

Docket No. 10-16696

In the
United States Court of Appeals
For the
Ninth Circuit

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,
 and
 CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff-Intervenor-Appellee,
 v.
 ARNOLD SCHWARZENEGGAR,
 in his official capacity as Governor of California, et al.,
Defendants,
 and
 DENNIS HOLLINGSWORTH, et al.,
Defendants-Intervenors-Appellants.

*Appeal from a Decision of the United States District Court for the Northern District of California,
 No. 09-CV-02292 · Honorable Vaughn R. Walker*

**AMICUS CURIAE BRIEF OF PACIFIC JUSTICE INSTITUTE
 IN SUPPORT OF DENNIS HOLLINGSWORTH, ET AL.,
 DEFENDANTS-INTERVENORS-APPELLANTS**

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September 24, 2010

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**IDENTITY AND INTEREST OF THE AMICI CURIAE --
PACIFIC JUSTICE INSTITUTE**

This amicus curiae brief is being filed by Pacific Justice Institute.

The Pacific Justice Institute is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. Amicus is dedicated to providing legal services to the community without charge in the areas of First Amendment rights, particularly in the areas of religious liberties, speech and association. In that the Pacific Justice Institute routinely represents the faith community, it has an interest in the outcome of the case. This is particularly true in that the lower court made its decision based upon what it believed to be religious beliefs of the voters of California. The brief submitted herein does not repeat arguments of the parties or other amici, but will provide a unique perspective with the goal of assisting the Court in its analysis.

This brief is filed pursuant to consent of all Counsel of Record.

STATEMENT OF ISSUES

From an historical perspective, does setting the parameters of marriage as an opposite sex union indicate unconstitutional discrimination or otherwise reflect malice against homosexuals as a matter of law?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts in this case are of public knowledge and cannot be subject to reasoned dispute. On November 4, 2008, the people of the State of California amended their Constitution by peacefully casting their ballots. The amendment added section 7.5 to Article I which reads in full: “Only marriage between a man and a woman is valid or recognized in California.” The authority for the people to amend the Constitution was derived from Article II, §§ 1, 8, 10 and Article XVIII, § 3 of the Constitution. On November 5, 2008, an extraordinary writ was filed in the California Supreme Court seeking an immediate stay of the amendment and challenging whether the Constitution was lawfully amended or whether Article I, § 7.5 was an illegally enacted revision. During the litigation, the California Attorney General argued that Article I, § 7.5 (also known as “Proposition 8” and the “Marriage Amendment”) was unlawfully added to the Constitution because marriage is an “inalienable right.” In a 6-1 decision, the California Supreme Court rejected that argument and found that the people acted lawfully in amending their Constitution.¹

On May 22, 2009, a lawsuit was filed in federal court challenging the Marriage Amendment based upon the Fourteenth Amendment to the

¹ Strauss v. Horton, 46 Cal. 4th 364 (2009).

U.S. Constitution. The federal district court entered judgment against State defendants on August 12, 2010.²

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Civilizations which have tolerated or even celebrated homosexual relationships have nonetheless regulated marriage so as to maintain it as an opposite sex union. This brief will be confined to providing an overview of homosexuality in ancient Greece and Rome and then discuss those societies' marriage laws.³

The district court's dismissive assertion that tradition alone is not a sufficient reason to define marriage is grossly simplistic.⁴ As will be demonstrated, some of the greatest minds that the West has produced came to the same conclusion as the voters of California regarding the importance of giving special place to marriage as a male and female undertaking. The Greeks and Romans did not accept marriage between a man and a woman without comment. As will be discussed in this brief, these were intellectually robust civilizations that left a written record of both their philosophy on this matter of public policy as well as their laws regulating marriage

² Perry v. Schwarzenegger ---- F.Supp.2d ----, 2010 WL 3170286 (N.D. CA Aug. 12, 2010).

