No. 10–16696

In The

United States Court of Appeals for the Ninth Circuit

Kristin Perry, et al.,

Plaintiffs–Appellees,

v.

Arnold Schwarzenegger, et al.,

Defendants,

and

Dennis Hollingsworth, et al.,

Defendants–Intervenors–Appellants

Appeal from the United States District Court
for the Northern District of California
Civil Case No. 09–2292 VRW
The Honorable Judge Vaughn R. Walker

BRIEF OF LIBERTY INSTITUTE, ASSOCIATION OF MARYLAND FAMILIES, CALIFORNIA FAMILY COUNCIL, CENTER FOR ARIZONA POLICY, CITIZENS FOR COMMUNITY VALUES, CORNERSTONE ACTION, CORNERSTONE FAMILY COUNCIL, DELAWARE FAMILY POLICY COUNCIL, FAMILY ACTION COUNCIL OF TENNESSEE, THE FAMILY FOUNDATION, THE FAMILY POLICY COUNCIL OF WEST VIRGINIA, FAMILY POLICY INSTITUTE OF WASHINGTON, FLORIDA FAMILY POLICY COUNCIL, GEORGIA FAMILY COUNCIL, ILLINOIS FAMILY INSTITUTE, INDEPENDENCE LAW CENTER, IOWA FAMILY POLICY CENTER, LOUISIANA FAMILY FORUM ACTION, MASSACHUSETTS FAMILY INSTITUTE, MICHIGAN FAMILY FORUM, MINNESOTA FAMILY COUNCIL, MISSOURI FAMILY POLICY COUNCIL, MONTANA FAMILY FOUNDATION, NEW JERSEY FAMILY FIRST, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, OREGON FAMILY COUNCIL, PALMETTO FAMILY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, WISCONSIN FAMILY ACTION, AND WYWATCH FAMILY ACTION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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Circuit Rule 26.1 Disclosure Statement

1. The full name of every party that the attorneys represent in this case:

   Liberty Institute, Association of Maryland Families, California Family Council, Center for Arizona Policy, Citizens for Community Values, Cornerstone Action, Cornerstone Family Council, Delaware Family Policy Council, Family Action Council of Tennessee, The Family Foundation, The Family Policy Council of West Virginia, Family Policy Institute of Washington, Florida Family Policy Council, Georgia Family Council, Illinois Family Institute, Independence Law Center, Iowa Family Policy Center, Louisiana Family Forum Action, Massachusetts Family Institute, Michigan Family Forum, Minnesota Family Council, Missouri Family Policy Council, Montana Family Foundation, New Jersey Family First, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Oregon Family Council, Palmetto Family Council, Pennsylvania Family Institute, Wisconsin Family Action, and WyWatch Family Action

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear:

   Kelly J. Shackelford, Jeffrey C. Mateer, Hiram S. Sasser III, and Justin E. Butterfield are attorneys with Liberty Institute, a public-interest law firm in Texas.

3. For all *amici curiae* that are corporations:

   i. Identify all parent corporations for all *amicus* parties:

      None.

   ii. List any publicly held company that owns 10% or more of any *amicus* party's stock:

      None.

s/ Kelly J. Shackelford
Kelly J. Shackelford

Table of Contents

Table of Authorities

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

Interest of the *Amici Curiae*[1]

Liberty Institute is a non-profit law firm dedicated to the preservation of civil rights and the promotion of individual liberty. Liberty Institute represents clients across the country whose rights have been trampled by those in authority. One of the most important civil rights for individual liberty is the right to self-government. The district court decision below threatens that right for the people of California. The judicial activism exemplified by the district court threatens the civil rights of many of Liberty Institute's clients across the country. If the district court's decision is upheld, the core principles that Liberty Institute fights for will be weakened.

The remaining thirty-one *amici* are Family Policy Councils—state-level organizations formed to invest in the future of America's families. These Family Policy Councils conduct policy analysis, promote responsible and informed citizenship, and advocate for family ideals. Much of the Family Policy Councils' advocacy and work is promoting legislative change, both directly and by encouraging the citizenry to work for change. Advocating for legislative change requires that the people be self-governing and have the power to change the laws or advocate that

1 This brief is filed with the consent of all the parties.

their legislators change the laws. The district court's decision makes this power mere pretense, undermining the efforts of the Family Policy Councils and all who would advocate for legislative change.

