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 PRELIMINARY OPPOSITIONS TO PETITION FOR WRIT OF MANDATE

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INTRODUCTION

At the heart of this case is a state initiative that this Court has "a duty to jealously guard," to ensure that elected officials do not "improperly annul[]" it. (See *People v. Kelly* (2010) 47 Cal.4th 1008, 1025, alterations and quotation marks omitted.) But the Attorney General and Opposing Respondents ask this Court to summarily decline the Petition, eviscerate an initiative of its primary force, and imbue public officials with authority to override any future initiative by first declining to defend it in court and then declining to appeal a trial court decision invalidating it. The Attorney General, in other words, wants this Court to grant her office, and the offices of all other public officials, a newfound power to cripple state initiatives with which they disagree. To fulfill its obligation to jealously guard state initiatives, this Court should accept the case, grant the requested writ of mandate, and decline the Attorney General's invitation to elevate public officials above the sovereign People that they serve.

The Petition raises an important question of state law: whether Respondents' failure to comply with state marriage law violates the principles expressed by this Court in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 (hereafter *Lockyer*), and by the People in article III, section 3.5 of the California Constitution (hereafter section 3.5). (See Petition and Memorandum at pp. 27-28, 44-50.) Although the Attorney General seeks to justify Respondents' actions by arguing that they are all bound by the injunction entered in *Perry v. Schwarzenegger*, this Court's analysis of that asserted justification raises another significant question of state law: whether the State Registrar has legal authority to supervise or control county clerks when issuing marriage licenses. (See Petition and Memorandum at pp. 36-43.) Vital matters of state law thus permeate this case.

Notwithstanding the Attorney General's and Opposing Respondents' arguments, Respondents are not bound by the *Perry* injunction for two principal reasons. First, that injunction does not prospectively bind any Respondent (including the Alameda and Los Angeles County Clerks) because the *Perry* court could grant injunctive relief only to the four plaintiffs before it. This Court should address that issue because, among other reasons explained below, the public interest requires this Court to construe the *Perry* injunction in light of the issuing court's legitimate jurisdiction.

Second, the *Perry* injunction does not bind Non-*Perry* Respondents because the State Registrar does not have authority to supervise or control county clerks *when issuing marriage licenses*. The Attorney General and Opposing Respondents concede that no statute directly affords that authority to the State Registrar. They nonetheless try to support their position by misconstruing case law and relying on periodic correspondence from the State Registrar to the county clerks. But these thin reeds fail to show that Respondents are under the supervision or control of the State Registrar.

Because Respondents are not prospectively bound by the *Perry* injunction, *Lockyer* and section 3.5 require Respondents to enforce state law defining marriage as a union between a man and a woman. The Attorney General's counterarguments assume that the injunction binds all Respondents. Yet because it does not, her contentions lack merit.

Petitioners thus ask this Court to accept this case and issue the requested writ of mandate.

DISCUSSION

I. The *Perry* Injunction Does Not Excuse Any Respondent from Enforcing State Marriage Law.

The *Perry* district court had authority to order injunctive relief only for the four plaintiffs. (See Petition and Memorandum at pp. 33-34.) Because the *Perry* plaintiffs have received marriage licenses and entered into legal marriages, any relief due under that injunction has already been provided, and any obligation that the injunction places on Respondents has been satisfied. Therefore, the *Perry* injunction does not excuse any Respondent from prospectively enforcing state marriage law against persons other than the four *Perry* plaintiffs.

A. This Court Should Analyze the Scope of the *Perry* Injunction.

The Attorney General argues that collateral review and res judicata principles prevent this Court from assessing the *Perry* injunction's scope. (AG Opp. at pp. 4-7.) These preclusion-based arguments lack merit for the following four reasons.

First, the *Perry* court's lack of authority to order injunctive relief beyond the four plaintiffs is a limitation on that court's fundamental jurisdiction. (See *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493, alterations omitted and emphasis in original ["Collateral attack is proper to contest a judgment void on its face for lack of personal or subject matter jurisdiction or the granting of relief which the court has *no power* to grant"].) According to the Attorney General, "[n]o case suggests that the scope of injunctive relief is a jurisdictional issue[.]" (AG Opp. at p. 11.) But the Ninth Circuit's decision in *Zepeda v. INS* (9th Cir. 1985) 753 F.2d 719, 727, contradicts that claim. The *Zepeda* court reviewed a district court injunction against the federal Immigration and Naturalization Service (INS) after the district court declined to certify a class action, and concluded:

> We must vacate and remand . . . because the scope of the injunction is too broad. On remand, the injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs. *A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court. . . . The district court must, therefore, tailor the injunction to affect only those persons over which it has power.*

(*Ibid.*, citations omitted, emphasis added; see also *id.* at 728, fn. 1 ["[O]ur legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated."].) The Ninth Circuit has thus recognized that the scope of a federal district court's injunction is indeed a fundamental jurisdictional issue. Accordingly, it is a question that this Court should address here.[1]

Second, Petitioners may raise the scope of the injunction here because unusual circumstances kept them from raising that issue in the *Perry* case. Even the Attorney General's and San Francisco's cited case law acknowledges that a party may contest a prior judgment "where unusual circumstances were present which prevented an earlier and more appropriate attack." (*Pacific Mutual Life Ins. Co. of Cal. v. McConnell* (1955) 44 Cal.2d 715, 727.) Petitioners could not have challenged the scope of the *Perry* injunction because the injunction did not exist until the district court issued its final decision (see *Perry v. Schwarzenegger* (N.D.Cal. 2010) 704 F.Supp.2d 921, 1004) and because the United States Supreme Court determined that Petitioners could not appeal the district court's

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[1] *Califano v. Yamasaki* (1979) 442 U.S. 682, 702, cited by the Attorney General (see AG Opp. at p. 11), did not disclaim the jurisdictional nature of this question. Instead, the Court emphasized that relief could be granted to persons similarly situated to the plaintiffs only "[i]f a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class." (*Califano v. Yamasaki*, *supra*, 442 U.S. at p. 702.)

ruling. (*Hollingsworth v. Perry* (2013) ___ U.S. ___ [133 S.Ct. 2652, 2668].)[2] Unusual circumstances thus prevented Petitioners from raising this issue.