³ It would not be practical in this limited space to discuss homosexuality and marriage for every major civilization. In that the ancient Greco-Roman civilizations are primary sources for political, legal thought and structure in the United States, they will be the examples used in this brief.

and the family. This brief will show that the Greeks and Romans were clearly not homophobic. Despite their tolerance and even celebration of homosexual relationships, the brief will demonstrate that families were deemed the core building blocks for a stable society, with male to female marriage as the initiating event in establishing a family. The conclusion drawn is that a society's setting parameters on marriage, as the voters of California have done, is not a reflection of bigotry, hatred, or malice toward those within the community who are gay or lesbian.

ARGUMENT

I. Overview of Homosexuality in Ancient Greece and Rome

A. Greece

Evidence of homosexuality pervades Greek philosophy, artwork, military practices, prostitution, political speeches, and public life. Perhaps the most compelling evidence of the extent and nature of the practice is the plethora of Greek literature addressing the subject, including lyric poetry and comedic plays.⁵ What is certain is that the practice came to be considered mainstream by the time of the Peloponnesian war and the zenith of classical Greece in the fourth, fifth, and sixth centuries B.C.

⁴ Perry, *Id.* at 124.

There is controversy as to whether male homosexuality began in Indo European-Minoa, in Sparta, or in Crete.⁶ The first artistic evidence of male homosexuality is said to be a Cretan vase,⁷ although explicit homosexual acts were abundant on Athenian vases until 460 B.C.⁸ There is more evidence of the practice in lyric poetry and in comedy. A diminution of representations of the practice was recorded. This is attributed to a rise of democratic reaction or to a moralization of “upper-class” pederasty.⁹

Aristotle suggested that homosexuality started as a birth control measure.¹⁰ He asserted that the practice was encouraged among the Cretans as a means of population control, stating, "and the lawgiver has devised many wise measures to secure the benefit of moderation at table, and the segregation of the women in order that they may not bear many children, for which purpose he instituted association with the male sex."¹¹

⁵ K. J. Dover, *Greek Homosexuality*, pp. 21-54, pp. 87-117 (Harvard University Press, Cambridge, MA updated 1989)..

⁶ *Id.*, p. 14 (Harvard University Press, Cambridge, MA updated 1989).

⁷ Thomas K. Hubbard, *Homosexuality in Greece and Rome: A Sourcebook of Basic Documents* 15 (University of California Press, Berkeley, CA, 2003)

⁸ *Id.*

⁹ *Id.* at 21-54, 87-117.

¹⁰ *Id.* at 14.

¹¹ Plato, *Politics* 2.10 1272a 22-24.

Athenian oratory in courts, published for the record since 525 B.C. makes explicit reference to male homosexuality.¹² Adversaries used oratory to convince juries who were primarily members of poorer classes. In order to appeal to popular prejudice, opponents attacked each other's character and without evidence and using inference, accused each other of homosexuality, effeminacy and male prostitution of youths.¹³ The accusation of prostitution was serious because it deprived the accused Athenian of the legal right to hold any public office or address a political assembly, council or court.¹⁴

By and large, the male to male sexual relationships in Greece were between an adult and a youth.¹⁵ Pederasty was such that the passive member was typically a "beardless boy."¹⁶ The relationship was to end at puberty.¹⁷

Insights on male homosexuality are likewise found in Greek philosophy since 400 B.C.¹⁸ There were several philosophical schools in ancient Greece, all composed of men, which address the issue. Socrates for instance is recorded as being surrounded by beautiful boys, although he explicitly discouraged physical

¹² Hubbard, *supra*, at 118-162.

¹³ *Id.* at 119.

¹⁴ *Id.*

¹⁵ Dover, *supra*, at 16.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Hubbard, *supra*. at 163-267.

involvement with them.¹⁹ Socrates was, in 399 B. C., condemned to death for corrupting the youth and denying the gods of the city.²⁰

Plato, in *Phaedrus*, gave an account of physical love between a man and a boy.

