

Here's to the 9th Circuit

by Brenda Feigen on February 8, 2012

Prop 8 — and the narrow approach ahead

As an attorney and half of one of the 18,000 same-sex couples who married in 2008 in California, I was delighted that the 9th Circuit Court of Appeals made history yesterday by ruling that Prop 8 is an unconstitutional violation of the Equal Protection Clause. The 9th Circuit ruled that even though domestic partners have all the rights and obligations of opposite-sex married couples, that's not enough. The name, alone, is what matters. Consider the following excerpt:

"We need consider only the many ways in which we encounter the word 'marriage' in our daily lives and understand it ... to convey a sense of significance. We are regularly given forms to complete that ask us whether we are "single" or "married." Newspapers run announcements of births, deaths and marriages. We are excited to make a life with someone and ask, "Will you marry me?" (Certainly it would not have the same effect to see "Will you enter into a registered domestic partnership with me?) ... "Marriage" ... is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it."

In its opinion, the 9th Circuit was very, very careful. It relied on an already-decided U.S. Supreme Court case that ruled unconstitutional an amendment to the Colorado constitution that disallowed cities from passing laws forbidding discrimination against gays and lesbians in employment, housing, etc. Once a group has a right, the 9th Circuit said, that right cannot be withdrawn and still survive constitutional scrutiny.

For another day is the decision as to whether same-sex couples **MUST** be granted the right to marry in states around the country. This narrow approach is the key to the decision — and is the reason I believe that the U.S. Supreme Court will find it very hard to overturn its decision (that is, if the case reaches that Court and the Court takes it).

The proponents have 15 days to ask for a review of this decision by the full 9th Circuit and/or 90 days to appeal to the U.S. Supreme Court. If the Court doesn't take this case or if it affirms, same-sex couples will marry in California. So yesterday was a very exciting day, and one that will go down in history. The Supreme Court's hand may be forced because the 9th Circuit relied on an already-decided high court case.

In my opinion, the 9th Circuit did a damn good job!

Editor's Note: Brenda Feigen is Principal in her firm, Feigen Law Group, where she practices antidiscrimination and civil rights, family, environmental, and intellectual property law. A graduate of Harvard Law School, she co-founded Ms. Magazine with Gloria Steinem and directed with (now Justice) Ruth Bader Ginsburg the Women's Rights Project of the ACLU. Her memoir, Not One of the Boys: Living Life as a Feminist, was published by Alfred A. Knopf in 2000. She moved from Manhattan to Los Angeles to produce her first feature film and currently lives there with Joanne Parrent, her longtime partner and spouse.