Federal law similarly recognizes that a court may review the scope of a prior judgment where it is not "apparent that a remedy is available" in the issuing court. (*Lapin v. Shulton, Inc.* (9th Cir. 1964) 333 F.2d 169, 172.) Here, no "apparent" remedy is available because the injunction is directed at the named official defendants (not Petitioners), and thus it is far from clear whether Petitioners could challenge the scope of the injunction in the *Perry* district court once that court reassumes jurisdiction over the case. Indeed, San Francisco has expressed doubts that Petitioners "have the right to return to the district court . . . to seek relief from the injunction." (SF Opp. at p. 10, fn. 1.) Even if Petitioners could raise this question with the *Perry* court, they could not appeal that court's ruling. (*Hollingsworth v. Perry*, *supra*, 133 S.Ct. at p. 2668.) In contrast, the parties with an unimpeachable interest in raising and appealing the scope of the injunction—the named official defendants—will not do so because they have either openly advocated for Proposition 8's demise or silently sat by throughout the *Perry* litigation.

Third, preclusion principles do not apply here because Petitioners—the parties against whom preclusion is asserted—cannot obtain appellate review of the *Perry* injunction. "[T]he availability of review for the correction of errors has become critical to the application of preclusion

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[2] Petitioners nevertheless attempted to appeal the scope of the injunction to both the Ninth Circuit and the United States Supreme Court. (See *Perry v. Brown* (9th Cir. Sept. 17, 2010, No. 10-16696) Defendant-Intervenors-Appellants' Opening Brief at pp. 29-31 <http://cdn.ca9.uscourts.gov/datastore/general/2010/09/22/10-16696_openingbrief.pdf> [as of July 29, 2013]; *Hollingsworth v. Perry* (U.S. Jan. 22, 2013, No. 12-144) Brief of Petitioners at pp. 17-18 [2013 WL 457384].)

doctrine." (Rest.2d Judgments, § 28, com. a.) The form of res judicata known as issue preclusion (or collateral estoppel) is inapplicable where a party cannot seek review of a prior judgment. (See *Kircher v. Putnam Funds Trust* (2006) 547 U.S. 633, 647.)

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded [when t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action[.]

(*Ibid.* [quoting Rest.2d Judgments, § 28, subd. (1)].) The form of res judicata known as claim preclusion likewise does not apply to a claim that Petitioners, regardless of whether they could have raised it with the *Perry* court, are not able to appeal. (Cf. *Pacific Estates, Inc. v. Super. Ct.* (1993) 13 Cal.App.4th 1561, 1573 [noting that "the preclusive effect of res judicata or collateral estoppel" does not apply to "an unreviewable decision"].)

Fourth, the public interest in the initiative at issue and the integrity of the initiative process in general requires this Court to interpret the *Perry* injunction consistent with its proper scope. When determining the preclusive effect of prior federal-court judgments, this Court has recognized a "'public interest' exception" to preclusion principles, stating that a prior judgment "'is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed.'" (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 621-622, emphasis omitted [quoting *Sacramento v. California* (1990) 50 Cal.3d 51, 64].) Unless this Court intervenes here, state officials will succeed in empowering one district court judge to essentially nullify an initiative approved by more than 7 million Californians. By their decision not to defend, and then not to appeal, those officials will achieve indirectly—the nullification of an initiative—what

they could not cause directly. (See *Perry v. Brown* (2011) 52 Cal.4th 1116, 1126-1127 [declining to permit public officials who lack "authority to veto or invalidate" a law "to indirectly achieve" that result].) With this indirect veto power established, the future of the initiative right—which exists primarily so that the People can bypass their public officials (*id.* at p. 1140)—will become subservient to those officials. This Court should thus intervene in the public interest, rectify this injustice, and preserve the People's precious initiative power.

The Attorney General claims that there is no threat to the initiative process because state officials defend most initiatives when challenged in court. (AG Opp. at p. 24.) But if this Court does not grant the relief requested by Petitioners, state officials will have the power to employ this new method for invalidating initiatives, thereby elevating public officials over the sovereign People and ultimately turning this State's political-power hierarchy on its head. (See *Perry v. Brown*, *supra*, 52 Cal.4th at p. 1140 ["[A]ll power of government ultimately resides in the people"]; Cal. Const., art. II, § 1 ["All political power is inherent in the people."].) Absent this Court's intervention, these officials can brandish their newfound power whenever the People pass a law that the officials consider disagreeable. The Attorney General's hollow assurances about the defense of most initiatives do not diminish this significant threat to the initiative process.

B. The *Perry* Injunction Cannot Reach Beyond the Four Plaintiffs.

"[F]ederal courts are courts of limited jurisdiction." (*Owen Equipment and Erection Co. v. Kroger* (1978) 437 U.S. 365, 374.) The jurisdictional "actual-injury requirement" requires that a federal court's "remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." (*Lewis v. Casey* (1996) 518 U.S. 343, 357.) Without class certification, a federal plaintiff does not have

"standing" to raise, nor do federal courts have jurisdiction to address, the alleged harms of "similarly situated" third parties not before the court. (*Zepeda v. INS*, *supra*, 753 F.2d at p. 728, fn. 1.)[3]

> If this elementary principle were not true, there would be no need for class actions. Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases. But such broad authority has never been granted to individual plaintiffs absent certification of a class.

(*Ibid.*; see also *Meinhold v. U.S. Dept. of Defense* (9th Cir. 1994) 34 F.3d 1469, 1480 [vacating, in a case brought as an individual action (rather than a class action), a broad injunction against the Department of Defense (DOD) "except to the extent it enjoins DOD from discharging [the plaintiff]"].)

