

Justices seem to be leaning in favor of Prop. 8

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(03-05) 17:10 PST SAN FRANCISCO -- The California Supreme Court, which last year declared the right of gays and lesbians to marry, appeared ready Thursday to uphold the voters' decision to overrule the court and restore the state's ban on same-sex marriage.

"There have been initiatives that have taken away rights from minorities by majority vote" and have been upheld by the courts, said Chief Justice Ronald George. "Isn't that the system we have to live with?"

George wrote the majority opinion in the court's 4-3 ruling in May striking down California's ban on same-sex marriages - which voters, in turn, reversed in November by approving Proposition 8, a constitutional amendment defining marriage as being only between a man and a woman.

Another member of last year's majority, Justice Joyce Kennard, said the challenge to Prop. 8 brought by advocates of same-sex marriage involved "a completely different issue" from the court's ruling that the marriage laws violated gays' and lesbians' rights to be treated equally and wed the partner of their choice.

"Here we are dealing with the power of the people, the inalienable right, to amend the Constitution," Kennard said. Speaking to a lawyer for same-sex couples, she said those who want to overturn the voters' decision "have the right to go to the people and present an initiative."

Backing for couples

There were some indications of divisions among the justices on the validity of Prop. 8 during the hearing, which lasted more than three hours at the court's San Francisco headquarters. But on a separate issue, all seven appeared to agree that the 18,000 same-sex couples who married before Prop. 8 passed would remain legally wed.

"When the highest court of the state declares that same-sex couples have the right to marry ... how can one deny the validity of those marriages?" asked Justice Marvin Baxter, who dissented from the May ruling throwing out the opposite-sex-only marriage law.

Relying on that ruling, thousands of gays and lesbians "upended their lives, changed their property responsibilities with their spouses," said Justice Ming Chin, another dissenter from that decision. "Is it really fair to throw that out?"

If the justices' questions were any indication, the court will allow Prop. 8 to ban same-sex marriages as of Nov. 5, the day after it passed with 52 percent of the vote. A ruling is due within 90 days.

The initiative, sponsored by conservative religious groups, amended the state Constitution to declare that

"only marriage between a man and a woman is valid or recognized in California." That was the language of a previous law that the court struck down last year as a violation of the state Constitution.

Plaintiffs' case

Prop. 8 was challenged by two groups of same-sex couples and by a group of local governments led by San Francisco. They argued that the measure, though drafted as an amendment to the Constitution, violated that document's core principle of equality and exceeded the voters' initiative powers.

"A guarantee of equality that is subject to exceptions by the majority is no guarantee at all," said Therese Stewart, San Francisco's chief deputy city attorney.

Opponents argued that Prop. 8 was not merely a constitutional amendment, which can be circulated as an initiative for voter approval, but was a revision of the Constitution, which requires approval from either two-thirds of the Legislature or delegates to a constitutional convention to reach the ballot.

Taking away rights

Pressed to define the difference, Shannon Minter of the National Center for Lesbian Rights, lawyer for one group of same-sex couples, said that when a majority repeals a fundamental right from a group "historically subject to discrimination," that's a revision.

But George said voters had done just that in ballot measures that restricted school busing for integration and banned affirmative action based on race or sex in government programs.

Kennard said the right to life is at least as fundamental as the right to marry. She noted that the court, after declaring the death penalty unconstitutional in 1972, upheld an initiative that year overturning the ruling.

Minter countered that the death penalty didn't single out one group for different treatment. Justice Carlos Moreno, whose questioning suggested that he might vote to overturn Prop. 8, said the death penalty case "didn't deal with the elimination of constitutional personal rights."

Kenneth Starr, lawyer for Protect Marriage, the sponsor of the ballot measure, argued that Californians have a virtually unlimited power to amend their Constitution.

"Rights are in the power of the people," said Starr, law dean at Pepperdine University and formerly the special prosecutor in the impeachment of former President Bill Clinton.

He said past rulings have classified initiatives as constitutional revisions only if they would cause a "far-reaching change in the basic structure of government."

'New to us'

But Justice Kathryn Mickle Werdegar said no previous case had presented the question of whether an initiative could be used to take away fundamental rights. "This is new to us," she said.

Starr also argued that Prop. 8 was a modest measure that left the rights of same-sex couples undisturbed under California's domestic-partner laws and other statutes banning discrimination based on sexual orientation.

The initiative "does not erode any of the bundle of rights that this state has very generously provided," he said, but merely "restores the traditional definition of marriage."

Several justices seemed to agree. Kennard said the voters arguably "took away the label of marriage, but ... left intact most of what this court declared," including unprecedented constitutional protections for gays and lesbians.

Christopher Krueger, a senior assistant in Attorney General Jerry Brown's office, also urged the court to overturn Prop. 8, saying the equality and individual liberty at the heart of last year's ruling were "inalienable rights" that should not be subject to a majority vote.

The court seemed unconvinced. Justice Carol Corrigan said Krueger appeared to be arguing that people may amend the Constitution "unless they do it in a way that this court doesn't like."

The lead case is *Strauss vs. Horton*, S168047.

Heard at the hearing

"A guarantee of equality that is subject to exceptions by the majority is no guarantee at all."

- Therese Stewart, San Francisco chief deputy city attorney, arguing that Prop. 8 violates equal-rights principles in the state Constitution

"The people established the Constitution. As judges, our power is very limited."

- Justice Joyce Kennard

"Is it for this court to limit the people's power to amend the Constitution?"

- Chief Justice Ronald George

"Proposition 8 does not erode any of the bundle of rights that this state has very generously provided" to same-sex couples.

- Kenneth Starr, lawyer for Protect Marriage, the sponsor of Prop. 8

"If you're in the marriage business, do it equally. If you're not going to do it equally, then get out of the marriage business."

- Michael Maroko, a lawyer for same-sex couples, replying to a question about whether the court should reserve the name "marriage" for religious ceremonies and convert existing civil marriages to civil unions

"It would exceed the power of this court."

- Starr, answering the same question

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