THE CONSTITUTION, PRIVACY, AND PROP 8: A CONVERSATION WITH THE HONORABLE VAUGHN R. WALKER

Case Summaries

Proposition 8

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. Following the court's decision, California counties issued more than 18,000 marriage licenses to same-sex couples. Later that year, California voters passed ballot initiative Proposition 8, which amended the California Constitution so that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5.

Two same-sex couples who wished to marry filed suit in the Northern District of California, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named California's Governor, Attorney General, and other officials as defendants. However, the officials refused to defend Prop 8 in court, although they continued to enforce it throughout the litigation. The District Court allowed the official proponents of Prop 8 to intervene and defend it.

After a twelve-day trial, the District Court declared Prop 8 unconstitutional and permanently enjoined California officials from enforcing the law. The District Court held that because Prop 8 cannot withstand rational basis review, it was invalid on both due process and equal protection grounds. With respect to the due process claim, the District Court found that Prop 8 was subject to strict scrutiny because it implicated the Plaintiffs' fundamental right to marry. With respect to the equal protection claim, the District Court stated that "strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). However, the District Court held that it need not decide if discrimination based on sexual orientation required a more stringent level of scrutiny since Prop 8 did not survive rational basis review.

The California officials declined to appeal the District Court order, although the Prop 8 proponents did. The Ninth Circuit questioned whether the Prop 8 proponents had standing to appeal the District Court order. The Ninth Circuit certified a question to the California Supreme Court regarding whether under California law, the official proponents of an initiative measure either: (1) possess a particularized interest in the initiative's validity or (2) are authorized to appear and assert the State's interest in the initiative's validity and to appeal a judgment invalidating the measure when public officials decline to defend the measure or appeal such a

judgment. Without addressing whether the proponents possess a particularized interest, the California Supreme Court concluded that the proponents are authorized to appear and assert the State's interest in the initiative's validity.

Relying on the California Supreme Court's conclusion, the Ninth Circuit found that the Prop 8 proponents had Article III standing. The Ninth Circuit affirmed the District Court's decision and found Prop 8 unconstitutional, although on much narrower grounds. It held that Prop 8 violated the Equal Protection Clause because it targeted a minority group and withdrew a right the group possessed without a legitimate reason for doing so. Judge Reinhardt's opinion did not address whether Prop 8 deprived same-sex couples of the fundamental right to marry under the Due Process Clause. It also did not address whether excluding same-sex couples from state-sponsored marriage while allowing opposite-sex couples access violated the Equal Protection Clause.

In June 2013, the U.S. Supreme Court issued its decision. In a 5–4 decision, the Court vacated the Ninth Circuit judgment because the Court found that the Prop 8 proponents lacked standing to appeal the District Court's order. In order to have standing, a litigant must seek relief for an injury that affects him in a personal and individual way. However, the majority found that the Prop 8 proponents' only interest was to uphold the constitutional validity of the initiative measure and that such a "generalized grievance" was insufficient to confer standing. Further, the Prop 8 proponents could not assert the State's cognizable interest in appealing the District Court's judgment. Although the California Supreme Court had concluded that under California law proponents of an initiative measure are authorized to appear and assert the State's interest, standing in federal court is a question of federal law, not state law. The majority found that the Prop 8 proponents were not agents of the State and could not assert the State's interest. The Court held: "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

The dissent, written by Justice Kennedy, described the majority's decision as "shortsighted" because it misconstrued principles of justiciability in order to avoid a controversial constitutional issue. The dissent found that the majority's decision completely undermined the purpose of California's initiative system, which is to establish a lawmaking process that does not depend upon state officials, and essentially gave the Governor and Attorney General a *de facto* veto.

Privacy: NSA Surveillance

In re National Security Agency Telecommunications Records Litigation, 700 F. Supp. 2d 1182 (N.D. Cal. 2010), *aff'd in part, rev'd in part, vacated sub nom.* Al-Haramain Islamic Foundation, Inc. v. Obama, 705 F.3d 845 (9th Cir. 2012).

