In the Supreme Court of the State of California

DENNIS HOLLINGSWORTH, et al.
Petitioners,

v.

PATRICK O' CONNELL, in his official capacity as Auditor-Controller/County Clerk-Recorder of Alameda County, et al.,
Respondents,

and

EDMUND G. BROWN JR., in his official capacity as Governor of the State of California, et al.
Real Parties in Interest.

Case No. S211990

INFORMAL OPPOSITION TO REQUEST FOR IMMEDIATE STAY OR INJUNCTIVE RELIEF

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INTRODUCTION

Real Parties in Interest Governor Edmund G. Brown Jr., Attorney General Kamala D. Harris, Director of the California Department of Public Health Dr. Ron Chapman, and State Registrar of Vital Statistics Tony Agurto submit this informal brief opposing petitioners' request for an immediate stay or injunction prohibiting county officials from obeying the federal injunction issued in *Perry v.* Schwarzenegger. (Petition, Ex. B).

The petition for a writ of mandate is a last-ditch effort to circumvent the federal district court's injunction, which operates directly against state and local officials. The Court should reject both the request for a stay and the petition because they are an impermissible collateral attack on the district court's final judgment. This Court is not the proper forum to litigate the scope or validity of the district court's injunction; that question is properly presented, if at all, to the federal district court. Further, petitioners do not seek to preserve the status quo but rather to upend it. Yet they can identify no harm that would befall them if this Court prohibits county officials from issuing marriage licenses to same-sex couples as they have been doing for over two weeks. The harm to the counties from an injunction from this Court, on the other hand, is the very real threat of contempt proceedings in federal district court for failing to comply with its injunction. Finally, the public interest weighs sharply against issuing a stay in this case. After years of litigation, there is now a final determination that Proposition 8 is unconstitutional. To revive Proposition 8, as petitioners have asked, by ordering county officials to enforce it would command the violation of gay and lesbian Californians' federal constitutional rights. The request for an immediate stay or injunctive relief should be denied.

ADDITIONAL MATERIAL FACTS NOT INCLUDED IN THE PETITION

1. After the United States Supreme Court issued its decision in *Hollingsworth v. Perry* (2012) 133 S.Ct. 2652, the Department of Public Health (DPH) issued an all county letter[1] to each county clerk and county recorder informing them that the decision had been issued. (Petition, Ex. C.) DPH advised county officials that the effect of this decision, which left the district court's injunction intact, was that same-sex couples would again have the right to marry in California once the Ninth Circuit lifted its stay of the district court's judgment. The petition selectively omits the advice letter from Attorney General Harris to Governor Brown, dated June 3, 2013, which was attached to the all county letter along with a copy of the district court's injunction. That advice letter is attached to this informal opposition as Exhibit A.

2. On June 28, 2013, the Ninth Circuit issued an order dissolving the stay effective immediately. (Petition, Ex. D.) On that same day, DPH issued a second all county letter informing the counties that they are now required, under the terms of the injunction, to issue marriage licenses to same-sex couples. (Petition, Ex. E.) On June 29, 2013, petitioners filed an emergency application with Justice Kennedy, acting as Circuit Justice for the Ninth Circuit, seeking a stay of the Ninth Circuit's order dissolving the stay. See United States Supreme Court, Docket 12-144, available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-144.htm. On June 30, 2013, Justice Kennedy summarily denied the application. *Id.*

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[1] DPH officials routinely communicate with county clerks and county recorders using the all county letter.

3. Since counties began issuing marriage licenses to same-sex couples on June 28, 2013, Real Parties in Interest are unaware of any county that has refused to issue a marriage license to a same-sex couple who otherwise met the requirements to be married. On information and belief, the City and County of San Francisco alone has issued more than 600 marriage licenses to same-sex couples since that time.

ARGUMENT

A stay should only be granted in cases in which the petitioners establish (1) that irreparable injury will result if the status quo is not preserved, and (2) that petitioners are likely to succeed on the merits. These standards are similar to that governing a preliminary injunction issued by a trial court. "In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) The general rule is that where plaintiffs seek such an injunction, public policy considerations come into play. "Where, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties the public interest must be considered." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472-1473 [citing *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588].) Each of these factors weighs uniformly against issuing a stay or an injunction.

