Kristin Perry, et al v. Campaign For California Famili, et al Doc. 4

Case No. 09-16959

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO, Plaintiffs/Appellees

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California, MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C. LOGAN, in his official capacity as Registrar-Recorder/ County Clerk for the County of Los Angeles, Defendants.

CAMPAIGN FOR CALIFORNIA FAMILIES, Proposed Intervenor-Defendant/Appellant

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON; andPROTECTMARRIAGE.COM-YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, Intervenor-Defendants/Appellees

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Appeal from the United States District Court for the Northern District of California
Honorable Vaughn R. Walker, U.S. District Judge
Case No. CV-09-02292 VRW

APPELLANT'S MOTION TO EXPEDITE APPEAL

MARY E. MCALISTER
STEPHEN M. CRAMPTON
RENA M. LINDEVALDSEN
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
court@lc.org Email

MATHEW D. STAVER
ANITA L. STAVER
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(800)671-1776 Telephone
(407) 875-0770 Facsimile
court@lc.org Email

Attorneys for Appellant Campaign for California Families

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Appellant, proposed Defendant-Intervenor Campaign for California Families (the "Campaign"), moves this Court to expedite its appeal against Plaintiffs/Appellees KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO ("Plaintiffs") and Intervenor-Defendants/Appellees PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAK-SHING WILLIAM TAM, and MARK A. JANSSON and PROTECTMARRIAGE.COM-YES ON 8, A PROJECT OF CALIFORNIA RENEWAL ("Intervenor-Defendants"). As a point of clarification, only the Plaintiffs and Intervenor-Defendants are listed as Appellees because they are the only parties who opposed the Campaign's Motion to Intervene. None of the originally named Defendants opposed the Campaign's intervention as an additional Defendant.

The Campaign makes this motion pursuant to 9th Cir. R. 27-12 on the grounds that in the absence of expedited treatment, the appeal will become moot and irreparable harm may occur.

PARTIES' POSITION ON THE MOTION

The Campaign's counsel has contacted counsel for the other parties regarding their position on this motion. The County of Los Angeles and County of Alameda have responded that they have no position on the motion. The Plaintiffs, Administration Defendants (Arnold Schwarzenegger, Linette Scott and Mark Horton), Attorney General and Intervenor-Defendants have responded that they do not object to the motion. As of the date and time this

motion is being filed, the Campaign has not received a response from Intervenor-Plaintiff the City and County of San Francisco.

INTRODUCTION

The unusual alignment of parties in this case – with a fellow Intervenor-Defendant listed along with the Plaintiffs as an adverse party in this appeal – and the Intervenor-Defendants' agreement to concede certain ultimate facts and expedite the prosecution of the case illustrate why it is critical that this Court expedite the Campaign's appeal. At issue is whether thorough constitutional analysis can be sacrificed in favor of a speedy resolution. At the behest of Plaintiffs the District Court set an expedited pre-trial and trial schedule under which the case will be decided before briefing is completed in this Court. (Civil Minute Order, District Court Dkt. # 160, Exhibit A to the Declaration of Mary E. McAlister, "McAlister Declaration"). As a result, the Campaign's appeal will become moot unless it is expedited.

If the Campaign's appeal is not expedited, then irreparable harm may occur in that the district court will determine the constitutionality of voter-enacted constitutional and statutory provisions before this Court can determine whether the Campaign's participation is necessary to create the fully developed factual record and comprehensive legal analysis necessary to establish whether the enactments violate the United States Constitution. *See City of Hammond v. Schappi Bus Line,* 275 U.S. 164, 172 (1927)(Mem)(District Court must have an adequate, unambiguous record before it can rule on significant constitutional issues). Instead of acknowledging the need for well-developed facts and legal arguments to meet their

burdens of proof, the parties emphasized simplicity and speed and decried what they viewed as the Campaign's proposed interference with their tactical decisions. If the appeal is not expedited, then tactics will trump constitutional analysis before this Court has the opportunity to determine whether exclusion of the Campaign and other tactical decisions will do justice to the significant constitutional issues raised in this case.

