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

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE

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INTRODUCTION AND SUMMARY OF ARGUMENT

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 (DPH), and State Registrar of Vital Statistics Tony Agurto (collectively, real parties) submit this preliminary opposition in response to the Court's Order filed July 12, 2013. The petition for a writ of mandate prohibiting county officials from obeying the federal injunction issued in *Perry v. Schwarzenegger* should now be denied.

The clerks and recorders of all 58 California counties are bound by a federal judgment enjoining them from enforcing Proposition 8, as explained in real parties' Informal Opposition to Immediate Stay or Injunctive Relief also filed July 12 (Opposition to Stay). The petition is an impermissible collateral attack on that judgment: despite the fact that the district court broadly enjoined enforcement of Proposition 8, petitioners would have this Court hold that the scope of the federal injunction is limited to affording relief to just the four named plaintiffs in the *Perry v. Schwarzenegger* litigation, or to enjoining Proposition 8 only in Alameda and Los Angeles counties.

Even if it were permissible for this Court to entertain such an attack on a federal court's judgment, petitioners' argument as to the legitimate scope of the injunction would fail. First, by its terms the federal injunction generally prohibits real parties and respondents – including all county officials under real parties' supervision or control – "from applying or enforcing Article I, § 7.5 of the California Constitution." (Petition, Ex. B.) As petitioners have again acknowledged (see Reply to Informal Opposition to Request for Immediate Stay or Injunctive Relief (Reply) at pp. 6–7, fn. 4), the district court intended its injunction to apply statewide. This acknowledgment necessarily follows from both the plain language of the

injunction and the district court's decision finding Proposition 8 to be unconstitutional in all applications.

Second, there is no merit to the arguments that the district court lacked authority to enter a statewide injunction. Undeniably, the district court possessed jurisdiction over the case and all the parties. And it is beyond dispute that a district court has the authority to issue a statewide injunction when it finds a law unconstitutional on its face.

Third, the federal court had the authority to bind county clerks and county recorders who were not named defendants because when performing their duties related to the state's marriage license and certification laws ("marriage functions"), they are subject to the supervision and control of DPH and the State Registrar, both of whom were defendants in *Perry v. Schwarzenegger*. (See Fed. Rules Civ. Proc., rule 65, 28 U.S.C.)

Finally, real parties' and respondents' compliance with a federal court injunction does not fairly implicate article III, section 3.5 of the California Constitution, nor does it call into question either the people's constitutional right to initiative or the primacy of the rule of law. This suit concerns only the scope of a federal court's authority to remedy what it concluded was a violation of the federal constitution, a decision that is now final. Petitioners may be frustrated that this case was resolved without an appellate ruling on the merits of the constitutional question, but the procedural resolution of this case is entirely consistent with the rule of law. Rather than place respondents in unacceptable jeopardy by forcing them to choose between violating an order of this Court or an order of the federal court, and rather than precipitating an unnecessary conflict with the federal court, this Court should deny the petition for writ of mandate.

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, DPH issued an All County Letter (ACL) to each county clerk and county recorder informing them that the decision had been issued. (Ex. 1.[1]) 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.

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 ACL informing the counties that they were now required, under the terms of the injunction, to issue marriage licenses to same-sex couples. (Petition, Ex. E.)

3. 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. (*Ibid.*)

4. Since counties began issuing marriage licenses to same-sex couples on June 28, 2013, real parties are unaware of any county that has refused to issue a marriage license to any eligible same-sex couple. On

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[1] This document is also attached to the Petition as Ex. C, but omits the attachments to which it refers. The complete document is attached hereto as Exhibit 1.

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 writ of mandate will issue to "compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (Code Civ. Proc., § 1085, subd. (a)), "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law" (*id.*, § 1086). In order to obtain writ relief, a party must establish "(1) [a] clear, present and usually ministerial duty on the part of the respondent ...; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty ... ." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868, citations omitted.) "A ministerial act is one that a public functionary is required to perform in a prescribed manner in obedience to the mandate of legal authority, without regard to his or her own judgment or opinion concerning the propriety of such act." (*Coachella Valley Unified School Dist. v. State* (2009) 176 Cal.App.4th 93, 113, citations omitted.) Because respondent county officials are enjoined from applying or enforcing Proposition 8 by virtue of a federal injunction, there is no clear, present, and ministerial duty for those officials to refuse to issue marriage licenses to same sex couples. Therefore mandamus should be denied.

