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Plaintiffs’, San Francisco’s Prop 8 Briefs Go to High Court

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ATTORNEYS REPRESENTING THE TWO SAME-SEX COUPLES CHALLENGING CALIFORNIA’S PROPOSITION 8 HAVE NOW FILED THEIR RESPONSE TO THE BRIEF SUBMITTED TO THE SUPREME COURT IN JANUARY BY THOSE DEFENDING THE 2008 VOTER INITIATIVE. IN ADDITION, THE CITY AND COUNTY OF SAN FRANCISCO, WHICH WAS ALLOWED TO INTERVENE AS A CO-PLAINTIFF IN THE CASE, HAS ALSO FILED ITS RESPONSE.

For the four plaintiffs and their attorneys, hired in 2009 by the American Foundation for Equal Rights (AFER), the ultimate goal is having the Supreme Court rule that same-sex couples have an equal right with different-sex couples to marry anywhere in the United States. Their brief never loses sight of their challenge in getting the high court to that point.

They argue, briefly, that the Official Proponents of Prop 8 — allowed to intervene by the US district court in the absence of the state of California defending the voter initiative — lack constitutional “standing” to appeal that same district court’s decision striking down the anti-gay ban.

Alternatively, AFER also argues that if the high court finds that the Proponents have standing, it should affirm the Ninth Circuit’s narrow ruling that Prop 8 is invalid because there was no rational basis for California to withdraw the right same-sex couples enjoyed to marry after the State Supreme Court granted that earlier in 2008.

The arguments on merit made by AFER and San Francisco are, in some respects, similar, since both hope to persuade the high court that the Proponents’ purported justifications for Proposition 8 are pathetically inadequate. In focusing their arguments differently, however, AFER and the city give the Supreme Court plausible alternatives for reaching a result that could either revive same-sex marriage in California or extend it across the nation.

There has been a lot of commentary about what would happen if the high court agrees that the Prop 8 Proponents lack standing to bring their appeal. That conclusion would not only rob the Supreme Court of jurisdiction but also mean that the Ninth Circuit Court of Appeals similarly lacked jurisdiction to hear an appeal from Prop 8’s defenders. That would leave District Judge Vaughn Walker’s 2010 ruling — which found a sweeping 14th Amendment right to marry by any same-sex couple in the nation — in place and unappealed.

Some commentators have suggested the Walker ruling would only apply to the four plaintiffs and the two county clerks who denied the couples licenses. Prop 8’s Proponents make this argument, noting the case was not brought as a class action on behalf of all unmarried same-sex couples in California nor were all county clerks in California certified as a defendant class.

The briefs from AFER and San Francisco both attack this argument, but the city develops it at greater length, which is logical given its primary goal of restoring same-sex marriage in California — and, particularly, in San Francisco, whose city clerk was not one of the defendants.

Both briefs argue, persuasively, that if Prop 8 is unconstitutional as to the plaintiffs, it is also unconstitutional as to all similarly situated people — including, at a minimum, all other same-sex couples seeking to marry in California. San Francisco’s brief also argues that since county clerks act as agents of the state on marriage matters, a ruling against a public official carrying out a state function would have effect across California.

These arguments are very convincing and should allay any fear that beating Prop 8’s defenders on the standing issue would have no immediate effect beyond just two same-sex couples.

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While the brief filed on behalf of the two plaintiff couples does address the standing question, San Francisco’s brief eagerly pursues it, since it is a potential big winner for its constituency of gay and lesbian couples and different-sex couples — including, at a minimum, all other same-sex couples and different-sex couples with just about total equality when it comes to parenting rights and responsibilities.

The heart of the Proponents’ justification for Prop 8 is that it encourages responsible procreation by heterosexual couples, but the San Francisco brief cogently points out that the referendum did not affect California law relating to procreation and parenting in any way — other than to disadvantage the children raised by same-sex couples who are barred from marrying.

Prop 8, the San Francisco brief argues, had nothing to do with procreation and everything to do with taking rights away, and the city’s attorneys devote considerable attention to the nasty campaign waged by Prop 8’s Proponents. Since the initiative fails even that most lenient standard for judicial review — showing that it had a rational basis — the city’s brief makes no argument that it should be subjected to a more demanding degree of scrutiny.

The AFER brief covers many of the same points as San Francisco’s but is focused on making a broad-ranging equal protection argument that seeks to place this case in the mainstream of Supreme Court equal protection jurisprudence. It devotes little attention to defending the Ninth Circuit’s approach, which trimmed back the sweeping implications of Judge Walker’s ruling in the district court. AFER’s aim is get the issue refocused on the way Walker’s decision spelled it out.