Introduction

In brushing aside the will of the people of California—declared in two separate initiatives—for the novel idea that marriage may be between other groups than one man and one woman, the District Court sacrificed "the most fundamental individual liberty of our people": the right to self-government. Empirical study demonstrates that the initiative process accurately reveals the will of the majority. Allowing the District Court's ruling to stand effectively imposes an arbitrary form of government upon California never chosen by or consented to by the people.

Summary of the Argument

The United States' government consists of checks and balances designed to limit the power of the various parts of the government, ensuring it follows the will of the people. As an additional check, many state and local governments provide for an initiative process by which the people may more directly express their will. Distinguished USC

professor Dr. John G. Matsusaka spent ten years performing empirical research to determine whether the initiative process accurately represents the will of the people or whether special interests subvert initiative processes. Dr. Matsusaka's research led him to the following conclusion: "Not a single piece of evidence links the initiative to nonmajority policies as the special interest subversion hypothesis would predict. … [B]ased on the facts, the initiative serves the many and not the few."

Twice, California used its initiative process to establish that the traditional definition of marriage should be used in that state. As the initiative process correctly serves as a check and balance against governmental appropriation of power, the District Court's abrogation of California's Proposition 8 is anti-majoritarian. At times throughout our nation's history, courts have subjugated the will of the people to the judges' own desires, often with disastrous results. Doing so is anti-democratic and ignores that self-governance is an important and essential part of liberty. Such actions by unelected judges disregard that the Bill of Rights provides that those powers not granted to the United States are reserved to the states and the people. These precepts are foundational to liberty and courts should not discard them as the whims of an elite few change.

Argument

When the Framers drafted the Constitution, they sought to secure liberty by implementing two systems of checks and balances: one horizontal—the tripartite division of the Federal government into the legislative, executive, and judicial branches—and one vertical—the establishment of a federal republic in which power was divided among the local, state, and national levels. As the Framers expected, political fighting ensued within these divisions of power with each branch of government and each level of government seeking more power for itself. At the foundation of this governmental structure, however, there is only one sovereign: the citizenry. As Benjamin Franklin observed, "In free Governments the rulers are the servants, and the people their superiors & sovereigns." 2 Records of the Federal Convention of 1787, at 120 (M. Ferrand, ed., 1911). With hesitancy and trepidation, then, should the one unelected, national branch of government veto the expressed will of the people.

I. Initiatives promote the will of the people better than government solely by the elite.

In addition to the tripartite government and federalism, the initiative process functions as an additional check to ensure that government

is responsive to the will of the people. The initiative process dates back to 1898, when South Dakota became the first state to implement the initiative process. By 1918, nineteen other states provided for the initiative process. John G. Matsusaka, For the Many or the Few 4 (Benjamin I. Page ed., paperback ed. 2008). At present, 24 states and 80 percent of cities with populations over 100,000 provide some form of the initiative process. *Id.* at 1 and 8. Currently, an estimated seventy percent of the population of the United States has some access to the initiative process. *Id.* at 1. Citizens used the initiative process regularly throughout the twentieth century, but a small fraction of times compared with the number of bills passed through the traditional legislative process. For example, "[i]n 1999 and 2000, only 35 measures were adopted by initiative compared to more than 10,000 new laws enacted by legislatures." *Id.* at 30. Despite the relatively few initiatives employed by the citizenry, the existence of the initiative in a state causes the state's policies to more closely abide by the will of the people.