After the lover has spent some time...staying near the boy (and even touching him during sports and on other occasions), then the spring that feeds the stream Zeus named 'Desire'...begins to flow mightily in the lover and is partly absorbed by him, and when he is filled it overflows and runs outside him.²¹

However, Plato later then suggested that platonic love was better than physical love, before finally, in *Laws* he advocated for an ideal state forbidding sexual relations between men.

Regardless of whether one approaches this subject in jest or in earnest, there is one thing that one must recognize and that is that the sexual pleasure experienced by the female and male natures when they join together for the purpose of procreation seems to have been handed down in accordance with nature, whereas the pleasure enjoyed by

¹⁹ *Id.* at 163.

²⁰ Plato, *The Apology of Socrates* 24 (D.F. Neville M.A., trans., with Introduction, Analysis, and Notes, late Exhibitioner of New College, Oxford London Fe Robinson & Co. 1901)

http://books.google.com/books?id=cJ_nkyjUxNgC&printsec=frontcover&dq=Apology&hl=en&ei=z9ObTKfbOY_UtQPTxI2kCQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCsQ6AEwAA#v=onepage&q&f=false (Visited on Sept. 23 2010).

²¹ Plato, *Phaedrus* 255 (R.Hackforth, trans. Cambridge University Press 1952), http://books.google.com/books?id=N6HRTHXlrE0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (Visited on Sept. 23 2010).

males with males and females with females seems to be beyond nature....²²

In the same vein, Aristotle opined that love of character was more durable than physical consummation.

But if their erotic relationship is characterized by an exchange of advantage rather than pleasure, the two are less friendly toward each other and the friendship lasts less long. Those who are friends for advantage cease to be friends when it ceases to be advantageous. For they are not friends of each other but friends of profit.²³

The Hedonist school of philosophy advocated enjoyment of either boys or girls if they were deemed beautiful.

Wouldn't a beautiful woman be useful in so far as she is beautiful?

And wouldn't a beautiful boy or young man be useful insofar as he is beautiful?

...Yes.

He is useful for sexual intercourse.²⁴

The Stoic school of philosophy, founded in early 300 B.C., approved the self-controlled love of young men based only on character or love of older boys who could be taught philosophy. "It is their opinion that the wise man will be the

²² Plato, *Laws* 636B-D.

²³ Aristotle, *Nicomachean Ethics* 8.4 at 2.

²⁴ Theodorus of Cyrene = Diogenes Laertius 2.99-100.

lover of those boys who clearly exhibit by their entire appearance a nature well formed toward excellence.”²⁵

The earliest record of female homosexuality was found in the poetry of a woman called Sappho of Lesbos²⁶ who was, perhaps not curiously, married and a mother of one daughter.²⁷ Although there is not as much historical record touching on lesbians, there is some discussion nonetheless, of female pederasty. For example, in Sparta pederasty was practiced among both the male and female populations. “Lovers shared in the reputation of their boyfriends, whether good or bad...Love was so esteemed among them that girls also became the erotic objects of noble women.”²⁸

B. Roman Republic²⁹

Homosexual acts with freeborn Romans were illegal, as was negotiating sexual favors with a freeborn Roman or adolescent even if he was a prostitute.³⁰ Homosexual acts could be practiced with a slave and it was not considered inappropriate to love a male slave if he was beautiful.

²⁵ Zeno of Citium, Fr. 248 *Stoicorum Veterum Fragmenta* = Diogenes Laertius 7.129-130.

²⁶ Hubbard, *supra*, at 16-17, 29-35.

²⁷ *Id.* at 22.

²⁸ Plutarch, *Lycurgus* 18.4.

²⁹ Hubbard, *supra*, at 308-343. The Roman republic is said to have existed from the expulsion of the Etruscans (Roman neighbors interested in Greek homosexuality) in 509 B.C. to 42 B.C.

