

In the

United States Court of Appeals

For the

Ninth Circuit

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KRISTIN PERRY, et al.,

Plaintiffs-Appellees,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

v.

ARNOLD SCHWARZENEGGER,

in his official capacity as Governor of California, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors,

and

COUNTY OF IMPERIAL, et al.,

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 IN SUPPORT OF APPELLANTS COUNTY OF IMPERIAL, THE BOARD OF SUPERVISORS OF THE COUNTY OF IMPERIAL AND ISABEL VARGAS

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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.

sixth centuries B.C.

of the Peloponnesian war and the zenith of classical Greece in the fourth, fifth, and

What is certain in that the practice came to be considered mainstream by the time

Greek literature addressing the subject, including lyric poetry and comic plays.⁵

compelling evidence of the extent and nature of the practice is the plethora of

practices, prostitution, political speeches, and public life. Perhaps the most

Evidence of homosexuality pervades Greek philosophy, artwork, military

A. Greece

I. Overview of Homosexuality in Ancient Greece and Rome

ARGUMENT

lesbian.

bigotry, hatred, or malice toward those within the community who are gay or

parameters on marriage, as the voters of California have done, is not a reflection of

event in establishing a family. The conclusion drawn is that a society's setting

building blocks for a stable society, with male to female marriage as the initiating

relationships, the brief will demonstrate that families were deemed the core

homophobic. Despite their tolerance and even celebration of homosexual

and the family. This brief will show that the Greeks and Romans were clearly not

- ¹¹ Plato, *Politics* 2.10 1272a 22-24.
- ¹⁰ *Id.* at 14.
- ⁹ *Id.* at 21-54, 87-117.
- ⁸ *Id.*
- ⁷ Thomas K. Hubbard, *Homosexuality in Greece and Rome: A Sourcebook of Basic Documents* 15 (University of California Press, Berkeley, CA, 2003).
- ⁶ *Id.*, p. 14 (Harvard University Press, Cambridge, MA updated 1989).
- ⁵ K. J. Dover, *Greek Homosexuality*, pp. 21-54, pp. 87-117 (Harvard University Press, Cambridge, MA updated 1989).

association with the male sex." ¹¹

order that they may not bear many children, for which purpose he instituted secure the benefit of moderation at table, and the segregation of the women in population control, stoning," and the lawgiver has devised many wise measures to He asserted that the practice was encouraged among the Cretans as a means of Aristotle suggested that homosexuality started as a birth control measure. ¹⁰ "upper-class" pederasty. ⁹

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

¹⁸ Hubbard, *supra*, at 163-267.

¹⁷ *Id.*

¹⁶ *Id.*

¹⁵ Dover, *supra*, at 16.

¹⁴ *Id.*

¹³ *Id.* at 119.

¹² Hubbard, *supra*, at 118-162.

being surrounded by beautiful boys, although he explicitly discouraged physical composed of men, which addresses the issue. Socrates for instance is recorded as since 400 B.C.¹⁸ There were several philosophical schools in ancient Greece, all

insights on male homosexuality are likewise found in Greek philosophy

“beardless boy.”¹⁹ The relationship was to end at puberty.¹⁷

an adult and a youth.¹⁵ Pederasty was such that the passive member was typically a

By and large, the male to male sexual relationships in Greece were between

address a political assembly, council or court.¹⁴

deprived the accused Athenian of the legal right to hold any public office or

prostitution of youths.¹³ The accusation of prostitution was serious because it

using inference, accused each other of homosexuality, effeminacy and male

prejudice, opponents attacked each other's character and without evidence and

juries who were primarily members of poorer classes. In order to appeal to popular

explicit reference to male homosexuality.¹² Adversaries used oratory to convince

Athenian oratory in courts, published for the record since 525 B.C. makes

- ¹⁹ *Id.* at 163.
- ²⁰ Plato, *The Apology of Socrates* 24 (D.F. Neville M.A., trans., with Introduction, Analyses, and Notes, late Exhibitioner of New College, Oxford London Fe Robinson & Co. 1901).
- ²¹ http://books.google.com/books?id=cj_nkyJUXNgc&printsec=frontcover&dq=Apologetics%20of%20Plato&hl=en&ei=z9QbTKf0Y_UtQPtx12KQ&sa=X&oq=book_result&ct=result&qs=gebs_ge_summary_rfcad=0#v=onepage&q=false (Visited on Sept. 23 2010).
- ²² Plato, *Phaedrus* 255 (R. Hackforth, trans., Cambridge University Press 1952), 2010).

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

sexual relations between men.

Physical love, before finally, in *Laws* he advocated for an ideal state forbidding

However, Plato later then suggested that platonic love was better than

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

boy.

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

corrupting the youth and denying the goods of the city.²⁰

involvement with them.¹⁹ Socrates was, in 399 B.C., condemned to death for

²² Plato, *Laws* 636B-D.

²³ Aristotle, *Nicomachean Ethics* 8.4 at 2.

²⁴ Theodorus of Cyrene = Diogenes Laertius 2.99-100.

who could be taught philosophy. "It is their opinion that the wise man will be the self-controlled love of young men based only on character or love of older boys

The Stoic school of philosophy, founded in early 300 B.C., approved the

He is useful for sexual intercourse.²⁴

...Yes.

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

girls if they were deemed beautiful.

The Hedonist school of philosophy advocated enjoyment of either boys or

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

beautiful?

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

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

inappropriate to love a male slave if he was beautiful.

Homosexual acts could be practiced with a slave and it was not considered sexual favors with a freeborn Roman or adolescent even if he was a prostitute.³⁰

Homosexual acts with freeborn Romans were illegal, as was negotiating

B. Roman Republic²⁹

of noble women.”²⁸

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

The earliest record of female homosexuality was found in the poetry of a

formed toward excellence.”²⁵

Lover of those boys who clearly exhibit by their entire appearance a nature well

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

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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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.

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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.

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