Dr. Matsusaka[2] spent ten years analyzing the economic policies of each state in the United States and used regression analysis to isolate

2 "John Matsusaka is the Charles F. Sexton Chair in American Enterprise in the Marshall School of Business, Gould School of Law, and Department of Political Science at the University of Southern

the effects caused by the existence of the initiative in a given state. Dr. Matsusaka found that, in the early part of the twentieth century, states with the initiative process had slightly more liberal economic policies than non-initiative states, while in the latter part of the twentieth century, states with the initiative had slightly more conservative economic policies than non-initiative states. *See id.* at 73–74. Dr. Matsusaka's research found that in recent years, in states with the initiative process, total government spending lessened, spending shifted from the state government to the local government, and the sources of governmental income shifted from taxes to user fees and charges for services. *Id.* at 52. The ultimate question, however, is whether these policies are in furtherance of the will of the people or in contravention to the people's will. Dr. Matsusaka compared the results of his economic analysis of state policies

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California, and President of the Initiative and Referendum Institute at USC. He currently serves as Vice Dean for Faculty and Academic Affairs in the Marshall School. Matsusaka received his Ph.D. in economics from the University of Chicago, and has held visiting appointments at the Hoover Institution at Stanford University, UCLA, Caltech, and the University of Chicago. His research focuses on the financing, governance, and organization of corporations and governments. He has published numerous scholarly articles, serves as a consultant for the White House Council of Economic Advisors, and is the author of *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (University of Chicago Press, 2004)." John G. Matsusaka, Home Page of John Matsusaka, http://www-bcf.usc.edu/~matsusak/ (last visited Sept. 21, 2010).

with the results of studies by the Advisory Commission on Intergovernmental Relations, the American National Election Studies, and the Los Angeles Times/ABC News polls. *Id.* at 56–57. Dr. Matsusaka found that the economic policies of states with the initiative better followed the will of the people than did those of states without the initiative. *See id.* at 57–71. As Dr. Matsusaka observed,

> Not a single piece of evidence links the initiative to non-majority policies [as the hypothesis that special interests control the outcomes of initiatives] would predict. … [T]he fact that a comprehensive examination of fiscal policies from the beginning to the end of the twentieth century reveals not a shred of evidence for the special interest subversion view makes as compelling a rejection of a hypothesis as we ever get in empirical research. This is the main message of the [research]: based on the facts, the initiative serves the many and not the few.

Id. at 114.

When the Oregon Supreme Court upheld Oregon's initiative process in 1910, they acknowledged the principle found by Dr. Matsusaka by quoting Thomas Jefferson:

> On this view of the import of the term 'republic,' instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican, as they have more or less of the element of popular election and control in their composition; and believing as I do, that the mass of citizens is the safest depository of their own rights and especially,

> that the evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents, I am a friend to that composition of government which has in it the most of this ingredient.

Kiernan v. Portland, 112 P. 402, 405 (Ore. 1910) (quoting 15 *Writings of Thomas Jefferson* 23).

In other words, Dr. Matsusaka found empirically what Thomas Jefferson believed ideologically. The people know what they are doing. They are less likely to harm themselves than the "egoism of their agents" is to bring about harm upon them.

II. Self-government is foundational to California's sovereignty and should not be lightly overruled.

Twice now the people of California have expressed their will that marriage in the state of California follow the traditional definition of being between one man and one woman. In March of 2000, Californians used the initiative process to define marriage as between one man and one woman. When the California Supreme Court struck down this definition as violating California's constitution, the people of California again used the initiative process in 2008 to pass Proposition 8, a state constitutional amendment defining marriage as between one man and one woman. In accordance with Dr. Matsusaka's findings that initiatives

truly express the will of the people and not the will of the best-funded special interest, the people of California passed Proposition 8 despite the opposition to Proposition 8's having raised over three million more dollars than the supporting campaign. Michelle Minkoff et al., *Proposition 8 Campaign Contributions*, L.A. Times, http://projects.latimes.com/prop8/ (last visited September 21, 2010).

Through the initiative process, the people of California have made their will known. In their state, they want marriage to remain as it has for thousands of years. They spoke twice in eight years, and their will should not be subverted by one judge of one branch of the federal government's redefining core institutions like marriage to follow the whims of the elite.

