Case No. S211990

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.

REPLY TO INFORMAL OPPOSITION TO REQUEST FOR IMMEDIATE STAY OR INJUNCTIVE RELIEF

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INTRODUCTION

Through an unlawful order to Respondents and a misplaced reliance on a federal court injunction, the Attorney General and other state officials are attempting to cast aside the most revered of all laws in this State—a duly enacted initiative constitutional amendment. Petitioners have shown the urgent need for an immediate stay to preserve that intiative while this Court considers the important state law questions presented by Petitioners' claims. The Attorney General predictably resists Petitioners' request for a stay, but her arguments on this issue are unpersuasive.

The Attorney General's characterizations of Petitioner's arguments misrepresent the issues. Petitioners herein expose these characterizations as misleading and inaccurate, and reiterate why they are likely to succeed on the merits of their state law claims. Petitioners then explain that the balance of the relevant interim harms weighs decidedly in favor of granting the requested stay—showing that the harms established by Petitioners are real and irreparable, while the harms alleged by the Attorney General are illusory.

DISCUSSION

I. This Petition Raises Important Issues of State Law.

This Petition raises important questions of state law. It is not, as the Attorney General insists, a "collateral attack" on or an attempt "to circumvent the federal district court's injunction." (Informal Opposition at p. 1; see also *id.* at p. 5.)

Petitioners' fundamental claim is that Respondents' failure to carry out their ministerial duties as prescribed by state law violates the state law principles expressed by this Court in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225, 95 P.3d 459] (hereafter *Lockyer*), and found in article III, section 3.5 of the California Constitution (hereafter section 3.5). (See Petition and Memorandum at pp.

27-28, 44-50.) These are important questions of state law, which this Court is undeniably fit to decide.

The Attorney General and State Registrar have publicly sought to justify Respondents' violation of state law by arguing that all county clerks are bound by the *Perry* injunction. (See Petition and Memorandum at p. 12 ¶ 89.) Evaluating this professed justification for Respondents' unlawful actions requires this Court to consider whether in fact the injunction applies to all county clerks in the State. That analysis primarily depends on a pure question of state law: whether the state officials named as defendants in *Perry* have legal authority to supervise or control county clerks issuing marriage licenses. (See Petition and Memorandum at pp. 36-43.) Indeed, the Attorney General in her June 3, 2013 letter to the Governor, attached as Exhibit A to the Informal Opposition, illustrates the centrality of this state law question when determining whether the injunction binds all county clerks. (See Informal Opposition Exhibit A at pp. 4-6 [discussing state law bearing on the question whether "[c]ounty clerks . . . are state officials subject to the supervision and control of [the Department of Public Health]"].) This Court is undoubtedly a proper venue to litigate that disputed issue of state law.

Moreover, this Court may construe the injunction of another court when doing so is necessary to evaluate legal issues properly presented here. (*See People v. Gonzalez* (1996) 12 Cal.4th 804, 823-824 [50 Cal.Rptr.2d 74, 87, 910 P.2d 1366, 1378] [reviewing an injunction "by way of extraordinary writ"].) Construing federal court orders, in particular, requires this Court to interpret such orders in accordance with principles of federal law. (See Petition and Memorandum at p. 32.) This task of interpreting another court's injunction includes, as the Attorney General admits, considering whether the injunction-issuing court had "jurisdiction in the fundamental sense," including jurisdiction over "the parties." (Informal

Opposition at pp. 5-6 [quoting *Pacific Mut. Life Ins. Co. of Cal. v. McConnell* (1955) 44 Cal.2d 715, 725-26 [285 P.2d 636, 641] [evaluating whether an injunction-issuing court lacked jurisdiction].)

