

Nos. 10-16696, 11-16577

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KRISTIN M. PERRY et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR. et al.,

Defendants,

and

DENNIS HOLLINGSWORTH et al.,

Intervenors-Defendants-Appellants.

On Appeals from the United States District Court for the Northern District of California, No. CV-09-02292 (Hon. Vaughn R. Walker and Hon. James Ware)

**BRIEF OF AMICUS CURIAE LOVE HONOR CHERISH
IN OPPOSITION TO PETITION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that Amicus Curiae Love Honor Cherish is not a corporation that issues stock or has a parent corporation that issues stock.

March 9, 2012

Respectfully submitted,

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**STATEMENT OF INTEREST OF
AMICUS CURIAE LOVE HONOR CHERISH**

This brief of amicus curiae Love Honor Cherish is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2 with the consent of all parties to the case. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Love Honor Cherish states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (3) no person other than Love Honor Cherish, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

Founded in May 2008 to protect and defend the California Supreme Court's marriage equality decision, *In re Marriage Cases*, 43 Cal. 4th 757 (2008), Love Honor Cherish is the leading grassroots advocate in California for marriage equality. Its members come from all walks of life and are both gay and straight. What unites them is a strong conviction in the fundamental equality of all of California's citizens regardless of sexual orientation, and a belief in the importance of marriage equality. Love Honor Cherish worked tirelessly to defeat Proposition 8, and, since Proposition 8's passage, continues to advance marriage equality through public education, community empowerment, and the political process. Love Honor Cherish continues to take a leading role in working to change the hearts and minds of those Californians who voted in favor of Proposition 8.

ARGUMENT

I. INTRODUCTION.

The outcome of this case undoubtedly will have an extraordinary and very personal impact on the lives of gay and lesbian Californians and their families. Yet this case's very *pendency* – and any additional delay were a rehearing to be granted – affects them just as much. Proposition 8 continues to be enforced during the pendency of this case. Thus, every day that this case continues deprives gay and lesbian Californians of the ability to marry at the time of their choosing – a most personal and life-changing choice – and to share that moment with their loved ones.

II. THE DELAY OCCASIONED BY REHEARING WOULD IRREPARABLY HARM GAY AND LESBIAN COUPLES AND THEIR FAMILIES.

Plaintiffs and Plaintiff-Intervenor have prosecuted this case diligently and have argued emphatically for expedited consideration at every stage in this lawsuit. Recognizing this urgency, this Court's motions panel gave the case expedited consideration in the same order in which it stayed enforcement of the District Court's injunction. (*See* 8/16/2010 Order, Dkt. Entry 14.) Nonetheless, almost three years have passed since this this matter was filed in May 2009.

To encumber the fundamental right to marry through protracted litigation is tantamount to depriving gay and lesbians couples of that right. For some, this deprivation will be permanent. In the time that this litigation has been pending, many gay and lesbian couples have quite literally not lived to see the day when they could get married. These words are not just rhetoric.

The harm wrought by this years-long delay in resolving the status of marriage equality is tragically illustrated by the case of Derence Kernek and Ed Watson, a couple in their late seventies who had been in a loving relationship for over forty years. Ed was diagnosed with Alzheimer's disease in summer 2010, and his mental condition was deteriorating rapidly. Derence and Ed posted a video on the Internet in which they expressed their hope that they could be married while Ed's health still permitted.¹ Unfortunately, Ed passed away shortly thereafter, on December 7, 2011.² They were never able to marry.

Undoubtedly, there are countless other loving couples like Ed and Derence who will not be able to marry in their lifetimes – or do so in the presence of their

¹ Derence and Ed's two-minute video is available on YouTube. <http://www.youtube.com/watch?v=H8nTy0e8mj4> (last visited Mar. 7, 2012).

² Carol J. Williams, *Gay marriage proponent who urged halt to Prop. 8 enforcement dies*, L.A. Times, Dec. 8, 2011, <http://articles.latimes.com/2011/dec/08/local/la-me-1209-gay-marriage-death-20111209>.

family and friends – because of the duration of this case.³ Indeed, members of Love Honor Cherish have experienced the heartbreak of the fact that life is not eternal.

Further, gay and lesbian couples and their families deserve the dignity to order and plan their lives just as much as does everyone else. Fundamental to individual liberty and the right to marry is the right of individuals to choose when they wish to get married. *See Manwani v. U.S. Dept. of Justice, I.N.S.*, 736 F. Supp. 1367, 1374 (W.D.N.C. 1990) (“A couple that abandons or delays their right to marry suffers a deprivation of marital association that is self-evident.”). For gay and lesbian couples in California, however, the ability to choose when they can get married and enjoy the benefits of marriage continues to hinge on the pendency and outcome of this litigation. The only alternative is to uproot their lives, leave California, and move to one of the states where same-sex marriage is legal.