I. PETITIONERS CANNOT RELITIGATE THE SCOPE OF THE DISTRICT COURT'S INJUNCTION IN THIS COURT

Petitioners' bid to have this Court undermine or modify the district court's injunction cannot succeed. If a court with fundamental jurisdiction "acts in excess of its jurisdiction, its act or judgment is merely voidable. That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by principles of estoppel, disfavor of collateral attack or res judicata." (*People v. Bankers Ins. Co.* (2010) 182 Cal.App.4th 1377, 1382, internal quotation marks and citations

omitted.) Here the petition fails because it is both an impermissible collateral attack on the judgment, and the claims raised are barred by res judicata.

First, the petition should be denied because it is a collateral attack on the judgment of the federal court. Petitioners claim that the district court lacked authority to enter a statewide injunction. As demonstrated below, the district court did not lack this authority. But even if it did, such "[e]rrors which are merely in excess of jurisdiction should be challenged directly . . . and are generally not subject to collateral attack once the judgment is final unless unusual circumstances were present which prevented an earlier and more appropriate attack." (*Id.* at pp. 1382–1383, citing *People v. Am. Contractors Indem. Co.* (2004) 33 Cal. 4th 653, 661, internal quotation marks omitted; see also *Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1269-1270 ["In contrast to cases involving other types of jurisdictional defects, a party may be precluded from challenging action in excess of a court's jurisdiction when the circumstances warrant applying principles of estoppel, disfavor of collateral attack or res judicata," quoting *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1101].) Accordingly, courts routinely reject attempts, such as this, to collaterally attack judgments that are alleged to be in excess of the issuing court's jurisdiction. (See, e.g., *City of Los Angeles v. Harco Nat'l Ins. Co.* (2006) 144 Cal.App.4th 656, 661–662 [rejecting collateral attack on an allegedly voidable grant of summary judgment].)

The refusal to entertain a collateral attack on another court's ruling is particularly strong where, as here, the Supremacy Clause is implicated because a state court has been asked to interfere with an order issued by a federal court. (U.S. Const., art. VI, § 2.) "Just as the federal courts lack jurisdiction to review the decisions of the state courts, so also must state

courts defer to the federal appellate process mandated by Congress. What is sauce for the goose is also sauce for the gander." (*Williams Nat. Gas Co. v. City of Oklahoma City* (10th Cir. 1989) 890 F.2d 255, 265.) If there were any question about whether the federal court exceeded its discretion by issuing an injunction that binds all county clerks and recorders in California, that issue should be decided by the district court itself. (See, e.g., *Valerio v. Boise* (1986) 177 Cal.App.3d 1212, 1223 [giving full faith and credit to a federal injunction barring the action and stating that "an erroneous judgment is as conclusive as a correct one under both federal and California law"].) Here, too, the attempt to collaterally attack the district court's final judgment and injunction should be rejected.

Important policy considerations also support this conclusion. Chief among them is that allowing a second, coordinate court to rule on the scope of another court's discretion or prior orders would interfere with and usurp that court's power to effectuate (and, if appropriate, clarify or limit) its own judgment. (See *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1454 ["'One of the strongest policies a court can have is that of determining the scope of its own judgments,'" quoting *Kern v. Hettinger* (2d Cir. 1962) 303 F.2d 333, 340]; *Lapin v. Shulton, Inc.* (9th Cir. 1964) 333 F.2d 169, 172 [stating that "for a nonissuing court to entertain an action" for relief from a judgment or for a collateral attack upon an injunction "would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court ... to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified, or discontinued ... "].)

Second, res judicata bars the petition. Because petitioners successfully intervened as defendants in *Perry*, the doctrine of res judicata

precludes them from raising their claims here.[2] (*Martin v. Martin*, *supra*, 2 Cal.3d at p. 758 ["The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction," internal quotation marks and citations omitted].) Res judicata extends not only to issues that were actually raised in the federal litigation, but to issues that "could have been raised." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.) The scope of the district court's injunction, its jurisdiction, and the fact that it enjoined real parties and everyone under their supervision or control from enforcing Proposition 8, are all questions that could have been raised in the federal district court. Petitioners are therefore barred from raising these questions here.

