No. 12-144

In The Supreme Court of the United States

Dennis Hollingsworth, et al.,

Petitioners,

v.

Kristen M. Perry, et al.,

Respondents.

ON APPLICATION FOR IMMEDIATE ORDER VACATING NINTH CIRCUIT'S ORDER PURPORTING TO DISSOLVE STAY

DIRECTED TO HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPLICATION OF DENNIS HOLLINGSWORTH, GAIL KNIGHT, MARTIN GUTIERREZ, MARK JANSSON, AND PROTECTMARRIAGE.COM TO VACATE NINTH CIRCUIT'S ORDER PURPORTING TO DISSOLVE STAY

To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioners Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Mark Jansson, and ProtectMarriage.com[1] respectfully apply for an immediate order vacating the United States Court of Appeals for the Ninth Circuit's June 28, 2013 Order that purports to dissolve the stay of the district court's injunction, or in the alternative, declaring that the Order is of no effect because the Ninth Circuit, having yet to receive jurisdiction back from this Court, lacked authority to issue it. Without the immediate relief requested by this Application, the Ninth Circuit will circumvent the proper rules and procedures established by this Court.

INTRODUCTION

The Ninth Circuit's June 28, 2013 Order purporting to dissolve the stay of the district court's injunction is the latest in a long line of judicial irregularities that have unfairly thwarted the defense of California's marriage amendment, known as Proposition 8, which is codified at Article I, Section 7.5 of the California Constitution. Petitioners request immediate relief from this Court, and they do so for the following reasons.

First, the Ninth Circuit lacked authority to issue its Order purporting to dissolve the stay because this Court's grant of certiorari deprived the Ninth Circuit of jurisdiction

[1] ProtectMarriage.com is not a corporation, but a primarily formed ballot committee under California law. *See* Cal. Gov. Code §§ 82013, 82047.5.

in this case. The Ninth Circuit does not reacquire jurisdiction—even for the limited purpose of dismissing the appeal or dissolving the stay—until this Court's final disposition, which occurs when this Court sends a certified copy of the judgment to the Ninth Circuit. But even though this Court has not yet issued a certified copy of the judgment, the Ninth Circuit purported to dissolve the stay, a maneuver for which it lacked jurisdiction.

Second, the Ninth Circuit's attempt to dissolve its stay violated the terms of its own stay order. That order provides that "the stay shall continue until final disposition by the *Supreme Court*." Order at 4, *Perry v. Brown*, No. 10-16696 (9th Cir. June 5, 2012), ECF No. 425-1 (attached as Exhibit A) (emphasis added). But final disposition by this Court has not yet occurred, and it will not happen until 25 days after entry of this Court's decision. *See* Supreme Court Rule 45(2), (3). The Ninth Circuit thus violated the terms of its own stay order.

Third, because the Ninth Circuit's Order purporting to dissolve the stay fails to comply with applicable rules and procedures, this Court has a significant interest in supervising the Ninth Circuit and bringing it into compliance. Failing to correct the appellate court's actions threatens to undermine the public's confidence in its legal system.

Fourth, the relief requested is necessary to ensure that Petitioners have a meaningful opportunity to exercise their right to petition for rehearing, a right provided by this Court's Rules. *See* Supreme Court Rule 44(1). Petitioners thus request relief to preserve that right.

STATEMENT

Respondents filed this lawsuit in the United States District Court for the Northern District of California, alleging that Proposition 8 violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The named defendants—various state and local officials in the State of California—all refused to defend Proposition 8. Petitioners, the Official Proponents of Proposition 8, intervened as of right and were the lone defenders of that measure. After conducting expedited proceedings, the district court ruled in Respondents' favor against Proposition 8. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

Petitioners moved to stay the district court's judgment, and although the district court denied that motion, it granted a limited stay permitting Petitioners to seek a stay from the Ninth Circuit. Order at 10-11, *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. Aug. 12, 2010), ECF No. 727 (attached as Exhibit B). Immediately thereafter, the district court entered a permanent injunction ordering that "[d]efendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution." Permanent Injunction at 2, *Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. Aug. 12, 2010), ECF No. 728 (attached as Exhibit C) (emphasis omitted). Petitioners then sought and obtained from the Ninth Circuit a stay of the district court's substantive order pending appeal. Order at 1, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Aug. 16, 2010), ECF No. 14 (attached as Exhibit D). In the order granting that stay, the Ninth Circuit—to ensure itself of its own jurisdiction—"directed" Petitioners "to

include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing." *Id.* at 2.

Subsequently, the Ninth Circuit decided to affirm the district court's judgment. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012). Thereafter, Petitioners filed a timely petition for rehearing en banc, which the Ninth Circuit denied. Order at 4, *Perry v. Brown*, No. 10-16696 (9th Cir. June 5, 2012), ECF No. 425-1 (Ex. A). In that order, the Ninth Circuit stated that if Petitioners file "a petition for writ of certiorari in the Supreme Court . . . , the stay shall continue until final disposition by the Supreme Court." *Id.* This Court granted certiorari.

This past Wednesday, June 26, 2013, this Court issued a 5-4 decision concluding that Petitioners lack Article III standing to appeal in defense of Proposition 8. *See Hollingsworth v. Perry*, No. 12-144, 2013 WL 3196927 at *14 (U.S. June 26, 2013). That same day, the Clerk of this Court sent a letter to the Ninth Circuit Clerk stating that "[t]he judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45," and that if "a petition for rehearing [is] filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing." Letter from William K. Suter to Ninth Circuit Clerk at 1, *Perry v. Brown*, No. 10-16696 (9th Cir. June 26, 2013), ECF No. 431-2 (attached as Exhibit E).

Despite this Court's unambiguous statement that a certified copy of its judgment—and thus its final disposition—would not issue for at least 25 days, and the accompanying conclusion that the Ninth Circuit would not have jurisdiction to dismiss

the appeal or dissolve the stay until that time,[2] on June 28, 2013, at 3:22 Pacific Time, a Ninth Circuit panel (comprising Judges Reinhardt, Hawkins, and Smith) entered an order stating that "[t]he stay in the above matter is dissolved effective immediately." Order at 4, *Perry v. Brown*, No. 10-16696, (9th Cir. June 28, 2013), ECF No. 432 (attached as Exhibit G).

Ninth Circuit officials have acknowledged the abnormality of the Court's decision to issue its order before this Court delivers a certified copy of its judgment. According to the Associated Press, "Ninth Circuit spokesman David Madden said Friday that the panel's decision to act sooner was 'unusual, but not unprecedented,' although he could not recall another time the appeals court acted before receiving an official judgment from the high court." Lisa Leff, *Plaintiffs in Gay marriage Case Wed in SF, LA*, Jun. 28, 2013, 11:38 PM EDT, *available at* http://bigstory.ap.org/article/appeals-court-lifts-hold-calif-gay-marriages (attached as Exhibit H). This procedural irregularity is likely what prompted the press to speculate "whether the appeals court's action would be halted by [this Court]." Associated Press, *Plaintiffs in gay marriage case marry in San Francisco, Los Angeles*, FoxNews.com, Jun. 29, 2013, *available at* http://www.foxnews.com/

[2] Respondent City and County of San Francisco appears to agree that the Ninth Circuit does not resume jurisdiction over the case until this Court's decision becomes final. In a letter distributed on June 11, 2013, the San Francisco City Attorney wrote: "[T]he Supreme Court will likely announce its decision in Hollingsworth in mid-to-late June. We expect the Supreme Court's decision to become final about a month later, and the Ninth Circuit will resume jurisdiction over the case at that time. The Ninth Circuit will then issue its formal notice of decision in the case ('the mandate'), and the decision will take effect." San Francisco City Attorney Dennis J. Herrera, Letter to Director of the San Francisco County Clerk's Office Karen Hong Yee, June 11, 2013, *available at* http://www.sfcityattorney.org/modules/showdocument.aspx?documentid=1308 (attached as Exhibit F).

politics/2013/06/29/hold-on-calif-gay-marriages-lifted-by-federal-appeals-court/ (attached as Exhibit I).

The press also reported that "*[j]ust minutes after the appeals court issued its order*, the two lead plaintiffs in the case were standing in line at San Francisco City Hall to get a marriage license." Lisa Leff, *Appeals court lifts hold on Calif. gay marriages*, Jun. 28, 2013, *available at* http://news.yahoo.com/appeals-court-lifts-hold-calif-gay-marriages-224831884.html (attached as Exhibit J)(emphasis added). Within a few hours, the other two plaintiffs were married in Los Angeles. Lisa Leff, *Plaintiffs in Gay Marriage Case Wed in SF, LA*, Jun. 28, 2013, 11:38 PM EDT, *available at* http://bigstory.ap.org/article/appeals-court-lifts-hold-calif-gay-marriages (Ex. H.).

The Court's decision in this case is not final because the Clerk has not sent the Ninth Circuit "a certified copy of the judgment." Supreme Court Rule 45(3). The certified copy of the judgment "will not issue for at least twenty-five days pursuant to Rule 45." Letter from William K. Suter to Ninth Circuit Clerk at 1, *Perry v. Brown*, No. 10-16696 (9th Cir. June 26, 2013), ECF No. 431-2 (Ex. E); *see also* Robert L. Stern, et al., Supreme Court Practice 734 (8th ed. 2002) ("Ordinarily, the Clerk forwards to the lower federal court a copy of the opinion or order of the Supreme Court together with a certified copy of its judgment . . . . The Clerk takes this action 25 days after entry of judgment[.]"). The reason for this 25-day delay is to permit the parties time to petition for rehearing of this Court's decision. *See* Supreme Court Rule 44(1). Because this Court's decision is not yet final, neither is the conclusion that Petitioners lack standing to appeal.

