



### Legal Analysis of Plaintiffs' Brief in *Hollingsworth v. Perry*

Plaintiffs argue that the Proposition 8 Proponents lack standing because they do not personally suffer any injury by Proposition 8's invalidation. But the Supreme Court has acknowledged that each State has an unquestionable interest in defending its laws, and that state law may identify persons (such as Proponents here) to represent that undeniable interest. Because the California Supreme Court unanimously recognized that these Proponents have the right to represent the State's interest in defending Proposition 8, Proponents have standing in this case.

Plaintiffs next assert that the United States Constitution includes a fundamental right to same-sex marriage. This argument overlooks, *inter alia*, Supreme Court precedent on fundamental rights analysis, requiring: (1) a "careful description" of the asserted fundamental liberty interest, which in this case is a supposed right to same-sex marriage, and (2) a finding that the asserted interest is deeply rooted in America's history. Yet same-sex marriage is not deeply rooted in the history and traditions of our nation, recent occurrences notwithstanding. Consequently, Plaintiffs' claim to a fundamental right to same-sex marriage must fail and Proposition 8 does not violate the Fourteenth Amendment.

Plaintiffs then argue that "sexual orientation" should be treated as a suspect classification, like race or sex, thus triggering what is known as heightened constitutional scrutiny regarding Proposition 8. But this focus ignores that laws affirming marriage as the union of one man and one woman rationally distinguish between same-sex couples and opposite-sex couples, and that this biologically-based distinction is rooted in the reality that only opposite-sex couples naturally procreate. This difference makes Proposition 8 constitutional, for the Constitution requires only that a State treat similarly situated persons similarly. The State is not required to engage in gestures of superficial equality or otherwise pretend that different things are the same. Moreover, Plaintiffs' heightened scrutiny argument also ignores that "sexual orientation" is not an appropriate suspect classification because, among other things, "sexual orientation" is not an immutable characteristic and gays and lesbians wield tremendous political power.

Plaintiffs finally argue that Proponents must present a reason to maintain marriage as the union of one man and one woman. But distinguishing between same-sex couples and opposite-sex couples is constitutional so long as the inclusion of one group promotes a legitimate governmental purpose and the addition of other groups would not. Proponents thus need only show that opposite-sex couples generally further the State's procreative purpose for marriage, while same-sex couples do not. Only opposite-sex relationships implicate society's interest in ensuring responsible procreation. As a result, Proposition 8 does not violate the Equal Protection Clause of the Fourteenth Amendment.

2/21/2013