I. PETITIONERS ARE UNLIKELY TO PREVAIL ON THE MERITS

Petitioners' writ of mandate and accompanying request for a stay invoke article III, section 3.5 of the California Constitution. But as set forth in the attached June 3, 2013 letter from the Attorney General to the

Governor, the injunction the Northern District of California issued in *Perry v. Schwarzenegger* operates *directly* against state and county officials. (See Petition, Ex. B and Ex. A hereto.) No state or county official has argued that article III, section 3.5 is even at issue in this case. Article III, section 3.5 has no application where officials are acting under a federal court order. (*Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 595-596 [concluding that art. III, § 3.5 does not excuse an administrative agency from complying with the direct order of a superior court].) Accordingly, DPH directed county officials to issue marriage licenses to same-sex couples because they were so enjoined by a federal district court.

Thus the issue presented by the petition is controlled by the Supremacy Clause of the United States Constitution. (U.S. Const., art. VI, § 2.) All parties — *including petitioners* — have acknowledged before the United States Supreme Court that the federal court's injunction applies statewide. (*Hollingsworth v. Perry*, United States Supreme Court Case No. 12-144, *Brief of Petitioners* at pp. 17–18 [Proponents referencing the "statewide injunction"]; *Brief of Respondent City and County of San Francisco* at p. 19, fn. 4, and *Brief of Respondents* at p. 19 ["The district court therefore was within its power to enjoin enforcement of the amendment statewide"].) The United States Supreme Court shared this view. (*Hollingsworth v. Perry* (2013) 133 S.Ct. 2652, Kennedy, J., dissenting [referencing the "District Court's judgment, and its accompanying *statewide* injunction," emphasis added].) After the Attorney General's analysis was publicly released, the Ninth Circuit took the extraordinary step of dissolving the stay that would typically have remained in place until the mandate issued. (Compare *Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 906 with Petition, Ex. D.) State and county officials have thus acted in accordance with their legal duties in complying with the federal court's injunction.

Under the Supremacy Clause, the federal injunction overrides state law, including article III, section 3.5 of the California Constitution. (*LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1160 [noting that article III, section 3.5 does not excuse state officials from complying with federal law under the Supremacy Clause].) By requesting a stay or injunction that would affirmatively prohibit county officials from complying with their obligations under the injunction, petitioners are in effect asking this Court to modify the scope of the district court's injunction.

That petitioners are directly attacking the district court's injunction is clear from the face of petition. It is clear that the federal injunction was not limited to providing relief only to the four named plaintiffs. The injunction provides 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." (Petition, Ex. B.) Petitioners ignore the clear language of the injunction and instead argue that the district court "lacks the authority to award relief beyond an injunction limited to the four named plaintiffs." (Petition at p. 34.) To be sure, there are numerous federal cases evaluating whether a federal district court abused its discretion in issuing relief that went beyond the parties to the case, with differing results. (Compare, e.g., *Los Angeles Haven Hospice, Inc. v. Sebelius* (9th Cir. 2011) 638 F.3d 644 and *Meinhold v. United States Dept. of Defense* (9th Cir. 1994) 34 F.3d 1469 with *Isaacson v. Horne* (9th Cir. 2013) 716 F.3d 1213, 1230; *Bresgal v. Brock* (9th Cir. 1988) 843 F.2d 1163, 1169, 1171; *Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017; *Easyriders Freedom F.I.G.H.T. v. Hannigan* (9th Cir. 1996) 92 F.3d 1486.) But such disputes go to whether a district court properly exercised its discretion, not to whether the district court had the fundamental power to enter a judgment benefiting third parties. California law is clear that a litigant cannot collaterally attack a final judgment unless

the initial court lacked fundamental jurisdiction over the parties or the subject matter, which is not the case here. (See, e.g., *Estate of Buck* (1994) 29 Cal. App. 4th 1846, 1854; see also *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 725 [stating the general rule that a final judgment or order is not subject to collateral attack "even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties"].)