REASONS FOR GRANTING THE REQUESTED RELIEF

I. The Ninth Circuit Lacked Jurisdiction to Issue its Order Purporting to Dissolve the Stay.

This Court's grant of certiorari in this case deprived the Ninth Circuit of jurisdiction. *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir. 1960) ("When a case is appealed from [the Ninth Circuit] to the Supreme Court, [the Ninth Circuit] *completely* loses jurisdiction of the cause.") (emphasis added). The Ninth Circuit does not reacquire jurisdiction, even for the limited purpose of dismissing the appeal or dissolving the stay, until this Court's final disposition, which occurs when this Court sends a certified copy of the judgment to the Ninth Circuit. *Id.* ("[After this Court grants certiorari, the Ninth Circuit's] jurisdiction can be revived only upon the mandate of the Supreme Court itself"); *see also* Stern, Supreme Court Practice at 719 n.4 ("In cases coming from federal courts, the opinion or order and judgment are used instead of a mandate, but the time of transmission to the lower court is the same."). The Ninth Circuit, however, purported to dissolve the stay before this Court issued a certified copy of the judgment. Thus the Ninth Circuit did not have jurisdiction to dissolve the stay.

This Court's conclusion that Petitioners lack standing to appeal the judgment against Proposition 8 does not preclude this Court from ruling on this Application. After all, it is well established that this Court has "jurisdiction on appeal . . . for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936). And in any event, this Court's decision in *Hollingsworth,* and its accompanying judgment, are not final for at least another three weeks, after Petitioners

are afforded a reasonable opportunity to petition for rehearing and after this Court sends a certified copy of the judgment to the Ninth Circuit. Until this occurs, this Court's opinion that Petitioners lack standing and that the appellate courts lack jurisdiction is not final and thus does not divest this Court of jurisdiction.

The question raised here is whether the Ninth Circuit has lawfully dissolved its stay—not whether it had jurisdiction to enter the stay in the first place.[3] To lawfully dissolve the stay, the Ninth Circuit must have jurisdiction, even if only for the limited purpose of dismissing the appeal and dissolving the stay. This Court has ordered that the case be remanded to the Ninth Circuit "with instructions to dismiss the appeal for lack of jurisdiction," *see Hollingsworth*, 2013 WL 3196927 at *14, thereby acknowledging that the Ninth Circuit will have jurisdiction for the limited purpose of undoing what it has previously done in the case. But the Ninth Circuit does not have the authority to take any such actions yet because that court "completely los[t] jurisdiction" when this Court granted certiorari and that court's "jurisdiction can be revived only upon the [certified judgment] of [this] Court." *See Hermann*, 274 F.2d at 843; *see also* Stern, Supreme Court Practice at 719 n.4.

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[3] In any event, the Ninth Circuit had jurisdiction to enter the stay. Courts "have the power to determine whether or not [they have] jurisdiction." *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *see also Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1117 (9th Cir. 2009) ("[Courts] have jurisdiction to determine [their] own jurisdiction") (quotation marks and internal citation omitted). The Ninth Circuit entered the stay pending appeal as part of its effort to determine whether "th[e] appeal should . . . be dismissed for lack of Article III standing." *See* Order at 1, 2, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Aug. 16, 2010), ECF No. 14 (Ex. D). Because the stay was a necessary component of the Ninth Circuit's attempt to assess its own jurisdiction, that court had jurisdiction to enter it.

That the Ninth Circuit was without jurisdiction to issue its Order purporting to dissolve the stay requires this Court to vacate the Order. Alternatively, this Court should declare that the Order is of no effect because the Ninth Circuit, having yet to receive jurisdiction back from this Court, lacked authority to issue it.

II. The Ninth Circuit Violated its Stay Order.

The Ninth Circuit stayed the district court's substantive order pending appeal, *see* Order at 1, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Aug. 16, 2010), ECF No. 14 (Ex. D); and after denying Petitioners' petition for hearing en banc, ordered that if Petitioners file "a petition for writ of certiorari in [this] Court . . . , the stay shall continue until final disposition by [this] Court," Order at 4, *Perry v. Brown*, No. 10-16696 (9th Cir. June 5, 2012), ECF No. 425-1 (Ex. A). Final disposition by this Court does not occ r until this Court's Clerk "send[s] the clerk of the lower court . . . a certified copy of the judgment." Supreme Court Rule 45(3). But that has yet to occur here, and it will not happen until 25 days after entry of this Court's decision. *See* Supreme Court Rule 45(2), (3). Thus, the Ninth Circuit has reneged on its unambiguous representation to the parties—namely, that "the stay shall continue until final disposition by [this] Court."

The three Ninth Circuit judges who dissolved the stay in violation of the prior order are the same judges who just last year reminded us that "[t]he integrity of our judicial system depends in no small part on the ability of litigants and members of the public to rely on a judge's word." *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012). The "assurances that a judge makes" and "the decisions [that] the judge issues[] must be consistent and worthy of reliance." *Id.* at 1087. Yet here the Ninth Circuit has breached

its representation to all parties that the stay would not be lifted until final disposition by this Court. In so acting, the panel's actions threaten "serious damage to the integrity of the judicial process." *Id.*

III. This Court Has a Significant Supervisory Interest in Ensuring That Lower Courts Comply with Rules and Procedures.

This Court "has a significant interest in supervising the administration of the judicial system." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam). In particular, when considering a prior appeal in this very case, this Court recognized that "[c]ourts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Id.* at 184; *see also id.* at 199 ("If courts are to require that others follow regular procedures, courts must do so as well."). Here, the procedural regularities are well established: the Ninth Circuit does not resume jurisdiction over the case until it receives a certified copy of the judgment from this Court. *See Hermann*, 274 F.2d at 843; Stern, Supreme Court Practice at 719 n.4. The Clerk of this Court informed the Ninth Circuit of this procedure in a letter. *See* Letter from William K. Suter to Ninth Circuit Clerk at 1, *Perry v. Brown*, No. 10-16696 (9th Cir. June 26, 2013), ECF No. 431-2 (Ex. E). And the Ninth Circuit's staff acknowledged that issuing an order before this Court sends a certified copy of its judgment is "unusual"—so abnormal, in fact, that the staff member "could not recall another time the appeals court acted before receiving an official judgment from [this Court]." Lisa Leff, *Plaintiffs in Gay marriage Case Wed in SF, LA*, Jun. 28, 2013, 11:38 PM EDT, *available at* http://bigstory.ap.org/article/appeals-court-lifts-hold-calif-gay-marriages (Ex. H).

The interests vindicated by ensuring that lower courts follow relevant rules are of the utmost significance. If courts were allowed to depart from the rules by which they are required to operate, they may "compromise the orderly, decorous, rational traditions that [the judiciary relies] upon to ensure the integrity of [its] own judgments." *Hollingsworth*, 558 U.S. at 197. "By insisting that courts comply with the law, parties vindicate . . . the law's own insistence on neutrality and fidelity to principle." *Id.* at 196. If courts were free to disregard well-defined procedures at their whim, the public's confidence in the judiciary would suffer. Yet "public confidence . . . is vital to the functioning of the Judicial Branch[.]" *See Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring). And "the unstained integrity of the courts" is "essential to [the] country's well being." *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1264 (9th Cir.1988) (quotation marks and citation omitted), *vacated on other grounds United States v. Chavez-Sanchez,* 488 U.S. 1036 (1989).

IV. Permitting the Ninth Circuit to Prematurely Dissolve its Stay Order Would Effectively Deprive Petitioners of a Meaningful Opportunity to Exercise their Right to Petition for Rehearing.

All parties to cases before this Court have the right to petition for rehearing. Supreme Court Rule 44(1). The reason why this Court waits 25 days before sending a certified copy of the judgment to the clerk of the lower court is to provide the parties with adequate time to file a petition for rehearing. *See* Letter from William K. Suter to Ninth Circuit Clerk at 1, *Perry v. Brown*, No. 10-16696 (9th Cir. June 26, 2013), ECF No. 431-2 (Ex. E); Supreme Court Rule 44(1); Supreme Court Rule 45(2), (3). Allowing circuit

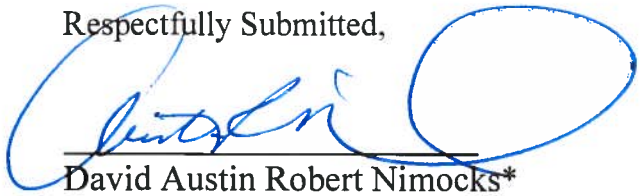
courts to dissolve stays before the parties have had adequate time to assess their right to file a petition for rehearing would render that right illusory.

A petition for rehearing "is part of the appellate procedure authorized by the Rules of this Court[.]" *See Flynn v. United States*, 75 S. Ct. 285, 286 (1955) (Frankfurter, J., in chambers). "The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied." *See id.* As a result, this Court should vacate the Ninth Circuit's Order purporting to dissolve the stay and thereby ensure that Petitioners have a meaningful opportunity to exercise their right to petition for rehearing.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request an immediate order vacating the Ninth Circuit's Order that purports to dissolve the stay of the district court's injunction, or in the alternative, declaring that the Order is of no effect because the Ninth Circuit, having yet to receive jurisdiction back from this Court, lacked authority to issue it.

