Bancroft PLLC

February 16, 2012

By Overnight Delivery

The Honorable Barbara S. Jones
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Windsor v. United States*, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones:

On behalf of Defendant the Bipartisan Legal Advisory Group of the U.S. House of Representatives, we write to the Court regarding *Perry v. Brown*, 9th Cir. No. 10-16696 (Feb. 7, 2012). Contrary to the suggestion made in Plaintiff's letter dated February 8, 2012, *Perry* does not support Plaintiff's challenge to Section 3 of the Defense of Marriage Act ("DOMA"). Indeed, the most striking thing about the Ninth Circuit's opinion is the very narrowness of its reasoning in striking down California's Proposition 8.

The panel majority in *Perry* regarded Proposition 8 as "unique," *Perry* Op. at 6, and emphasized that its ruling was based on "the specific history of same-sex marriage in California." *Id.* at 34. That is, "California had already extended to committed same-sex couples both the incidents of marriage and the official designation of 'marriage,' and Proposition 8's only effect was to take away that important and legally significant designation." *Id.* at 6. The panel majority invalidated Proposition 8 on the view that it "singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry." *Id.* at 33 (emphasis in original). *See id.* at 58 n.20 (distinguishing a Nebraska law on the ground it "did not *withdraw* an existing right from same-sex couples as did Proposition 8.") (emphasis in original).

Perry is also noteworthy for what the panel majority expressly did *not* decide. The panel majority did not hold that Proposition 8, by denying same-sex couples "the right to use the designation of 'marriage' " thereby "stripped the state's gays and lesbians of any federal constitutional right." *Id.* at 46. Indeed, the panel majority did "not consider" and "express[ed] no view" on the question "whether

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same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so." *Id.* at 47. The panel majority "did not decide whether a state may decline to provide the right to marry to same-sex couples." *Id.* at 50.

The panel majority found that certain rationales offered in support of Proposition 8 were inapplicable in the unique circumstances of that case. Thus, the panel majority did not decide whether the interests in "responsible procreation and childrearing" "would be legitimate interests under other circumstances." *Id.* at 56. *See id.* ("We need not decide" this question); *id.* at 60 (same); *id.* at 61 ("again, we need not decide" this question). Similarly, the panel majority did not decide whether the "interest in proceeding with caution when considering changes to the definition of marriage" would justify a different law in other circumstances. *Id.* at 64 (internal quotation marks and brackets omitted). *See also id.* at 65 (noting that Proposition 8 amended the state constitution to impose a "permanent ban"); *id.* at 69, 70 ("We . . . do not decide whether" the interests of "promot[ing] childrearing by biological parents," "encourag[ing] responsible procreation," or "proceed[ing] with caution in social change" would justify a law that furthered such interests).

In sum, the panel majority's reasoning supplies no basis for questioning the constitutionality of DOMA.

Respectfully submitted,

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