Or is it because it was not unseemly or shameful for the men of old to love male slaves who were in their season of youthful beauty, as the comedies show even today, but they emphatically kept away from free boys, and free boys bore this sign so men would not be uncertain if they encountered boys naked?³¹

In 200 B.C. the Roman Playwright Plautus in his comedies referred to homosexuality involving slaves.³² Later moralistic texts then began rejecting the practice, ostensibly because of rising democratic sentiment.³³ By 100 B.C., comedies of Pomponius and Novius, and the satires of Lucilius made references to male prostitution, effeminacy, “freeborn men who prefer the passive role.”³⁴

C. Augustan Rome

Within the context of military exploits, aggressive male homosexuality found expression in obscene slogans on slingshot bullets in the Perugian battle (41 B.C.) between Octavia (later named Augustus) and his rival Mark Anthony.³⁵ At the same time, a romantic type of poetry emerged primarily based on heterosexual themes, but also occasionally touched homoerotic subjects. For example, a poem on advice on how to succeed with boys begins, “What’s your secret? You know how to catch good-looking boys, but it’s not your looks: rough, uncombed, beard

³⁰ *Id.* at 308.

³¹ Plutarch, *Roman Questions* 288A.

³² Hubbard, *supra*, at 309.

³³ *Id.* at 309-10.

³⁴ *Id.* at 310.

uncared for; naked you endure the freezing winter, and the scorching summer dog-days.”³⁶

It was towards the end of the Augustan era that a Roman poet, Publius Ovidius Naso, known as Ovid (43 B.C-17 CE) wrote *Metamorphoses*, the first Roman texts (mythical stories) to address female homosexuality. In one passage a girl was transgendered by an Egyptian goddess.

Her birth pangs came upon her then, and her burden brought itself into the open air: a female child, unknown to her father, Her mother raised her secretly. To be raised as a boy...She wore boys' clothes and had the kind of face that would be called beauty, masculine or feminine.³⁷

II. Classical Greco-Roman Views on Marriage

A. Greece

Ancient Greek writers emphasized the political and social role of marriage, for good of the society. However, Greece did not inherit nor develop a belief that a divine power had revealed to mankind a code of regulation of sexual behavior and had no religious institutions to enforce sexual prohibitions.³⁸

In the *Republic* (380 B.C.) Plato wrote that it was obvious that “a just Republic... must arrange for marriages, sacramental and the most sacred marriages

³⁵ *Id.* at 344 citing *Glandes Perusinae* = *CIL* 11.6721.

³⁶ Tibullus 1.4.

³⁷ Ovid, *Metamorphosen* 9.700-710.

³⁸ Dover, *supra*, at 203.

would be the most beneficial.”³⁹ Plato wrote in *Laws* that a “man should ‘court the tie’ that is for the city’s good. Procreation, a natural impulse in marriage would do “untold good”.⁴⁰

According to Aristotle, marriage was the foundation of the republic.⁴¹ Thus he saw man as a “political animal” who forms associations for the purpose of attaining greater good.⁴² He asserts that the family unit is older and more fundamental than the state. The man and woman cohabit to get children and also to pool their resources to live life to the fullest.⁴³ Aristotle wrote in *Politics*

[E]very state is composed of households. Every household, in turn, is composed of a union or pairing of those who cannot exist without one another. A male and female must unite for the reproduction of the species--not from deliberate intention, but from the natural impulse . . . to leave behind them something of the same nature as themselves.⁴⁴

Sparta was no exception to the views described above, though with a decidedly more marshal underpinning. Though possibly not an historic figure,

³⁹ John Witte, Jr., *The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019, 1022 (2001) (citing Plato, Republic, translated in The Collected works of Plato, including the letters, 575, 698 (Edith Hamilton & Huntington Cains eds., 1961)).

⁴⁰ *Id.* at 1022-1023 (citing Plato, *Laws*, The collected works of Plato, incl. letters, supra at 1225, 1350).