II. THE FEDERAL COURT'S INJUNCTION PROPERLY APPLIES STATEWIDE

Even if this Court were to consider the merits of the petition, the arguments about the proper scope of the injunction would fail: the federal

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[2] It is a truism that federal judgments have the same effect in this Court as in federal court. ((*Martin v. Martin* (1970) 2 Cal.3d 752, 761.) But that rule is significant because "the federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." (*Ibid.*, citing *Stoll v. Gottlieb* (1938) 305 U.S. 165, 170-171.) Thus, in this Court as in federal court, the district court's injunction was res judicata when issued, can only be "reversed on appeal or modified or set aside in the court of rendition" (*ibid.*) and cannot be collaterally challenged, modified or set aside in this Court. To this effect are both *Younger v. Jensen* (1980) 26 Cal.3d 397, 411 (discussing collateral estoppel effect of federal district court injunction and concluding that even the pendency of a federal appeal does not prevent a federal judgment from operating to collaterally estop litigation of the same issue in state court) and *Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173. (See Petition at p. 32.) Accordingly, the argument that the district court "lacks authority to order injunctive relief for anyone except the four plaintiffs in that case" (Petition at p. 33) cannot be adjudicated in state court; it could only have been raised in the federal courts.

court entered a statewide injunction, and it had the jurisdiction and legal authority to do so. Federal case law establishes that a district court properly enjoins all application of a provision of state law where that law is unconstitutional in all its applications, as the district court concluded in *Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921 1003–1004.

A. By Its Terms, the Federal Judgment Generally Enjoins Enforcement of Proposition 8 Statewide Because the Court Found Proposition 8 To Be Unconstitutional in All Applications

After a two-week trial and extensive findings of fact and conclusions of law, the federal court determined that Proposition 8 violated the Equal Protection and Due Process clauses of the federal constitution, and that it was facially invalid. (*Perry v. Schwarzenegger*, *supra*, 704 F.Supp.2d at p. 1003.) The corresponding remedy was an injunction permanently and generally enjoining enforcement of Proposition 8. "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." (*Id.* at p. 1004.)

Accordingly, the district court entered an injunction enjoining defendants and all persons under their control or supervision from enforcing Proposition 8. By its terms, the injunction is not limited to the four named plaintiffs in *Perry*. It 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.) There is no indication whatsoever that the relief afforded by the injunction extends only to the named plaintiffs. Because they are defendants, the Alameda Clerk-

Recorder and Los Angeles Registrar-Recorder/County Clerk are expressly enjoined, without limitation, from enforcing or applying Proposition 8. 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 the injunction. And the express inclusion of "all persons under the control or supervision of defendants" plainly means that the reach of the injunction is not limited to the named defendants.

Indeed, 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 [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, 2674 (dis. opn. of Kennedy, J.) [referencing the "District Court's judgment, and its accompanying *statewide* injunction," emphasis added].) And here, while they assert that the district court lacked jurisdiction to enter statewide relief, petitioners nevertheless acknowledge that they understand the injunction to apply statewide.[3] (Reply at pp. 6–7, fn. 4.)

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[3] It is true that the Ninth Circuit observed that the scope of the injunction might be unclear, but it expressly declined to rule on that issue. (*Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 904, fn. 3.) Petitioners also rely on statements at oral argument taken out of context to argue that counsel for the *Perry* plaintiffs admitted that the injunction did not apply statewide. (Petition at p. 33.) In context, however, counsel's statements were much more nuanced. More to the point, counsel for Imperial County argued that Imperial County *was* bound by the injunction.

(continued...)

B. The Federal Court Properly Issued a Statewide Injunction

Petitioners contend that the federal court lacked authority to impose an injunction that applies statewide, arguing that the court lacked jurisdiction over the case, that it lacked jurisdiction over the state defendants, that it lacked authority to order relief for persons other than the *Perry* plaintiffs, and that it lacked authority to bind county clerks and recorders other than those named as defendants. Even if these arguments were properly before this Court, they would not withstand scrutiny.

