



DEPARTMENT OF JUSTICE

1162 Court Street NE  
Justice Building  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4400

February 7, 2012

Governor John Kitzhaber  
Peter Courtney, Senate President  
Bruce Hanna, Co-Speaker of the House  
Arnie Roblan, Co-Speaker of the House  
Oregon State Capitol  
900 Court Street NE  
Salem, OR 97301

Re: California Proposition 8

Gentlemen:

This morning, the U.S. Court of Appeals for the Ninth Circuit held in *Perry v. Brown* that California's ban on same-sex marriage violates the United States Constitution. Ninth Circuit decisions apply to all states within the circuit, including Oregon, which has a similar state constitutional ban on same-sex marriage. There are important differences between how this legal issue has developed in Oregon (where the constitutional provision did not remove an existing statutory right to marry) and in California (where the constitutional provision took away that existing right). Nevertheless, the Ninth Circuit's decision will inevitably raise questions about the constitutionality and legal viability of Oregon's state constitutional ban on same-sex marriage.

We are currently studying the ruling and will be ready to provide the Governor with a complete analysis of the decision and its implications for Oregon law within forty-eight hours. In the meantime, this letter will provide you with basic information about the decision and likely next legal steps.

The Equal Protection Clause of the Fourteenth Amendment stipulates that the government may not provide different rights, privileges, and benefits to different groups of individuals unless there is a "rational basis" for the discriminatory conduct. The court here found that no "rational basis" exists for eliminating the right of same-sex couples to marry. Accordingly, under the opinion, California may not deny a license to marry to same-sex couples. As Judge Reinhardt concluded in the majority opinion, "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for laws of this sort."

The losing party in the case now has several procedural options. Although it could accept the court's decision, it is far more likely that the losing party will seek review of the decision. There are two primary options.

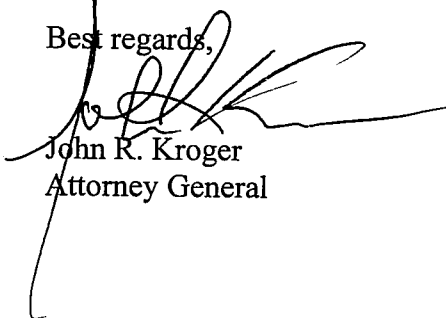
First, the losing party can seek *en banc* review, allowing a larger panel of Ninth Circuit judges to review the decision. The losing party has fourteen days to file a petition for *en banc* review. The decision to accept or reject *en banc* review could take from a few weeks to several months. A briefing schedule, oral arguments, and an opinion by the larger panel could delay a final decision by as much as a year.

Alternatively, the losing party could opt to appeal directly to the U.S. Supreme Court by filing a petition for *certiorari*. This is the process the losing party also would likely take if its petition for *en banc* review were denied. The deadline for seeking *certiorari* is ninety days. Given the magnitude of the case, the U.S. Supreme Court likely would grant review and hear the case during its next term, starting in October 2012.

If some path of review is pursued, the most critical intermediate question is whether the losing party seeks and obtains a stay of the Ninth Circuit ruling, which would, in effect, temporarily suspend the ruling until further review is completed. We consider a stay likely in this case, given the confusion that would ensue if the ruling were to go into effect while the case is still pending before the U.S. Supreme Court.

As noted above, we will be ready to provide a more complete legal analysis of the decision to the Governor and state agencies on Thursday. In the meantime, please contact me if I can provide any additional information.

Best regards,



John R. Kroger  
Attorney General

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