If petitioners wish to challenge the scope of the district court's injunction or seek modification of it, they must do so before that court. They cannot ask this Court to enjoin county officials from complying with the district court's injunction. Because the injunction applies statewide, and because this Court is not the proper forum for seeking modification of that injunction, petitioners are unlikely to succeed on the merits of their claims, and this Court should deny any injunctive relief on that basis alone.

II. PETITIONERS HAVE NOT ESTABLISHED THAT A STAY IS NEEDED TO PREVENT IRREPARABLE INJURY

The balance of harm to the parties weighs against issuance of a preliminary stay or injunction. The petition articulates no harm that will befall the petitioners themselves in the absence of a stay. But the respondent county officials and real party state officials will be put in an untenable position if a stay issues. They will be caught (on pain of contempt) between a federal court judgment that enjoins them from enforcing Prop. 8, and an order of this Court requiring them to enforce the very same law.

Similarly, the balance of harm to the public interest weighs against issuance of a preliminary stay or injunction. Petitioners contend that the marriages of same-sex couples that have been solemnized since June 28 injure the "public's confidence in the rule of law and their system of government." (Petition at p. 25.) But there is no evidence that this is the

case. Our system of government and the rule of law have in fact been carried out. A federal court ruled that Prop. 8 violates the Due Process and Equal Protection clauses of the U.S. Constitution. The Supreme Court ruled that petitioners did not have standing to challenge this ruling. Consistent with the expressions of the petitioners and the Supreme Court itself, the Attorney General, prepared for such a ruling, analyzed the law and advised the Governor that the injunction applied to all 58 counties, and the Department of Public Health so advised the counties. The judgment went into effect when the Ninth Circuit lifted its stay. The Department of Public Health notified the counties that the injunction had become effective, and that marriage equality was again the law of the State of California.

Petitioners further claim that in the absence of a stay, the public interest would be harmed because the failure to enforce Prop. 8 "harms the People by ignoring their will as expressed in a constitutional initiative." (Petition at p. 25.) This is the same argument that petitioners made and lost before the district court, the Ninth Circuit, and ultimately before the U.S. Supreme Court. Petitioners cannot collaterally attack the judgment of the district court here, or raise the argument it lost in the district court as grounds for the issuance of a stay of this Court. In any event this harm is insufficient, standing alone, for an injunction to issue. In every case in which the actions of an official are challenged as being unconstitutional, petitioners will allege that there is a generic harm that occurs by virtue of the alleged unconstitutional act. For this Court to exercise its original jurisdiction and issue a stay that would overturn the status quo, a showing of a specific and particularized harm is required.

Petitioners fail to even address the harm to the public interest that would arise from a stay or injunction. First, the stay itself would create the very kind of uncertainty about the same-sex marriages solemnized since

June 28 that petitioners profess to want to avoid. (Petition at p. 25.) Today, all state and county officials agree that those marriages are valid; if a stay issues, they will be rendered uncertain.

Second, a stay would not only put the county and state officials in the impossible position of choosing between complying with the federal court injunction and this Court's stay, but it could precipitate a conflict of constitutional dimension between this Court and the federal court. To the extent that there is any substance to petitioners' claims about the scope of the injunction (and there is not), that uncertainty should be resolved in the first instance by the federal court that issued it, to avoid any potential conflict that might otherwise result between state and federal courts.

Third, petitioners do not address the harm that would result from the lack of uniformity in application of the marriage laws that was of concern to this court in *Lockyer*. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1005, 1078–1079.) The argument that the injunction does not apply to any same-sex couple who applies for a marriage license in Alameda and Los Angeles counties does not survive a plain-meaning analysis of the injunction—it applies directly and without reservation to all "defendants," including the Alameda and Los Angeles County clerk/recorders. A more narrowly-crafted injunction that only applies in the 56 counties petitioners alternatively contend are not covered by the injunction, see Petition at pp. 36–42, would threaten the uniformity and coherence of state marriage law. Such an injunction would also raise issues about what would happen to couples who marry in Alameda or Los Angeles but move to other counties. Petitioners' application for a stay or injunctive relief fails to consider or address any of these legitimate and practical public interest concerns.