1. The district court had subject matter jurisdiction

Petitioners' lack of standing to appeal the judgment of the district court does not mean that court lacked fundamental subject matter jurisdiction to adjudicate the *Perry* case to judgment. When they initiated suit, the *Perry* plaintiffs were required to show that they had standing to invoke the jurisdiction of the district court. (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 561.) To have standing plaintiffs must demonstrate injury-in-fact, a causal relationship between that injury and the challenged conduct, and that a favorable decision would remedy the injury. (*Ibid.*) The *Perry* plaintiffs met those standing requirements: the refusal of county officials to issue plaintiffs a marriage license was a cognizable injury that was caused by the officials and their adherence to Proposition 8. A district court decision invalidating Proposition 8 and enjoining its enforcement

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(...continued)
(*Perry v. Schwarzenegger*, Ninth Circuit Oral Argument Audio (Dec. 6, 2010, No. 10-16696) at 29:01-30:15 <http://cdn.ca9.uscourts.gov/datastore/media/2010/12/ 06/10-16696.wma> [as of July 11, 2013].) And whatever the statements of counsel for the *Perry* plaintiffs were, they cannot bind real parties or respondents, nor can they change the plain meaning of the injunction.

would remedy that injury. The district court thus had fundamental jurisdiction over the suit.

Even if the district court's injunction were overbroad, and even if that were a proper subject for this Court's consideration, such a defect would not affect the fundamental *jurisdiction* of the federal court to enter the injunction. It is true that a district court injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." (*Califano v. Yamasaki* (1979) 442 U.S. 682, 702.) But "while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a[n] ... injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." (*Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 931–32.) No case suggests that the scope of injunctive relief is a jurisdictional issue, even on direct review.

To be sure, there are numerous cases on direct appeal that consider whether a district court abused its discretion in granting relief that went beyond the parties to the case, with differing results. In some cases, the Ninth Circuit has overturned nationwide or statewide injunctive relief where it found that a narrower injunction could provide complete relief to the named plaintiffs. (See, e.g., *Los Angeles Haven Hospice, Inc. v. Sebelius* (9th Cir. 2011) 638 F.3d 644, 664; *Meinhold v. United States Dept. of Defense* (9th Cir. 1994) 34 F.3d 1469, 1480.) However, the Ninth Circuit has also cautioned that "[t]here is no general requirement that an injunction affect only the parties in a suit" and that "class-wide relief may be appropriate even in an individual action." (*Bresgal v. Brock* (9th Cir. 1987) 843 F.2d 1163, 1169, 1171.) Accordingly, the Ninth Circuit has upheld nationwide and statewide injunctions. (See, e.g., *id.* at p. 1171; *Isaacson v. Horne* (9th Cir. 2013) 716 F.3d 1213, 1230; *Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017, 1024; *Easyriders Freedom F.I.G.H.T. v.*

Hannigan (9th Cir. 1996) 92 F.3d 1486, 1501.) In all of these cases, the Ninth Circuit evaluated the injunction under an abuse of discretion standard. In no instance has it held an overly broad injunction to be in excess of the district court's jurisdiction.

As shown below, the district court properly entered a statewide injunction consistent with its conclusion that Proposition 8 violated the Equal Protection and Due Process clauses of the United States Constitution. Even if it did abuse its discretion, which it did not, there is no question that the district court acted with fundamental jurisdiction and that its injunction cannot be challenged in this Court.

2. The district court had jurisdiction to enter relief against the state defendants

Petitioners are also mistaken in arguing that the federal injunction could not bind even the state officials named as defendants in *Perry*, an argument they make for the first time in this Court. (Petition at pp. 35–36.) The cases petitioners cite are not about standing, as that term is traditionally used. Rather, they concern the Eleventh Amendment (U.S. Const., 11th Amend.), which is a shield available to states and state officials to avoid federal litigation. Petitioners mistakenly attempt to use the Eleventh Amendment as a sword to argue that the injunction is ineffective against real parties.

It is appropriate to include as a party any entity needed to afford complete relief. As discussed below, officials at DPH, in addition to having supervisory authority over all county clerks and recorders, are responsible for proscribing all the forms used by the counties in implementing the state marriage laws. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1076-1079.) Petitioners were entitled to include officials at DPH as parties to ensure that they could obtain the relief they sought in their complaint.

It is routine for plaintiffs to include other state officials in a suit alleging the facial unconstitutionality of a state law. In particular, litigants frequently name the Attorney General when a suit challenges the constitutionality of a state law; if the *Perry* plaintiffs had not sued the Attorney General, they or the district court would have been required to notify her of the suit, and she would have been permitted to intervene as of right and to participate as a full party. (Fed. Rules Civ. Proc., rule 5.1, 28 U.S.C.) In the absence of her assertion of the Eleventh Amendment bar, including the Attorney General as a named party could not, therefore, have been improper.

