

# States Continue to Debate Same-Sex Unions

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The last few years have seen much state activity in the area of domestic partnerships and same-sex marriage. From the passage of Proposition 8 in California, and the resulting lawsuits, to the enactment of laws legalizing same-sex marriage in a number of states, and actions taken in several other states to recognize same-sex marriages performed elsewhere, it is clear that this has become a pressing issue in many jurisdictions.

## California's Proposition 8 Is Again Challenged in Court

The struggle for marriage equality for same-sex couples in California continues. The issue has now been brought before the U.S. District Court for the Northern District of California in a lawsuit claiming that Proposition 8 violates the U.S. Constitution. Proposition 8 was the controversial 2008 ballot measure approved by 52 percent of state voters that amended the California state constitution to define marriage as a union between one man and one woman.

The California Supreme Court opened the door for same-sex marriage in May 2008 when it ruled that laws limiting marriage to opposite-sex couples violated the state constitutional rights of same-sex couples, despite the fact that California law extends equivalent rights and benefits of marriage to same-sex couples who register with the state as domestic partners. The ruling overturned a ballot measure approved by 61 percent of California voters in 2000, which stated that only an opposite-sex marriage would be valid or recognized in the state. The ruling did not mandate that same-sex couples be extended the right to marry, but rather it concluded that if opposite-sex couples are extended the right to marry, same-sex couples must be treated equally. Despite an appeal to do so, the court refused to issue a stay of its decision and directed that, effective June 16, 2008, state and local offices had to ensure that same-sex couples could legally marry. The decision did not revive the approximately 4,000 same-sex marriages performed at San Francisco City Hall in 2004, which were later annulled by court order.

However, same-sex marriage in California was short-lived as it ceased the same day that voters approved Proposition 8. The validity of Proposition 8 under the California state constitution was immediately challenged and was upheld by the California Supreme Court in May 2009. The court's decision was based on an analysis of whether Proposition 8 was an "amendment" or a "revision" to the state constitution. A revision would have required approval by at least two-thirds of both houses of the state legislature before going to voters, unlike amendments which can proceed to voters without prior legislative approval. The court examined the legal precedent involving amendments and revisions to the state constitution and concluded that Proposition 8 was a valid amendment because it did not alter the fundamental nature of the government plan or framework set forth in the state constitution. However, the court also determined that the over 18,000 same-sex marriages that had been performed in the state in the brief interval during which same-sex marriage had been legal would continue to be valid and recognized under state law.

The current lawsuit, *Perry v. Schwarzenegger*, was filed by the American Foundation for Equal Rights on behalf of two same-sex couples who are unable to marry now that the state constitution had been amended by Proposition 8. By preventing them from

marrying, the plaintiffs argue that they are left with the "separate-but-unequal" option of registering as domestic partners.

Although the lawsuit was filed against several state government officials, including Attorney General Jerry Brown and Governor Arnold Schwarzenegger, the district court permitted the original proponents of Proposition 8, the group ProtectMarriage.com, to intervene as defendants after both Brown and Schwarzenegger declined to defend Proposition 8. Brown opted not to defend the lawsuit because he believes Proposition 8 should be found unconstitutional under the 14th Amendment of the United States Constitution. Schwarzenegger publicly supported the lawsuit, because he believes it asks "important constitutional questions that require and warrant judicial determination."

In September 2009, the defendants filed a motion for summary judgment asking the court to uphold the constitutionality of Proposition 8 without the need for a trial. The defendants argued that a 1972 ruling by the United State Supreme Court was determinative of the issue. However, the district court denied the motion for summary judgment noting that the Supreme Court's doctrine on sexual orientation and gender discrimination had changed considerably in the years since that case had been decided.

In preparation for the trial, the plaintiffs requested that the defendants produce internal documents related to the purpose and intent of Proposition 8 and the messages that were communicated during the public campaign to persuade voters to support the measure. The plaintiff's aim was to show that Proposition 8 was motivated by animus towards gay and lesbians, rather than furthering a legitimate state purpose. The defendants objected to the request for documents and argued that having to procedure these confidential communications could potentially have a chilling effect on political speech. After the district court ruled in favor of the plaintiffs and ordered that the documents be produced, the defendants immediately appealed and requested a stay of the trial pending the outcome of the appeal. In December 2009, the 9th U.S. Circuit Court of Appeals ruled in favor of the defendants and held that the release of any such documents "would likely have a chilling effect on political association and the formulation of political expression."

As the case proceeded to trial, the defendants argued that the case should be adjudicated through legal briefs filed by the parties. The District Court disagreed and determined that evidence would need to be presented regarding the purported justifications for Proposition 8 and the effects of the initiative on same-sex couples and their families as well as on opposite-sex couples and their families. The trial took place in January 2010.

The plaintiffs argued their being unable to marry after the passage of Proposition 8 has caused them significant hardship, including the deprivation of the rights guaranteed by the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution. They believe Proposition 8 is unconstitutional because it denies same-sex couples and their families the right to have their relationships recognized by the state without any societal benefit for doing so. The plaintiffs sought to have Proposition 8 and any other similar state laws that attempt to deny same-sex couples the right to marry invalidated because they violate the protections of the U.S. Constitution.