The originally named government Defendants–the parties obligated to defend the constitutionality of amendments and statutes–have indicated that they will not be vigorously defending the challenged amendment and statutes, but are delegating those obligations to third-party intervenors. (See Reporter's Transcript ("R.T."), Exhibit B to McAlister Declaration, p. 38). The Attorney General has gone one step farther, saying not only that he will not defend the laws, but that he will join with Plaintiffs in seeking to have them overturned. (R.T., p. 39). Neither Plaintiffs nor any of the originally named Defendants opposed Intervenor-Defendants' motion to intervene. Because of the Attorney General's alliance with Plaintiffs and the other Defendants' neutral stance on the challenged provisions, Intervenor-Defendants were left as the only true "defendants" of the voter-approved initiatives. Nevertheless, Intervenor-Defendants joined the Plaintiffs in vigorously opposing the Campaign's request to join as a fellow defender of the constitutionality of the voter-approved initiatives challenged by Plaintiffs. (R.T., pp. 36-37 and 41-42).

The reasons behind the Intervenor-Defendants' curious alliance with the Plaintiffs to silence any further voices in defense of the amendments and statutes became clear during the hearing on the intervention motion and further illustrate why the Campaign's appeal must

be expedited. Plaintiffs and Intervenor-Defendants expressed concerns that the Campaign's involvement might delay the expeditious resolution of the case. (R.T., pp. 36, 41). More tellingly, Intervenor-Defendants emphasized that permitting the Campaign to intervene would interfere with their tactical decision to concede certain prerequisite factual determinations critical to defending the constitutional and statutory provisions being challenged by Plaintiffs. (R.T. pp 41-42). Plaintiffs affirmed that Intervenor-Defendants had already conceded several issues and Plaintiffs did not want the Campaign to disturb their arrangement. (R.T. p. 36). For both Plaintiffs and Intervenor-Defendants the emphasis was on speedy completion of the case instead of on reasoned analysis of the significant constitutional issues involved. (R.T. pp. 36, 41-42). The Campaign described the significant constitutional issues being conceded by Intervenor-Defendants, but was rebuffed by both Plaintiffs and Intervenor-Defendants for trying to add too much complexity and possibly slowing down their high speed train. (R.T. pp. 18-25, 36, 41-42).

The District Court agreed with the parties, denied the Campaign's motion to intervene and approved an expedited pre-trial and trial schedule that will be completed before the parties can complete their briefing in this Court. The District Court's action guarantees that the significant factual issues which must be analyzed in order to determine the constitutionality of the challenged provisions will be given abbreviated consideration or no consideration, regardless of whether this Court would find the issues critical to the analysis. Only expedited consideration of the Campaign's appeal will permit this Court to meaningfully determine whether the existing parties' tactical decisions are constitutionally

permissible.

LEGAL ARGUMENT

I. THE CAMPAIGN'S APPEAL WILL BECOME MOOT IF IT IS NOT EXPEDITED BY THIS COURT.

Under 9th Cir. Rule 27-12, the Campaign can move for an expedited appeal for good cause, which includes situations in which the appeal will become moot if it is not expedited. *Alaska Center for Environment v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999). The schedules adopted by the District Court and this Court create just such a situation. If this appeal is not expedited, then the case in which the Campaign is seeking intervention will be concluded, or within days of being concluded, before the final brief is filed in this appeal. The Time Schedule Order filed by this Court on September 4, 2009 provides that Appellant's Opening Brief and Excerpts of Record are to be served and filed on or before December 11, 2009; the Appellees' Brief filed on or before January 11, 2010 and Appellant's Reply Brief within 14 days of the filing of the Appellees' Brief. The District Court's pre-trial/trial scheduling order provides for a hearing on dispositive motions on October 14, 2009, completion of discovery by November 30, 2009, a pre-trial conference on December 16, 2009 and trial on January 11, 2010, the same day that Appellees' brief is due in this Court. Even if Appellants filed their brief before December 11, 2009, Appellees' brief would still not be due until the first day of trial on January 11, 2010. Ninth Cir. R. 31-2.1. Appellant's reply brief would be filed during the course of the trial of the case into which the Campaign is seeking intervention, and this Court's ruling would occur after the trial had concluded.