As a result, this Court, when evaluating whether the *Perry* injunction excuses Respondents' non-enforcement of state marriage law, should consider the *Perry* court's plain jurisdictional limitations. Petitioners thus raise two jurisdictional limitations on the *Perry* injunction. First, the *Perry* court lacked authority to order relief in favor of persons not parties to that case. (See *Lewis v. Casey* (1996) 518 U.S. 343, 349 fn.1 [116 S.Ct. 2174, 2178 fn.1, 135 L.Ed.2d 606] [acknowledging that this is a jurisdictional issue].)[1] Second, the *Perry* court lacked authority to bind state officials that do not possess direct power to issue marriage licenses—the harm complained of in that case. (See Petition and Memorandum at pp. 35-36 [citing cases acknowledging that this is a jurisdictional issue].) This Court should analyze these jurisdictional limitations because they are necessary to determine the effect that a federal court would give to the *Perry* injunction and they are relevant to resolving the state law questions (regarding the issuance of marriage licenses) that are properly before this Court. In short, evaluating the jurisdictional limitations underlying the *Perry* injunction does not constitute an impermissible collateral attack on that injunction.

Notably, it would be inappropriate for a federal court to decide the state law questions that are central to this case—whether the principles in *Lockyer* forbid Respondents' nonenforcement of state law, whether section 3.5 forbids Respondents' nonenforcement of state law, and whether state

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[1] Notwithstanding the Attorney General's attempt to distinguish between the *power* of a federal court to order injunctive relief and the *discretion* of a court to order injunctive relief (see Informal Opposition at p. 5), this question involves an issue of federal court power. (See *Lewis v. Casey*, *supra*, 518 U.S. at 349 fn.1; *Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017, 1024 [a federal court has "no power over those not properly before it"].)

officials have authority to supervise or control county clerks issuing marriage licenses. Therefore, the Attorney General's assertion that Petitioners' grievance against Respondents should have been lodged in federal court is deeply misguided. (See Informal Opposition at p. 1.)

II. This Court Should Enter an Immediate Stay to Remain in Place during the Pendency of these Proceedings.

The Attorney General argues that the standard for entering a stay here is "similar to [the analysis] governing a preliminary injunction issued by a trial court." (Informal Opposition at p. 3.) That standard involves two 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." (*Ibid.*, emphasis added [quoting *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678 [15 Cal.Rptr.2d 480, 486, 842 P.2d 1240, 1246].) While this Court has not concluded that this standard applies to temporary stays during an original writ proceeding, assuming that those factors apply, they are satisfied here.[2]

A. Petitioners Are Likely to Prevail on the Merits.

The Attorney General mischaracterizes, rather than responds to, Petitioners' claims. In particular, she asserts that "[u]nder the Supremacy Clause, the federal injunction overrides state law, including article III, section 3.5 of the California Constitution." (Informal Opposition at p. 5.)

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[2] The Attorney General is incorrect in suggesting that Petitioners do not seek "to preserve the status quo." (Informal Opposition at p. 1.) Entering a temporary stay or injunction preserves the status quo until this Court is able to finally resolve the claims raised in this Petition. The status quo is the "the last actual peaceable, uncontested status which preceded the pending controversy." (*United Railroads of San Francisco v. Super. Ct. in and for City and County of San Francisco* (1916) 172 Cal. 80, 87 [155 P. 463, 466].) Here, the status quo is the state of affairs that existed when Respondents enforced Proposition 8. That was the last "uncontested status which preceded the pending controversy." (*Ibid.*) Entering the temporary stay requested by Petitioners preserves the status quo pending the final outcome of this case.

But Petitioners' arguments *do not* match the force of section 3.5 and the principles expressed by this Court in *Lockyer* against the force of the *Perry* injunction. Instead, Petitioners argue that because the injunction does not bind all county clerks, section 3.5 and the principles in *Lockyer* forbid clerks not bound by the injunction from declining to enforce Proposition 8.[3] In other words, Petitioners argue that, for the county clerks not bound by the *Perry* injunction, no conflict exists between their obligations under the injunction (because they have none) and their obligations under section 3.5 and *Lockyer* to enforce state law. The Supremacy Clause thus is irrelevant, and the Attorney General's legal analysis concerning section 3.5 and the principles expressed in *Lockyer* is misplaced and unpersuasive.