Resisting this jurisdictional limitation, the Attorney General repeats, as stated in her Informal Opposition to Petitioners' request for a stay, her patently flawed assertions that "[a]ll parties" in *Perry* acknowledge that "the federal court's injunction applies statewide," and that the United States Supreme Court "shared th[at] view." (AG Opp. at p. 9.) Petitioners have already refuted these allegations, and they incorporate their previous arguments here. (See Reply to Informal Opposition to Request for Immediate Stay or Injunctive Relief at pp. 6-7.)

The Attorney General also contends that the *Perry* court could grant relief beyond the four plaintiffs because that court determined that

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[3] The general prohibition on third-party standing is a "fundamental restriction on [federal court] authority," which "admits of certain, limited exceptions[.]" (*Powers v. Ohio* (1991) 499 U.S. 400, 410.) The recognition that limited exceptions exist is what qualifies this rule, as San Francisco notes, as a principle of prudential standing. (SF Opp. at p. 8.) That fact does not improve San Francisco's argument, however, because the *Perry* plaintiffs did not claim, let alone establish, any of the rule's exceptions.

Proposition 8 "was facially invalid" (AG Opp. at p. 8)—that is, "unconstitutional in all its applications." (*Id.* at pp. 13-14.) Yet as San Francisco admits, "facial invalidation, by definition, means there is *no* set of circumstances in which the government could constitutionally apply the [law]." (SF Opp. at p. 7, emphasis added, citing *United States v. Salerno* (1987) 481 U.S. 739, 745-746.) The *Perry* court, however, did not conclude that Proposition 8 is unconstitutional in all its applications. Rather, as San Francisco states, the district court determined that Proposition 8 is unconstitutional as applied to "lesbian and gay Californians." (SF Opp. at p. 8.) That court did not consider whether, let alone hold that, Proposition 8 is unconstitutional as applied to, for instance, polyamorous Californians, bisexual Californians, and other Californians desiring marital arrangements outside Proposition 8's definition of marriage as "between a man and a woman." (Cal. Const., art. I, § 7.5.) If a party wants to enjoin a law's application to a subclass of the affected citizens (here, gays and lesbians), he must certify that group as a class. (See *Zepeda v. INS*, *supra*, 753 F.2d at p. 728, fn. 1.) The *Perry* plaintiffs chose not to do that.

The Attorney General's cited cases are inapposite and unpersuasive. The Attorney General invokes *Doe v. Reed* (2010) ___ U.S. ___ [130 S.Ct. 2811, 2817] in support of her claim that facial invalidation of a law permits a statewide injunction. (AG Opp. at p. 14.) But the Court there concluded that the plaintiffs *did not succeed in establishing* a facial challenge. (*Doe v. Reed*, *supra*, 130 S.Ct. at p. 2821.) The Court thus did not decide whether the district court had jurisdiction to issue injunctive relief to persons other than the named plaintiffs.

The Attorney General also relies on *Isaacson v. Horne* (9th Cir. 2013) 716 F.3d 1213, 1230-1231. (AG Opp. at p. 14.) That case is distinguishable, however, because the plaintiff physicians there did "not seek relief on the basis of their own right to perform abortions," "but on the

basis of the constitutional right of their patients." (*Isaacson v. Horne*, *supra*, 716 F.3d at p. 1221.) In other words, that case involved one of the limited exceptions to the jurisdictional bar on third-party standing, and that enabled the plaintiffs to assert, and the court to remedy, the harms of third parties not before the court.

The Attorney General also discusses *Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017, 1024. (AG Opp. at pp. 14-15.) Yet the Ninth Circuit there held that the district court's power to enter a broad injunction rested on the declaratory judgment entered under 28 U.S.C. § 2201. (*Doe v. Gallinot*, *supra*, 657 F.2d at pp. 1024-1025.) Here, however, the *Perry* court did not enter a declaratory judgment. (See *Alpine State Bank v. Ohio Casualty Ins. Co.* (7th Cir. 1991) 941 F.2d 554, 558, quotation marks and alterations omitted ["In the context of a declaratory judgment action, . . . Rule 58 says that the judgment must appear on a separate piece of paper—separate, that is, from the court's opinion"].) Nor, as discussed above, did the *Perry* court determine that Proposition 8 was invalid in all its applications. Moreover, in *Gallinot*, unlike here, the district court did not attempt to enjoin "'the separate counties in the State of California,' under whose auspices" future unconstitutional conduct "may take place," because "the court had no power over those not properly before it." (*Doe v. Gallinot*, *supra*, 657 F.2d at p. 1024.)

Asserting an alternative position, San Francisco argues that because the *Perry* court found that Proposition 8 "inflicts stigma," remedying the plaintiffs' asserted injuries requires that the law "be swept away entirely." (SF Opp. at pp. 5-6.) While an injunction may extend benefits "to persons other than prevailing parties in the lawsuit . . . *if such breadth is necessary to give prevailing parties the relief to which they are entitled*" (*Bresgal v. Brock* (9th Cir. 1987) 843 F.2d 1163, 1170-1171), that breadth is not necessary here. Because the *Perry* plaintiffs have received marriage

licenses and entered into legal marriages, they will no longer experience, as alleged in their Complaint, the asserted "humiliation, emotional distress, pain, suffering, psychological harm, and stigma caused by the inability to marry the ones they love." (Petition Exhibit A at p. 011 ¶ 48.) Remedying that harm does not require the *Perry* court to grant relief to others. Indeed, the *Perry* court did not find that such broad relief was essential to provide the plaintiffs with a sufficient remedy.

Acknowledging the legitimate scope of the *Perry* injunction will not intrude on federal interests or the *Perry* plaintiffs' constitutional rights: that court lacked authority to extend injunctive relief to third parties; and the plaintiffs' asserted constitutional harms have already been remedied. On the other hand, declining to address the scope of the *Perry* injunction will jeopardize important state interests in the enforceability of a state initiative and the future of the initiative process.