CONCLUSION

Petitioners' request for an immediate stay or injunctive relief should be denied, and the Court should summarily deny the petition in its entirety.

Dated: July 12, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **INFORMAL OPPOSITION TO REQUEST FOR IMMEDIATE STAY OR INJUNCTIVE RELIEF** uses a 13 point Times New Roman font and contains 2,489 words.

Dated: July 12, 2013

KAMALA D. HARRIS
Attorney General of California

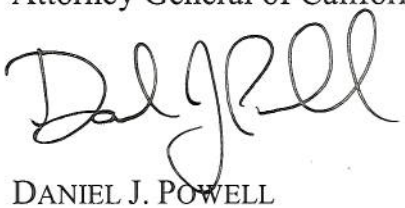

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Exhibit A

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

June 3, 2013

The Honorable Edmund G. Brown Jr.
Governor of the State of California
State Capitol, First Floor
Sacramento, CA 95814

RE: *Hollingsworth v. Perry*
Supreme Court of the United States, Case No. 12-144

Dear Governor Brown:

Your office has asked us to analyze the scope of the district court's injunction in *Perry v. Schwarzenegger*, should it go into effect. The scope of the injunction will be significant if the United States Supreme Court dismisses the case and vacates the Ninth Circuit's opinion for lack of jurisdiction, leaving the district court's judgment intact. Specifically, we have analyzed whether the county clerks and registrar/recorders who have responsibility for carrying out state marriage laws are bound by the terms of the injunction, and whether the Department of Public Health (DPH) should so advise them. Under the circumstances of this case, we conclude that the injunction would apply statewide to all 58 counties, and effectively reinstate the ruling of the California Supreme Court in *In re Marriage Cases* (2008) 43 Cal.4th 757, 857. We further conclude that DPH can and should instruct county officials that when the district court's injunction goes into effect, they must resume issuing marriage licenses to and recording the marriages of same-sex couples.

BACKGROUND

On November 4, 2008, California voters approved Proposition 8, which amended the California Constitution to provide: "Only marriage between a man and a woman is valid or recognized in California." (Cal. Const., art. I, § 7.5.) After the election, opponents of Proposition 8 challenged the measure in the California Supreme Court, arguing that it was an impermissible revision of the California Constitution rather than an amendment. (Compare Cal. Const., art. II, § 8, subd. (b); *id.*, art. XVIII, § 3 with *id.*, art. XVIII, § 1.) The California

Supreme Court rejected that challenge, and concluded Proposition 8 was a valid amendment to the California Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 388.)

Before the California Supreme Court issued its decision, two same-sex couples filed a facial challenge against the amendment in federal district court, alleging that Proposition 8 violates the Fourteenth Amendment to the U.S. Constitution and seeking declaratory and injunctive relief. (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921 [*Perry I*].) The suit was brought against Governor Arnold Schwarzenegger, Attorney General Edmund G. Brown Jr., the Director of the California Department of Public Health and State Registrar of Vital Statistics, the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, the Clerk-Recorder of the County of Alameda, and the Registrar-Recorder/County Clerk for the County of Los Angeles. The official proponents of Proposition 8 intervened on behalf of the defendants, and the City and County of San Francisco intervened on behalf of the plaintiffs.

In answer to the Complaint, Attorney General Brown admitted that Proposition 8 violated the Fourteenth Amendment to the U.S. Constitution. (*Perry I, supra*, 704 F.Supp.2d at p. 928.) Governor Schwarzenegger, DPH, and the county officials refused to take a position on the merits, but stated that they would continue to enforce Proposition 8 until they were enjoined from doing so or there was a final judicial determination that Proposition 8 was unconstitutional. (*Perry I, supra*, Case No. 3:09-cv-02292-JW, Docket No. 41, 42, 46.) Indeed, Proposition 8 continues to be enforced throughout California. The Proponents mounted a thorough defense of the amendment, which included significant discovery and a two-week bench trial.

After trial, the district court issued extensive findings of fact and conclusions of law. It held that Proposition 8 violated the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. (*Perry I, supra*, 704 F.Supp.2d 921, 1003.) Subsequently, it issued the judgment and injunction at issue, which provides in relevant part:

> 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.