Even if real parties might have asserted an Eleventh Amendment defense as did the state officials in the cases cited in the petition (at pp. 35–36; see, e.g., *1st Westco Corp. v. School Dist. of Philadelphia* (3d Cir. 1993) 6 F.3d 108, 113; *Bishop v. Oklahoma* (10th Cir. 2009) 333 F. App'x 361, 365; *Walker v. United States* (S.D. Cal. Nov. 25, 2008, No. 08-1314 JAH) 2008 U.S. Dist. LEXIS 107664 *9-10), they did not do so in this case. In any event, that potential immunity would not support the argument that the injunction, once entered, was ineffective to bind those defendants. And even if the Eleventh Amendment provided some basis for objecting to the injunction (which is does not), that argument has long since been waived.

3. The district court had the authority to order statewide relief to remedy a constitutional violation

The district court both had the authority to issue statewide relief, and did not abuse its discretion in doing so. Where, as in *Perry*, a court concludes that a law is unconstitutional in all its applications, it may enjoin all applications of that law even if the case is not certified as a class action. For instance, in discussing the distinction between a facial challenge and an

as applied challenge, the Supreme Court recently concluded that what mattered was that the plaintiffs—who did not represent a class—were seeking relief that would "reach beyond the particular circumstances of these plaintiffs." (*Doe v. Reed* (2010) 130 S.Ct. 2811, 2817.) The Supreme Court did not suggest that plaintiffs had to represent a class (which again, they did not), but rather held that plaintiffs must meet the strict standards for proving a facial challenge in order to obtain relief enjoining enforcement of the state law at issue. (*Ibid.*) Similarly, in *Perry* the district court concluded that Proposition 8 was facially unconstitutional, and it appropriately entered relief that extended beyond the plaintiffs to the case.

The Ninth Circuit recently confirmed this rule in *Isaacson v. Horne* (9th Cir. 2013) 716 F.3d 1213. There, the Court of Appeals concluded that three physicians were entitled to an injunction generally prohibiting state and local officials from enforcing an Arizona law that largely forbade physicians from performing an abortion where the fetus was twenty weeks old. (*Id.* at p. 1217.) Because the court determined that the law was unconstitutional in every practical application, this determination was "sufficient to require declaring the statute entirely invalid." (*Id.* at p. 1230.) The Ninth Circuit expressly held that because the statute was facially invalid, the "usual concern with invalidating an abortion statute on its face—that the injunctive relief goes beyond the circumstances in which the statute is invalid to include situations in which it may not be—does not arise." (*Id.* at p. 1231.)

The Ninth Circuit previously addressed this distinction in *Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017, in which a district court enjoined enforcement of certain provisions of California law governing involuntary commitment of mentally ill persons. The district court concluded that it violated the federal due process clause to commit persons judged to be "gravely disabled" due to mental disease to a mental institution for 72 hours

on an emergency basis, and up to 14 more days for involuntary treatment, with no requirement that the state initiate a hearing before an independent tribunal to determine whether adequate cause for commitment exists. (*Id.* at p. 1019.) Although the case was brought by a single individual who had been involuntarily committed under this statute on six different occasions (*id.* at p. 1020), the district court enjoined all certifications under the act (*id.* at p. 1024).

Like petitioners in this case, state officials in *Doe* argued that the district court lacked jurisdiction to order relief that would benefit persons other than the individual plaintiff. (*Id.* at p. 1024.) According to the state officials, "plaintiff was granted no standing to assert the constitutional rights of third persons" and accordingly, the district court should not have granted relief beyond "an injunction prohibiting future certifications of John Doe, the plaintiff, without a probable cause hearing." (*Ibid.*) The Ninth Circuit, however, was "at a loss to understand this argument." (*Ibid.*)

> [H]aving declared the statutory scheme unconstitutional on its face, the district court was empowered under 28 U.S.C. § 2202 to grant "(f)urther necessary or proper relief" to effectuate the judgment. The challenged provisions were not unconstitutional as to Doe alone, but as to any to whom they might be applied. Under the circumstances, it was not an abuse of discretion for the district court to enjoin the defendants from applying them.

