I don’t know if it has any social meaning,” he testified. “It is, I think, quite clear that young children do not aspire to become domestic partners. But, certainly, the word ‘marriage’ is something that many people aspire to.” (Transcript Page 828, Line 3; Page 827, Line 14)

MARRIAGE HAS SHED DISCRIMINATORY RESTRICTIONS

- COTT discussed the history of marriage and that it has shed discriminatory restrictions.

“And long ago marriage had an important political governance purpose. It set up men as heads of households who would be responsible economically for their spouses and for any of their dependents, whether those were biological children, adopted children, stepchildren, slaves, apprentices, et cetera,” she testified. “As many as 41 states and territories had for significant periods of their history [bans] on marriage between a white person and a person of color.” (Transcript Page 221, Line 23; Page 228, Line 10)

“Now, that political governance purpose of marriage today is — has shifted rather dramatically, because we no longer assume that a single head of household governs everyone below it. We have a much more individualized distribution of political power in our population, particularly since 1920, when women got the right to vote. ...The institution of marriage has always been at least as much about supporting adults as it has been about supporting minors, children, as the proponents tend to emphasize the child’s side.” (Transcript Page 222, Line 7)

- COTT also testified about the meaning of marriage in the context of slavery. “When slaves were emancipated, they flocked to get married. And this was not trivial to them, by any means. They saw the ability to marry legally, to replace the informal unions in which they had formed families and had children, many of them, to replace those informal unions with legal, valid marriage in which the states in which they lived would presumably protect their vows to each other. In fact, one quote that historians have drawn out from the record ... it was said by an ex-slave who had also been a Union soldier, and he declared, ‘The marriage covenant is the foundation of all our rights.’”

“And then in corollary with that,” Dr. Cott continued, “there are other ways in which this position of civil rights, of basic citizenship, is a feature of the ability to marry and to choose the partner you want to choose. ... It has to do with a black man, Dred Scott, who tried to say, when he was in a non-slave-holding state, that he was a citizen. And in an infamous decision, the Supreme Court denied him that claim. And why this is relevant here is that Justice Taney spent about three paragraphs of that opinion remarking that the fact that Dred Scott as a black man could not marry a white woman — in other words, that there were marriage laws in the state where he was and many other states, that prevented blacks from marrying whites — was a stigma that marked him as less than a full citizen.... he remarked on it because of the extent to which this limitation on Dred’s ability to marry was a piece of evidence that Justice Taney was remarking upon in his opinion to say this shows he could not be a full citizen.” (Transcript Page 202, Line 22)

GAY MEN AND LESBIANS ARE ENTITLED TO THE FULL PROTECTION OF THE 14th AMENDMENT

Sexual Orientation Irrelevant to Participation in Society

- HEREK testified that “There’s no inherent relationship between a person’s sexual orientation and their ability to be productive and contributing members of society.” (Transcript Page 2028, Line 5)

History of Discrimination is Ongoing and Includes Prop. 8

- It was also demonstrated that gay men and lesbians continue to suffer from discrimination. In addition to the testimony of Drs. Herek and Meyer, Yale History Professor GEORGE CHAUNCEY, Ph.D., testified: “Lesbians and gay men have experienced widespread and acute discrimination from both public and private authorities over the course of the 20th century. And that has continuing legacies and effects. This has been manifested in the criminalization of sexual intimacy and association; the discrimination in public accommodations, in employment; censorship of images about gay people and speech by gay activists; stereotyping and

demonization of lesbians and gay men. And that all this has been drawn on and reinforced sustained patterns of prejudice and hostility.” (Transcript Page 361, Line 12)

- Specifically regarding Prop. 8, Dr. Chauncey testified that “the wave of campaigns that we have seen against gay marriage rights in the last decade are, in effect, the latest stage and cycle of anti-gay rights campaigns of a sort that I have been describing; that they continue with a similar intent and use some of the same imagery.” (Transcript Page 424, Line 18)
- After viewing several pro-Prop. 8 television ads and videos Dr. Chauncey testified: “You have a pretty strong echo of this idea that simple exposure to gay people and their relationships is somehow going to lead a whole generation of young kids to become gay. ... The underlying message here is something about the – the undesirability of homosexuality, that we don’t want our children to become this way.” (Transcript Page 430, Line 5; Page 432, Line 9)

Evidence Clearly Discounts Prop. 8 Backers’ Assertions that Sexual Orientation is a Choice; That So-called NARTH-style “Change Therapies” are Effective; and That Marriage to Someone of Opposite Sex Viable Alternative for gays and lesbians.

