

# Governor's Gay Marriage Views Sought

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SAN FRANCISCO — Even as he rejected bids by several organizations to join a case challenging the constitutionality of California's same-sex marriage ban, a U.S. judge on Wednesday called out one party already in the case, defendant Gov. Arnold Schwarzenegger, for not taking a position.

Amid the clamor of voices fighting to be heard in the controversial litigation, Chief Judge Vaughn R. Walker told an attorney for Schwarzenegger that the governor's silence "surprised him." The governor has taken no position on the claims of two gay couples, who say Proposition 8, passed by voters in November, denies them equal treatment under federal law. *Perry v. Schwarzenegger*, 09-2292. The judge cited Schwarzenegger's virtual absence as one reason for allowing the City and County of San Francisco to intervene as the lone governmental voice.

"I know [Schwarzenegger] has the budget, water and fires, but this matter is of some importance to people in the state," Walker told Schwarzenegger's attorney, Kenneth C. Mennemeier. "His thoughts and views would be appreciated."

Mennemeier, of Mennemeier, Glassman & Stroud in Sacramento, said he would relay the message. A spokesperson from Schwarzenegger's office did not respond to a call seeking comment.

Earlier in the hearing, Walker also called out Attorney General Jerry Brown.

Theodore B. Olson, who represents the gay couples, argued against outside party intervention, saying they had the opportunity to raise the federal questions in previous state litigation but chose not to do so.

"So did the attorney general, and he's under oath to uphold the Constitution of the United States," Walker said pointedly.

Olson, of Gibson, Dunn & Crutcher in Washington, D.C., said he was "not going to criticize" that decision.

Brown has filed papers saying the ban is unconstitutional but that he would not present evidence in the case.

Walker's comments came at a case management conference during which he rejected motions to intervene by several organizations on both sides of Proposition 8. Walker said those groups' interests were adequately represented by either ProtectMarriage.Com, the defendant intervenors who were proponents of the ban, or the plaintiff couples who oppose it.

The judge granted the City and County of San Francisco's motion to intervene, citing its arguments that it has a unique perspective as a governmental entity that can speak to the economic and public health harm caused by discrimination.

Walker heard about an hour's worth of arguments from the parties fighting to join the litigation before reading an already prepared ruling from the bench.

The conference provided some insight into some of the infighting among gay rights groups. Some organizations had opposed a federal lawsuit, claiming it was too risky with the current make-up of the U.S. Supreme Court.

Olson, in opposing intervention by other organizations, said those groups chose not to bring a federal lawsuit while his clients did. He said the plaintiff couples' choice of counsel should not be "usurped" and requested that if anyone were allowed to intervene that he and his co-counsel "remain in firm, unequivocal and indisputable control" of the litigation.

Outside court after the hearing, Jennifer C. Pizer, of the Lambda Legal Defense and Education Fund in Los Angeles, said there was "nothing new about teams having different strategies." Pizer represented three gay rights groups seeking to intervene. She said her clients would help the plaintiffs in any way they could from outside the case.

Walker set a trial date of Jan. 11.