History demonstrates that an overzealous judiciary acting to protect the people from their own ideas has not been good for the United States. In 1857, the Supreme Court overturned the Missouri Compromise in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) ("[S]ix of us declare that [the Missouri Compromise law] was unconstitutional."). It has been suggested that at least some members of the Supreme Court inserted themselves in place of the legislative process in *Dred Scott* to promote

slavery in a less controversial manner than were the legislature involved—they were trying to save the country from itself. *See, e.g.*, Mark A. Graber, Dred Scott and the Problem of Constitutional Evil 41–42 (2006). Again, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court ruled that the Civil Rights Act of 1875, prohibiting discrimination by public accommodations, was unconstitutional, striking down the will of the people expressed through their representatives and setting civil rights back by eighty years. Had the Supreme Court engaged in judicial restraint and allowed the civil rights laws passed by Congress to stand, perhaps some or many of the thousands of lives lost to lynchings in the South might have been saved. It is true that the courts did return to these issues generations later and remedy the errors that they implemented, but the Court's actions prove that the elite few do not know better than the majority.

Judicial activism to impose the views of the "enlightened" judiciary on the masses has another danger, expounded in Justice Black's famous dissent:

> It can be, and has been, argued that when this Court strikes down a legislative act because it offends the idea of "fundamental fairness," it furthers the basic thrust of our Bill of Rights by protecting individual freedom. But that argument

> ignores the effect of such decisions on perhaps *the most fundamental individual liberty of our people*—the right of each man to participate in the self-government of his society. Our Federal Government was set up as one of limited powers, but it was also given broad power to do all that was "necessary and proper" to carry out its basic purpose of governing the Nation, so long as those powers were not exercised contrary to the limitations set forth in the Constitution. And the States, to the extent they are not restrained by the provisions in that document, were to be left free to govern themselves in accordance with their own views of fairness and decency. Any legislature presumably passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. The people … may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people, in my opinion, should never be denied by this Court except when the decisions of the people … conflict with the express or necessarily implied commands of our Constitution.

In re Winship, 397 U.S. 358, 384–85 (1970) (Black, J., dissenting) (emphasis added).

The people may be wrong, as they often are. The courts, too, may be wrong, as they often are. But this we know: twice in eight years the people of California declared they want to keep marriage as it has been for time immemorial. Courts should not violate the people's self-governance—the "most fundamental individual liberty of our people"—and impose instead their own views upon the people of California. The Tenth

Amendment of the Bill of Rights, which promises that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," should be preserved against a judge's own sense of morality that he believes trumps the morality held by the people of California and most Americans for over two hundred years.[3] This nation was built upon principles of self-government that the District Court's ruling brushes aside so that a new morality may be forced instead.

In the latter half of the eighteenth century, King George III, outside of the authority granted to him by the colonial charters, "refused his Assent to Laws" passed by the colonists; "dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people;" "combined with others to subject [the colonists] to a jurisdiction foreign to [the colonists'] constitution, and unacknowledged by [the colonists'] laws, giving his Assent to their Acts

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3 The district court found that "Proposition 8 finds support *only* in such [moral disapprobation]. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives," "no matter how large the majority that shares that view." ER59 (emphasis added). While it is dubious whether the district court can ascertain the moral views and reason for supporting Proposition 8 of more than seven million California voters, this does not negate that the district court is placing its own morality in place of that of the citizens of California.

of pretended Legislation;" "abolish[ed the colonists'] most valuable Laws and alter[ed] fundamentally the Forms of [the colonists'] Governments;" and "suspend[ed the colonists'] Legislatures, and declar[ed] themselves invested with power to legislate for the [colonists] in all cases whatsoever." The Declaration of Independence paras. 3, 7, 15, 23, and 24 (U.S. 1776). In significant part because of the Crown's removal of the legislative power from the people and vesting of it in persons unconstitutionally qualified to legislate, and because true governments "deriv[e] their just powers from the consent of the governed," the colonists considered that "it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." *Id.* para. 2. If the district court's decision to abolish the citizens of California's laws and to invest itself with the power to legislate for the people of California is upheld, the "new Guard" is but following the old and we have come full circle.

Conclusion

For the foregoing reasons, the judgment of the District Court for the Northern District of California must be reversed.

September 23, 2010

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,909 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 23, 2010.

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