NO. 10-16696, NO. 11-16577

NO. 10-16696 ARGUED DECEMBER 6, 2010
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS, & N.R. SMITH)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

DEFENDANT-INTERVENORS-APPELLANTS' MOTION TO CONSOLIDATE

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Defendant-Intervenors-Appellants Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com (collectively, "Proponents") respectively move this Court to consolidate Case No. 10-16696 and Case No. 11-16577, so that the latter appeal may be decided prior to, or simultaneous with, the former.

BACKGROUND

On August 12, 2010, the district court below entered judgment permanently enjoining defendants from enforcing Proposition 8, an initiative constitutional amendment providing that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. *See* Doc. No. 728.[1]

Proponents' appeal of that judgment, Case No. 10-16696, is currently pending before this court. Oral argument was held on December 6, 2010. Following argument, this Court certified a question to the California Supreme Court related to Proponents' standing to maintain their appeal of the district court's judgment and stayed further proceedings in this Court "pending final action by the Supreme Court of California." Case No. 10-16696, Docket Entry 292 at 19. The

[1] References to "Doc. No." are to district court's docket entries, while references to "Docket Entry" are to this Court's docket entries in Case No. 10-16696 or Case No. 11-16577, as specified in the text. Page numbers in such citations refer to the courts' ECF pagination.

California Supreme Court accepted the certification request and issued an opinion answering the certified question just yesterday.

Former Chief Judge Vaughn Walker, the district court judge who presided over the trial and entered judgment in this matter, retired in February, 2011. On April 6, 2011, Judge Walker disclosed to the press that he has been in a same-sex relationship for more than 10 years. *See* Dan Levine, *Gay judge never thought to drop marriage case*, Reuters, Apr. 6, 2011, *available at* http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406 (last visited Nov. 17, 2011). On April 25, shortly after learning of this revelation, Proponents filed a motion in the district court pursuant to FED. R. CIV. P. 60(b) and 62.1, arguing that the judgment below should be vacated because former Chief Judge Walker was disqualified from sitting on this matter under 28 U.S.C. §§ 455(a) & (b)(4). *See* Doc. No. 768. On June 14, the district court, Chief Judge Ware presiding, denied Proponents' motion. *See* Doc. No. 797. Briefing on Proponents' appeal from that ruling, Case No. 11-16577, is now complete, with the filing of today's reply brief.

Counsel for Proponents contacted counsel for the other parties to these appeals by email on November 16, 2011, regarding those parties' positions on this

motion. Neither counsel for Plaintiffs nor counsel for Plaintiff-Intervenor City and County of San Francisco has responded.

ARGUMENT

As the facts recounted above demonstrate, Case No. 10-16696 and Case No. 11-16577 both seek to overturn the same district court judgment, the former on the merits, the latter on the ground that the presiding judge was disqualified from sitting on the case. Accordingly, in their filings submitted in Case No. 11-16577, Proponents have repeatedly identified Case No. 10-16696 as a related case, *see* Case No. 11-16577, Docket Entry 2 at 2, Docket Entry 9 at 65; this Court's docket sheet for Case No. 11-16577 lists Case No. 10-16696 both as a "companion" case and as a "related" case; and this Court's docket sheet for Case No. 10-16696 lists Case No. 11-16577 as a "companion" case.

In their recently filed response brief in Case No. 11-16577, Plaintiffs-Appellees Perry et al. and Appellee-Intervenor City and County of San Francisco stated that because "Proponents' 'original appeal [of that same judgment] is still pending,' *see* No. 10-16696, this Court should 'consolidate the proceedings.' " Docket Entry 14 at 11 (quoting *Stone v. INS*, 514 U.S. 386, 401 (1995) (alterations in Plaintiffs-Appellees' Brief). For the reasons stated below, Proponents agree.

1. Ample authority makes clear that consolidation is procedurally proper in circumstances such as those presented here. As the Supreme Court explained in *Stone*:

> A litigant faced with an unfavorable district court judgment must appeal that judgment within the time allotted by Federal Rule of Appellate Procedure 4, whether or not the litigant first files a Rule 60(b) motion . . . . Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable as a separate final order, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.

514 U.S. 386, 401 (1995); *see also* Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2873 ("[d]uring the pendency of an appeal . . . the district court may deny the [Rule 60(b)] motion . . . . This allows a new appeal from the denial of the motion and often the appellate court can consider that appeal together with the appeal from the original judgment."); *Ray v. Pinnacle Health Hospitals, Inc.*, Nos. 09-4508, 10-3571, 2010 WL 4704455, at *3 (3d Cir. Nov. 22, 2010) ("The appeal from summary judgment and the appeal from the denial of the Rule 62.1 motion to alter judgment are now joined before this Court.").

2. Proponents respectfully submit that consolidating Proponents' appeal from the denial of the motion to vacate with their appeal from the district court's judgment on the merits will serve judicial economy and the interests of justice. As an initial matter, the panel assigned to the merits appeal is by now familiar with the

proceedings leading up to the district court's judgment on the merits, aspects of which are relevant to Proponents' motion to vacate the judgment. *See* Case No. 11-16577, Docket Entry 9 at 40-43, 59-61. It is accordingly appropriate that the issues presented by the two appeals be considered and decided by the same panel. Furthermore, a favorable ruling on Proponents' motion to vacate the judgment would obviate the need for this Court to decide the constitutional questions presented by the district court's decision invalidating Proposition 8. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). Indeed, if this Court determines that Judge Walker's ruling on the constitutionality of Proposition 8 must be vacated, there will be no final judgment to review in Case No. 10-16696. Finally, because briefing is complete in Case No. 11-16577 and the California Supreme Court has just yesterday issued an opinion on the certified question in Case No. 10-16696, consolidation need not result in any undue delay in the resolution of either appeal.

CONCLUSION

For the foregoing reasons, Proponents respectfully request that this Court consolidate Case No. 10-16696 and Case No. 11-16577, so that the latter appeal may be decided prior to, or simultaneous with, the former.

Dated: November 18, 2011

Respectfully submitted,

s/ Charles J. Cooper

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9th Circuit Case Number(s) 10-16696, 11-16577

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