Respectfully Submitted,



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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2013, I caused to be served on the following counsel a true and correct copy of the foregoing via electronic mail and via depositing a true and correct copy with a third-party commercial carrier for delivery within three calendar days:

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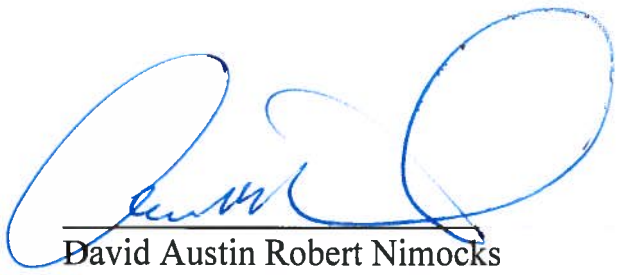

David Austin Robert Nimocks

No. 12-144

In The Supreme Court of the United States

Dennis Hollingsworth, et al.,

Petitioners,

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Respondents.

EXHIBITS TO APPLICATION FOR IMMEDIATE ORDER VACATING NINTH CIRCUIT'S ORDER PURPORTING TO DISSOLVE STAY

DIRECTED TO HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

No. 10-16696

D.C. No. 3:09-cv-02292-VRW

ORDER

HAK-SHING WILLIAM TAM,

Intervenor-Defendant,

and

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Intervenor-Defendants - Appellants.

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California

No. 11-16577

D.C. No. 3:09-cv-02292-JW

Department of Public Health & State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

HAK-SHING WILLIAM TAM,

Intervenor-Defendant,

and

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Intervenor-Defendants - Appellants.

Before: REINHARDT, HAWKINS, and N.R. SMITH, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing en banc. Judge N.R. Smith would grant the petition.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

The mandate is stayed for ninety days pending the filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G BROWN JR, in his official capacity as Attorney General of California; MARK B HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

ORDER

Defendant-intervenors Dennis Hollingsworth, Gail Knight, Martin Gutierrez, Mark Jansson and ProtectMarriage.com ("proponents") move to stay the court's judgment to ensure that Proposition 8 remains in effect as they pursue their appeal in the Ninth Circuit. Doc #705. In the alternative, proponents seek a brief stay to allow the court of appeals to consider the matter. Id.

Plaintiffs and plaintiff-intervenor City and County of San Francisco ask the court to deny the stay and order the injunction against Proposition 8 to take effect immediately. Doc #718. California's Governor and Attorney General (collectively the "state defendants") also oppose any stay. Doc ##716, 717. Other than proponents, no party seeks to stay the effect of a permanent injunction against Proposition 8. Because proponents fail to satisfy any of the factors necessary to warrant a stay, the court denies a stay except for a limited time solely in order to permit the court of appeals to consider the issue in an orderly manner.

I

"A stay is not a matter of right, even if irreparable injury might otherwise result." Nken v Holder, 556 US ----, 129 SCt 1749, 1761 (2009) (internal quotations omitted). Rather, the decision to grant or deny a stay is committed to the trial court's sound discretion. Id. To trigger exercise of that discretion, the moving party must demonstrate that the circumstances justify a stay. Id.

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In deciding whether a stay is appropriate, the court looks to four factors:

(1) whether proponents have made a strong showing that they are likely to succeed on the merits;

(2) whether proponents will be irreparably injured absent a stay;

(3) whether the stay will substantially injure other interested parties; and

(4) whether the stay is in the public interest.

Id (internal quotations omitted) (noting overlap with Winter v Natural Resources Defense Council, Inc, 555 US ----, 129 SCt 365, 374 (2008)). The first two factors "are the most critical." Nken, 129 SCt at 1757. The court addresses each factor in turn.

A

The court first considers whether proponents have shown a likelihood of success on the merits of their appeal. The mere possibility of success will not suffice; proponents must show that success is likely. Winter, 129 SCt at 375. Proponents assert they are likely to succeed "[f]or all the reasons explained throughout this litigation." Doc #705 at 7. Because proponents filed their motion to stay before the court issued its findings of fact and conclusions of law, proponents do not in their memorandum discuss the likelihood of their success with reference to the court's conclusions. Neither do proponents discuss whether the court of appeals would have jurisdiction to reach the merits of their appeal absent an appeal by a state defendant.

To establish that they have standing to appeal the court's decision under Article III, Section 2 of the Constitution,

proponents must show that they have "suffered an injury in fact, which is fairly traceable to the challenged action and is likely to be redressed by the relief requested." Didrickson v United States Dept of Interior, 982 F2d 1332, 1338 (9th Cir 1992). Standing requires a showing of a concrete and particularized injury that is actual or imminent. Lujan v Defenders of Wildlife, 504 US 555, 560 (1992). If the state defendants choose not to appeal, proponents may have difficulty demonstrating Article III standing. Arizonans for Official English v Arizona, 520 US 43, 67 (1997).

As official proponents under California law, proponents organized the successful campaign for Proposition 8. Doc #708 at 58-59 (FF 13, 15). Nevertheless, California does not grant proponents the authority or the responsibility to enforce Proposition 8. In Lockyer v City & County of San Francisco, the California Supreme Court explained that the regulation of marriage in California is committed to state officials, so that the mayor of San Francisco had no authority to "take any action with regard to the process of issuing marriage licenses or registering marriage certificates." 33 Cal 4th 1055, 1080 (2004). Still less, it would appear, do private citizens possess authority regarding the issuance of marriage licenses or registration of marriages. While the court has ordered entry of a permanent injunction against proponents, that permanent injunction does not require proponents to refrain from anything, as they are not (and cannot be) responsible for the application or regulation of California marriage law. See Cal Health & Safety Code § 102180. The court provided proponents with an opportunity to identify a harm they would face "if an injunction against Proposition 8 is issued." Doc

#677 at 7. Proponents replied that they have an interest in defending Proposition 8 but failed to articulate even one specific harm they may suffer as a consequence of the injunction. Doc #687 at 30.

When proponents moved to intervene in this action, the court did not address their standing independent of the existing parties. See Doc #76 at 3; see also Perry v Proposition 8 Official Proponents, 587 F3d 947, 950 n2 (9th Cir 2009). While the court determined that proponents had a significant protectible interest under FRCP 24(a)(2) in defending Proposition 8, that interest may well be "plainly insufficient to confer standing." Diamond v Charles, 476 US 54, 69 (1986). This court has jurisdiction over plaintiffs' claims against the state defendants pursuant to 28 USC § 1331. If, however, no state defendant appeals, proponents will need to show standing in the court of appeals. See Arizonans for Official English, 520 US at 67.

Proponents' intervention in the district court does not provide them with standing to appeal. Diamond, 476 US at 68 (holding that "Diamond's status as an intervenor below, whether permissive or as of right, does not confer standing to keep the case alive in the absence of the State on this appeal"); see also Associated Builders & Contractors v Perry, 16 F3d 688, 690 (6th Cir 1994) ("The standing requirement * * * may bar an appeal even though a litigant had standing before the district court."). The Supreme Court has expressed "grave doubts" whether initiative proponents have independent Article III standing to defend the constitutionality of the initiative. Arizonans for Official English, 520 US at 67.

Proponents chose not to brief the standing issue in connection with their motion to stay, and nothing in the record shows proponents face the kind of injury required for Article III standing. As it appears at least doubtful that proponents will be able to proceed with their appeal without a state defendant, it remains unclear whether the court of appeals will be able to reach the merits of proponents' appeal. In light of those concerns, proponents may have little choice but to attempt to convince either the Governor or the Attorney General to file an appeal to ensure appellate jurisdiction. As regards the stay, however, the uncertainty surrounding proponents' standing weighs heavily against the likelihood of their success.

Even if proponents were to have standing to pursue their appeal, as the court recently explained at length the minimal evidence proponents presented at trial does not support their defense of Proposition 8. See Doc #708 (findings of fact and conclusions of law). Proponents had a full opportunity to provide evidence in support of their position and nevertheless failed to present even one credible witness on the government interest in Proposition 8. Doc #708 at 37-51. Based on the trial record, which establishes that Proposition 8 violates plaintiffs' equal protection and due process rights, the court cannot conclude that proponents have shown a likelihood of success on appeal. The first factor does not favor a stay.

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B

The second factor asks whether proponents will be harmed if enforcement of Proposition 8 were enjoined. Proponents argue that irreparable harm will result if a stay is not issued because "a state suffers irreparable injury whenever an enactment of its people * * * is enjoined." Doc #705 at 9-10 (citing Coalition for Economic Equity v Wilson, 122 F3d 718, 719 (9th Cir 1997)). Proponents, of course, are not the state. Proponents also point to harm resulting from "a cloud of uncertainty" surrounding the validity of marriages performed after judgment is entered but before proponents' appeal is resolved. Doc #705 at 10. Proponents have not, however, alleged that any of them seek to wed a same-sex spouse. Proponents admit that the harms they identify would be inflicted on "affected couples and * * * the State." Id. Under the second factor the court considers only whether the party seeking a stay faces harm, yet proponents do not identify a harm to them that would result from denial of their motion to stay.

Both plaintiffs and the state defendants have disavowed the harms identified by proponents. Doc #716 at 2 (Attorney General states that any administrative burdens surrounding marriages performed absent a stay "are outweighed by this Court's conclusion, based on the overwhelming evidence, that Proposition 8 is unconstitutional."); Doc #717 at 6 (Governor opposes a stay based on California's strong interest in "eradicating unlawful discrimination and its detrimental consequences."). Plaintiffs assert that "gay men and lesbians are more than capable of determining whether they, as individuals who now enjoy the freedom

to marry, wish to do so immediately or wait until all appeals have run their course." Doc #718 at 9.

Proponents do not adequately explain the basis for their belief that marriages performed absent a stay would suffer from a "cloud of uncertainty." Doc #705 at 10. The court has the authority to enjoin defendants from enforcing Proposition 8. It appears, then, that marriages performed pursuant to a valid injunction would be lawful, much like the 18,000 marriages performed before the passage of Proposition 8 in November 2008. See Strauss v Horton, 46 Cal 4th 364, 472 (2009) (holding that married couples' rights vest upon a lawful marriage).