(*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1991, 1194 [*Perry II*].) The Ninth Circuit stayed the injunction pending a final decision in the case. (*Ibid.*)

On the same day the district court filed its findings and conclusions, and before the judgment and injunction issued, the Proponents filed a notice of appeal. (*Perry II*, 628 F.3d at p. 1195.) None of the named defendants appealed, however, raising the question of whether the Ninth Circuit had jurisdiction to hear the appeal under Article III of the U.S. Constitution. Article III limits the power of federal courts to deciding cases and controversies, and requires that a party who invokes federal court jurisdiction have standing. Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of

first instance." (*Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 64.) The Ninth Circuit concluded that "Proponents' claim to standing depends on Proponents' particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative." (*Perry II*, *supra*, 628 F.3d at p. 1195.) Accordingly, it certified the state law question to the California Supreme Court. (*Id.* at p. 1193.)

The California Supreme Court agreed to answer the certified question and concluded that "in a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1127 [*Perry III*].) Relying on this decision, the Ninth Circuit concluded that the Proponents had Article III standing, and proceeded to reach the merits of the case. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1074 [*Perry IV*].) On the merits, the Ninth Circuit affirmed the district court, although on narrower grounds.

On December 7, 2012, the United States Supreme Court granted Proponents' petition for certiorari. (*Hollingsworth v. Perry* (2012) 133 S.Ct. 786.) In addition to the question presented by the petition, the Court ordered the parties to address "[w]hether [Proponents] have standing under Article III, § 2 of the Constitution in this case." (*Ibid.*) If the Court concludes that Proponents lack standing, then it will likely vacate the Ninth Circuit's decision, but leave the district court's judgment and injunction intact. (See *FW/PBS, Inc. v. City of Dallas* (1990) 493 U.S. 215, 235–236.) It is this particular outcome that our analysis addresses.

DISCUSSION

Throughout the litigation, all parties have expressed their understanding that if the stay were lifted, the injunction would apply statewide.[1] This is unsurprising because this case presents a facial constitutional challenge to state law. Success in a facial constitutional challenge necessarily means that the court has determined there is no possible constitutional application of the law. For the reasons set forth below, we conclude that so long as county officials receive notice, the federal injunction will apply statewide to all county clerks and registrar/recorders. In addition, we conclude that DPH can and should direct county officials to begin issuing marriage licenses to same-sex couples as soon as the district court's injunction goes into effect.

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[1] *Hollingsworth v. Perry*, United States Supreme Court Case No. 12-144, *Brief of Petitioners* at pp. 17–18 [Proponents referencing the "statewide injunction," and failing to challenge plaintiff-intervenor San Francisco's assertion that "the district court's injunction requires the state defendants responsible for uniform execution of the marriage laws to notify county officials of the injunction and instruct them not to enforce Proposition 8"], *Brief of Respondent City and County of San Francisco* at p. 19, fn. 4, and *Brief of Respondents* at p. 19 ["The district court therefore was within its power to enjoin enforcement of the amendment statewide"].)

The district court enjoined defendants and all persons under their control or supervision "from applying or enforcing Article I, § 7.5 of the California Constitution." The injunction effectively restores California law as it was following *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 857. There, the California Supreme Court struck section 308.5 from the Family Code and the words "between a man and a woman" from Family Code section 300, and held that "the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples." (*Ibid.*)

Because they are defendants, the Alameda Clerk-Recorder and Los Angeles Registrar-Recorder/County Clerk are expressly enjoined from enforcing or applying Proposition 8. Should the district court's injunction go into effect, any qualified same-sex couple who applies will be entitled to obtain a marriage license in those counties. If the Alameda Clerk-Recorder or the Los Angeles Registrar-Recorder/County Clerk were then to refuse to issue a license to a couple because they are of the same sex, he would be "applying or enforcing" Proposition 8 in violation of both the injunction and his ministerial duty to enforce state marriage statutes consistent with *In re Marriage Cases.*[2]

The question is whether the injunction applies to officials from the other 56 counties who are not named defendants. We conclude that in the circumstances particular to enforcement of the state's marriage laws, and under Federal Rule of Civil Procedure 65, the injunction does bind all county officials, as well as the named defendants. Specifically, because the injunction operates directly against the Director and Deputy Director of DPH who are named defendants, and because these two officials supervise and control county officials with respect to their enforcement of the marriage laws, the injunction binds the clerks and registrar/recorders in all 58 counties.