⁴¹ *Id.* at 1023, citing Aristotle, Ethics bk. I, ch. 7, translated in Ethics of Aristotle 24 (J.A.K. Thompson trans. Reprinted ed. 1965).

⁴² *Id.*

⁴³ *Id.* 1024 (citing Aristotle, *Ethics* bk. VIII, ch. 12, at 225-26).

Lycurgus instituted the laws of Sparta. Pursuant to his laws, men must marry by the age of 30 or face prosecution.⁴⁵

Although homosexual relationships were prevalent, a review of the literature shows that there were no laws providing for same gender marriage in ancient Greece. That would have been deemed inconsistent with the philosophical underpinnings of society, and by extension, public policy.

B. Rome

Marcus Tullius Cicero (106-43 B.C.) considered marriage a natural partnership of person and property of husband and wife.⁴⁶ But beyond this, he considered marriage, and by extension families, core building blocks for society. Cicero articulated this view in two key passages:

Since it is by nature common to all animals that they have a drive to procreate, the first fellowship exists within marriage itself, and the next with one's children. Then, there is the one house in which everything is shared. Indeed that is the principle of a city and the seed-bed, as it were, of a political community. . . . In such propagation and increase political communities have their origin.⁴⁷

⁴⁴ *Id.* 1023 (citing Aristotle, *Politica*, bk. 1, ch. 3 § 1, translated in *The Politics of Aristotle* (Ernest Baker trans. & ed. 1962)).

⁴⁵ Sarah B. Pomeroy, Stanley M. Burstein, Walter Donlan & Jennifer Tolbert Roberts, *Ancient Greece: A Political, Social and Cultural History* (second ed. Oxford University Press, USA, 2007).

⁴⁶ *Id.* (citing Cicero, *De Finibus* bk. III, ch. 23, § 65 (H. Rackham trans., 1983)).

⁴⁷ Alfonso Cardinal López Trujillo, *Perspectives on Natural Marriage, The nature of marriage and its various aspects*, 4 Ave Maria L. Rev. 297, 339 (2006) (quoting Cicero, *On Duties* 23 (M.T. Griffin & E.M. Atkins eds., 1991)).

In *De Officiis* he demonstrates the logical nexus between marriage and construction of society itself.

For since the reproductive instinct is by Nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state. Then follow the bonds between brothers and sisters, and next those of first and then of second cousins; and when they can no longer be sheltered under one roof, they go out into other homes, as into colonies. Then follow between these in turn, marriages and connections by marriage, and from these again a new stock of relations; and from this propagation and after-growth states have their beginnings.⁴⁸

Marriage thus has a purpose for the individual (i.e. procreation). But that union also serves a separate but corresponding purpose for the establishment of civilization. That is logically why homosexual relationships were not given the same status or nomenclature of “marriage.” Male to female partnerships to form families comprise a unique function in society.

In 18 B.C., the emperor Augustus enacted laws to encourage marriage and childbearing. Adultery became a crime punishable by exile and

⁴⁸ Cicero, *De Officiis*, bk. I, ch. xvii, at 57

confiscation of property.⁴⁹ Fathers could kill adulterous daughters and partners and husbands were required to divorce adulterous wives.⁵⁰ Men were required to marry and awards were offered to marry and have families while unmarried men and unmarried women paid higher taxes.⁵¹

As a philosophical, as opposed to legal, approach, Musolius Rufus, a stoic of the First Century, described marriage as the union of a husband and wife, not just to procreate (because other sexual unions could also produce children) but to enjoy perfect companionship and mutual love.⁵² He lauded legislators who “considered the increase of homes of citizens the most fortunate thing for a city.”⁵³ Whoever destroys human marriage destroys the home, the city and the whole human race.⁵⁴

⁴⁹ Julian Marriage Laws No. 123 at:www.unrv.com/government/julianmarriage.php (accessed visited Sept. 15, 2010).