To support her argument, the Attorney General states that "[n]o . . . county official has argued that article III, section 3.5 is even at issue in this case." (Informal Opposition at p. 4.) This is a curious assertion considering that none of the county clerks, each of whom was named as a Respondent here, has yet to respond to Petitioners' claims. Meanwhile, although the Attorney General suggests that all Respondents agree with her legal position, she has threatened to bring suit against any Respondent who fails to comply with the State Registrar's directive (see Petition and Memorandum at p. 13 ¶ 94), perhaps for the very purpose of silencing disagreement from the county clerks. It is thus understandable why none of the county clerks have publicly expressed legal views contradicting those of the Attorney General. This Court therefore should not assume, as the

[3] See Petition and Memorandum at pp. 31-32 ["Non-*Perry* Respondents . . . are not bound by . . . the *Perry* injunction . . . . In the absence of th[at], this Court's case law and the California Constitution . . . forbid Non-*Perry* Respondents from declining to enforce state marriage law."]; *id.* at p. 44 ["Because Non-*Perry* Respondents are not bound by the *Perry* injunction, they are required to enforce Proposition 8."].

Attorney General would have it, that all county clerks agree with her legal position.

In her quest to pit the *Perry* injunction against Petitioners' claims, the Attorney General assumes, without establishing, that all county clerks are bound by the *Perry* injunction and thus that Petitioners cannot prevail. (See Informal Opposition at p. 3-4; *id.* at p. 6 ["Because the injunction applies statewide . . ."].) But her assumption is unfounded, as Petitioners' Memorandum of Points and Authorities demonstrates. (See Petition and Memorandum at pp. 32-43.)

The Attorney General does not attempt to refute Petitioners' argument that state officials lack authority to supervise or control Respondents when issuing marriage licenses—an issue that, as discussed above, is critical in determining whether all county clerks are bound by the injunction. (See Petition and Memorandum at pp. 36-43.) Instead, the Attorney General summarily asserts that "[a]ll parties" in *Perry* have acknowledged that "the federal court's injunction applies statewide," and that the United States Supreme Court has endorsed that view. (Informal Opposition at p. 4.) Neither assertion is true.

As the Petition states, *but the Attorney General ignored*, counsel for some parties in *Perry* openly acknowledged that the injunction does not bind county clerks outside of Los Angeles and Alameda Counties. (See Petition and Memorandum at pp. 32-33.) Indeed, one of the *Perry* plaintiffs' lead attorneys stated that those county clerks could "'refuse a marriage license to a same-sex couple' 'without violating th[e] injunction.'" (*Id.* at p. 33.)[4]

[4] The Attorney General suggests that Petitioners have previously conceded "that the [*Perry*] injunction applies statewide." (Informal Opposition at p. 4 [citing *Hollingsworth v. Perry* (June 26, 2013, No. 12-144), ___ U.S. ___ [2013 WL 3196927], Brief of Petitioners at pp. 17-18].) But this is not true.

Nor did the United States Supreme Court endorse the Attorney General's "statewide" injunction theory. The Attorney General's only support for this assertion is dicta from Justice Kennedy's *dissent.* In contrast, the Supreme Court *majority*, far from characterizing the district court's injunction as "statewide," called it what it is—one "enjoin[ing] *the state officials named as defendants* from enforcing it." (*Hollingsworth v. Perry* (June 26, 2013, No. 12-144) ___ U.S. ___ [2013 WL 3196927 at p. *7] [emphasis added].) The Supreme Court did not attempt to interpret or address the state law authority of those state officials to supervise or control the issuance of marriage licenses. The High Court thus did not indicate that the *Perry* injunction binds all county clerks throughout the State.