C. Statewide Uniformity Requires That the Injunction Be Limited to the Four *Perry* Plaintiffs.

Opposing Non-*Perry* Respondents emphasize the importance of uniformity in enforcing state marriage law, and stress "the wisdom of California in enacting statutes that provide for uniform marriage laws throughout the State." (Non-*Perry* Resp. Opp. at p. 11.) But the only way to achieve statewide uniformity is if the *Perry* injunction applies only to the four plaintiffs. Indeed, the "patchwork" state of affairs that those Respondents lament—with some "officials within the same counties" ignoring, and some enforcing, Proposition 8—will result under their view of the *Perry* injunction. (*Id.* at p. 9.)

Opposing Non-*Perry* Respondents (perhaps unwittingly) illustrate the concern:

> What if a lesbian employee of Ventura County obtained a marriage license in Los Angeles? Should Ventura County treat her as married for purposes of providing spousal health

> benefits? . . . And what if a gay property owner in Sonoma County got a marriage license from San Francisco and then attempted to deed his property to his spouse? Should Sonoma recognize him as married . . . ?

(*Id.* at p. 10.) Those Respondents think that this "[d]isuniformity" would result from adopting Petitioners' legal position. (*Ibid.*) But in truth, these examples will occur under Opposing Respondents' and the Attorney General's reading of the *Perry* injunction.

If their view of that injunction were to prevail, the persons bound by it would include the named official defendants and all county clerks and county registrars. Yet countless other local officials are not persons under the control or supervision of the named defendants, and thus are not bound by the injunction. Therefore, if the hypothetical Ventura County employee discussed above worked for the Board of Supervisors, her employer would not be bound by the injunction and thus would be required to enforce Proposition 8, which instructs the board to "recognize[]" or treat as "valid" only "marriage[s] between a man and a woman." (Cal. Const., art. I, § 7.5.) Similarly, in the other hypothetical, the Sonoma County Assessor, who likewise is not bound by the injunction, is obligated to enforce Proposition 8 and thus forbidden from recognizing the property owner as married.

The lack of uniformity will reach far beyond these two examples. Proposition 8 will continue to require all county and other local officials not bound by the injunction (e.g., mayors, county assessors, school boards) to decline to "recognize[]" or treat as "valid" any marriage other than a union "between a man and a woman." (Cal. Const., art. I, § 7.5.)[4] This is so regardless of where (whether in a different county or even a different State) the marriage license was issued or the union was solemnized. The only way

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[4] This highlights the importance of an appellate court decision resolving the constitutionality of an initiative because only that kind of decision will bind all state and local officials as a matter of authoritative judicial precedent.

to bring about statewide uniformity in the enforcement of marriage law is for this Court to recognize that the *Perry* court lacked authority to extend its injunction beyond the four plaintiffs.

II. The *Perry* Injunction Does Not Excuse Non-*Perry* Respondents from Enforcing State Marriage Law.

In addition, the *Perry* injunction does not bind Non-*Perry* Respondents, and thus does not excuse their non-enforcement of state marriage law, because they are not "persons under the control or supervision of" the State Registrar. (Petition Exhibit B at p. 015.)

A. This Court Should Decide this Important Question of State Law.

The Attorney General suggests that this Court is precluded from deciding the question whether the State Registrar has authority to control or supervise county clerks when they issue marriage licenses. (See AG Opp. at pp. 5-7.) Yet the *Perry* injunction, by its own terms, incorporates this question of state law. And it is the prerogative of this Court (not a federal court) to decide matters of state law. State courts, after all, "are the principal expositors of state law. . . . Indeed, as the [United States Supreme Court] has often observed, federal courts lack jurisdiction authoritatively to construe state legislation." (*Kopp v. Fair Pol. Practices Com.*, *supra*, 11 Cal.4th at p. 620, quotation marks, citations, and footnotes omitted.) This Court should thus address this important state law question.

In addition, three of the four reasons why this Court should decide that the *Perry* injunction cannot grant relief beyond the four plaintiffs (discussed in Section (I)(A) above) also require this Court to decide this issue involving the State Registrar's authority over county clerks when they issue marriage licenses: (1) unusual circumstances prevented Petitioners from raising that state law question in *Perry*; (2) preclusion principles do not apply because Petitioners cannot appeal any issue relating to the *Perry* injunction; and (3) the public interest requires this Court to decide this state

law question, which transcends "private parties" and affects citizens "statewide." (*Kopp v. Fair Pol. Practices Com.*, *supra*, 11 Cal.4th at p. 622.)

B. The State Registrar Does Not Have Authority to Supervise or Control County Clerks Issuing Marriage Licenses.

Non-*Perry* Respondents are not bound by the *Perry* injunction because the State Registrar does not have state law authority to supervise or control county clerks when they issue marriage licenses. The power granted by state statutes is preeminent here, for "'the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated[.]'" (*Lockyer*, *supra*, 33 Cal.4th at p. 1074 [quoting *McClure v. Donovan* (1949) 33 Cal.2d 717, 728].) The Attorney General and Opposing Non-*Perry* Respondents concede that no statute gives the State Registrar the authority to supervise or control county clerks when they issue marriage licenses. (See Non-*Perry* Resp. Opp. at p. 7 ["[N]o particular statute gives the State Registrar this authority"]; AG Opp. at p. 18 [asserting that the Department of Public Health (DPH) "has implied authority" and thereby conceding that no express statutory authority exists].) "[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*In re Jennings* (2004) 34 Cal.4th 254, 273.) In two statutes pertaining to marriage records, the Legislature explicitly gave the State Registrar "supervisory power over local registrars." (Health & Saf. Code, § 102180; see also Health & Saf. Code, § 102295.) But the Legislature provided no such authority over county clerks issuing marriage licenses. This omission shows that the Legislature did not intend for the State Registrar to have this power.