Consequently, this Court would be deciding whether the Campaign should be permitted to participate as a party in pre-trial and trial proceedings that were already concluded. Unlike the situation in *Alaska Center for Environment*, the circumstances of the underlying case here would not be subject to the "capable of repetition yet evading review" exception to mootness. *Alaska Center for Environment*, 189 F. 3d at 855. The Plaintiffs' constitutional challenges are not recurring events into which the Campaign might seek intervention in the future. Once the District Court has tried the case in January 2010, the Campaign's opportunity to present evidence and legal argument disappears. Therefore, unless this Court grants the motion to expedite, the appeal will become moot. The question of whether the Campaign should be precluded from providing part of that analysis should not be permitted to go unanswered by this Court because of Plaintiffs' desires for a speedy resolution. That is particularly true in light of the significant constitutional questions posed by Plaintiffs, as discussed below.

II. IF THIS APPEAL IS NOT EXPEDITED, THEN IRREPARABLE HARM MAY OCCUR IN THAT THE DISTRICT COURT WILL MAKE A RULING ON THE CONSTITUTIONALITY OF VOTER INITIATIVES WITHOUT THIS COURT'S DETERMINATION OF WHETHER EXCLUSION OF THE CAMPAIGN PRECLUDES DEVELOPMENT OF THE COMPREHENSIVE FACTUAL RECORD AND LEGAL ANALYSIS NECESSARY TO MAKE SUCH A RULING.

When, as is true in this case, irreparable harm may result if an appeal is not expedited, then good cause exists for expedited treatment. Ninth Circuit Rule 27-12(3). Plaintiffs are seeking to invalidate voter-approved constitutional and statutory provisions as violative of

their due process and equal protection rights under the United States Constitution. The Plaintiffs' claims are novel and far-reaching, as they are asking the District Court to invalidate the definition of marriage as the union of one man and one woman and establish a new standard of review for claims based upon sexual orientation. The Supreme Court has long recognized that such claims can only be decided after the facts and legal concepts essential to the determination are developed by the district court through adequate evidence. *City of Hammond v. Schappi Bus Line,* 275 U.S. 164, 172 (1927)(mem).

In this case, the essential facts and legal concepts include obtaining empirical evidence to determine which analytic standard should be applied to Plaintiffs' claims, and in turn, what facts need to be established to meet the relevant burden of proof for that standard. For the due process claim, the parties need to particularly describe the asserted liberty interest at stake and provide the Court with facts necessary to determine whether the liberty interest is a fundamental right subject to strict scrutiny or a right subject to intermediate scrutiny or the rational basis test. *See Washington v. Glucksberg*, 521 U.S. 702, 721, 723 (1997). For the equal protection claim, the parties need to provide facts to enable the district court to establish whether Plaintiffs are being subjected to differential treatment despite being similarly situated to other groups and whether the challenged laws burden a fundamental right or target a suspect class. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-441 (1985). In order for the district court to determine whether the challenged laws target a suspect class, the parties must provide empirical evidence regarding whether the challengers possess a readily identifiable characteristic, whether there has been

a history of invidious discrimination against the group, whether the group lacks political power, whether the group's identifying characteristic is immutable, and whether the characteristic is related to an individual's ability to contribute to society. *See id.* at 442-446.

If the district court determines that there is no differential treatment of similarly situated people, no burden on a fundamental right and no targeting of a suspect class, then it will apply the rational basis test. *See id.* at 439-441. If that test is applied, then Plaintiffs would have the burden of negating every conceivable basis which might support the legislative classification, which would require development of a factual record describing those conceivable bases. *See Fields v. Legacy Health Systems,* 413 F.3d 943, 955 (9th Cir. 2005). If the district court determines that the laws target a quasi-suspect class, then a heightened, or intermediate scrutiny standard will apply. *Cleburne,* 473 U.S. at 440-441. Under that standard, the Defendants would have to provide the factual basis necessary for the district court to determine that the laws serve important governmental objectives and that the means employed are substantially related to the achievement of those objectives. *See Hibbs v. Department of Human Resources,* 273 F.3d 844, 855 (9th Cir. 2001). If the district court determines that the laws burden a fundamental right or a suspect class, then the Defendants would have to provide the factual basis necessary for the court to determine that there is a compelling governmental interest for making the challenged classification and that the law is narrowly tailored to meet that interest. *Cleburne*, 472 U.S. at 441.