The defendants argued that the people of California have the right to vote on what is best and that the plaintiffs bear the sole burden of proving that Proposition 8 is unconstitutional. The plaintiffs countered by arguing that the defendants bear the burden of proving the alleged harms that will be caused by permitting same-sex couples to marry and justifying why marriage that is restricted to opposite-sex couples must be preserved.

Closing arguments were expected to be scheduled soon after the district court had reviewed the evidence offered by both parties. However, closing arguments have now been delayed pending the defendants' appeal of their request for internal documents from

some of the gay rights groups who opposed Proposition 8. The groups, including Equality California, oppose the request and have argued that these documents are irrelevant to the trial since these groups are not parties to the litigation.

It is impossible to know how the district court will rule, but the case will certainly have a major impact in California and beyond. The legalization and subsequent repeal of same-sex marriage in California drew national attention and the state remains at the forefront of the heated debate. Regardless of the district court's final decision on the constitutionality of Proposition 8, the case is expected by many to be appealed to the U.S. Supreme Court.

### **Five States and D.C. Legalize Same-Sex Unions**

Same-sex marriage is now legal in Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia. In addition, California recognizes same-sex marriages performed between June 16, 2008 and November 5, 2008, the brief period of time during which same-sex marriage was legal in the state before voters approved Proposition 8. Same-sex marriages from other states are also recognized in New York and Rhode Island, even though same-sex couples in both states cannot legally marry.

Maryland recently joined New York and Rhode Island in legally recognizing out-of-state same-sex marriages despite the fact that Maryland state law defines marriage as a union between one man and one woman. Maryland Attorney General Douglas F. Gansler issued a legal opinion in February 2010 in which he concluded that the Maryland Supreme Court would likely find that same-sex marriages performed in those states that have legalized same-sex marriage would be valid and recognized under Maryland law based on general principles of comity (the principle under which states typically recognize laws and court judgments from other states). Although the opinion is not binding law, it is meant to guide state courts and agencies in interpreting state law.

Gansler concluded in his opinion that until the Maryland legislature or courts decide otherwise, state agencies should recognize out-of-state same-sex marriages and said that his office would defend any state agency in court for doing so. Although same-sex couples in Maryland are still not permitted to marry, Maryland law does permit such couples to register as domestic partners in order to obtain certain limited rights such as the ability to make medical and burial decisions and exemption from state inheritance taxes. Informal calls to several Maryland state agencies indicate that the legal implications of the ruling are still being determined. The debate over same-sex marriage is not new to Maryland. In 2004, a Maryland state court ruled that the state's prohibition on same-sex marriage violated the terms of the state constitution. The ruling, however, was overturned shortly thereafter on appeal to the Maryland Court of Appeals. An amendment to the Maryland state constitution has now been proposed to the state legislature that would allow same-sex marriage by redefining marriage as a union between two consenting adults.

Although a law to legalize same-sex marriage was enacted by the Maine legislature in 2009, the law never took effect after 53 percent of state voters rejected same-sex marriage in a referendum on the issue in November 2009. Same-sex couples in the state can continue to register as domestic partners in order to receive some of the rights and benefits of marriage. A bill to expand the rights and benefits of domestic partners to include all of the rights and benefits afforded to opposite-sex couples by marriage was introduced to the state legislature in 2009 but died when it failed to pass before the end of the legislative session. Supporters of same-sex marriage have vowed to continue to fight for the legalization of same-sex marriage in the state, while those against same-sex marriage are now seeking to amend the state constitution to restrict marriage to opposite-sex unions.

Other forms of same-sex unions are recognized in many states. Civil unions are recognized in New Jersey. California, Nevada, Oregon, Washington and the District of Columbia recognize domestic partnerships that extend all of the rights afforded to opposite-sex spouses under state law. Maine, Maryland and Wisconsin recognize limited forms of domestic partnerships that extend only certain rights and benefits under state law. New Jersey also recognizes domestic partnerships registered there before Feb. 19, 2007, the date on which civil unions became legal in the state.

Two bills are pending in Illinois that could legalize some form of same-sex union in the state. A bill to legalize civil unions has been proposed to the state legislature several times in recent years and would extend all of the rights and benefits that Illinois law affords to opposite-sex spouses to civil union partners. Separate bills to legalize same-sex marriage in Illinois were introduced to both houses of the state legislature in 2009. However, another bill was introduced at the same time proposing to amend the state constitution to permit only marriages between opposite-sex couples to be recognized in the state and to prohibit the state or any political subdivision thereof from creating or recognizing a legal status for same-sex couples similar to that of marriage.

Although it is difficult to predict which states will be the next to legalize some form of same-sex union, it is clear that the debate over same-sex marriage will continue as additional states continue to enact and adjudicate laws on both sides of the issue.

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