Tellingly, the Attorney General's letter to the Governor betrays the lack of state law support for her assertion that the injunction binds all county clerks as persons under the supervision or control of state officials. On Page 5 of that letter, the Attorney General asserts that if the State Registrar has "authority to . . . supervise and control the actions of county *clerks* when they are performing marriage-related functions," it is "*implied* authority." (Informal Opposition Exhibit A at p. 5, emphasis added.) That, of course, is an admission of what Petitioners contend—that no express legal authority gives a state official authority over county clerks when issuing marriage licenses. (See Petition and Memorandum at pp. 36-37.) It

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Petitioners, to be sure, have acknowledged that the *Perry* court *purported* to enter a statewide injunction, but they have never conceded that the district court had authority to enter a statewide injunction or in fact succeeded in its attempt to do so. The *Perry* court did not succeed in issuing a statewide injunction because, among other reasons explained in the Memorandum of Points and Authorities (see Petition and Memorandum at pp. 32-43), the district court mistakenly believed that county clerks are under the supervision and control of state officials. (See *Perry v. Schwarzenegger* (N.D.Cal. Aug. 4, 2010, No. C 09-2292 VRW) Order, Doc. No. 709 at p. 9 [opining incorrectly that "[c]ounty clerks have no discretion to disregard a legal directive from the existing state [official] defendants"].)

also underscores the immediate need for this Court's definitive guidance on this critical question of state law.

B. The Balance of the Relevant Interim Harms Weighs in Favor of Granting the Stay.

The "principal objective" of granting a temporary stay during the pendency of proceedings "'is to minimize the harm which an *erroneous* interim decision may cause.'" (*White v. Davis* (2003) 30 Cal.4th 528, 561 [133 Cal.Rptr.2d 648, 674-675, 68 P.3d 74, 96] [emphasis in original] [quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73 [196 Cal.Rptr. 715, 721, 672 P.2d 121, 127]].) The relevant legal analysis thus considers only the *interim harms* that will occur during the period that the stay is in place. Accordingly, this Court should assess the harm that will occur during the pendency of these proceedings if it denies the stay now but eventually issues the requested writ. And it must balance that harm against the harm that will occur during the pendency of these proceedings if the Court grants the stay now but ultimately declines to issue the writ.

1. Great Interim Harm Will Result If this Court Denies the Stay and Later Issues the Writ.

Petitioners, as the Official Proponents of Proposition 8, appear in this case as representatives of the People, and thus they represent the State's interest in that constitutional initiative measure. (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1125 [134 Cal.Rptr.3d 499, 504, 265 P.3d 1002, 1006] [discussing initiative proponents' right "to assert *the people's*, and hence *the state's*, interest" in a duly enacted intiative measure].)[5] A stay is warranted here because the State and its People are irreparably harmed whenever public officials illegitimately cease enforcing state constitutional provisions. (*Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122

[5] Contrary to the Attorney General's assertion (see Informal Opposition at p. 6), Petitioners, as representatives of the People's (and thus the State's) interests in Proposition 8, need not show harm to themselves personally.

F.3d 718, 719 ["[I]t is clear that a state suffers irreparable injury whenever an enactment of its people … is enjoined."]; see also *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.* (1977) 434 U.S. 1345, 1351 [98 S.Ct. 359, 363, 54 L.Ed.2d 439] [Rehnquist, J., in chambers].)

The irreparable harm to the People is more acute, and the need for an immediate stay is heightened, when the unenforced state law is an initiative constitutional amendment. (See *Perry v. Brown*, *supra*, 52 Cal.4th at p. 1140, quotation marks omitted ["[T]he courts have described the initiative and referendum as articulating one of the most precious rights of our democratic process"].) This Court regularly extolls the value of the initiative power, proclaiming the judiciary's "duty to jealously guard the people's initiative power, and hence to apply a liberal construction to this power . . . in order that the right to resort to the initiative process be not improperly annulled." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025 [103 Cal.Rptr.3d 733, 747, 222 P.3d 186, 197, quotation marks omitted].) These well-established legal principles counsel in favor of granting the stay and preventing public officials from annulling the People's will as expressed in an initiative constitutional amendment.[6]