1. Case Law Does Not Support the Attorney General's and Opposing Non-*Perry* Respondents' Position.

Lacking statutory support, the Attorney General and Opposing Non-*Perry* Respondents claim that case law bolsters their arguments. (AG Opp. at pp. 17-19; Non-*Perry* Resp. Opp. at pp. 3-5.) But the relevant cases, like the governing statutes, do not advance their position.

The Attorney General and Opposing Non-*Perry* Respondents misread *Lockyer*. The Attorney General inaccurately asserts that *Lockyer* concluded that "a mayor lacks . . . authority" over county clerks "when those officials are performing marriage-related functions" because the clerks "are subject to the control of state officials." (AG Opp. at p. 18 [citing *Lockyer*, *supra*, 33 Cal.4th at p. 1080].) But this assertion distorts the cited passage from *Lockyer* in two ways. First, the reason that the mayor did not have authority over county clerks issuing marriage licenses was that the "statutes" or "local charter" did not give him that power. (*Lockyer*, *supra*, 33 Cal.4th at p. 1080.) And as discussed above, the same can be said not only of a mayor, but also of the State Registrar. Second, *Lockyer*'s discussion about a mayor's lack of control over county clerks *did not* state that county clerks are under the control or supervision of the State Registrar. That insinuation, moreover, is at odds with the central premise of *Lockyer*: that county clerks answer to, and must comply with, the *state laws* that govern their official duties—not the directives of state officials. (See *Lockyer*, *supra*, 33 Cal.4th at pp. 1104-1105 [concluding that county clerks must "perform their ministerial duty in conformity with the current California marriage statutes"].)

Opposing Non-*Perry* Respondents cite to the passage in *Lockyer* where this Court stated, without explanation, that the county clerk and county recorder function as "state officer[s]" when they perform their marriage-related duties. (Non-*Perry* Resp. Opp. at p. 3; *Lockyer*, *supra*, 33

Cal.4th at pp. 1080-1081). This passing statement, which acknowledges simply that these county officials perform duties mandated by state law, says nothing about whether county clerks, when they issue marriage licenses, are under the State Registrar's control or supervision. Rather, the absence of a statute giving the State Registrar this authority (particularly when statutes give the State Registrar this authority over local registrars (see Health & Saf. Code, §§ 102180, 102295)) and *Lockyer*'s insistence that clerks must act "in conformity with the current California marriage statutes" (not in conformity with whatever the State Registrar orders (see *Lockyer*, *supra*, 33 Cal.4th at pp. 1104-1105)) confirm that county clerks issuing marriage licenses answer to the law of the land (not the State Registrar's directives).

The Attorney General and Opposing Non-*Perry* Respondents both quote *Lockyer*'s statement that the DPH Director, "*by statute*, has general supervisory authority over the marriage license and marriage certificat[e] process." (AG Opp. at p. 19, emphasis removed in part [quoting *Lockyer*, *supra*, 33 Cal.4th at p. 1118]; Non-*Perry* Resp. Opp. at p. 4 [same].) But the *relevant statutes* task the State Registrar with only two categories of duties concerning marriage records: (1) prepare marriage forms and instructions regarding those forms; and (2) receive, review, store, and maintain completed marriage records. (See Petition and Memorandum at pp. 37-38.) The Legislature has not authorized the State Registrar to supervise or control county clerks when they issue marriage licenses. (*Ibid.*)

The concluding directives of both *Lockyer* and the *Marriage Cases* are also unhelpful to the Attorney General and Opposing Non-*Perry* Respondents. (See AG Opp. at pp. 19-20; Non-*Perry* Resp. Opp. at pp. 4-5.) Petitioners have already explained why those directives do not establish that the State Registrar has authority to supervise county clerks issuing marriage licenses. (See Petition and Memorandum at pp. 42-43.) Neither

the Attorney General nor Opposing Non-*Perry* Respondents have responded to Petitioners' arguments. Petitioners thus incorporate their prior arguments here.[5]

It is also insignificant that the State Registrar "issued a letter to all county clerks and recorders" about the *Marriage Cases* decision. (See Non-*Perry* Resp. Opp. at p. 5.) That letter and the other post-*Marriage Cases* correspondence between the State Registrar and county officials related to the "new marriage license forms" (Non-*Perry* Resp. MJN Exhibit A at pp. 1-6; Exhibit C at pp. 1-9), which state statutes require the State Registrar to create. (See Health & Saf. Code, § 102200.) Those materials do not purport to direct county clerks concerning the issuance of marriage licenses. Nor was such a directive necessary, for the *Marriage Cases* decision itself, as an authoritative appellate precedent of this Court, directly bound all county clerks.

In addition to *Lockyer* and *Marriage Cases*, the Attorney General also enlists *Sacramento v. Simmons* (1924) 66 Cal.App. 18, 24-25, as a case purportedly supporting her argument. (AG Opp. at pp. 18-19.) That case is inapposite, however, because the local official at issue there was the "local registrar of vital statistics," and state statutes provided then, as they do now, that he "act[s] under the authority" of "the state registrar." (See *Sacramento v. Simmons*, *supra*, 66 Cal.App. at pp. 23-25 [discussing the former statutes and relevant analysis]; Health & Saf. Code, §§ 102180, 102295 [current statutes].)

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[5] Opposing Non-*Perry* Respondents claim that Los Angeles County was "dismissed" as a respondent "from the [*Marriage Cases* proceeding] before it reached this Court." (Non-*Perry* Resp. Opp. at p. 4.) The cited evidence, however, does not indicate that the County was dismissed. Instead, it appears that the County in *Marriage Cases*, much like the Alameda and Los Angeles County Clerks in *Perry*, did not actively participate in the proceedings before this Court.