If proponents had identified a harm they would face if the stay were not granted, the court would be able consider how much weight to give to the second factor. Because proponents make no argument that they — as opposed to the state defendants or plaintiffs — will be irreparably injured absent a stay, proponents have not given the court any basis to exercise its discretion to grant a stay.

The first two factors are the "most critical," and proponents have shown neither a likelihood of success nor the possibility of any harm. Nken, 129 SCt at 1757. That alone suffices for the court to conclude that a stay is inappropriate here. Nevertheless, the court turns to the remaining two factors.

C

The third factor considers whether any other interested party would be injured if the court were to enter a stay. Plaintiffs argue a stay would cause them harm. Doc #718 at 9-10.

Proposition 8 violates plaintiffs' equal protection and due process rights, and the court presumes harm where plaintiffs have shown a violation of a constitutional right. Goldie's Bookstore, Inc v Superior Court, 739 F2d 466, 472 (9th Cir 1984). But no presumption is necessary here, as the trial record left no doubt that Proposition 8 inflicts harm on plaintiffs and other gays and lesbians in California. Doc #708 at 93-96 (FF 66-68). Any stay would serve only to delay plaintiffs access to the remedy to which they have shown they are entitled.

Proponents point to the availability of domestic partnerships under California law as sufficient to minimize any harm from allowing Proposition 8 to remain in effect. Doc #705 at 11. The evidence presented at trial does not support proponents' position on domestic partnerships; instead, the evidence showed that domestic partnership is an inadequate and discriminatory substitute for marriage. Doc #708 at 82-85 (FF 52-54).

Proponents claim that plaintiffs' desire to marry is not "urgent," because they chose not to marry in 2008. Doc #705 at 11. Whether plaintiffs choose to exercise their right to marry now is a matter that plaintiffs, and plaintiffs alone, have the right to decide. Because a stay would force California to continue to violate plaintiffs' constitutional rights and would demonstrably harm plaintiffs and other gays and lesbians in California, the third factor weighs heavily against proponents' motion.

D

Finally, the court looks to whether the public interest favors a stay. Proponents argue that the public interest tips in

favor of a stay because of the "uncertainty" surrounding marriages performed before a final judicial determination of the constitutionality of Proposition 8. Doc #705 at 11. Proponents also point to the public interest as reflected in the votes of "the people of California" who do not want same-sex couples to marry, explaining that "[t]here is no basis for this Court to second-guess the people of California's considered judgment of the public interest." Id at 12.

The evidence at trial showed, however, that Proposition 8 harms the State of California. Doc #708 at 92-93 (FF 64). Representatives of the state agree. The Governor states that "[a]llowing the Court's judgment to take effect serves the public interest" in "[u]pholding the rights and liberties guaranteed by the federal Constitution" and in "eradicating unlawful discrimination." Id at 5-6. Moreover, the Governor explains that no administrative burdens flow to the state when same-sex couples are permitted to marry. Id at 7. The Attorney General agrees that the public interest would not be served by a stay. Doc #716 at 2.

The evidence presented at trial and the position of the representatives of the State of California show that an injunction against enforcement of Proposition 8 is in the public's interest. Accordingly, the court concludes that the public interest counsels against entry of the stay proponents seek.

II

None of the factors the court weighs in considering a motion to stay favors granting a stay. Accordingly, proponents' motion for a stay is DENIED. Doc #705. The clerk is DIRECTED to

enter judgment forthwith. That judgment shall be STAYED until August 18, 2010 at 5 PM PDT at which time defendants and all persons under their control or supervision shall cease to apply or enforce Proposition 8.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G BROWN JR, in his official capacity as Attorney General of California; MARK B HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

PERMANENT INJUNCTION

This action having come before and tried by the court and the court considered the same pursuant to FRCP 52(a), on August 4, 2010, ordered entry of judgment in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors and each of them, Doc #708, now therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.

Dated: August 12, 2010

Cora Klein

Cora Klein, Deputy Clerk
Chief Judge Vaughn R Walker

EXHIBIT D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY; et al.,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff - Intervenor-Appellee,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; et al.,

Defendants,

and

DENNIS HOLLINGSWORTH; et al.,

Defendants -Intervenors-Appellants.

No. 10-16696

D.C. No. 3:09-cv-02292-VRW
Northern District of California,
San Francisco

ORDER

Before: LEAVY, HAWKINS and THOMAS, Circuit Judges.

Appellants' motion for a stay of the district court's order of August 4, 2010 pending appeal is GRANTED. The court *sua sponte* orders that this appeal be

expedited pursuant to Federal Rule of Appellate Procedure 2. The provisions of Ninth Circuit Rule 31-2.2(a) (pertaining to grants of time extensions) shall not apply to this appeal. This appeal shall be calendared during the week of December 6, 2010, at The James R. Browning Courthouse in San Francisco, California.

The previously established briefing schedule is vacated. The opening brief is now due September 17, 2010. The answering brief is due October 18, 2010. The reply brief is due November 1, 2010. In addition to any issues appellants wish to raise on appeal, appellants are directed to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 66 (1997).

IT IS SO ORDERED.

EXHIBIT E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 26, 2013

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Dennis Hollingsworth, et al.
v. Kristin M. Perry, et al.
No. 12-144
(Your No. 10-16696, 11-16577)

Dear Clerk:

The opinion of this Court was announced today in the above stated case. A copy of the opinion is available on the Court's website at www.supremecourt.gov.

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

William K. Suter

William K. Suter, Clerk

by

Cynthia Rapp
Deputy Clerk
(202) 479-3031

EXHIBIT F

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

MOLLIE LEE
Deputy City Attorney

DIRECT DIAL: (415) 554-4290
E-MAIL: mollie.lee@sfgov.org

MEMORANDUM

TO: Carmen Chu, Assessor-Recorder
Karen Hong Yee, Director of the San Francisco County Clerk's Office

FROM: Dennis J. Herrera, City Attorney
Therese M. Stewart, Chief Deputy City Attorney
Mollie M. Lee, Deputy City Attorney

DATE: June 11, 2013

RE: *Hollingsworth v. Perry*: Possible Outcomes and Next Steps

As you know, the United States Supreme Court is currently considering a federal challenge to Proposition 8, the ballot measure that eliminated same-sex couples' right to marry in California. The Supreme Court heard arguments in *Hollingsworth v. Perry* on March 26, 2013 and will likely issue a decision by the end of June. The Court could decide the case on the merits, dismiss the case, or decide that Proposition 8's proponents lacked standing to appeal the District Court decision. Or there could be a split decision based on more than one of these grounds. This memorandum describes the court procedures that would follow each of these outcomes and estimates when you could begin issuing marriage licenses to same-sex couples.

We provide this information to aid you in preparing for a possible change in the State's marriage laws. Please be aware that the dates in this memorandum are estimates, and the precise timing and procedures will depend on the Supreme Court's decision. While this memorandum addresses the most likely potential outcomes at the Supreme Court, it would be impossible to predict and evaluate every possibility. We will be available to provide further advice after the Supreme Court issues its decision. You may also receive direction from the State Registrar or other State officials, who have authority to oversee local officials' implementation and enforcement of California's marriage laws.

Summary of Advice

Based on past practice, the Supreme Court will likely announce its decision in *Hollingsworth* in mid-to-late June. We expect the Supreme Court's decision to become final about a month later, and the Ninth Circuit will resume jurisdiction over the case at that time. The Ninth Circuit will then issue its formal notice of decision in the case ("the mandate"), and the decision will take effect. Depending on how the Supreme Court decides the case, marriages could resume as soon as mid-to-late July, although there is an unlikely possibility that marriages could resume even faster, as we discuss below in footnote 2. The five scenarios we see as reasonably possible, and your obligations under each, are as follows (not in order of likelihood).

Scenario 1: The Supreme Court reverses the Ninth Circuit and upholds Proposition 8. Unless and until there are future legislative or judicial developments, you may not issue marriage licenses to same-sex couples.

Scenario 2: The Supreme Court affirms the Ninth Circuit decision and invalidates Proposition 8. The Supreme Court decision will be the final decision in the case and will become effective as soon as the Ninth Circuit issues the mandate. You must issue marriage licenses to same-sex couples at that time. There is no specific rule about timing of the mandate, but we

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anticipate that the Ninth Circuit will issue it promptly after resuming jurisdiction over the case. Therefore, you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July.

Scenario 3: The Supreme Court dismisses the petition for certiorari as improvidently granted. The Ninth Circuit decision will be the final decision in the case and become effective as soon as the Ninth Circuit issues the mandate. You must issue marriage licenses to same-sex couples at that time. We anticipate that the Ninth Circuit will issue the mandate promptly after resuming jurisdiction over the case, and you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July.

Scenario 4: The Supreme Court affirms the decision based on a combination of rationales (merits, lack of standing and/or dismissal of certiorari). If there is not a majority for any one rationale, the Ninth Circuit decision will likely be the final decision in the case and become effective as soon as the Ninth Circuit issues the mandate. Your obligations would be the same as in Scenario 3.

Scenario 5: The Supreme Court decides that the Proposition 8 proponents lacked standing to appeal. The Ninth Circuit opinion will be vacated and the District Court opinion will be the final decision in the case. The District Court judgment will go into effect as soon as the Ninth Circuit issues a mandate dismissing the appeal. We anticipate that the Ninth Circuit will issue the mandate promptly after resuming jurisdiction over the case, and you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July.

