

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN
FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 10-16696

Argued December 6, 2010

U.S. District Court

Case No. 09-cv-02292 VRW

**PLAINTIFF-INTERVENOR-APPELLEE
CITY AND COUNTY OF SAN FRANCISCO'S REPLY
TO OPPOSITION TO MOTION TO VACATE STAY
PENDING APPEAL**

On Appeal from the United States District Court
for the Northern District of California

The Honorable Vaughn R. Walker

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CITY AND COUNTY OF SAN FRANCISCO

As explained in the City's opening brief, the Court may not impose a stay where its jurisdiction is uncertain. One would have expected Proponents to respond by citing a case in which an appellate court issued a stay even when standing was concededly uncertain. Instead, Proponents focus their attention on the fact that many of the cases cited by the City involved attempts by third parties to establish next-friend status to seek relief from death sentences on behalf of death row inmates. *See, e.g., Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) ("before granting a stay [of execution], . . . federal courts must make certain that an adequate basis exists for the exercise of federal power.")

As a preliminary matter, the rule articulated in *Demosthenes* stems from first principles; it did not originate with the next-friend cases. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible without exception.'" (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884))).

In any event, far from rendering the next-friend cases irrelevant, the fact that they involve the execution of human beings underscores why a stay is not appropriate here. Indeed, the *Demosthenes* Court's statement about how even an impending execution does not allow a federal appellate court to bend its jurisdictional rules is worth quoting in full:

We realize that last minute petitions from parents of death row inmates may often be viewed sympathetically. But federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts *must make certain* that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed [with the execution] without federal intervention. Accordingly, we grant the State's motion to vacate the stay entered by the Court of Appeals.

495 U.S. at 737 (emphasis added). If jurisdictional uncertainty divests federal appellate courts of authority to stop a person from being put to death, surely it divests those courts of the ability to prevent loving same-sex couples from getting married, merely to prevent some amorphous injury Proponents allege they and the State of California would suffer. This is particularly so when 19,000 same-sex couples are already married in California, with no harm having been caused to anyone.

Proponents are equally wrong to say that courts only refuse to issue stays after "definitively determin[ing] that standing was lacking." Opposition at 8. In *Demosthenes* itself, the Supreme Court did not conclude that the death-row inmate was competent to waive federal habeas proceedings; indeed the district court in that case had declined to hold an evidentiary hearing on the question. 495 U.S. at 737. Rather, the district court concluded that "petitioners had failed to *establish* that the court had jurisdiction." *Id.* at 733 (emphasis added). Here too, as evidenced by this Court's decision to certify the question to the California Supreme Court, Proponents have thus far "failed to establish" jurisdiction, which requires that the stay be lifted.

Proponents also cite *Vargas v. Lambert*, 159 F.3d 1161 (9th Cir. 1998), for the proposition that a federal appellate court may issue a stay even if its jurisdiction is uncertain. But Proponents neglect to mention that, the day after the Ninth Circuit issued its order staying the execution in *Vargas*, the Supreme Court vacated the stay in a one-sentence order. *Lambert v. Vargas*, 525 U.S. 925 (1998). Furthermore, although the passage of *Vargas* quoted by Proponents might be read to suggest the majority believed it had the power to issue a stay absent a clear determination of jurisdiction, other portions of the majority's opinion suggest it believed it could not issue a stay unless the party seeking it had actually

established standing, which Proponents here have not done. *See Vargas*, 159 F.3d at 1167 (explaining that the applicant "has established her standing . . .").

Finally, Proponents' suggestion that a decision to lift the stay would only benefit the four individuals who are parties to the case is preposterous. The district court enjoined the State from enforcing Proposition 8, which will cause the State to do exactly what it did in response to the California Supreme Court's decision in *In Re Marriage Cases* – direct county clerks statewide to stop denying marriage licenses to same-sex couples. Thus, maintenance of the stay harms tens of thousands of Californians, including people like Derence Kernek and Ed Watson, who have been together for 40 years and will likely never be able to marry if the stay remains in place while this winds its way through the state and federal court system, because Mr. Watson has been diagnosed with Alzheimer's Disease, and his illness is progressing rapidly.¹

At the end of the day, Proponents effectively ask the Court to create a "same-sex marriage" exception to the established rule that federal appellate courts may not issue or maintain a stay when jurisdiction is uncertain. There is nothing about the issue of marriage equality that requires such an extraordinary departure from the rules. To the contrary, this is the most important civil rights issue of our time, and the Court should put an immediate end to the harm this state-sponsored

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¹ See <http://www.youtube.com/watch?v=H8nTy0e8mj4>.

discrimination is inflicting upon same-sex couples, their children and their families.

Dated: March 14, 2011

Respectfully submitted,

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