2. The State Registrar's Practices Do Not Support the Attorney General's and Opposing Non-*Perry* Respondents' Position.

That the State Registrar provides some guidance to county officials—a primary focus of Opposing Non-*Perry* Respondents' arguments (see Non-*Perry* Resp. Opp. at pp. 5-7)—does not establish that state law authorizes the State Registrar to supervise or control county clerks when they issue marriage licenses. Those Respondents extensively discuss the Marriage Handbook distributed by DPH. (Non-*Perry* Resp. Opp. at pp. 5-6.) Yet that Handbook is not a directive from a supervisor to a subordinate. Rather, it is an informational tool "designed as an aid to assist members of the clergy, County Clerks and registrars, and other local officials who have responsibilities related to completing, issuing, filing, and registering licenses and certificates of marriage." (Non-*Perry* Resp. MJN Exhibit B at p. 1.) Distributing this Handbook no more establishes that the State Registrar has authority to supervise county clerks when they issue marriage licenses than it signifies that he has authority to supervise "members of the clergy" when they solemnize marriages.

This understanding of the Handbook is consistent with typical state-agency operations. State agencies regularly provide local officials and the public with topical resources about various areas of state law. That they supply this legal guidance does not illustrate or otherwise establish that they have authority to supervise or control the recipients. The California Environmental Protection Agency (CEPA), for example, publishes an Air Quality and Land Use Handbook to guide local government land-use decisions. (California Air Resource Board, California Environmental Protection Agency, Air Quality and Land Use Handbook: A Community Health Perspective (April 2005) <http://www.arb.ca.gov/ch/handbook.pdf> [as of July 29, 2013].) But CEPA does not supervise or control local

officials when they make those decisions. (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 ["Land use regulation in California historically has been a function of local government"].) Myriad similar examples could be cited.

Furthermore, the communications from the State Registrar's office to county clerks and county recorders/local registrars do not contradict Petitioners' arguments. The State Registrar must send guidance to the local registrars because he has "supervisory power over [them]." (Health & Saf. Code, § 102180.) Including the county clerk on these communications is logical because "in many counties the offices of clerk and recorder are combined and held by a single person." (Non-*Perry* Resp. Opp. at p. 7.) Additionally, periodic correspondence between the State Registrar and county clerks is unavoidable because the State Registrar is responsible for prescribing marriage forms (see Health & Saf. Code, § 102200), and county clerks are responsible for issuing them. (See Fam. Code, § 350, subd. (a), § 359, subd. (a).) Indeed, as mentioned above, all the submitted post-*Marriage Cases* correspondence between the State Registrar and county officials pertained to the marriage license forms. (See Non-*Perry* Resp. MJN Exhibit A at pp. 1-6; Exhibit C at pp. 1-9.)[6]

Rather than analyzing intermittent guidance that the State Registrar has transmitted to county clerks, a far better indicator of the State Registrar's authority is how he has previously handled county clerks who disregarded state law concerning the issuance of marriage licenses. *Lockyer*

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[6] None of the miscellaneous emails, conference-call notices, or questions that Opposing Non-*Perry* Respondents have provided to this Court discuss the county clerks' issuance of marriage licenses. They address other issues, such as "marriage license forms" (see Non-*Perry* Resp. MJN Exhibit D at p. 1), local registrars' mailing marriage certificates to the State Registrar (see Non-*Perry* Resp. MJN Exhibit D at p. 2), and private-party solemnization of marriages. (See Non-*Perry* Resp. MJN Exhibit E at p. 1.)

presents the foremost (if not the only) relevant example. The actions of former State Registrar Michael L. Rodrian, who held the position at the time of the *Lockyer* case, are instructive. Although he issued "a directive" to the "San Francisco County Recorder" instructing her to "cease[] the practice of registering marriage certificates submitted by same-sex couples," he did not send a comparable directive to the county clerk. (*Lockyer*, *supra*, 33 Cal.4th at p. 1072.) This experience tells far more about the State Registrar's authority than the Marriage Handbook, letters, and emails proffered by Opposing Non-*Perry* Respondents. And it unmistakably shows that the State Registrar does not have the power he now asserts.[7]

3. Statewide Uniformity Does Not Require the State Registrar to Supervise or Control County Clerks.

Opposing Non-*Perry* Respondents argue that supervision by the State Registrar is necessary to ensure "uniform administration of [the] marriage laws." (Non-*Perry* Resp. Opp. at p. 2.) This is unpersuasive, however, because state marriage laws themselves, not oversight by the State Registrar, bring about statewide uniformity. There is no need for oversight because, as Opposing Non-*Perry* Respondents acknowledge, county clerks "have no discretion" when issuing marriage licenses and "[t]heir functions . . . are purely '*ministerial.*'" (*Id.* at p. 3.) Moreover, if a county clerk defies state law, any citizen may institute writ proceedings to force them into compliance and thereby ensure statewide uniformity. (See, e.g., *Lockyer*, *supra*, 33 Cal.4th at p. 1120.)

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[7] The Attorney General's mention of Federal Rule of Civil Procedure 65 does not aid her opposition. "[U]nder Rule 65," she argues, the *Perry* injunction binds "all 58 county clerks" because they are "subject to the supervision and control of DPH." (AG Opp. at pp. 20-21.) But the State Registrar does not supervise or control county clerks when they issue marriage licenses, and thus Rule 65 does not widen the injunction's scope to include all Respondents. (See Petition and Memorandum at p. 43.)

Opposing Non-*Perry* Respondents also assert that if county clerks issuing marriage licenses are not under the control of the State Registrar, irreconcilable conflicts will somehow arise between the duties of the county clerk and those of the county recorder/local registrar. (Non-*Perry* Resp. Opp. at p. 10.) Yet these alleged conflicts are illusory. County clerks are the only public officials authorized to issue marriage licenses. (See Fam. Code, § 350, subd. (a), § 359, subd. (a).) Because county clerks are not bound by the *Perry* injunction, they should not issue marriage licenses in violation of state law. Accordingly, no such marriages certificates should be presented to county recorders/local registrars for filing. Therefore, the conflict of duties that Opposing Non-*Perry* Respondents reference should not materialize.