While we expect that the first four scenarios would proceed uneventfully, there is a possibility of further litigation if the Court holds that proponents lacked standing to appeal. The proponents and some commentators have suggested that a standing decision would result in a limited judgment that would apply only to the two couples who are plaintiffs in the lawsuit, or only to Alameda and Los Angeles, the counties that are named defendants to the lawsuit. Those suggestions are incorrect. As an initial matter, even if the proponents were correct about the scope of the judgment, San Francisco would benefit from the judgment and be bound by the injunction because it is a plaintiff-intervenor in the lawsuit and the District Court ruled in its favor. Furthermore, the District Court judgment applies statewide because it binds all persons under the control or supervision of the named state defendants. State law establishes that county clerks and recorders are state officers with respect to marriage and perform marriage-related duties under the supervision of state officials, specifically the State Registrar. Additionally, under Rule 65(d)(2) of the Federal Rules of Civil Procedure, the injunction applies to the named parties' officers and agents, and anyone who acts in concert with them. This includes county clerks and recorders, who administer marriage laws under the direction of the named state defendants. For these reasons, the District Court judgment binds county clerks and recorders throughout California, regardless of whether they were individually named in the lawsuit.

Proposition 8's proponents and some commentators have also suggested that the District Court improperly enjoined the defendants from applying Proposition 8 to anyone in California rather than merely to the four named plaintiffs. This suggestion is incorrect. Because the District Court held that Proposition 8 is facially unconstitutional, there is no circumstance in which it can constitutionally be applied by the defendants or anyone acting under their supervision. Therefore, these officials cannot apply Proposition 8 to anyone. We are confident that we would prevail in any litigation challenging the scope of the injunction.

Memorandum

TO: Carmen Chu, Assessor-Recorder
Karen Hong Yee, Director of the San Francisco County Clerk's Office
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Discussion

I. BACKGROUND

A. *Lockyer v. City and County of San Francisco*

The legal battle for marriage equality in California began in February 2004, when San Francisco began issuing and recording marriage licenses for same-sex couples. The State Registrar instructed San Francisco to stop, San Francisco ignored this directive, and then-Attorney General Bill Lockyer sued San Francisco in the California Supreme Court. The Court held that local officials in San Francisco lacked the authority to disregard the State's marriage statutes, which at the time prohibited marriage between members of the same sex. *See Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1104-05 (2004). The Court also explained that in performing duties related to marriage, county clerks and recorders are subordinate to the California Director of Health Services, who also serves as the State Registrar of Vital Statistics and "has general supervisory authority over the marriage license and marriage certificate process." *Id.* at 1118. Accordingly, the writ in *Lockyer* directed San Francisco's officials to take corrective action "under the supervision of the California Director of Health Services." *Id.* at 1120.

B. *In re Marriage Cases*

In March 2004, San Francisco and private plaintiffs filed lawsuits arguing that California's marriage statutes violated the California Constitution. These cases were litigated together under the title *In re Marriage Cases*, 43 Cal.4th 757 (2008). Three of the four coordinated cases named the State of California or the State Attorney General as the defendant. *Id.* at 786. Only one named a county, and that county did not actively defend against the challenge. In May 2008, the California Supreme Court held that the equal protection, due process and privacy provisions of the California Constitution guarantee same-sex couples the right to marry. *Id.* at 839-56. Even though only two counties were party to the coordinated cases – San Francisco as a plaintiff and Los Angeles as a nominal defendant – the court issued statewide relief that applied to all counties. It directed "the appropriate state officials to take all actions necessary to effectuate [the] ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." *Id.* at 857.

To implement the *In re Marriage Cases* decision, the State Registrar prepared revised marriage-related forms that replaced previous designations for "Bride" and "Groom" with the words "Party A" and "Party B." The State Office of Vital Records provided local officials with these revised forms and instructions "to ensure uniformity throughout the state in complying with the California Supreme Court's directions." *See* Letter from Linette Scott to County Clerks and County Recorders (May 28, 2008).

C. *Perry v. Schwarzenegger*

In November 2008, California voters narrowly enacted Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. 1, § 7.5. On May 22, 2009, two same-sex couples – Sandra Stier and Kristin Perry of Alameda County, and Paul Katami and Jeffrey Zarrillo of Los Angeles County – brought a facial challenge to Proposition 8 in federal court, alleging that it

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violates the Equal Protection and Due Process Clauses of the United States Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928-29 (N.D. Cal. 2010).

The lawsuit named as defendants the statewide officials responsible for the execution and administration of the marriage laws: the California Governor, the California Attorney General, the California Director of Public Health, and California's Deputy Director of Health Information and Strategic Planning. *Id.* at 928. The complaint also named as defendants Patrick O'Connell, the county clerk and recorder for Alameda County, and Dean Logan, the county clerk and recorder for Los Angeles County, because the couples resided in those counties and wished to obtain marriage licenses from the clerks there. *Id.* The statewide and county defendants filed answers and continued to enforce Proposition 8, although they declined to defend its constitutionality. *Id.*

The Court permitted the official proponents of Proposition 8 to intervene as defendants, and it permitted San Francisco to intervene as a plaintiff. *Id.* at 928-29. It denied other motions to intervene, including Imperial County's motion to intervene as a defendant. *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Aug. 4, 2010) (order denying motion to intervene). Quoting at length from the California Supreme Court's decision in *Lockyer*, the Court explained that Imperial and its officials possessed no independent discretion regarding litigation decisions or any other matter relating to marriage because the Imperial officials served as state officers with respect to the administration of marriage, and their duties were purely ministerial ones, subject to the supervision of higher-level statewide officials. *Id.*

At trial, the Proposition 8 proponents presented a vigorous defense of the measure, while plaintiffs and San Francisco presented the case that Proposition 8 is unconstitutional. The District Court held that Proposition 8 violates the federal Constitution and entered judgment permanently enjoining its enforcement. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 1004. In a written opinion setting forth its findings of fact and conclusions of law, the District Court concluded:

> Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without bond in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors pursuant to FRCP 58.

Id. Thereafter, the Court issued an injunction commanding that the defendants, "and all persons under the control or supervision of the defendants, are permanently enjoined from applying or enforcing" Proposition 8. *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Aug. 12, 2010) (permanent injunction).

The Proposition 8 proponents appealed from the District Court judgment invalidating Proposition 8. *Perry v. Brown*, 671 F.3d 1052, 1070 (9th Cir. 2012). The Ninth Circuit certified to the California Supreme Court questions about the ability of an initiative proponent under state law to defend a measure in litigation where Governor and Attorney General have declined to do so. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011). The California Supreme Court ultimately ruled that an initiative proponent indeed has authority under state law to defend the measure under these circumstances. *Perry v. Brown*, 52 Cal. 4th 1116 (2011). The Ninth Circuit then held that the proponents had standing to appeal, and affirmed the District Court's

ruling on the merits, holding that Proposition 8 violated the federal constitution. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

After the proponents' petition for rehearing *en banc* was denied, they filed a petition for certiorari with the United States Supreme Court, which the Court granted. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) *cert. granted sub nom. Hollingsworth v. Perry*, 184 L. Ed. 2d 526 (U.S. Dec. 7, 2012) (No. 12–144). The Court held argument on March 26, 2013. It has not yet issued its decision.

II. ANALYSIS

The Supreme Court could issue a decision in *Hollingsworth* at any time, but based on past practice, the Court will likely issue its decision later this month. The Court usually releases opinions at 10 a.m. Eastern Time. It does not provide advance notice about when it will release an opinion in a particular case. After the Court announces its decision, the parties will have 25 days to petition for rehearing. *See* Sup. Ct. Rule 44(1)-(2). These petitions are rarely granted, but the Court generally does not issue a final judgment until the end of the rehearing period. *See* Sup. Ct. Rule 45(2)-(3). In practice, the Court often takes up to 35 days after issuing a decision before issuing the judgment. This means that if the Court announces a decision in late June, it would likely issue the judgment in late July.[1]

After the Supreme Court issues its judgment, the Ninth Circuit will resume jurisdiction over the case. If the Supreme Court reverses the Ninth Circuit, Proposition 8 will remain in effect until there are further legislative or judicial developments. If the Supreme Court affirms the Ninth Circuit or dismisses the case, the Ninth Circuit will promptly issue a mandate making the District Court judgment effective, and same-sex couples will be able to marry as soon as the mandate issues.[2] Finally, if the Supreme Court decides that the Proposition 8 proponents lacked standing to appeal, the Ninth Circuit's opinion will be vacated and the District Court opinion will be the final decision in the case. In that event, it is possible that there will be further litigation about the scope of the District Court judgment, but local officials in San Francisco should begin issuing marriage licenses to same-sex couples immediately once the Ninth Circuit issues its mandate lifting its stay of the District Court order. Each of these scenarios is discussed in further detail below.

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[1] If any party petitions for rehearing, it will take longer for the Court to issue its judgment. The Court will not issue an order about whether to grant rehearing until late July, and it will not issue the judgment until after that. We think it is unlikely that any party will file a petition for rehearing, and the timing estimates in this memorandum assume that no such petition is filed. We will provide a further update if a petition for rehearing is filed.

[2] It is possible that if the Supreme Court affirms on the merits or dismisses the case, you could be required to issue marriage licenses to same-sex couples before the Supreme Court judgment becomes final. The District Court judgment invalidating Proposition 8 is currently stayed by order of the Ninth Circuit, and the Ninth Circuit could decide to lift the stay after the Supreme Court decision, without waiting for the final judgment and issuance of the mandate. If the Ninth Circuit lifts the stay at any point, we will notify you, and you should immediately begin issuing marriage licenses to same-sex couples. However, because we think it is unlikely that the Ninth Circuit will act before the Supreme Court's decision is final, this memorandum assumes that the Ninth Circuit does not lift the stay until it resumes full jurisdiction over the case and issues the mandate.