County clerks and recorders are state officials subject to the supervision and control of DPH for the limited purpose of enforcing the state's marriage license and certification laws ("marriage laws"). (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1080.) In *Lockyer*, the California Supreme Court considered the validity of marriage licenses issued to same-sex couples in contravention of Prop. 22, the statutory precursor to Prop. 8 that similarly restricted civil marriage to opposite-sex couples. (*Id.* at p. 1067.) In its opinion, the Court conducted an exhaustive review of California's marriage laws and the role of state and local officials. To marry, a couple must obtain a marriage license from a county clerk, who must

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[2] "[T]he duties of the county clerk and the county recorder . . . properly are characterized as ministerial rather than discretionary. When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage." (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1081–1082.)

ensure that the statutory requirements for marriage are met. (Fam. Code, §§ 350, 354.) The form used by the county clerks is prescribed by DPH. (*Id.*, § 355.) In addition, the individual who solemnizes the marriage must sign and endorse a form that is also prepared by DPH. (*Id.*, § 422.) Through the State Registrar of Vital Statistics (who is also the Director of DPH), DPH registers each marriage that occurs in the state. (See Health & Saf. Code, § 102175 [designating the director the Department of Public Health as the State Registrar]; *id.*, § 102100 [requiring marriages to be registered using a form prescribed by the State Registrar].)

In *Lockyer*, the California Supreme Court recognized that DPH supervises and controls both county clerks and county registrar/recorders in the execution of the marriage laws. It emphasized that in addition to giving DPH the authority to "proscribe and furnish all record forms" and prohibiting any other forms from being used (Health & Saf. Code, § 102200), the Health and Safety Code gives DPH "'*supervisory power over local registrars,*[3] *so that there shall be uniform compliance*'" with state law requirements. (*Lockyer*, *supra*, 33 Cal.4th at p. 1078, quoting Health & Saf. Code, § 102180, emphasis in *Lockyer*.) The California Supreme Court also indicated that DPH has implied authority to similarly supervise and control the actions of county *clerks* when they are performing marriage-related functions. It wrote that although a mayor "may have authority . . . to supervise and control the actions of a *county clerk or county recorder* with regard to other subjects" a mayor lacks that authority when those officials are performing marriage-related functions, which are subject to the control of state officials. (*Id.* at p. 1080, emphasis added [citing *Sacramento v. Simmons* (1924) 66 Cal.App. 18, 24–25 for the proposition that "when state statute designated local health officers as local registrars of vital statistics, 'to the extent [such officers] are discharging such duties they are acting as state officers'"].) The existence of this implied authority was substantiated by the relief ordered. After concluding that San Francisco officials could not disregard Prop. 22, the Court issued a writ of mandate directing "the county clerk and the county recorder of the City and County of San Francisco to take [ ] corrective actions *under the supervision of the California Director of Health Services* [now the Director of the Department of Public Health] *who by statute, has general supervisory authority over the marriage license and marriage certification process.*" (*Id.* at p. 1118, emphasis added.)

The understanding that DPH supervises and controls both county clerks and registrar/recorders in their execution of state marriage laws is also reflected in the California Supreme Court's subsequent decision in *In re Marriage Cases*. After the Court determined that Prop. 22 was invalid under the California Constitution, it instructed the superior court to issue a writ of mandate directing state officials to ensure that county officials enforced the marriage laws consistent with the Court's opinion:

> [A]ppropriate state officials [must] take all actions necessary to effectuate our ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their

[3] The county recorder is the local registrar of marriages. (Health & Saf. Code, § 102285.)

> duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court.

(*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 857.) Although the Court did not identify "the appropriate state officials," it is reasonable to conclude that the Court was referring to the director of DPH, who was a respondent. This language indicates that the California Supreme Court did not doubt that it was appropriate, in order to effectuate relief, to order the state officials responsible for ensuring the uniform application of California's marriage laws to ensure that local officials applied the marriage laws in a manner consistent with its decision.

