Federal judge strikes down anti-gay Proposition 8 in California

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In a lengthy ruling issued late Wednesday afternoon, Federal District Court Judge Vaughn R. Walker declared that California's ban on same-sex marriage was unconstitutional. The ban was imposed in a statewide referendum in November 2008. Proposition 8 passed by a narrow margin, 52 percent to 48 percent.

Walker struck down the ban, which had overturned a California State Supreme Court ruling that, under the California state constitution, gay men and women have a right to marry their partners. Some 18,000 gay couples married during the interval between the state court decision and the passage of Proposition 8, and these marriages remain legally recognized.

The federal court decision does not immediately reinstate gay marriage in the state, as Walker stayed his own decision pending a hearing Friday. At that time he will hear arguments on whether the decision's effect should be stayed indefinitely, pending appeal.

Right-wing Christian fundamentalist and anti-gay groups immediately filed an appeal of Walker's decision with the Ninth Circuit Court of Appeals, which has jurisdiction over nine western states, eight of which have enacted laws banning gay marriage. Any appeals court decision is certain to be appealed to the US Supreme Court.

There was a barrage of incendiary reactions from right-wing circles, focused largely on the fact that Walker is one of three openly gay federal judges. Now the chief judge of the US District Court for Northern California, Walker was first nominated to the federal bench by Ronald Reagan in 1987. After being initially blocked by Democratic opposition in Congress, in part because he was deemed too conservative, his nomination was resubmitted by George H.W. Bush and he was confirmed in 1989.

Walker's 136-page ruling was an across-the-board demolition of the constitutional basis for Proposition 8, which he declared was nothing more than an effort to institutionalize anti-gay bigotry, to "enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples."

He said that it was clear from the evidence presented at trial last January that there was no "rational basis" for the singling out of gays and lesbians. While a narrow majority had voted for Proposition 8, "voters' determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons."

The judge found that Proposition 8 violated two guarantees provided by the 14th Amendment of the US Constitution, due process and equal protection of the law.

In an important legal distinction, Walker cited court precedents that marriage—not same-sex marriage—is a fundamental right, and that the purpose of Proposition 8 was to deny this fundamental right to gays and lesbians. The plaintiffs were not seeking recognition of a new right, he wrote, but rather the same right enjoyed by opposite-sex couples.

The judge also found that Proposition 8 violated the equal protection clause, which requires that legal restrictions on a particular group must have some compelling or rational state interest, and cannot be arbitrarily imposed. "Excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest," Walker wrote.

This argument seems to be tailored to the language of a 1996 Supreme Court decision, *Romer v. Evans*, written by Justice Anthony Kennedy, the likely swing vote on any gay rights decision by the highest court. In that ruling, Kennedy struck down a state constitutional amendment in Colorado that barred any city, town or county from enacting local ordinances to protect gay rights. Kennedy wrote, "the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a

rational relationship to legitimate state interests."

One of the most striking elements of the ruling was its flat repudiation of any link between law and religious doctrine. "The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples," Walker wrote.

He discussed the religious opposition to homosexual identity and behavior, citing documents from the Catholic Church, the Southern Baptist Convention, the Lutheran Church-Missouri Synod, and the Mormons, all of which backed Proposition 8, and explained that no church could or would be compelled to give religious sanction to civil marriages for gays and lesbians. He then wrote the following (upper-case passage in the original):

"A PRIVATE MORAL VIEW THAT SAME-SEX COUPLES ARE INFERIOR TO OPPOSITE-SEX COUPLES IS NOT A PROPER BASIS FOR LEGISLATION.... California's obligation is to treat its citizens equally, not to 'mandate [its] own moral code.'"

This strikes at the core of the position of the religious right, which on a wide array of social and cultural issues—gay rights, abortion, contraception, etc.—seeks to impose the views of Christian fundamentalism, or its Roman Catholic equivalent, on the entire society, using the coercive power of the state.

This aspect of the ruling left the supporters of Proposition 8 both apoplectic and uncomprehending. "They say we're just like the Ku Klux Klan," sputtered Brian Brown of the National Organization for Marriage, one of the anti-gay-marriage groups, at a press briefing. "Those of us who believe marriage is a union between a man and a woman are going to be treated in law as if we're bigots."

In a legal sense, Walker's decision is negative rather than prescriptive. He did not find that the federal constitution guarantees any special rights to gays and lesbians, only that it forbids the state of California to single out gays and lesbians for discriminatory treatment, in this case, by barring them from marrying.

Because Walker conducted the case as a bench trial, without a jury, he is the finder of fact as well as law, and his findings of fact are a key element in the ruling. The attorneys for the anti-gay groups put on a very limited factual showing, only two witnesses, one of them so openly bigoted that Walker ruled his testimony inadmissible. The plaintiffs' attorneys, Theodore Olson, former Bush administration solicitor-general, and David Boies, former attorney for Democrat Al Gore in the 2000 presidential election, put on an extensive factual case with 16 witnesses.

Much of the testimony of expert scientific witnesses is incorporated in Walker's factual findings, including:

• Sexual orientation is biological and innate, not chosen

• California has no state interest in changing the sexual orientation of gays and lesbians

• Same-sex couples form relationships as viable as those of opposite-sex couples

• Domestic partnership is not a cultural, legal or economic equivalent of marriage

• Same-sex marriage will have no effect on the stability or health of opposite-sex marriages

• Proposition 8 places the force of law behind the unequal and discriminatory treatment of gays and lesbians.

• Sexual orientation and parenting skills are unrelated.

The judge also cited considerable evidence of the crude anti-gay bigotry that animated the campaign for Proposition 8, noting that it "relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian."

This is the second major court decision in a month in favor of gay rights, following the ruling of a federal judge in Massachusetts that declared unconstitutional the 1996 Defense of Marriage Act (DOMA), a federal law passed by a Republican Congress and signed by Democratic President Bill Clinton.

The Obama administration greeted the ruling with a distinct lack of enthusiasm. Obama tried to corral both gay rights supporters and traditional churchgoers in his 2008 campaign, opposing same-sex marriage and opposing Proposition 8 as well. After initially supporting DOMA, he has since called for its repeal.

The White House issued a brief statement Thursday that took no position on the judge's ruling, but merely restated Obama's opposition to Proposition 8 as "divisive and discriminatory." A White House spokesman told the press that Obama's opposition to gay marriage was unchanged.