Memorandum

TO: Carmen Chu, Assessor-Recorder
Karen Hong Yee, Director of the San Francisco County Clerk's Office
DATE: June 11, 2013
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RE: *Hollingsworth v. Perry*: Possible Outcomes and Next Steps

A. Scenario 1: Supreme Court Reverses The Ninth Circuit And Upholds Proposition 8

If the Supreme Court reverses the Ninth Circuit, Proposition 8 will remain in effect. We hope this is not the result, but if it is, you should maintain your current practices in administering the State's marriage laws. Unless and until there are subsequent legislative or judicial developments, California county clerks and recorders will not be authorized to issue marriage licenses to same-sex couples. *See Lockyer*, 33 Cal.4th 1055, 1069 (2004).

Procedurally, once the Ninth Circuit resumes jurisdiction of the case it will likely vacate the District Court opinion and remand to the District Court for further proceedings consistent with the Supreme Court opinion. *See, e.g., Knox v. California State Employees Ass'n, Local 1000, Serv. Employees Int'l Union, AFL-CIO-CLC*, 692 F.3d 924 (9th Cir. 2012). These further proceedings might involve claims for attorney fees and similar issues, but they will not affect your marriage-related responsibilities.

B. Scenario 2: Supreme Court Affirms The Ninth Circuit Decision And Invalidates Proposition 8

If the Supreme Court affirms the Ninth Circuit and invalidates Proposition 8, you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July. After the Supreme Court issues its judgment, the Ninth Circuit will resume jurisdiction over the case. The Ninth Circuit will then issue a mandate making the District Court judgment effective, and you should begin issuing marriage licenses to same-sex couples as soon as the mandate issues.

There is no formal rule about when the Ninth Circuit must issue the mandate, but we expect it will do so promptly after resuming jurisdiction over the case. San Francisco and Los Angeles have lodged letters with the Ninth Circuit requesting 24 hours' advance notice of the issuance of mandate so that counties have adequate time to prepare.

Once the Ninth Circuit issues the mandate, Proposition 8 will be invalid and you must immediately begin processing applications, issuing licenses, and solemnizing marriages for same-sex couples who seek to marry. All county clerks and recorders will be bound by the Supreme Court decision both because they administer state marriage laws under the supervision of the state officials who are named as defendants in this case (see Part D) and because the Supreme Court decision will have precedential effect that will extend, at minimum, to all of California. If the decision focuses narrowly on Proposition 8 and events that occurred in California, its precedential effect beyond this state may be limited. However, if the Supreme Court issues a decision that broadly declares denial of marriage to same-sex couples unconstitutional, such a decision will be binding precedent for all courts throughout the nation.

C. Scenario 3: Supreme Court Dismisses The Case

During oral argument, some Justices suggested that perhaps the Supreme Court should not have granted review of the case. This comment has led some observers to speculate that the Court may decide to dismiss the case, leaving the Ninth Circuit decision in place as the final appellate decision in the case. If five justices support this approach, the Court will issue an order dismissing the petition for certiorari as improvidently granted. Parties will then have 25 days to petition for rehearing of that order. *See* Sup. Ct. Rule 44(2). If no party files a petition for rehearing, or if the Supreme Court denies any petition for rehearing, the Court will transmit its order to the Ninth Circuit after the end of the rehearing period. The subsequent timing and procedures would be the same as those following a merits decision affirming the Ninth Circuit.

Memorandum

TO: Carmen Chu, Assessor-Recorder
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Specifically, once the Ninth Circuit resumes jurisdiction over the case, it will issue a mandate making the District Court judgment effective. This will likely occur in mid-to-late July, and you must begin processing marriage applications, issuing marriage licenses and solemnizing marriages for same-sex couples at that time. All county clerks and recorders will be bound by the Ninth Circuit decision both because they administer marriage laws under the supervision of the state officials who are named as defendants in this case (see Part D) and because the Ninth Circuit's February 2012 decision declaring Proposition 8 unconstitutional will be binding precedent for all lower federal courts throughout the Ninth Circuit, establishing as a matter of law that Proposition 8 is invalid and that same-sex couples have a right to marry in California. Because the Ninth Circuit decision rests on California-specific facts, it will not have an direct impact on other states' marriage laws, but it may have some precedential effect on future federal cases in the Ninth Circuit challenging other states' marriage laws.

D. Scenario 4: The Supreme Court Affirms The Decision Based On A Combination Of Rationales

The Supreme Court may issue a fractured opinion that contains separate opinions by less than a majority of the Court on the merits, lack of standing and/or dismissal of certiorari. If there is a majority supporting affirmance but there is not a majority for any one rationale, the Ninth Circuit decision will likely be the final decision in the case and become effective as soon as the Ninth Circuit issues the mandate. Your obligations would be the same as in Scenario 3.

E. Scenario 5: Supreme Court Issues A Standing Decision

If the Supreme Court determines that Proposition 8's proponents lack standing to appeal, it will likely vacate the Ninth Circuit judgment and remand the case to the Ninth Circuit with instructions to dismiss the appeal for lack of jurisdiction. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 550 (1986). This will have the practical effect of erasing the Ninth Circuit decision and will leave the District Court opinion in place as the final decision in the case. *See, e.g., Karcher v. May*, 484 U.S. 72, 84 (1987). The District Court judgment will take effect as soon as the Ninth Circuit issues a mandate dismissing the appeal and dissolving the stay presently in place. We expect that this will happen promptly, and you should be prepared to issue marriage licenses to same-sex couples soon after the Supreme Court issues its final judgment, likely in late July.

Some commentators and the proponents of Proposition 8 have raised questions about the scope of the District Court judgment, suggesting that it might be limited to the named plaintiffs or the counties that are defendants in the case – namely, Alameda and Los Angeles. It is true that District Court decisions only declare the rights and obligations of parties before the court, unlike appellate court decisions that announce precedential rulings of law. In this case, however, the parties to the case include the state officials who supervise and control administration of the state's marriage laws. As explained in more detail below, the District Court judgment enjoins the Governor, State Registrar, Attorney General and "all persons under their control or supervision" from enforcing Proposition 8. When administering and enforcing state marriage laws, all county clerks and county recorders act under the direction of these State officials, and they are therefore covered by the injunction regardless of whether they were individually named in the case. Moreover, San Francisco intervened in the case and sought a judgment declaring Proposition 8 unconstitutional. The District Court entered judgment in San Francisco's favor. Therefore, regardless of the status of other counties, San Francisco will not be obliged to enforce Proposition 8.

Memorandum

TO: Carmen Chu, Assessor-Recorder
Karen Hong Yee, Director of the San Francisco County Clerk's Office
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1. By Its Terms And Intent, The District Court Injunction Applies Statewide To All Persons Under The Supervision Of The Named State Defendants.

The District Court judgment enjoins the State Registrar, Governor, Attorney General and "all persons under their control or supervision" from enforcing Proposition 8. *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Aug. 12, 2010) (permanent injunction). All parties and the court understood that this injunction would extend beyond the named Plaintiffs and Defendants and prohibit enforcement of Proposition 8 statewide. For example, when Proponents moved the District Court for a stay of the injunction, they argued that "absent an immediate stay of any ruling invalidating Prop 8, same-sex couples would be permitted to marry in the counties of Alameda and Los Angeles (and possibly throughout California)." Def. Mot. Stay, ECF No. 705 at 5. The Administration's opposition to this motion described the effect of the injunction even more clearly, stating "the Court has enjoined enforcement of Proposition 8 and, in effect, ordered California to resume issuing marriage licenses in a gender-neutral manner, as had been done before Proposition 8 went into effect. . . . The Administration believes the public interest is best served by permitting the Court's judgment to go into effect, thereby restoring the right of same-sex couples to marry in California." Admin. Opp. to Stay, ECF No. 717 at 1. *See also* Att'y General Opp. to Stay, ECF 716 at 2; Pl. and Pl.-Intervenor Opp. to Stay, ECF 718 at 1-2.

The District Court's order denying a stay of the injunction reiterated that it intended to reinstate marriage equality statewide: "Because a stay would force California to continue to violate plaintiffs' constitutional rights and would demonstrably harm plaintiffs *and other gays and lesbians* in California, the third factor [whether any other interested party would be injured if the court were to enter a stay] weighs heavily against proponents' motion." *Perry v. Schwarzenegger*, No. 09-2292, ECF 727 at 9 (N.D. Cal. Aug. 12, 2010) (emphasis added). Despite this statement, none of the parties challenged the scope of the injunction by motion for reconsideration or otherwise in the District Court.

The District Court addressed the relationship between the state defendants and counties in its order denying Imperial County's motion to intervene, explaining that the State Registrar has "supervisory responsibility" over county clerks and recorders with respect to the marriage laws. *Id.*, ECF 709 at 6. The Ninth Circuit affirmed this denial for two reasons. First, with respect to Imperial's Board of Supervisors, as well as the county itself, the Court explained that they have no role whatsoever with respect to marriage: "Local elected leaders 'may have authority under a local charter to supervise and control the actions of a county clerk or county recorder with regard to other subjects,' but they have 'no authority to expand or vary the authority of a county clerk or county recorder to grant marriage licenses or register marriage certificates . . . .'" *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Lockyer*, 33 Cal.4th at 1080). Second, with respect to Imperial's deputy county clerk, the Court concluded she was not a proper party. The Court explained that if the injunction bound an Imperial official directly, it would be the county clerk himself, not the deputy. *Id.* at 903. The Ninth Circuit did suggest in *dicta* that "the effect of the existing order and injunction on County Clerks in California's other counties is unclear . . . ." *Id.* at 904 n.3. As explained below, however, the scope of the injunction becomes clear when considered against the backdrop of state law, which establishes that the named state defendants supervise the local officials who administer marriage laws.