The district court did essentially the same thing in fashioning the injunction in this case, and its language making the injunction directly applicable to anyone under the "supervision and control" of the defendants echoes that of *Lockyer v. City & County of San Francisco*. The district court, relying on *Lockyer*, understood that in fulfilling their duty to discharge the marriage laws, county clerks and county registrar/recorders are subject to the supervision and control of DPH. For example, in denying the motion of Imperial County to intervene, the district court concluded that DPH, not the Imperial County Board of Supervisors, was responsible for supervising county clerks and recorders for purposes of their role in enforcing the marriage laws. (*Perry v. Schwarzenegger* (N.D. Cal. No. 3:09-cv-02292, Aug. 4, 2010) 2010 U.S. Dist. Lexis 78815 at pp. *14–*15.) The district court concluded that "[t]he state, not the county, thus bears the 'ultimate responsibility' to ensure county clerks perform their marriage duties according to California law." (*Id.* at p. *17, citing *Lockyer*, *supra*, 33 Cal.4th at p. 1080.)

The "supervision and control" that DPH exercises with respect to its enforcement of state marriage laws brings county clerks and registrar/recorders within the scope of the district court's injunction. Federal Rule of Civil Procedure 65(d)(2) provides that, in addition to the parties, an injunction also binds "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation with anyone" who are parties or their officers, agents, servants, employees, and attorneys. (Fed. R. Civ. P. 65(d)(2).) Although federal courts may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law, Rule 65 "is derived from the common law doctrine that 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.* (1945) 324 U.S. 9, 13–14, emphasis added; *Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.* (7th Cir. 2010) 628 F.3d 837, 848.) As set forth above, when performing their ministerial duty to execute the marriage laws, all 58 county clerks and registrar/recorders are subject to the supervision and control of DPH. Consequently, under Rule 65 the injunction binds them, just as it binds DPH.

To be enforceable against any particular county official not a party to the case, the official must have actual notice of the injunction. (Fed. R. Civ. P. 65 [advisory committee note to the 2007 amendment].) Because the injunction binds county clerks and registrar/recorders who have actual notice of the injunction, we conclude that DPH should notify all county officials

of the injunction and instruct them to comply with it. Although the district court did not order DPH to provide notice of the injunction, the state's strong interest in uniform application of marriage laws supports doing so here. (See, e.g., *Lockyer*, *supra*, 33 Cal.4th at pp. 1078–1079 [noting the "repeated emphasis on the importance of having uniform rules and procedures apply throughout the state to the subject of marriage"].) Additionally, providing notice and instruction would be consistent with both DPH's direct compliance obligations under the injunction and its general supervisory role over county officials who enforce state marriage laws.

There is a substantial risk that county officials who were not named defendants will be unaware or uncertain of their obligations under the district court injunction. In the absence of notice and direction from DPH, this uncertainty will inevitably result in a patchwork of decisions that will confuse the public and threaten the uniformity and coherence of state marriage law. As a practical matter, it is difficult to conceive how two parallel marriage systems could operate simultaneously in California. A federal court has ruled, after a full trial of the evidence, that Proposition 8 is facially unconstitutional. The state's interest in uniformity and rational application of the law will be undermined if same-sex couples are artificially restricted to marrying solely in Los Angeles and Alameda counties—particularly if some county officials are inclined to conclude that same-sex marriages performed in those counties cannot be recognized in the rest of the state. To avoid these risks, DPH should act to notify and inform all counties of their obligation to comply with the injunction.

CONCLUSION

If the United States Supreme Court vacates the decision of the Ninth Circuit for lack of jurisdiction, the district court's judgment and injunction will require all county clerks and recorders throughout the state to cease enforcing or applying Proposition 8. Although the injunction does not expressly require state officials to direct counties to issue marriage licenses to qualified same-sex couples, providing such direction is within DPH's authority, and will be necessary to avoid confusion and ensure uniform application of the state's marriage laws.

Sincerely,

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Attorney General