

# BREAKING NEWS: JUDGE WALKER'S PROP 8 STAY DECISION



Liberty & Justice by Mirko Ilic

A week ago yesterday, Judge Vaughn Walker issued his landmark decision in the *Perry v. Schwarzenegger* Proposition 8 marriage equality case. Concurrent with his decision, Walker ordered a temporary stay of the judgment pending his consideration and determination of Defendant-Intervenors' Motion For Stay Pending Appeal, and there has been much anticipation of that ruling ever since.

It is here.

The stay requested by DIs has been DENIED by the court, but will be kept in force until August 18 in order to give DIs a chance to apply for a stay from the 9th. The key language from the ruling:

None of the factors the court weighs in considering a motion to stay favors granting a stay. Accordingly, proponents' motion for a stay is DENIED. Doc #705. The clerk is DIRECTED to enter judgment forthwith. That judgment shall be STAYED until August 18, 2010 at 5 PM PDT at which time defendants and all persons under their control or supervision shall cease to apply or enforce Proposition 8. It is so ordered.

I thought from the outset of the stay application that Judge Walker would deny it at the District level in order to force the 9th to get moving on the appeal quickly:

Furthermore, Walker not granting a stay for DIs, by definition, accelerates the

appellate process by making the 9th Circuit assign a panel and consider the the certain stay request by DIs there once Walker denies it at the District level. Walker knows this will accelerate the consideration by the 9th and keep it moving along.

Not to mention that the tenor, tone, assertiveness, vibrancy and passion of Judge Walker's main judgment on the merits is, as the real defendants in interest, the State of California and Governor have argued, simply not consistent with there being a legitimate basis for stay. And so it has been decided exactly as predicted.

And with that, the case now moves on to the 9th Circuit Court of Appeals. As the DIs have already noticed their appeal, the case is already docketed at the 9th and a presumptive briefing schedule set. Appellant/DIs' opening brief is due November 12, 2010 and Appellee/Plaintiffs' answering brief is due December 13, 2010. Appellee/DIs have the option to file a reply brief if they wish (and they would) by December 27, 2010.

So now the question is which three judges will be assigned to the panel that will consider and rule on the appeal, because the makeup of the appellate panel is absolutely critical to the process and potential outcome. There has not yet been a formal panel assigned to the appeal, but just as with the court protocol I used to predict Walker's decision ahead of time, there is a tradition and protocol generally followed in the 9th Circuit that may give us an idea of the panel that will be deciding this seminal case.

In the 9th Circuit, when a case goes up on appeal, and it has been there before to a given panel on any issue, that panel has the option of taking the full appeal when it is filed. Well, the *Perry* case has indeed already been up to the 9th previously on an interlocutory appeal of a

discovery issue during the trial process, and that appeal was decided by a panel consisting of Judges Wardlaw, Fisher and Berzon. I think there is a very decent chance the standard 9th protocol is followed here and the full appeal is assigned to the previous panel of Wardlaw, Fisher and Berzon, which makes sense in terms of judicial economy since they are already up to speed on the parties and the case facts and posture.

So who are these judges, and what is the book on them? Well, that is where the fun comes in. They are all three Clinton appointees, and two of them, Marsha Berzon and Ray Fisher, clerked for Justice Brennan. Solid liberal credentials for sure, and Kim Wardlaw may actually be even more enlightened. If the appeal gets assigned to this panel, it would be in excellent hands and I would like very much the chances for upholding Judge Walker's decision in favor of marriage equality for all.

So the case now moves on from the meticulous hands of Vaughn Walker and up to the 9th Circuit. First there is the matter of assignment to a panel. Then we will see whether the automatically generated briefing schedule set upon filing stays in place or is accelerated, whether by motion by a party or *sua sponte* by the court. It will be exciting to watch such a historic case continue to play out right in front of our eyes, and Emptywheel and Firedoglake will be bringing you complete coverage every step of the way including planned live coverage of the critical oral argument. Stay tuned!

UPDATE: And, as a simply beautiful little parting shot poke in the eye to the DI H8ters and bigots, Judge Walker's court also just executed and lodged the Permanent Injunction prohibiting any and all enforcement of Proposition 8.

This action having come before and tried by the court and the court considered the same pursuant to FRCP 52(a), on

August 4, 2010, ordered entry of judgment in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors and each of them, Doc #708, now therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.

Vaughn Walker is something special, and the way he has worked this case is simply a work of art. My hat is off to a wonderful man and great judge. Liberty, justice and equality are beautiful things when you really see them in action. Let's hope the 9th keeps that vision intact and alive; I think they will.

[The absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Mirko is an artist par excellence in New York who also teaches illustration and design. Please visit Mirko and check out his stock of work, it is really superb.]