AFER does a brilliant job of countering the argument made by Prop
Republicans Say Do

A group of at least 75 prominent Republicans have signed on to an amicus brief supporting the two plaintiff couples who will challenge California's Proposition 8 before the Supreme Court in oral arguments on March 26. The New York Times reports that the list includes two members of Congress — New York's Richard Hanna and Ileana Ros-Lehtinen of Florida — four ex-governors, including Utah's Jon Huntsman, who sought last year's GOP presidential nomination, former Ohio Congresswoman Deborah Pryce, who was a member of the GOP leadership in the House, and leading figures from Republican presidential administrations dating back to Ronald Reagan.

The Times said the brief is "a direct challenge to Speaker John A. Boehner and reflects the civil war in the party since the November election." Boehner has stepped in, on behalf of the House, to defend the federal Defense of Marriage Act against constitutional challenges in the wake of the Obama administration’s 2011 decision to no longer do so. DOMA will be before the Supreme Court the day after its oral arguments in the Prop 8 case. (See Arthur S. Leonard’s reporting on the latest developments in both cases on pages 6 and 7.)

The Times notes that several prominent Republicans who support the right of same-sex couples to marry — including former First Lady Laura Bush, ex-Vice President Dick Cheney, and former Secretary of State Colin Powell — are not on the list. Bush recently asked that a video clip of her endorsing marriage equality be removed from a television ad produced by the pro-gay Respect for Marriage Coalition.

Theodore Olson, who served as solicitor general in President George W. Bush’s first administration, is one of the lead attorneys hired by the American Foundation for Equal Rights on behalf of the Prop 8 plaintiffs.

In a written statement, Evan Wolfson, president of Freedom to Marry, said, “A who’s who of the Republican Party has come before the Supreme Court to affirm that support for the freedom to marry is a mainstream position that reflects American values of freedom, family, and fairness, as well as conservative values of limited government and personal responsibility.” Opposition to marriage equality, he said, is becoming “increasingly isolated and the exclusion from marriage increasingly indefensible.”

Marc Solomon, Freedom to Marry’s national campaign director, cited the spade work that Ken Mehlman, who headed up Bush’s 2004 reelection campaign, has done in building Republican support for gay marriage.

“The last three years, Ken has been working tirelessly on the cause,” Solomon told Gay City News. “He has worked quietly. Whenever I give him 10 legislators to call, he asks me for the 11th and 12th... This is the powerful culmination of his strategic mind and his leveraging of his relationships to advance our cause.”

When Mehlman came out in 2010, he faced considerable criticism by many in the LGBT community for the 2004 Republican campaign’s reliance on anti-gay marriage amendments to push evangelical Christian voters to the polls. — PS

Mexican Supreme Court Strikes Down Gay Marriage Ban

A legal ban on same-sex marriage in the Mexican state of Oaxaca was declared unconstitutional by that nation’s Supreme Court on February 18, the Washington Blade reports. The ruling cited two US precedents — a 1967 Supreme Court ruling that struck down bans on interracial marriage and the high court’s 1954 Brown v. Board of Education decision that ordered an end to school segregation.

“The historic disadvantages that homosexuals have suffered have been amply recognized and documented: public scorn, verbal abuse, discrimination in their places of employment and in the access of certain services, including their exclusion from certain aspects of public life,” read the decision according to the Blade. “In comparative law it has been argued that discrimination that homosexual couples have suffered when they are denied access to marriage is analogous with the discrimination suffered by interracial couples at another time.”

Same-sex couples have been able to marry in Mexico City since 2010, and the court has since ruled that other Mexican states must recognize those marriages. — PS

Tebow Cancels Anti-Gay Date in Dallas

Tim Tebow, a New York Jets quarterback widely known for his devout Christianity, has canceled plans to appear at a Dallas megachurch whose pastor is unapologetic about his harshly anti-gay views, as well as hostility to Islam, Catholicism, Judaism, Hinduism, and Buddhism.

Tebow, who has often worn black eye strips inscribed with Biblical verse numbers during games, was scheduled to speak in April at the First Baptist Church in Dallas, whose pastor is Robert Jeffress.

In addition to labeling non-Protestant faiths as “cults,” Jeffress has said, “Homosexuality is perverse, it represents a degradation of a person’s mind and if a person will sink that low and there are no restraints from God’s law, then there is no telling to whatever sins he will commit as well.”

Both Islam and homosexuality, he has charged, lead to pedophilia.

Under pressure for days to bow out of the Dallas event, Tebow, taking to Twitter on February 21, stated that “due to new information that has been brought to my attention, I have decided to cancel my... upcoming appearance.”

The quarterback, widely expected to be let go by the..
LGBT Center Ends Moratorium on Israel/Palestine-Themed Gatherings

Protest against refusal to allow Sarah Schulman reading led to abandonment of two-year-old policy

BY DUNCAN OSBORNE

Following a furious outcry over its refusal to rent space for a reading by Sarah Schulman from her latest book, "Israel/Palestine and the Queer International," New York City’s gay community center has lifted a moratorium on renting to groups that “organize around the Israeli-Palestinian conflict.”