The Attorney General incorrectly asserts that "[t]his is the same argument that petitioners made and lost before the district court, the Ninth Circuit, and ultimately before the U.S. Supreme Court." (Informal Opposition at p. 7.) On the contrary, Petitioners raised this argument in their request to the Ninth Circuit for a stay pending appeal, and the Ninth Circuit *granted* that request. (See *Perry v. Brown* (9th Cir. Aug. 12, 2010, No. 10-16696) Emergency Motion for Stay Pending Appeal, Doc. No. 4-1

[6] If any "doubts" exist on the question of entering a temporary stay, those should "be resolved in favor of" requiring Respondents to enforce the People's intiative. (See *Perry v. Brown*, *supra*, 52 Cal.4th at p. 1140, emphasis omitted.)

at pp. 66-73 [arguing that irreparable injury is certain in the absence of a stay]; *Perry v. Brown* (9th Cir. Aug. 16, 2010, No. 10-16696) Order, Doc. No. 14 [granting Petitioners' request for stay pending appeal].) This Court should do the same here.

Harm will also result to a broad section of the general public from the widespread issuance of marriage licenses of uncertain validity. (See Petition and Memorandum at pp. 23-25.) That the Attorney General did not attempt to refute this harm is not surprising because former Attorney General (now Governor) Edmund G. Brown Jr., previously agreed that courts should avoid the harm that results when the government issues marriage licenses of questionable validity. Specifically, then-Attorney General Brown opposed the *Perry* plaintiffs' unsuccessful motion for a preliminary injunction because of "the potential harm to a *broad section of the general public* from subsequent invalidation of possibly thousands of marriages, as well as the ongoing uncertainty about their validity that would undoubtedly persist until a *final determination by an appellate court*." (*Perry v. Schwarzenegger* (N.D.Cal. June 11, 2009, No. C 09-2292 VRW) Attorney General's Opposition to Plaintiffs' Motion for Preliminary Injunction, Doc. No. 34 at p. 10, emphasis added.) Those same harms exist here and weigh heavily in favor of entering a temporary stay pending the outcome of these proceedings.

2. No Interim Harm Will Result If this Court Grants the Stay and Later Declines to Issue the Writ.

The Attorney General argues that if this Court issues a stay, county clerks will be in an untenable position where they risk enduring legal contempt proceedings in federal court. (See Informal Opposition at pp. 1, 6.) Yet this assertion of harm ignores that the Attorney General has *already placed the county clerks in an untenable position*. Right now county clerks, on the one hand, face writ-of-mandate proceedings (like this action) for

violating their legally prescribed ministerial duties if they decline to enforce the California Constitution; and the county clerks, on the other hand, face the legal prosecution threatened by the Attorney General if they, after rightly determining that they are not bound by the *Perry* injunction, continue to enforce Proposition 8 as the law of California. Simply put, the county clerks are already in a no-win situation that presents potential legal suits on all horizons.[7]

The Attorney General next asserts that the stay "would create the very kind of uncertainty about the same-sex marriages solemnized since June 28 that petitioners profess to want to avoid." (Informal Opposition at pp. 7-8.) The basis for this argument, according to the Attorney General, is that "all state and county officials agree that those marriages are valid." (*Id.* at p. 8.) But this is far from clear. As previously mentioned, none of the county clerks has filed a legal response yet. Once they do, some may very well disagree, or at least raise legitimate questions, regarding the validity of those marriages. Furthermore, the Attorney General's argument is misplaced in any event because the stay itself would *not* create the uncertainty surrounding those marriages. This doubt *already exists* because the county clerks are issuing marriage licenses in violation of the California Constitution. The absence of a stay will only heighten and multiply the uncertainty. In the end, the cloud of uncertainty will not dissipate until this Court finally decides whether Respondents are violating state law by declining to enforce Proposition 8.

