BREAKING NEWS: COURT OVERTURNS PROP 8; JOY FOR MARRIAGE EQUALITY

Yesterday's anticipation has turned into today's joy. Judge Vaughn Walker of the United States District Court for the Northern District of California (NDCA) has issued his verdict and, as predicted, he has found in favor of Plaintiffs Kristin Perry, Sandra Steir et. al. The court, in a historic opinion and verdict, has declared California's Proposition 8 to be unconstitutional:

> Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8. California is able to issue marriage licenses to same-sex couples, as it has already issued 18,000 marriage licenses to same-sex couples and has not suffered any demonstrated harm as a result, see FF 64-66; moreover, California officials have chosen not to defend Proposition 8 in these proceedings.
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> Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without bond in favor of plaintiffs and plaintiff-intervenors and

> against defendants and defendant-intervenors pursuant to FRCP 58.

Here is the full official decision and verdict and it is framed under both equal protection and due process.

The opinion is, again as predicted, extremely well written, consummately detailed, brilliantly structured and contains a foundation of extremely well supported findings of fact and conclusions of law. In short, Vaughn Walker has crafted as fine a foundational opinion as could possibly be hoped for, and one that is designed with the intent to withstand appellate scrutiny not just in the 9th Circuit, but in the Supreme Court as well.

Obviously this is but a step in the process because there will be appeals, and the case will, without question, go to the Supreme Court. But, that said, you could not ask for a better platform and posture for a case on this issue to go to the Supremes on. It is all that and more.

Additionally, regarding the Defendant-Intervenors' request for a stay, Judge Walker has ordered as follows:

> Defendant-intervenors ("proponents") have moved to stay the court's judgment pending appeal. Doc #705. They noticed the motion for October 21, 2010 and moved to shorten time. Doc #706.
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> The motion to shorten time is GRANTED.
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> Plaintiffs, plaintiff-intervenor and defendants are DIRECTED to submit their responses to the motion to stay on or before August 6, 2010, at which time the motion will stand
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> submitted without a hearing unless otherwise ordered.
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> The clerk shall STAY entry of judgment herein until the motion to stay pending appeal, Doc #705, has been decided.

There will obviously be a lot of further analysis and detailed discussion and dissection of Judge Walker's opinion to follow, both at this blog and elsewhere. I would like to make one point as to the much discussed prospects on appeal, as that is clearly a concern and fear of anybody interested in the ultimate issue of marriage equality and removal of pernicious discrimination from American society.

The common wisdom is that the prospects for upholding Judge Walker's decision in the 9th Circuit are good. I agree. However, the common fear is that the ever more conservative and dogmatic Roberts Court will reverse and ingrain the discrimination, inequality and hatred of Proposition 8 and its supporters deep into American law and lore. I am much more optimistic this is not the case.

As the inestimable Linda Greenhouse noted recently, although the Roberts Court is increasingly dogmatically conservative, and Kagan will move it further in that direction, the overarching influence of Justice Anthony Kennedy is changing and, in some ways, declining. However, there is one irreducible characteristic of Justice Kennedy that still seems to hold true; she wrote of Kennedy:

> …he embraces whichever side he is on with full rhetorical force. Much more than Justice O'Connor, whose position at the center of the court fell to him when she left, Justice Kennedy tends to think in broad categories. It has always seemed to me that he divides the world, at least the world of government action — which is what situates a case in a constitutional framework — between the fair and the not-fair.

The money quotes of the future consideration of the certain appeal and certiorari to come on Judge Walker's decision today in *Perry v. Schwarzenegger* are:

> Laws designed to bar gay men and lesbians from achieving their goals through the political process are not fair (he wrote the majority opinion striking down such a measure in a 1996 case, Romer v. Evans) because “central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”
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> ……
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> In a book titled “Justice Kennedy’s Jurisprudence,” a political scientist, Frank J. Colucci, wrote last year that Justice Kennedy is animated by an “ideal of liberty“ that “independently considers whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person’s standing in the community, or violate essential elements of human dignity.” That is, I think, a more academically elegant way of saying fair versus not-fair.
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> So the challenge for anyone arguing to Justice Kennedy in the courtroom, or with him as a colleague in the conference room, would seem to be to persuade him to see your case on the fair (or not-fair, depending) side of the line.

I believe that Linda is spot on the money with her analysis of what drives Anthony Kennedy in his jurisprudence. And this is exactly what his longtime friend, and Supreme Court advocate extraordinaire, Ted Olson will play on and argue when the day arrives. It is exactly what Vaughn Walker has ingrained in to and framed his extraordinary decision today on.

Today is one of those rare seminal days where something important and something good has occurred. Fantastic. The beauty and joy of equality, due process and equal protection under the Constitution of the United States of America.