(*Ibid.*)

None of these cases were styled or certified as a class action, and each of them involved an injunction that afforded relief that reached beyond the plaintiffs to the action.[4] There is thus no support for the argument that a

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[4] Indeed, courts have denied class action certification on the grounds that the injunctive relief sought by individual plaintiffs would, as a practical matter, produce the same result as class-wide relief, making class certification unnecessary. (See, e.g., *James v. Ball* (9th Cir. 1979) 613 F.2d 180, 186 [citing cases], reversed on other grounds, (1981) 451 U.S. 355.)

federal court abuses its discretion when it issues a statewide injunction prohibiting the enforcement of a statute found to be unconstitutional in all of its applications.

Even if the authority of the district court could be adjudicated by this Court, the cases cited in the petition for the proposition that the district court lacked such authority are readily distinguishable. *Perry* was a facial challenge to a provision of the California Constitution, and the injunction entered barred all enforcement of Proposition 8. Therefore, this case is unlike *Lewis v. Casey* (1996) 518 U.S. 343 (cited in Petition at pp. 33–34), in which prison inmates alleged violations of their civil rights to access to the courts, and the Supreme Court ruled that there was insufficient evidence of actual injury to merit system-wide relief. (*Id.* at pp. 356–357.) In contrast here, there is no question that all lesbians and gay men who wish to marry are harmed by a constitutional provision that prevents the state from solemnizing or recognizing their marriages.

Similarly inapposite here are *Monsanto Co. v. Geertson Seed Farms* (2010) 130 S.Ct. 2743, 2757–2762 (addressing scope of injunction entered to prevent planting of genetically engineered alfalfa pending preparation of an environmental impact statement), *Califano v. Yamasaki* (1979) 442 U.S. 682, 702 (addressing recoupment of social security overpayments), *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) 429 U.S. 252, 263 (holding that a corporation has no racial identity and therefore no standing to assert civil rights discrimination), *Warth v. Seldin* (1975) 422 U.S. 490, 499 (holding that plaintiffs did not have standing), and *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 931 (addressing preliminary injunctive relief enjoining a criminal ordinance). (Petition at p. 34). None of these cases establishes that the district court lacked authority to enter relief that protects parties other than the *Perry* plaintiffs from a facially

unconstitutional law, or that the plaintiffs did not have standing to seek such relief.

The district court had jurisdiction over the parties to the *Perry* suit, and it had the discretion to issue a statewide injunction after it found Proposition 8 to be unconstitutional on its face.

4. The district court had the authority to enjoin county officials who were not named defendants because they perform state marriage functions under the supervision and control of DPH

Despite the fact that the Governor, Attorney General, and officials at the Department of Public Health (including the State Registrar) were all named defendants in the *Perry* litigation, petitioners argue that county officials not named as defendants could not be bound by the district court's injunction. (*Ibid.*) That argument is incorrect. Under the district court's broad equitable powers and Federal Rule of Civil Procedure 65, the district court's injunction was effective to bind county officials in all 58 California counties who perform state marriage functions under the supervision and control of DPH, even though they were not named defendants.

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*, *supra*, 33 Cal.4th at p. 1080.) This Court's decisions establish that DPH supervises both county clerks and county registrars in the performance of their duties related to the state's marriage laws. In *Lockyer*, this 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, this 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 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, DPH registers each marriage that occurs in the state. (See Health & Saf. Code, § 102175 [designating the director of 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*, this 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,*[5] *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*.) This 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

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

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, this 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 this Court's subsequent decision in *In re Marriage Cases* (2008) 43 Cal.4th 757. 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 duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court.

(*Id.* at p. 857.) Although the Court did not identify "the appropriate state officials," the only reasonable conclusion is that this Court was referring to the director of DPH, who was a respondent. This language indicates that this 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 direct 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 *Perry*, and its language making the injunction directly applicable to anyone under the "supervision and control" of the defendants echoes that of *Lockyer v. City and 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, combined with actual notice of the injunction, brings county clerks and registrar/recorders within the scope of the district court's injunction.[6] 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.

[6] In practice, the pervasive reliance of county clerks and recorders on the supervision and control of the State Registrar is precisely how statewide uniformity is achieved in the operation of the marriage laws. (See Twenty Respondent Clerk-Recorders' Preliminary Opposition at pp. 5-7, filed July 22, 2013.)

Rules Civ. Proc., rule 65(d)(2), 28 U.S.C.) 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. Respondents, all of whom have in good faith complied with the federal injunction, have not violated any state law duty in issuing marriage licenses to same sex couples that would warrant a writ of mandate from this Court.