In re National Security Agency Telecommunications Records Litigation involves numerous cases related to the U.S. government's Terrorist Surveillance Program ("TSP"), which intercepted international communications into and out of the United States of persons alleged to have ties to Al Qaeda and other terrorist networks. In this particular case, the Al-Haramain Islamic Foundation and two U.S. citizens, who were attorneys for Al-Haramain, sought damages from the government for intercepting and eavesdropping on their international telephone conversations without warrants.

The defendants moved to dismiss the complaint because: (1) the plaintiffs lacked standing to obtain prospective declaratory or injunctive relief with respect to the TSP because the TSP was terminated in January 2007 and (2) the court lacked jurisdiction because § 1810 of the Foreign Intelligence Surveillance Act ("FISA") does not expressly waive the sovereign immunity of the United States. The District Court denied the defendants' motion to dismiss because the plaintiffs' prayer for equitable relief was not predicated on the continued existence of the TSP. With respect to sovereign immunity, the court upheld a previous decision in which it found that § 1810 implicitly waived sovereign immunity.

The plaintiffs moved for summary judgment on two issues: (1) the plaintiff's Article III standing and (2) the defendants' liability under FISA's civil liability provision, 50 U.S.C. § 1810. The District Court granted the plaintiffs' motion for summary judgment. The court found that the plaintiffs were able to establish their standing with non-classified evidence that was not protected by the common law states secret privilege ("SSP"). The plaintiffs had made out a prima facie case of electronic surveillance, which shifted the burden onto the government to demonstrate to that the alleged surveillance was authorized by a FISA warrant or that plaintiffs were not in fact electronically surveilled. FISA provides a procedure in which a district court may review in camera and ex parte classified materials "as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). However, the defendants failed to take advantage of the procedure or otherwise show the court that a warrant existed. Accordingly, the District Court granted the plaintiffs' motion and held the defendants liable under FISA.

The Ninth Circuit affirmed in part, reversed in part, and vacated the District Court's judgment. It affirmed the District Court's decision to dismiss the claims against FBI Director Robert S. Mueller III in his individual capacity. However, the Ninth Circuit vacated the District Court's judgment because it found that Al Haramain's suit for damages against the United States could not proceed under § 1810. Specifically, the Ninth Circuit found that the government had

not waived its sovereign immunity in § 1810. The court contrasted § 1810 with §§ 1806(a), 1825(a), and 1845(a), in which Congress included explicit waivers of sovereign immunity as part of the Patriot Act. In light of these, the lack of an explicit waiver in § 1810 was glaring and did not support the District Court's determination that there was an implied waiver. The Ninth Circuit found the District Court's concern that FISA relief would become a dead letter was not valid because the plaintiffs can bring suit for damages against the United States for use of collected information under § 1806 (but not for the collection of the information itself).

Privacy: Internet/Technology

In re TD Ameritrade Accountholder Litigation, 266 F.R.D. 418 (N.D. Cal. 2009).

This class action arose from a security breach that exposed the private information of TD Ameritrade accountholders to "spammers" and others. The proposed settlement before the District Court contained the following terms: in return for the class dropping its claims, TD Ameritrade agreed to (1) retain an independent expert who will conduct penetration tests to determine whether the information security system has any vulnerabilities; (2) retain ID Analytics to conduct an additional analysis to determine whether the data breach may have resulted in identity theft for any members of the class; and (3) provide each class member with a unique identifier number that may be used to obtain a one-year subscription or a one-year renewal for an anti-virus, anti-spam internet security product.

The District Court found that the first two terms seemed to benefit TD Ameritrade more than the class members. These terms did not require TD Ameritrade to adopt any new permanent security measures to remedy the problems that gave rise to the lawsuit, and any reputable company dealing with sensitive personal data should already be taking such measures. The court found that the third term conferred "little to no benefit upon the class" because the class members either already owned anti-spam software, utilized anti-spam email services, or changed email addresses after the data breach and thus no longer needed such software to block spam caused by the breach. Although denial of final approval of a proposed settlement is unusual, the District Court denied approval due to its "reservations about the purported benefits of the proposed settlement."