With the Attorney General aligned with the Plaintiffs and the other governmental defendants indicating that they will not actively participate in development of the factual

record, the task of developing the thorough factual record necessary to meet these burdens of proof falls on third-party intervenors. The present Intervenor-Defendants indicated to the district court that instead of creating an evidentiary record for many of the facts they were simply going to concede that those facts exist. (See R.T. pp. 18-24). For example, the Intervenor-Defendants said that they will not present evidence regarding history of invidious discrimination, but will merely concede that it exists. (R.T. p. 21). The Campaign will provide empirical evidence regarding the discrimination issue to enable the district court to make the determination, as is required under *Cleburne*. (R.T. p. 21). The Intervenor-Defendants similarly said that they will concede the identifying characteristic factor for suspect classification, while the Campaign would provide empirical evidence to enable the court to make that determination. (R.T., p. 21).

The district court found that the empirical evidence to be offered by the Campaign would not contribute elements necessary to its determination which would otherwise not be presented by the parties. (R.T. p. 48). Implicit in that ruling is a statement that facts related to history of discrimination and identifiable characteristics, elements necessary to determining suspect classification under *Cleburne* are not in fact necessary to the district court's determination of that issue. The district court also questioned whether those elements were even appropriate to consider. (R.T. , p. 48). The court also emphasized that permitting the Campaign to intervene would likely require additional time to develop the factual record, time that the court did not believe was necessary. Since the district court adopted an expedited pre-trial and trial schedule, this Court will not have the opportunity to determine

whether the district court acted properly unless this appeal is expedited. That would mean that the parties and the court would speed through discovery and pre-trial preparation to create an abbreviated factual record upon which to base findings regarding fundamental constitutional principles of due process and equal protection.

The fundamental rights at stake make this Court's review of the district court's action particularly critical. This Court should not be foreclosed from reviewing those actions by the Plaintiffs' and district court's desire to race toward a resolution. Granting the Campaign's motion to expedite the appeal will ensure that does not happen.

STATUS OF TRANSCRIPT PREPARATION

The Campaign's appeal is based upon a hearing conducted on August 19, 2009. The reporter's transcript of that hearing is already prepared and has been placed on the District Court's electronic docket as Dkt. # 162. Therefore, it should be available for immediate transmission to this Court.

PROPOSED BRIEFING SCHEDULE

The Campaign would propose the following briefing schedule for the Court's consideration:

Appellant's Opening Brief and Excerpts of Record due September 25, 2009;

Appellees' Answer Brief due October 9, 2009;

Appellant's Reply Brief due October 16, 2009.

Oral argument the week of October 19, 2009.

CONCLUSION

The Campaign's appeal will become moot unless it is expedited by this Court. In the absence of expedited consideration, irreparable harm may occur as the district court will make constitutional determinations based upon an artificially limited factual record.

On these bases the Campaign's motion to expedite the appeal should be granted.

Dated: September 10, 2009

/s/ Mary E. McAlister
MARY E. MCALISTER
STEPHEN M. CRAMPTON
RENA M. LINDEVALDSEN
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
court@lc.org Email
Attorneys for Appellant Campaign for California Families

MATHEW D. STAVER
ANITA L. STAVER
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(800)671-1776 Telephone
(407) 875-0770 Facsimile
court@lc.org Email
Attorneys for Appellant Campaign for California Families

PROOF OF SERVICE

I am employed at the law firm of Liberty Counsel. I am over the age of 18 and not a party to the within action. My business address is 100 Mountain View Road, Suite 2775, Lynchburg Virginia 24502.