III. ARTICLE III, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION DOES NOT APPLY TO THIS CASE

Respondents' compliance with the federal injunction does not implicate article III, section 3.5 of the California Constitution. Because the district court's injunction directly prohibits county officials from applying or enforcing Proposition 8, article III, section 3.5 does not apply.

Article III, section 3.5 provides that

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. [¶] (b) To declare a statute unconstitutional. [¶] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Even assuming that article III, section 3.5 applies to county officials (a question this Court left open in *Lockyer v. City and County of San Francisco*, *supra*, 33 Cal.4th at pp. 1085–1086), that provision does not apply where a court has directly ordered (or here, enjoined) officials from enforcing state law. (*Fenske v. Bd. of Administration* (1980) 103 Cal.App.3d 590, 595 ["When a superior court issues a writ directed to an administrative agency to not enforce a statute because it is unconstitutional as it relates to an individual petitioner, or class of petitioners, the administrative agency must obey that mandate"].)

Even if article III, section 3.5 were otherwise applicable, 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, 1159–1160 [noting that article III, section 3.5 does not excuse state officials from complying with federal law under the Supremacy Clause].)

In its decision affirming the district court's denial of the motion to intervene filed by Imperial County in *Perry*, the Ninth Circuit admonished that article III, section 3.5 would not relieve county clerks of their obligation to comply with the district court's injunction. (*Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 904.)[7] The Deputy Clerk of the County had argued that Imperial County should be permitted to intervene in part because of the "legal confusion" regarding the interplay between article III, section 3.5 and the district court's injunction. (*Ibid.*) The Ninth Circuit rejected this argument, finding that there could "be no 'confusion' in light of the Supremacy Clause. U.S. Const. art. VI, cl. 2. If

[7] This opinion was issued in a different appeal from that reviewed by the Supreme Court on certiorari, and was not vacated by virtue of the Supreme Court's decision in *Hollingsworth*.

a federal district court were to enjoin a County Clerk from enforcing state law, no provision of state law could shield her against the force of that injunction." (*Ibid.*) Neither real parties nor respondents have violated article III, section 3.5 by complying with the district court's injunction.

IV. ISSUANCE OF A WRIT WOULD NOT PROMOTE THE ENDS OF JUSTICE

A petitioner is not entitled, as a matter of right, to the issuance of a writ of mandamus. (*Dare v. Bd. of Med. Examiners* (1943) 21 Cal.2d 790, 796-97.) A determination as to whether the writ should be granted rests to a considerable extent in the discretion of the court to which the application is made. (*Betty v. Superior Court of Los Angeles Cnty.* (1941) 18 Cal.2d 619, 622-23.) The writ is an equitable remedy, which shall not be issued if it is contrary to "promoting the ends of justice." (*Lockyer v. City & County. of San Francisco*, *supra*, 33 Cal.4th at p. 1121, (conc. opn. of Moreno, J.), citing *Bartholomae Oil Corp. v. Superior Court* (1941) 18 Cal.2d 726, 730.) "Cases may therefore arise where when the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief." (*Fawkes v. City of Burbank* (1922) 188 Cal. 399, 402.)

Real parties have demonstrated that petitioners are not entitled to a writ of mandate, because respondents are under a legal duty not to enforce Proposition 8 by virtue of the district court's injunction. But even if there were a serious question about the scope of the injunction that this Court could entertain, this Court should still exercise its discretion to deny mandamus. As discussed in real parties' Opposition to Stay, as well as the respondents' Preliminary Opposition briefs, filed July 22, 2013, a writ of mandate from this Court would put county officials in an impossible position: they would have to chose among conflicting orders from state and

federal courts, and no matter what choice they made, they would be subject to sanctions for contempt.[8]

In addition, issuance of a writ could precipitate a wholly unnecessary conflict between this Court and the federal court. (See, e.g., *Madej v. Briley* (7th Cir. 2004) 370 F.3d 665.) The same policies that underlie the traditional refusal to consider a collateral attack on another court's orders also counsel against issuing a writ of mandate in this case.

Finally, a writ of mandate is not required to protect either the rule of law or the initiative process. In over 100 years of initiatives, California officials have refused to defend an initiative only twice: Proposition 14 (1964), which nullified the Rumford Fair Housing Act, and Proposition 8 (2008). Ordinarily, state officials have every incentive to defend an initiative that was approved by the electorate to which they are accountable, and they decline to do so only rarely. It will be rarer still that no one will have standing in federal court to appeal a determination that an initiative measure is unconstitutional.[9]

A writ of mandate is also not required to protect the rule of law. Real parties did not oppose the intervention of the proponents of Proposition 8 in the district court. The proponents mounted a vigorous defense, but the

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[8] See Twenty Respondent Clerk-Recorders' Preliminary Opposition at pp. 8-9, filed July 22, 2013. This brief (at pp. 9-11) also addresses the risks to statewide marriage uniformity that would flow from issuance of a writ.