Whether warranted or not, hopes are raised with each favorable ruling, and then dashed by the continuation of the appellate process and stay. As the District Court found, “Proposition 8 results in frequent reminders for gays and lesbians in committed long-term relationships that their relationships are not as highly valued

³ Similar cases have been reported throughout the United States. *See, e.g.*, Monica Yant Kinney, *Same-Sex Gains Too Late For Some*, Philadelphia Inquirer, Feb. 26, 2012, http://articles.philly.com/2012-02-26/news/31101550_1_marriage-equality-gay-couples-marriage-equality.

as opposite-sex relationships.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 979 (N.D. Cal. 2010). The uncertainty occasioned by the long, winding procedural history of this case – a seesaw of emotions – itself serves to devalue gay and lesbian relationships.

So long as Proposition 8 remains in effect, gay and lesbian Californians will continue to suffer the indignity of discrimination with its concomitant emotional harm, what the Rev. Martin Luther King, Jr. called “a degenerating sense of nobodiness.”

In deciding whether to rehear this case, the Court should consider the impact that rehearing would have on all gay and lesbian couples and their families.

III. THE APPELLANTS APPEAR TO HAVE EMBRACED DELAY FOR ITS OWN SAKE.

Appellants petition this Court for rehearing *en banc*. Yet, at the same time, Appellants engage in a public campaign of denigrating the very Court in which they seek a rehearing.

Andrew Pugno, general counsel for the ProtectMarriage.com coalition and an attorney of record for Appellants, recently stated:

It's no surprise that the 9th Circuit's decision is completely out of step with every other federal appellate and Supreme Court decision in American history on the subject of marriage. Ever since the beginning of this case, we've known that the battle to preserve traditional marriage will ultimately be won or lost not here, but rather in the U.S. Supreme Court.⁴

Brian Raum, senior legal counsel for the Alliance Defense Fund and an attorney of record for Appellants, just last month said:

We are not surprised that this Hollywood-orchestrated attack on marriage — tried in San Francisco — turned out this way. But we are confident that the expressed will of the American people in favor of marriage will be upheld at the Supreme Court. Every pro-marriage American should be pleased that this case can finally go to the U.S. Supreme Court.⁵

Similarly, John C. Eastman, chairman of the National Organization for Marriage (which opposes marriage equality) and the principal author of amicus briefs supporting Appellants filed by the Center for Constitutional Jurisprudence, stated:

⁴ Press Release, ProtectMarriage.com, Prop 8 Proponents to Appeal Ninth Circuit Ruling Against Traditional Marriage (Feb. 7, 2012), <http://www.protectmarriage.com/blog/2012/02/prop-8-proponents-to-appeal-ninth-circuit-ruling-against-traditional-marriage/> (last visited Mar. 7, 2012).

⁵ Press Release, Alliance Alert, ADF comment on 9th Circuit decision in Perry v. Brown (Feb. 7, 2012), <http://www.alliancealert.org/2012/02/07/adf-comment-on-9th-circuit-decision-in-perry-v-brown-ca-prop-8/> (last visited Mar. 7, 2012).

The Ninth Circuit Court of Appeals is the most overturned circuit in the country, and Judge Stephen Reinhardt, the author of today's absurd ruling is the most overturned federal judge in America. Today's ruling is a perfect setup for this case to be taken by the U.S. Supreme Court, where I am confident it will be reversed.⁶

There is a plain contradiction between Appellants' request for rehearing and Appellants' public statements about this Court. Given the Appellants' proclamations that these proceedings are a mere prelude to going to the United States Supreme Court, why did Appellants not immediately file a petition for certiorari? The petition for rehearing *en banc* thus raises the unmistakable inference that Appellants have embraced delay for its own sake.

The *mere filing* of the petition all but guarantees that the United States Supreme Court will not be able to grant or deny a petition for certiorari prior to the close of its current term. By prolonging this litigation even further, Appellants – four California voters who are not State officials and who are accountable to no one – have been able to perpetuate the harmful denial of equal dignity under the

⁶ Press Release, National Organization for Marriage (“NOM”) Blog, NOM Condemns Ninth Circuit Ruling Finding Prop 8 Unconstitutional, Imperiling the Marriage Laws of 43 states: Group will support efforts to take the issue to the US Supreme Court (Feb. 7, 2012), <http://www.nomblog.com/18991/> (last visited Mar. 7, 2012). Mr. Eastman's Center for Constitutional Jurisprudence filed its amicus brief on September 24, 2010. (Dkt. Entry 63).

law that Proposition 8 has inflicted upon gay and lesbian Californians and their families.

CONCLUSION

Love Honor Cherish thus files this amicus brief in support of those individuals whose rights are being denied while this litigation proceeds and, in their name, respectfully requests that the Ninth Circuit forgo an *en banc* rehearing to ensure a more timely resolution of this litigation.

March 9, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 29-2(c)(2), the undersigned certifies that this amicus curiae brief is proportionally spaced, has a typeface of 14 points or more, and does not exceed 15 pages.

March 9, 2012

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