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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

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

[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

[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

[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,

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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

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