Although Opposing Non-*Perry* Respondents object to an outcome where the Alameda and Los Angeles County Clerks are bound by the *Perry* injunction and thus prohibited from enforcing Proposition 8, while the Non-*Perry* Respondents are required to enforce state marriage law (see Non-*Perry* Resp. Opp. at pp. 8-11), this result is avoidable, as Petitioners have shown in Section (I) above, if this Court affirms that the scope of the *Perry* injunction cannot reach beyond the four plaintiffs. But if the county clerks named as defendants in *Perry* are bound by the injunction and the remaining county clerks are not, the causes of that scenario are the litigation strategy of the *Perry* plaintiffs (see *Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 907-908 [Reinhardt, J., concurring] ["Plaintiffs could have obtained a statewide injunction had they filed an action against a broader set of defendants, a simple matter of pleading."]) and the litigation choices of the Governor and Attorney General, as Petitioners have explained elsewhere and incorporate here. (See Reply to Informal Opposition to Request for Immediate Stay or Injunctive Relief at p. 13, fn. 9.) In any event, that situation would not exist for an extended period of

time because subsequent legal developments would clarify Proposition 8's validity before long.[8]

III. *Lockyer* and Article III, Section 3.5 of the California Constitution Require Respondents to Enforce State Marriage Laws.

Because the *Perry* injunction does not prospectively bind Respondents, *Lockyer* and article III, section 3.5 of the California Constitution require Respondents to enforce state law defining marriage as a union between a man and a woman. (See Petition and Memorandum at pp. 44-50.) The Attorney General's and Opposing Non-*Perry* Respondents' attempts to dismiss section 3.5 as irrelevant are unpersuasive because those arguments are premised on the erroneous assumption that the *Perry* injunction binds all Respondents. Notably, no opposing party contests, and thus the Attorney General and Respondents appear to concede, that Petitioners will prevail on the merits of their claims against any Respondent not bound by the injunction.

Fenske v. Board of Administration of the Public Employees' Retirement System (1980) 103 Cal.App.3d 590, 595-596—a case cited in the Preliminary Oppositions (see AG Opp. at p. 22; Non-*Perry* Resp. Opp. at p. 12)—does not refute Petitioners' argument that section 3.5 requires Respondents not bound by the *Perry* injunction to enforce state marriage law. The question before the court of appeal in *Fenske* was whether the superior court, when reviewing an administrative agency's decision, has authority to evaluate a statute's constitutionality. The appellate court concluded that when a party appeals an administrative decision, section 3.5

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[8] Opposing Non-*Perry* Respondents' argument that "[d]ifferent marriage requirements in different counties would raise questions about the validity of inter-county marriages" is self-defeating because they simultaneously recognize that "a license issued by [one county clerk] authorizes a marriage that can be performed in any California county." (Non-*Perry* Resp. Opp. at pp. 9-10.)

does not "divest[] the superior court of jurisdiction to rule on the constitutionality of statutes governing administrative agencies." (*Fenske v. Bd. of Admin.*, *supra*, 103 Cal.App.3d at p. 595.) That holding has no relevance here because this case does not involve an appeal from a state administrative decision.

LSO, Ltd. v. Stroh (9th Cir. 2000) 205 F.3d 1146, 1159-1160, another case featured in the Preliminary Oppositions (see AG Opp. at p. 22; Non-*Perry* Resp. Opp. at p. 12), is also unhelpful when analyzing the section 3.5 issue presented in this case. The government defendants in *LSO*, despite United States Supreme Court precedent clearly establishing that their enforcement of a state regulation violated plaintiffs' constitutional rights, claimed qualified immunity. (*LSO, Ltd. v. Stroh*, *supra*, 205 F.3d at pp. 1157-1160.) They argued that reasonable officials "could have believed that their conduct was lawful" because "even if it was clear . . . that applying [the regulation] . . . was unconstitutional, they were nonetheless required to enforce the regulation because of" section 3.5. (*Id.* at p. 1159.) The Ninth Circuit disagreed, concluding that under the Supremacy Clause of the United States Constitution, section 3.5 cannot "immunize" officials from their failure to comply with clearly established United States Supreme Court precedent. (*Id.* at pp. 1159-1160.) That analysis is inapplicable here because the only federal authorities that the Attorney General and Opposing Non-*Perry* Respondents invoke are a nonprecedential district court opinion and an injunction that does not bind Respondents. No United States Supreme Court case law, or other existing federal appellate precedent, establishes that enforcing California's marriage laws would be unconstitutional. Under these circumstances, Respondents must comply with section 3.5 and enforce Proposition 8.

Opposing Non-*Perry* Respondents nevertheless suggest that if they enforce Proposition 8 and are sued by a same-sex couple, they "would have

little chance of prevailing" and "could be personally liable" because qualified immunity would not apply. (Non-*Perry* Resp. Opp. at p. 9 and fn. 3.) They offer only a scintilla of legal support for this argument because the *Perry* district court decision has no precedential weight (see Petition and Memorandum at p. 45), and the *Perry* Ninth Circuit decision has been vacated. (See Non-*Perry* Resp. Opp. at p. 9.) More importantly, this legal support is overwhelmed by an unbroken line of state and federal appellate court decisions (from the United States Supreme Court, a federal court of appeals, state courts of last resort, and state courts of appeals) upholding state laws defining marriage as a union between a man and a woman under the United States Constitution. (See *Baker v. Nelson* (1972) 409 U.S. 810 [denying appeal "for want of a substantial federal question," which constitutes a ruling on the merits]; *Citizens for Equal Protection v. Bruning* (8th Cir. 2006) 455 F.3d 859, 871; *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 308; *Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588, 590; *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, 187; *In re Marriage of J.B. & H.B.* (Tex.Ct.App. 2010) 326 S.W.3d 654, 677; *Standhardt v. Super. Ct. of Ariz.* (Ariz.Ct.App. 2003) 77 P.3d 451, 465; *Singer v. Hara* (Wash.Ct.App. 1974) 522 P.2d 1187, 1197.) This appellate authority not only supports Respondents' enforcement of Proposition 8, but would readily entitle them to qualified immunity in any subsequent legal challenge.