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2. County Clerks And Recorders Are Bound by the Injunction Because They Administer Marriage Laws Under The Supervision Of The State Registrar.

State law vests the Registrar with responsibility for overseeing the State's marriage laws, with assistance from the Attorney General. The Health and Safety Code specifies that the Registrar has supervisory power over county recorders "so that there shall be uniform compliance with all the requirements" of the Health and Safety Code with respect to marriage. Cal. Health & Saf. Code § 102180. The Registrar is directed to "prescribe and furnish all record forms [relating to marriage] . . . and no records or formats other than those prescribed shall be used." *Id.* § 102200. More specifically, "[t]he forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar." *Id.* § 103125. Local recorders operate "under the supervision and direction of the State Registrar and shall make an immediate report to the State Registrar of any violation of this law coming to his or her knowledge." *Id.* § 102295. The Attorney General is given specific statutory authority to "assist in the enforcement of this part upon request of the State Registrar." *Id.*

It is well understood that the Registrar's authority over county clerks is the same as his authority over county recorders. Besides prescribing the marriage license and certificate forms used by county clerks, the Registrar provides direction to both county clerks and county recorders by publishing a detailed *Marriage License and Certificate Handbook*, which explains that "county clerks and recorders act under the direction of the State Registrar." *Id.* at 3. The Registrar also provides guidance by means of "All County Letters" that are regularly issued to both county clerks and county recorders. And when necessary, the Registrar supervises county clerks and county recorders to ensure that they comply with judicial rulings about the State's marriage laws.

The California Supreme Court recognized this chain of command in *Lockyer*, in which it explained that marriage is a matter of "statewide concern" given "the importance of having uniform rules and procedures apply throughout the state to the subject of marriage." *Id.* at 1079-80. Although a county clerk or recorder is a "local" official with respect to the discharge of other duties, she serves "as a state officer" with respect to marriage. *Id.* at 1080. County clerks' and county recorders' duties in administering state marriage statutes are purely ministerial, and they have no discretion to grant or withhold marriage licenses based on their own judgments or opinions. *Id.* at 1081-82. Nor do they take direction from higher local officials, such as a mayor or board of supervisors, with respect to these functions. *Id.* Rather, when county clerks and recorders administer marriage laws, they act as state officers and their principals are higher state officers, specifically, the Registrar.[3] *Id.* at 1118. Accordingly, the writ in *Lockyer* directed San

[3] The fact that a local official can be deemed a state executive officer when performing certain functions is no stranger to the law. After all, counties in California are subdivisions of state government, and therefore exercise "only the powers of the state, granted by the state." *Marin County v. Superior Court*, 53 Cal. 2d 633, 638 (1960). Thus, for example, when a local official is sued under 42 U.S.C. § 1983 for a violation of the federal constitution, that official is considered a state officer (and therefore protected from municipal liability under the doctrine of sovereign immunity) if the official committed the alleged constitutional violation in the performance of state-law duties. This is so even if the official is locally elected, receives her salary from the local treasury, and cannot be fired by any higher state official. *See, e.g.,*

Francisco's clerk and recorder to take corrective action "under the supervision of the California Director of Health Services." *Id.* at 1120. Similarly, the Court's order in the *Marriage Cases* directed "the appropriate state officials to take all actions necessary to effectuate [the Court's] ruling in this case so as to ensure that *county clerks and other local officials* throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." *Id.* at 857 (emphasis added).

3. County Clerks And Recorders Are Bound By The Injunction Because They Are Officers And Agents Of, And Act In Concert With, The Named State Defendants.

Rule 65(d)(2) of the Federal Rules of Civil Procedure states that injunctions apply not only to parties to a lawsuit but also to "officers" and "agents" of a party, and anyone who acts in "concert or participation" with a party or its officers or agents. Under this rule, county clerks and recorders would be bound by the injunction even if it did not specify that it applied to all persons under the supervision and control of the state defendants. It does not matter that the lawsuit did not name each individual county clerk and recorder as a defendant, because "a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945).

For example, in *American Booksellers Ass'n v. Webb*, 590 F.Supp. 677, 693 (N.D. Ga. 1984), local district attorneys were bound by an injunction preventing enforcement of a statute even though they were not party defendants, because the Attorney General had appeared in the case, and under Georgia law local district attorneys were subordinate to the Attorney General. Similarly, in *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 163 (S.D.N.Y. 1997), an injunction against the Governor and Attorney General preventing enforcement of a state statute bound the state's district attorneys even though they were not named in the lawsuit. There may be cases where, given the peculiarities of state law, local officials normally thought to be subordinate to a statewide official are not, in fact, "officers" or "agents" of the statewide official within the meaning of Rule 65(d)(2). But where, as here, the local official is an "officer" of the state, *Lockyer*, 33 Cal.4th at 1081, performing a ministerial duty under the supervision of higher state officers, in a domain of law where statewide uniformity is paramount, the local official is bound by an injunction against the higher state officers regardless of whether the local official participated in the litigation.

Furthermore, even if county clerks and recorders somehow could not be deemed "officers" and "agents" of the state defendants, they would still be bound by the injunction because they are in "active concert or participation" with the state defendants in the administration of California's marriage laws. The local and state officials here have a far closer relationship than entities held to be "in concert" in other cases. For example, in *Blackard v. Memphis Area Medical Center for Women*, 262 F.3d 568 (6th Cir. 2001), the Sixth Circuit held that an injunction against the state's Administrative Director of the Courts (ADC) also bound the state's juvenile courts, even though they were not named as parties and the ADC had no

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McMillan v. Monroe County, 520 U.S. 781, 792-93 (1997) (finding immunity for sheriff because, under Alabama law, "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties."). As with Alabama law regarding local sheriffs, *Lockyer* makes clear that under California law, county clerks and recorders "represent the State of [California]" when executing their ministerial duties with respect to marriage.

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supervisory power over the juvenile courts. The fact that the ADC was "responsible for the orientation and continued education of the judges of the state courts and for the orderly operation of the court system" and "assist[ed] the chief justice of the Supreme Court, who does have such authority" sufficed to establish that the courts acted in concert with the ADC for Rule 65 purposes. *Id.* at 575-76.

4. The Injunction Is Not Limited To The Two Couples Who Brought The Suit.

Proponents have also argued that only the named plaintiffs may *benefit* from the injunction, and those plaintiffs live in the defendant counties of Alameda and Los Angeles. As a preliminary matter, this argument does not apply to San Francisco, which sought and obtained declaratory relief as a plaintiff-intervenor in this case, and is a beneficiary of the judgment just as much as Plaintiffs.

More fundamentally, this argument reflects a basic misunderstanding about the difference between facial and as-applied challenges. While a successful "as-applied" challenge to a statute results merely in a ruling that the government may not apply the statute to the individual plaintiff, a successful "facial" challenge to a statute results (except in rare circumstances not present here) in a ruling that the government may not enforce the statute *at all*. When a "statutory scheme [is] unconstitutional on its face," the statutory provisions are "not unconstitutional as to [plaintiffs] alone, but as to any to whom they might be applied." *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981). The reason is that facial invalidation, by definition, means there is no set of circumstances in which the government could constitutionally apply the statute. *See United States v. Salerno*, 481 U.S. 739, 746 (1987). A facial challenge and "the relief that would follow" will necessarily "reach beyond the particular circumstances of the[] plaintiffs." *Doe v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2817 (2010). As the Seventh Circuit recently put it: "In a facial challenge like this one, the claimed constitutional violation inheres in the terms of the statute, not its application . . . . The remedy is necessarily directed at the statute itself and must be injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied to anyone." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). The same holds true here.

Conclusion

Of the five outcomes we see as most probable, only one – a loss at the Supreme Court – will maintain the status quo. The other four possible outcomes will restore marriage equality in California, and you will have a duty to issue marriage licenses to same-sex couples immediately after the Ninth Circuit issues the mandate. This will likely occur in mid-to-late July.

There is a possibility of further litigation in the event of a standing decision, but it is highly unlikely that this litigation will alter San Francisco's obligation to comply with the District Court judgment in *Hollingsworth*. Unless there is a court order to the contrary, you should plan to begin issuing marriage licenses as soon as the Ninth Circuit issues the mandate.

cc: Mayor Lee
Members, Board of Supervisors
Naomi Kelly, City Administrator

EXHIBIT G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

No. 10-16696

D.C. No. 3:09-cv-02292-VRW

ORDER

Defendants,

HAK-SHING WILLIAM TAM,

Intervenor-Defendant,

and

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Intervenor-Defendants - Appellants.

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO,

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California;

No. 11-16577

D.C. No. 3:09-cv-02292-JW

MARK B. HORTON, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

HAK-SHING WILLIAM TAM,

Intervenor-Defendant,

and

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Intervenor-Defendants - Appellants.

Before: **REINHARDT**, **HAWKINS**, and **N.R. SMITH**, Circuit Judges.

The stay in the above matter is dissolved effective immediately.

Exhibit H

The Big Story

Plaintiffs in gay marriage case wed in SF, LA

By LISA LEFF
— Jun. 28 11:38 PM EDT
Home » United States » Plaintiffs in gay marriage case wed in SF, LA

Sandy Stier, left, exchanges wedding vows with Kris Perry during a ceremony presided by California Attorney General Kamala Harris at City Hall in San Francisco, Friday, June 28, 2013. Stier and Perry, the lead plaintiffs in the U.S. Supreme Court case that overturned California's same-sex marriage ban, tied the knot about an hour after a federal appeals court freed same-sex couples to obtain marriage licenses for the first time in 4 1/2 years. (AP Photo/Marcio Jose Sanchez)

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SAN FRANCISCO (AP) — The four plaintiffs in the U.S. Supreme Court case that overturned California's same-sex marriage ban tied the knot Friday, just hours after a federal appeals court freed gay couples to obtain marriage licenses in the state for the first time in 4 1/2 years.

