

SUPREME COURT COPY

Case No.: S211990

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F.
GUTIERREZ; MARK A. JANSSON; and PROTECTMARRIAGE.COM –
YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

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.

**PRELIMINARY OPPOSITION OF RESPONDENT PATRICK
O'CONNELL TO WRIT OF MANDATE**

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SUPREME COURT
FILED

JUL 22 2013

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Respondent Patrick O'Connell certifies that he is not aware of any entity or person that rules 8.208 and 8.488 of the California Rules of Court require him to list in this Certificate.

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INTRODUCTION

Respondent Patrick O'Connell, County Clerk Recorder for the County of Alameda, ("O'Connell") files this preliminary opposition to the petition for writ of mandate because he is subject to a federal injunction that mandates him not to enforce Proposition 8. This Court is required to honor the federal injunction and thus cannot issue a writ that conflicts with the injunction. This Court should therefore deny the writ.

ARGUMENT

On August 10, 2010, in Perry v. Schwarzenegger (N.D. Cal. 2010) 704 F. 2nd 921, Judge Walker issued a permanent injunction that decreed the following:

Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, section 7.5 of the California Constitution. (Petitioner's Appendix at p. 15.)

On June 28, 2013, the Ninth Circuit Court of Appeals lifted the stay that had precluded the enforcement of this permanent injunction. (Petitioner's Appendix, page 22.) O'Connell is a defendant in Perry and thus directly subject to the mandate of Judge Walker's injunction.

Throughout the litigation in Perry, O'Connell maintained his neutrality as to the constitutionality of Proposition 8, expressing only

his desire to follow the direction of the federal court judgment, whatever that turned out to be. As all parties agree, his duties are ministerial. His past and present intention is to conform his official conduct to the law. Now, because of the federal injunction, the law is clear that he is not to enforce or apply Proposition 8. Consequently, since the stay was lifted, O’Connell and his staff have been issuing marriage licenses to same sex couples and registering those marriages when they take place in Alameda County.

It is beyond reasonable dispute that the plain and unambiguous meaning of the federal injunction is simple: the definition of marriage under Article I, section 7.5—“only a marriage between a man and a woman is valid or recognized in California”—cannot be enforced by O’Connell or any other defendants in Perry. The injunction obviously is not, as Petitioners contend, limited in its scope to a remedy solely for the benefit of the original plaintiffs in Perry.¹ It is equally clear and undisputed that the basis for that injunction was federal law—the Constitution of the United States. (Petitioner’s Appendix, pages 14-15.)

¹ It is noteworthy that the intervenor plaintiff City and County of San Francisco must also benefit from the judgment and injunction of the federal case as it sought to be relieved of its obligation to enforce Proposition 8.

Citing Younger v. Jensen (1980) 26 Cal. 3d 397, 411, and Levy v. Cohen (1977) 19 Cal. 3d 165, 172-173, Petitioners concede that this Court must honor the federal injunction. (Petition, page 32.) “Full faith and credit must be given to a final order or judgment of a federal court. Such an order has the same effect in the courts of this state as it would have in federal court.” Levy, supra. These authorities and others make it clear that Petitioners cannot collaterally attack the federal court injunction. But that is what they are up to. Indeed, it is patently clear that they ask this Court to revise or reform the federal injunction so narrowly as to annul it.

As the Attorney General pointed out in her Informal Opposition, the Supremacy Clause of the United States Constitution compels a recognition that the federal injunction overrides state law, including Article III, section 3.5 of the California Constitution. LSO, Ltd. v. Stroh (9th Cir. 2000) 205 F3d 1146, 1160. The question of the breadth or scope of the federal injunction cannot be subject to review by this Court. See Estate of Buck (1994) 29 Cal. App. 4th 1846, 1854; Pacific Mutual Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 725. If the injunction were to be reviewed, it would have to be in federal court in the Perry case, but not in this proceeding. Lapin v. Shulton

(9th Cir. 1964) 333 F. 2d 169,171-72. Consequently, this Court cannot either reform or narrow the federal injunction or issue a writ that compels O'Connell or other officials subject to the injunction to enforce or apply Proposition 8. The conflict that would otherwise arise could not be more striking or obvious.

In this vein, O'Connell requests this Court to consider his position if he were faced with the writ Petitioners seek. He would be compelled to do what he and other county clerks have assiduously endeavored to avoid: choose which version of the law *he* thinks best. For he would surely have to choose which court's order he would obey and which he would disobey. Either way, he would be subject to contempt. The law should do better than to impose a zugzwang on its honest and dedicated public officials. It does do better, which is why

this Court must decline to “interpret” the federal injunction and
may in confidence deny the Petition.

Dated: July 11, 2013

Respectfully submitted,

DONNA R. ZIEGLER, County Counsel,
in and for the County of Alameda, State
of California

By: 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 1,141 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this certificate of Compliance is true and correct and that this declaration was executed on July 22, 2013.

Dated: July 22, 2013

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL
Case No. A137734
Alameda County Superior Court No. OJ10015257

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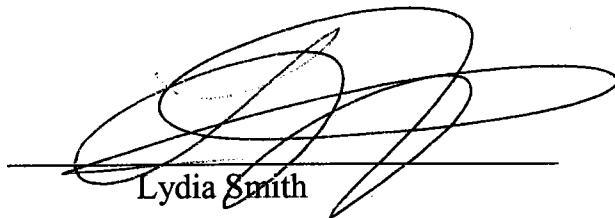
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I, Lydia Smith, declare under penalty of perjury that the foregoing is true and correct, and that this Declaration is executed on the 22nd day of July 2013, in Oakland, California.



Lydia Smith