[9] Proposition 14 was defended through a merits decision of the United States Supreme Court by landlords and others who had demonstrated Article III standing. (*Reitman v. Mulkey* (1967) 387 U.S. 369, 372.) Thus, in 100 years, only once has an initiative been denied a merits hearing in the United States Supreme Court because state officials declined to defend it. And in *Perry,* any one of the county clerks and recorders might have timely intervened to defend Proposition 8, but none did so. The number of cases in which no one with standing pursues the defense of an initiative on appeal in federal court is thus vanishingly small.

district court concluded after a two-week trial, in extensive findings of fact and conclusions of law, that Proposition 8 was unconstitutional. In accordance with that determination, the district court entered an injunction enjoining real parties and respondents from enforcing an unconstitutional law. The United States Supreme Court has determined that the proponents did not have standing to appeal that determination, which is now final. Real parties and respondents are complying with that federal court order, as they are required to do. Petitioners may disagree with the outcome, but all parties in this action are in fact following the rule of law.

The challenges to Proposition 8 have been working their way through the courts for over four years. The *Perry* case spawned multiple published decisions in the district court and in the Ninth Circuit, as well as a decision by this Court and two by the United States Supreme Court. In the meantime, same-sex couples in California were denied their constitutional rights while Proposition 8 remained in effect. The decision of the district court is now final. Gay men and lesbians with their children and their families have been happily exercising their equal protection and due process rights to wed for several weeks. This Court should deny the petition and bring this case to an end.

CONCLUSION

For all of the forgoing reasons, real parties respectfully request that the Court deny the petition for a writ of mandate.

Dated: July 22, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General
DANIEL J. POWELL
Deputy Attorney General
Attorneys for Real Parties in Interest

SA2013111979

CERTIFICATE OF COMPLIANCE

I certify that the attached **PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE** uses a 13 point Times New Roman font and contains 7,893 words.

Dated: July 22, 2013

KAMALA D. HARRIS
Attorney General of California

TAMAR PACHTER
Supervising Deputy Attorney General
Attorneys for Real Parties in Interest

EXHIBIT 1

State of California—Health and Human Services Agency
California Department of Public Health

RON CHAPMAN, MD, MPH
Director & State Health Officer

EDMUND G. BROWN JR.
Governor

June 26, 2013

13-15

TO: COUNTY CLERKS
COUNTY RECORDERS

SUBJECT: RULING BY THE U.S. SUPREME COURT REGARDING SAME-SEX MARRIAGES

On June 26, 2013, the U.S. Supreme Court dismissed the appeal of the decision invalidating Proposition 8, leaving intact the court order enjoining enforcement of Proposition 8. At our request, the Attorney General has provided legal advice regarding the scope of the district court's injunction. In her letter, the Attorney General concludes that the injunction applies statewide, and that county clerks and county recorders in all 58 counties must comply with it. A copy of the Attorney General's letter and the district court's injunction are attached to this notice.

The effect of the district court's injunction is that same-sex couples will once again be allowed to marry in California. But they will not be able to marry until the Ninth Circuit issues a further order dissolving a stay of the injunction that has been in place throughout the appeal process. We do not know when the Ninth Circuit will issue this order, but it could take a month or more. **County clerks and recorders should not issue marriage licenses to same-sex couples until this order is issued.** Further instructions will be issued by this office when additional information becomes available.

If you have any questions regarding this matter, please contact the Birth and Marriage Registration Section at (916) 445-8494.

Original signed by:

Tony Agurto, MPA
State Registrar
Assistant Deputy Director
Health Information and Strategic Planning

Attachments

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 1, § 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,

KAMALA D. HARRIS
Attorney General

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

DECLARATION OF SERVICE BY U.S MAIL

Case Name: ***Hollingsworth, et al. v. O'Connell, et al.***

No.: **S211990**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business

July 22, 2013, I served the attached **PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 22, 2013, at San Francisco, California.

A. Bermudez
Declarant

Signature