To advance her contention that section 3.5 is irrelevant here, the Attorney General also discusses *Perry v. Schwarzenegger*, *supra*, 630 F.3d at p. 904—the Ninth Circuit decision denying Imperial County's attempt to intervene in the *Perry* litigation. (AG Opp. at pp. 22-23.) The court there stated that "*[i]f* a federal district court *were to enjoin* a County Clerk from enforcing state law, no provision of state law," including section 3.5, "could shield her against the force of that injunction." (*Perry v.*

Schwarzenegger, *supra*, 630 F.3d at p. 904, emphasis added.)[9] But as Petitioners have explained, the *Perry* injunction does not bind Respondents, and thus the premise for the Ninth Circuit's observation is absent here. Given that Respondents are not bound by the injunction, section 3.5 applies and requires Respondents to enforce state law defining marriage as a union between a man and a woman.

One common denominator runs through all the Preliminary Oppositions: the mistaken assertion that granting the requested writ would force county clerks to choose between complying with this Court's writ of mandate and adhering to the *Perry* court's injunction. (AG Opp. at pp. 23-24; Non-*Perry* Resp. Opp. at p. 9; O'Connell Opp. at p. 5; see also AG Opp. at p. 24 [claiming that granting the "writ could precipitate a wholly unnecessary conflict between this Court and the federal court"].) This again ignores the premise of Petitioners' position: that Respondents are not bound by the injunction, and thus that *Lockyer* and section 3.5 require Respondents to enforce Proposition 8. Because Respondents are not bound by the injunction, no conflict would exist between the *Perry* injunction and any relief issued by this Court.

IV. Respondent San Francisco County Clerk Is Not Bound by the *Perry* Injunction, and Thus Must Enforce State Marriage Law.

San Francisco seeks to separate its county clerk from the other Non-*Perry* Respondents. (SF Opp. at pp. 10-11.) Its arguments miss the mark, however, because Respondent San Francisco County Clerk, like all other Non-*Perry* Respondents, is not bound by the *Perry* injunction. The

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[9] The Ninth Circuit noted that "the effect" of the *Perry* injunction "is unclear" (*Perry v. Schwarzenegger*, *supra*, 630 F.3d at p. 904, fn. 3), while elsewhere acknowledging the plaintiffs' view that the injunction "would be binding on the named state officers and on the county clerks in two counties only, Los Angeles and Alameda." (*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1195, fn. 2.)

injunction bound only the named "[d]efendants in their official capacities" and "all persons under the control or supervision of defendants." (Petition Exhibit B at p. 015.) Yet Respondent San Francisco County Clerk was not named as a defendant in *Perry*; nor, as Petitioners have shown, is she a person under the control or supervision of any named defendant.

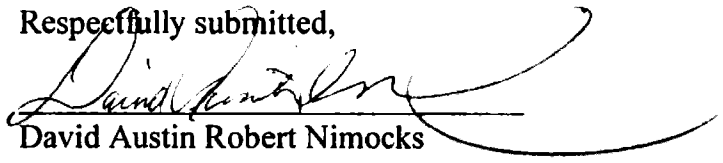
San Francisco nevertheless claims that as a plaintiff-intervenor in the *Perry* litigation, it "sued for, and won, the right to not enforce Proposition 8." (SF Opp. at p. 11.) That is not correct. The *Perry* court granted San Francisco's request for permissive intervention only "in part to allow San Francisco to present [the] issue of [Proposition 8's] alleged effect on governmental interests." (*Perry v. Schwarzenegger* (N.D.Cal. Aug. 19, 2009, No. C 09-2292 VRW) Minute Order, Doc. No. 160 at p. 2 (Petitioners' MJN Exhibit A).) The limited basis upon which the *Perry* court allowed San Francisco to intervene did not enable it to assert a substantive right not to enforce Proposition 8.[10] That is confirmed by the absence of any declaratory or injunctive relief specifically benefiting San Francisco.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the relief sought in the Petition for Writ of Mandate.

Dated: July 31, 2013.

Respectfully submitted,

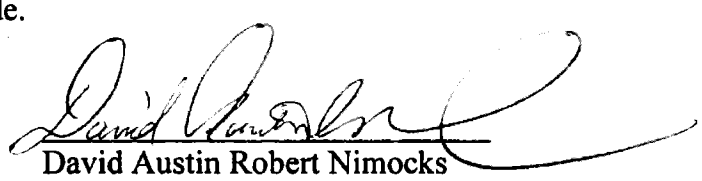


David Austin Robert Nimocks

[10] In addition, "[i]t is well established that political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." (*City of South Lake Tahoe v. California Tahoe Regional Planning Agency* (9th Cir. 1980) 625 F.2d 231, 233, quotation marks and alterations omitted.)

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 8,046 words, excluding the words in the sections that California Rules of Court, rule 8.204(c)(3) instructs counsel to exclude.



David Austin Robert Nimocks

PROOF OF SERVICE

I declare as follows:

1. I am over the age of 18 and not a party to this action. I am employed by Alliance Defending Freedom in the County of Maricopa, State of Arizona. My business address is 15100 N. 90th Street, Scottsdale, AZ 85260.

2. On July 31, 2013, I served true and correct copies of the attached document entitled:

REPLY TO PRELIMINARY OPPOSITIONS TO PETITION FOR WRIT OF MANDATE

by placing them in addressed and sealed envelopes, with delivery fees fully paid, and depositing those envelopes in a regularly maintained United States Post Office facility in Scottsdale, Arizona for regular delivery on the persons listed below at the provided addresses:

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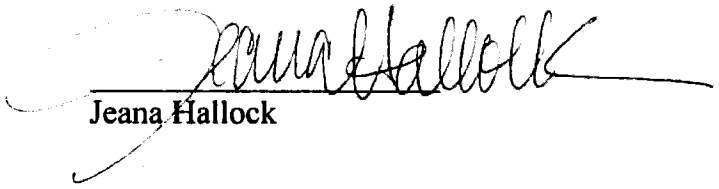

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