On September 10, 2009 I electronically filed this document through the ECF system, which will send a notice of electronic filing to the parties as shown on the attached **SERVICE LIST**.

Executed on September 10, 2009, at Lynchburg, Virginia.

I declare under penalty of perjury under the laws of the United States of America and State of California that the above is true and correct.

/s/ Mary E. McAlister

Mary E. McAlister

SERVICE LIST

Theodore B. Olson
Matthew C. McGill
Amir C. Tayranit
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8668
tolson@gibsondunn.com

Theodore J. Boutrous, Jr.
Christopher D. Dusseault
Ethan D. Dettmer
Theane Evangelis Kapur
Enrique A. Monagas
GIBSON, DUNN & CRUTCHER, LLP
333 S. Grand Avenue
Los Angeles, CA 90071
(213) 229-7804
tboutrous@gibsondunn.com

David Boies
Theodore H. Uno
BOIES, SCHILLER & FLEXNER, LLP
333 Main St
Armonk, NY 10504
(914) 749-8200
dboies@bsfllp.com

Attorneys for Plaintiffs

Kenneth C. Mennemeier
Kelcie M. Gosling
Landon D. Bailey
MENNEMEIER, GLASSMAN &
STROUD, LLP
980 9TH St, Suite 1700
Sacramento, CA 95814-2736
(916) 553-4000
kcm@mgslaw.com

Attorneys for Administration Defendants

Charles J. Cooper
David H. Thompson
Howard C. Nielson, Jr.
Peter A. Patterson
1523 New Hampshire Ave., N.W.,
Washington, D.C. 20036
(202) 220-9600
FAX (202) 220-9601
ccooper@cooperkirk.com

Timothy Chandler
ALLIANCE DEFENSE FUND
101 Parkshore Dr, Suite 100
Folsom, CA 95630
(916) 932-2850
tchandler@telladf.org

Andrew P. Pugno
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr, Suite 100
Folsom, CA 95630
(916) 608-3065
andrew@pugnolaw.com

Benjamin W. Bull
Brian W. Raum
James A. Campbell
ALLIANCE DEFENSE FUND
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
bbull@telladf.org
braum@telladf.org
jcampble@telladf.org
Attorneys for Proposition 8 Official Proponent Intervenor Defendants

Edmund G. Brown, Jr.
Attorney General of California
Jonathan K. Renner
Senior Assistant Attorney General
Tamar Pachter
Deputy Attorney General
455 Golden Gate Ave, Suite 11000
San Francisco, CA 94102-7004
(415) 703-5970
Tamar.Pachter@doj.ca.gov

Attorneys for Defendant Attorney General Edmund G. Brown Jr.

Dennis J. Herrera
City Attorney
Therese Stewart
Chief Deputy City Attorney
Danny Chou
Chief of Complex and Special Litigation
Vince Chhabria
Erin Bernstein
Christine Van Aken
Mollie M. Lee
Deputy City Attorneys
City and County of San Francisco
Office of the City Attorney
1 Dr. Carlton B. Goodlett Place
Room 234
San Francisco, CA 94102-4682
(415) 554-4708
FAX (415) 554-4699
Therese.stewart@sf.gov.org

Attorneys for Intervenor- Plaintiff City and County of San Francisco

Richard E. Winnie
County Counsel
Claude F. Kolm
Deputy County Counsel
Brian E. Washington
Assistant County Counsel
Lindsey G. Stern
Associate County Counsel
OFFICE OF THE COUNTY COUNSEL
County of Alameda
1221 Oak St. Suite 450
Oakland , CA 94612
(510)272-6700
claude.kolm@acgov.org

Attorneys for Defendant Patrick O'Connell

Elizabeth M. Cortez
Assistant County Counsel
Judy W. Whitehurst
Principal Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
500 W. Temple St.
Los Angeles, CA 90012-2713
(213) 974-1845
jwhitehurst@counsel.lacounty.gov

Attorneys for Defendant Dean C. Logan