Attorney General Kamala Harris presided at the San Francisco City Hall wedding of Kris Perry and Sandy Stier as hundreds of supporters looked on and cheered. The couple sued to overturn the state's voter-approved gay marriage ban along with Paul Katami and Jeff Zarrillo, who married at Los Angeles City Hall 90 minutes later with Mayor Antonio Villaraigosa presiding.

"By joining the case against Proposition 8, they represented thousands of couples like themselves in their fight for marriage equality," Harris said during Stier and Perry's brief ceremony. "Through the ups and downs, the struggles and the triumphs, they came out victorious."

Harris declared Perry, 48, and Stier, 50, "spouses for life," but during their vows, the Berkeley couple took each other as "lawfully wedded wife." One of their twin sons served as ring-bearer.

Although the couples fought for the right to wed for years, their nuptials came together in a flurry when a three-judge panel of the 9th U.S. Circuit Court of Appeals issued a brief order Friday afternoon dissolving a stay it had imposed on gay marriages while the lawsuit challenging the ban advanced through the courts.

Sponsors of California's same-sex marriage ban, known as Proposition 8, also were caught off-guard and complained that the San Francisco-based 9th Circuit's swift action made it more difficult for them to ask the Supreme Court to reconsider its decision.

Under Supreme Court rules, the losing side has 25 days to ask the high court to rehear the case, and Proposition 8's backers had not yet announced whether they would do so.

"The resumption of same-sex marriage this day has been obtained by illegitimate means. If our opponents rejoice in achieving their goal in a dishonorable fashion, they should be ashamed," said Andy Pugno, general counsel for a coalition of religious conservative groups that sponsored the 2008 ballot measure.

"It remains to be seen whether the fight can go on, but either way, it is a disgraceful day for California," he said.

The Supreme Court ruled 5-4 Wednesday that Proposition 8's sponsors lacked standing in the case after Harris and Gov. Jerry Brown, both Democrats, refused to defend the ban in court.

The decision lets stand a trial judge's declaration that the ban violates the civil rights of gay Californians and cannot be enforced.

The Supreme Court said earlier this week that it would not finalize its ruling in the Proposition 8 case "at least" until after the 25-day period, which ends July 21.

The appeals court was widely expected to wait until the Supreme Court's judgment was official. Ninth Circuit spokesman David Madden said Friday that the panel's decision to act sooner was "unusual, but not unprecedented," although he could not recall another time the appeals court acted before receiving an official judgment from the high court.

The panel — Judge Stephen Reinhardt, who was named to the 9th Circuit by President Jimmy Carter and has a reputation as the court's liberal lion; Judge Michael Daly Hawkins, an early appointee of President Bill Clinton; and Judge Randy Smith, the last 9th Circuit judge nominated by President George W. Bush — decided on its own to lift the stay, Madden said.

Its order read simply, "The stay in the above matter is dissolved effective immediately."

Vikram Amar, a constitutional law professor at the University of California, Davis, said the Supreme Court's 25-day waiting period to make its decisions final isn't binding on lower courts.

"Some people may think it was in poor form, But it's not illegal," Amar said. "The appeals court may have felt that this case has dragged on long enough."

The same panel of judges ruled 2-1 last year that Proposition 8 was unconstitutional, but it kept same-sex marriages on hold while the case was appealed. But when the Supreme Court decided Proposition 8's backers couldn't defend the ban, it also wiped out the 9th Circuit's opinion.

Proposition 8 passed with 52 percent of the vote in November 2008, 4 1/2 months after same-sex marriages commenced in California the first time. The Williams Institute, a think tank at the University of California, Los Angeles, estimates 18,000 couples from around the country got married in the state during that window.

Shortly after the appeals court issued its order Friday, the governor directed California counties to resume performing same-sex marriages. A memo from the Department of Public Health said "same-sex marriage is again legal in California" and ordered county clerks to comply by making marriage licenses available to gay couples.

Given that word did not come down from the appeals court until mid-afternoon, most counties were not prepared to stay open late to accommodate potential crowds. The clerks in a few counties announced that they would stay open a few hours late Friday before reopening Monday.

A jubilant San Francisco Mayor Ed Lee announced that same-sex couples would be able to marry all weekend in his city, which is hosting its annual gay pride celebration.

—

Associated Press writers Jason Dearen, Paul Elias and Mihir Zaveri contributed to this story.

Tags

Government and politics, North America, United States, Municipal governments, Local governments, United States government, General news, Legal proceedings, Law and order, California, Social affairs, Social issues, Same sex marriage, Marriage, Couples, Relationships, Lifestyle, Family issues, Gay rights, Human rights and civil liberties, National governments, Jerry Brown, Los Angeles, Court decisions, Occasions, Supreme courts, National courts, Courts, Judiciary, San Francisco, Bill Clinton, Ed Lee, George W. Bush, Supreme Court of the United States, Government appointments and nominations, Jimmy Carter, Antonio Villaraigosa, Judicial appointments and nominations, Constitutions, Constitutional amendments, Weddings, Kamala Harris, Dennis Herrera, Stephen Reinhardt, Gays and lesbians, California state government, Louisiana state government

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Exhibit I

SAN FRANCISCO – The lead plaintiffs in the U.S. Supreme Court case that overturned California's same-sex marriage ban tied the knot at San Francisco City Hall on Friday, about an hour after an appeals court cleared the way for same-sex couples to obtain marriage licenses for the first time in 4 1/2 years.

State Attorney General Kamala Harris presided at the wedding of Kris Perry and Sandy Stier, of Berkeley. The couple sued to overturn the state's voter-approved gay marriage ban along with Jeff Katami and Paul Zarrillo, of Burbank, who planned to marry Friday evening at Los Angeles City Hall.

"They have waited and fought for this moment," Harris said. "Today their wait is finally over."

Harris declared Perry, 48, and Stier, 50, "spouses for life," but during their vows, they took each other as "lawfully wedded wife."

The 9th U.S. Circuit Court of Appeals had issued a brief order

RELATED IMAGES

June 27, 2013: Rainbow flag flies on the corner of Castro Street and Market Street in San Francisco

Friday afternoon dissolving a stay it imposed on gay marriages while the lawsuit challenging Proposition 8 worked its way through the courts.

Sponsors of California's same-sex marriage ban said the appeals court's decision was "disgraceful."

Anthony Pugno, general counsel for a coalition of religious conservative groups, called the 9th Circuit's order an "outrageous act" by judges and politicians determined to overturn Proposition 8.

He called the court's decision an "abuse of power to manipulate the system and render the people voiceless."

The Supreme Court ruled 5-4 Wednesday that the sponsors of California's voter-approved gay marriage ban lacked authority to defend the measure in court once Harris and Gov. Jerry Brown refused to do so.

The decision lets stand a trial judge's declaration that the ban, approved by voters in November 2008, violates the civil rights of gay Californians and cannot be enforced.

Under Supreme Court rules, the losing side in a legal dispute has 25 days to ask the high court to rehear the case. The court said earlier this week that it would not finalize its ruling in the Proposition 8 dispute until after that time had elapsed.

It was not immediately clear whether the appeals court's action would be halted by the high court.

Michelle Malkin reacts to the administration's troubles

Calif. appeals court lifts hold on same-sex marriage

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Exhibit J

Appeals court lifts hold on Calif. gay marriages

Two men hold hands while walking on Castro Street in San Francisco, Thursday, June 27, 2013. The Supreme...

Associated Press

LISA LEFF 15 hours ago

Politics Society United States courts of appeals Kamala Harris Same-sex marriage Appellate court

SAN FRANCISCO (AP) — A federal appeals court on Friday cleared the way for the state of California to immediately resume issuing marriage licenses to same-sex couples after a 4 1/2-year freeze.

The 9th U.S. Circuit Court of Appeals issued a brief order saying it has dissolved a stay it imposed on gay marriages while a lawsuit challenging the state's voter-approved ban on such unions worked its way through the courts.

Matt Dorsey, a spokesman for San Francisco City Attorney Dennis Herrera, said city officials were preparing to let couples marry right away.

Just minutes after the appeals court issued its order, the two lead plaintiffs in the case were standing in line at San Francisco City Hall to get a marriage license. They planned to wed at 4:15 p.m., with state Attorney General Kamala Harris officiating, according to the American Foundation for Equal Rights, which brought the lawsuit.

"On my way to SF City Hall. Let the wedding bells ring," Harris tweeted after the 9th Circuit issued its order.

The Supreme Court ruled 5-4 Wednesday that the sponsors of California's voter-approved gay marriage ban lacked authority to defend Proposition 8 in court once Harris and Gov. Jerry Brown refused to do so.

The decision lets stand a trial judge's declaration that the ban violates the civil rights of gay Californians and cannot be enforced.

Under Supreme Court rules, the losing side in a legal dispute has 25 days to ask the high court to rehear the case. The court said earlier this week that it would not finalize its ruling in the Proposition 8 dispute until after that time had elapsed.

It was not immediately clear whether the appeals court's action would be halted by the high court.

Appeals court lifts hold on Calif. gay marriages Associated Press

Just Like That, Gay Marriage Is Once Again Legal in California The Atlantic Wire

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Kamala Harris
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Gay marriages resume in California after five-year hiatus

9th Circuit: Same-Sex Marriages Can Resume in California

Raw Video: San Francisco's First Same-Sex Wedding Post-Prop. 8

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