“Our resulting Space Use Guidelines, Terms and Conditions will govern the use of our space going forward, and, accordingly, the moratorium is no longer in effect,” the Lesbian, Gay, Bisexual & Transgender Community Center said in a February 15 statement. “The Center does not endorse the views of any groups to which it rents space. We adamantly believe in and defend free speech and the open exchange of ideas, but we deplore the rhetoric of hate and bigotry.”

On January 23, Queers Against Israeli Apartheid (QAIA), a group that opposes Israeli government policy on Palestine, applied to rent space for a March event featuring Schulman reading from her book. The reading was to coincide with Israeli Apartheid Week, a series of events that organizers say will discuss Israel’s “apartheid policies” toward Palestinians and promote the Boycott, Divestment, and Sanctions movement against Israel. News of the refusal spawned requests from QAIA for an explanation of the Center’s commitment to free expression and its policy on Palestine, applied to rent restrictions. Since its founding in 2011 after a controversy erupted over the Center renting space to the Siege Busters Working Group, an organization that was challenging the Israeli naval blockade of the Gaza Strip, and later over renting space to QAIA.

Lucas threatened to organize a boycott by Center donors if Siege Busters and QAIA were allowed to use the West 13th Street facility. While the Center can legally refuse to rent to groups, those who opposed the moratorium saw it as a violation of the Center’s mission and now 30-year history.

In an email, Lucas wrote that he had known since February 14 that the Center was going to lift the moratorium, or surrender “to the pressure from some of the Center’s elected officials.” The group also took the elected officials to task for the statement they issued.

“While the elected officials’ makes clear, both to the Center and to the queer community, that the Center’s ban on mentioning Palestinians, queer or otherwise, has its source in powerful political circles,” the group wrote. “The bigotry institutionalized in New York City’s politics, which has chained our community center for the past two years, must still be challenged.”

Sarah Schulman and Glennda Testone. Stuart Appelbaum, the openly gay president of the Retail, Wholesale and Department Store Union, and Steven Goldstein, who then chaired Garden State Equality, New Jersey’s gay lobbying group, also supported QAIA.

In an email, Lucas wrote that he had absolutely no time to be fighting with the spineless LGBT Center of New York who have no backbone or principles," Lucas wrote. "I would advise people to stop donating to the center and believe the city should stop funding an organization whose original mission of helping gay people has changed to providing a platform to anti-Israeli hate groups.”

Roughly 20 minutes after the Center issued its statement on the moratorium’s end, Quinn, Assemblywoman Deborah Glick, State Senator Brad Hoylman, and City Councilman Jimmy Van Bramer issued a statement commending the Center for ending the moratorium.

The four gay and lesbian elected officials also said that they “categorically reject attempts by any organization to use the Center to delegitimize Israel and promote an anti-Israel agenda.”

In a statement, QAIA expressed some distrust of the new policy. "We are also concerned that the Center’s guidelines for using space there says ‘no group utilizing space at the Center shall engage in hate speech or bigotry of any kind.’" the group wrote. “We completely deplore bigotry of any kind, but we cannot help but wonder who will define ‘hate speech’ and/or ‘bigotry of any kind.’ There needs to be more clarification on this issue.”

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Prop 8, from p.10

denying marriage to their parents disadvantages them. Both briefs find support for the non-child-centered elements of marriage in prior Supreme Court rulings. AFER’s first-rate advocates should be acknowledged for their achievement. David Boies (and his colleagues at Boies, Schiller & Flexner) and Theodore B. Olson (and his colleagues at Gibson, Dunn & Crutcher) have turned out a brief that is a true masterpiece — precise and passionate, every word calculated to make its mark.

And San Francisco City Attorney Dennis J. Herrera can be proud of the powerful brief produced by his chief deputy, Therese M. Stewart. The next stage in the Prop 8 case will be the filing of amicus briefs in support of AFER and the City of San Francisco, and then a reply from the Prop 8 Proponents. Oral argument at the Supreme Court takes place on March 26. The immediate drama now focuses on the White House, where President Barack Obama is under mounting pressure to authorize the Justice Department to file an amicus brief in this case. The federal government is not a party to this case and is busy preparing to challenge the federal Defense of Marriage Act in the oral arguments to be held on March 27. Many of the arguments that the solicitor general will make in attacking the “justifications” for DOMA are pertinent to the Prop 8 case — not least the question of the standard for judicial review — so filing an amicus brief here would be redundant from a legal point of view. It could take on great meaning, however, in terms of strategy and the signals it sends to both the Supreme Court and the public.