⁵⁰ Witte, *Id.*

⁵¹ Witte, *Id.*

⁵² Witte, *Id.* (citing Musonius Rufus, Fragment 13A, What is the Chief end of Marriage? Translated in Musonius Rufus: the Roman Socrates 89 (Cora E. Lutz ed.& trans. 1947).

⁵³ Witte, *Id.* (Fragment 15, *Should Every Child That is Born be Raised?* Translated in Musonius Rufus: the Roman Socrates).

⁵⁴ Witte, *Id.* (Fragment 14, *Is Marriage a Handicap to the Pursuit of Philosophy?* Translated in Musonius Rufus: the Roman Socrates).

Hierocles, a disciple of Musonius considered marriage as the “basis of household and the household is essential for civilization.”⁵⁵ It is self evident that Hierocles views not only echo the understanding of his teacher, but also Aristotle and Cicero.

As with ancient Greece, there were no laws which provided for marriage between persons of the same gender.⁵⁶ Laws relative to marriage were based upon a rational, and indeed, compelling public policy to support the family and society itself.

CONCLUSION

Though homosexuality was condoned and even celebrated in ancient Greece and Rome, these civilizations were constant in their efforts to fundamentally protect and regulate marriage and the raising of children as fundamental for the political and social structure of the society. These classical sources demonstrate that marriage between a man and a woman was deemed the building block of the community. For as Hierocles succinctly put it, “the household is essential for civilization.” That was a conclusion drawn by the Greeks and Romans and has

⁵⁵ Witte, *Id.* (citing Judith Evans Grubb, *Law and Family in Late Antiquity: The Emperor Constantine’s Marriage Legislation* (1995) quoting Hierocles).

⁵⁶ It should be noted that there was a recorded incident in which the emperor Nero castrated a boy and “married” him. Suetonius Nero 28; Dio Cassius Epitome 62.28 http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cassius_Dio/62*.html.

been self evident to all major civilizations. A view that California voters, acting as the ultimate lawmakers, were irrational in deciding to maintain the traditional family unit as the building block of their communities is not supported by the historical record. In view of the Greek and Roman views on both homosexuality and the importance of marriage as the basis for establishing the household, it simply does not follow that limiting marriage as between a man and a woman is bigoted, hateful or otherwise malicious. Historically, it was simply a reasonable determination made by great thinkers, many of whom were homosexual, about what is necessary for a stable society.

There are a variety of living arrangements for which people find themselves. Some of these are based on mere personal or group exploration. Others are born of necessity. Nonetheless, these alternative units are not “marriages”

Regrettably there is insufficient space to discuss great civilizations from the East relative to laws on marriage and the family, along with views on homosexuality. Those streams of thought would also be helpful to the Court in further demonstrating that the decision by the voters finds reasoned support in other historical and philosophical traditions. Nonetheless, it is sufficient to show that the two societies, which made the most significant contributions to this

Other than the raw power that an emperor possessed, there was no legal basis for the “marriage.” (Accessed Sept. 17, 2010).

country in philosophy, the political system, and the law, deemed marriage between opposite sexes as foundational to an ordered society. Through the voting process, it was the collective wisdom of the citizens of California to maintain an understanding of marriage which is consistent with the wisdom of the civilizations for which they are heirs. This is not bigoted and it is not unreasonable. There is regrettably insufficient space in these pages to provide biographical sketches of intellectual giants that are quoted in herein. Those sketches would reveal that they had colleagues, friends, family members who were homosexual. Indeed, some of these men were themselves gay. In this sense they are not unlike the voters of California. Whether despite this or because of this, these great men determined that marriage should be limited as an institution between a man and a woman. Hence, defining marriage as a union of a man and a woman reflects not only the collected wisdom of the citizens, but of the ages as well.

Respectfully submitted this 24th day of September, 2010.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FRAP 32(A)(7)(B) in that it contains no more than 14,000 words. According to Microsoft Word's "Statistics," this document contains 4,130 words.

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery to the following non-CM/ECF participants:

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