- ZARRILLO testified that he could not marry a person of the opposite sex: “I have no attraction, desire, to be with a member of the opposite sex.” (Transcript Page 85, Line 16)
- STIER testified as to her sexual orientation: “Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris.” (Transcript Page 167, Line 3)
- KATAMI testified the he has been gay, “As long as I can remember.” (Transcript Line 91, Line 17)
- PERRY testified: “I have always felt strong attraction and interest in women and formed really close relationships with women, and I have only ever fallen in love with women.” Asked whether she may change her sexual orientation she testified: “I’m 45 years old. I don’t think so.” (Transcript Line 141, Line 19)
- HEREK testified as to his agreement with research stating: “We suggested the term sexual preference is misleading, as it assumes conscious or deliberate choice and may trivialize the depth of the psychological processes involved. We recommend the term sexual orientation because most of research findings indicate that homosexual feelings are a basic part of an individual’s psyche and are established much earlier than conscious choice would indicate.” (Transcript Page 2319, Line 24)

He testified that “the American Psychiatric Association, the American Psychological Association.... the major professional mental health associations have all gone on record affirming that homosexuality is a normal expression of sexuality, that it is not in any way a form of pathology.” (Transcript Page 2027, Line 23)

He testified that he agrees with the position of the American Psychological Association that “the results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE [sexual-orientation-change efforts].” (Transcript Page 2036, Line 7)

He also agreed with the following from the American Psychological Association: “...the [APA]concludes that there is insufficient evidence to support the use of psychological interventions to change sexual orientation” and testified that no other major mental health organizations have endorsed therapies to change sexual orientation, and that aside from being ineffective, they can cause harm. (Transcript Page 2038, Line 18)

“It’s important to realize that the underlying assumption of these therapies tends to be that there’s something wrong; that homosexuality is a mental illness; that it’s something that needs to be cured or something that needs to be fixed or repaired. And that, of course, is completely inconsistent with the stance of the American

Psychological Association, the American Psychiatric Association, and other professional organizations in this area," he testified. (Transcript Page 2039, Line 20)

- RYAN KENDALL, who was forced to undergo "change therapy," testified that at its conclusion: "I was just as gay as when I started." (Transcript Page 1513, Line 4)

"I knew I was gay, just like I knew I was short and half Hispanic. I never thought those facts would change." (Transcript Page 1510, Line 6)

*****Gay Men and Lesbians Remain Politically Vulnerable*****

- GARY M. SEGURA, Ph.D., professor of American politics in the Department of Political Science at Stanford University, testified that "gays and lesbians do not possess a meaningful degree of political power. They are not able to protect their basic interests and effectuate their interests into law and to secure those." (Transcripts Page 1535, Line 6)

"Relative to some other groups that currently enjoy judicial protection, gays and lesbians are actually, in the statutory and constitutional sense, worse off than some of those groups were when they were granted judicial protection," Segura testified. (Transcript Page 1535, Line 10)

"There is no group in American society who has been targeted by ballot initiatives more than gays and lesbians. They have essentially lost a hundred percent of the contests over same-sex marriage," Segura testified. "The initiative process has been really the Waterloo of gay and lesbian politics." (Transcript Page 1552, Line 6)

Segura noted that 33 of 34 ballot initiatives against equal marriage were passed over the last decade. (In Arizona it failed because of a clause that would impact health care. It was put back on the ballot the following year and passed.) (Transcript Page 1554, Line 17)

THERE IS NO GOOD REASON FOR PROP. 8's DENIAL OF FUNDAMENTAL RIGHTS

*****Procreation Not Defining Purpose of Marriage*****

- COTT challenged statements made by defendant-intervenors' attorney Charles Cooper during his opening statement that procreation is the "central and ... defining purpose of marriage." She testified that the ability or willingness to procreate has never been a litmus test for marriage. (Transcript Page 219, Line 21)

"There has never been a requirement that a couple produce children in order to have a valid marriage. Of course, people beyond procreative age have always been allowed to marry. And known sterility or barrenness in a woman has never been a reason not to allow a marriage. In fact, it's a surprise to many people to learn that George Washington, who is often called the father of our country, was sterile," she testified. (Transcript Page 223, Line 6)

*****Equal Rights Will Not Harm Others*****

- PEPLAU testified that there is no evidence to suggest that marriage equality would harm others.

"It is very hard for me to imagine you would have a happily married couple who would say, 'Gertrude, we have been married for 30 years, but I think we have to throw in the towel because Adam and Stewart down the block got married,'" Dr. Peplau testified. (Transcript Page 601, Line 22)

- BADGETT testified, “I have the opinion that letting same-sex couples marry would not have any adverse effect on the institution of marriage or on different sex couples.” (Transcript Page 1330, Line 17)
- MICHAEL LAMB, Ph.D., a Professor and Head of the Department of Social and Developmental Psychology at Cambridge University told the court, “We have a substantial body of evidence documenting that a child being raised by same-sex parents are just as likely to be well-adjusted as children raised by heterosexual parents.” (Transcript Page 1009, Line 23)
- Lamb also testified (referring to children of gay and lesbian parents) that: “For a significant number of these children, their adjustment would be promoted were their parents able to get married. (Transcript Page 1010, Line 2)

For a complete transcript, latest updates and other information please visit: www.equalrightsfoundation.org

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