The Attorney General also argues that the public interest weighs against a stay because the stay would violate "gay and lesbian Californians'

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[7] The Attorney General's contempt argument assumes that Respondents are bound by the injunction and thus would be subject to contempt before that federal court. But as we have explained elsewhere, Respondents are not bound by that injunction. (See Petition and Memorandum at pp. 32-43.)

federal constitutional rights." (Informal Opposition at p. 1.) This asserted harm is without foundation. Because a federal district court's decision does not establish precedent that is binding on a subsequent state or federal court (see Petition and Memorandum at p. 45), it simply cannot be said, except concerning the *Perry* plaintiffs (who have already entered into their marriage), that same-sex couples in California have a federal constitutional right to marry each other.

The Attorney General additionally asserts that no harm to the public interest will result from refusing to grant a stay because "[o]ur system of government and the rule of law have in fact been carried out." (Informal Opposition at p. 7.) In other words, the Attorney General claims that there is no harm to the public interest because she believes that her arguments will prevail in the end. But that is not the relevant question, which, of course, requires this Court to focus on the harms that will result from an erroneous interim decision. (See *White v. Davis*, *supra*, 30 Cal.4th at p. 561.)

Finally, the Attorney General discusses harm that she claims "would result from the lack of uniformity in application of the marriage laws." (Informal Opposition at p. 8.)[8] But this argument misses the mark because *the stay would actually ensure statewide uniformity during the pendency of these proceedings*. If the stay is not issued, the county clerks will be left, on an individualized basis, to determine whether they believe themselves to be

[8] There is absolutely no concern that "couples who marry in Alameda or Los Angeles but move to other counties" will risk forefeiting their marriage's validity. (Informal Opposition at p. 8.) State marriage law contains no county-specific residency requirement, and the Attorney General cites no basis for this alleged harm. In any event, because the *Perry* court lacked authority to grant relief to anyone other than the four plaintiffs (see Petition and Memorandum at pp. 33-34), the validity of all other marriages between same-sex couples in Alameda and Los Angeles Counties is already suspect.

bound by the injunction. (Cf. Petition and Memorandum at pp. 45-46.) This will likely result in different county clerks arriving at different conclusions concerning their duty to enforce Proposition 8. A stay is thus essential to ensuring statewide uniformity throughout these proceedings.[9]

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In sum, the balance of relevant interim harms weighs in favor of granting the stay. This Reply and the Memorandum of Points and Authorities articulate important interests that, as this Court acknowledged in *Lockyer*, warrant an immediate stay during these original writ proceedings. (*Lockyer*, *supra*, 33 Cal.4th at p. 1073.) The Attorney General has not demonstrated sufficient counterbalancing interests or harms to justify this Court in deviating from the course it took in *Lockyer*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court enter a stay—to remain in place during the pendency of these writ proceedings—requiring Respondents to enforce state law defining marriage as a union between a man and a woman.

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[9] This harm, if it were to occur, directly results from the strategic legal and political choices of the Governor and Attorney General. They chose not to defend Proposition 8 or to appeal the *Perry* court's decision against it. Had they simply filed a notice of appeal, even if they did not defend the constitutionality of Proposition 8 in their appellate briefs, the Ninth Circuit could have definitely settled Proposition 8's validity throughout the State as a matter of binding legal precedent. (Cf. *United States v. Windsor* (June 26, 2013, No. 12-307) ___ U.S. ___ [2013 WL 3196928 at pp. *6-10] [concluding that the Department of Justice's decision to file a notice of appeal, even though the Department agreed with the plaintiff that the challenged Defense of Marriage Act (DOMA) was unconstitutional, provided the appellate courts with jurisdiction to definitively resolve DOMA's constitutionality].) To the extent that the Attorney General claims any harm from lack of statewide uniformity, she and the Governor have no one to blame but themselves. These state officials cannot leverage harm that they caused to bolster their opposition to Petitioners' request for a stay.

Dated: July 15, 2013.

Respectfully submitted,

Andrew P. Pugno

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CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this document, certify that the foregoing document contains 4257 words, excluding the words in the sections that California Rules of Court, rule 8.204(c)(3) instructs counsel to exclude.

Andrew P. Pugno

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