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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

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.

Case No. 09-CV-02292 VRW

THE ADMINISTRATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: July 2, 2009
Time: 10:00 a.m.
Location: Courtroom 6, 17th Floor
The Honorable Vaughn R. Walker

I.

INTRODUCTION

Defendants Arnold Schwarzenegger, in his official capacity as Governor of California, Mark B. Horton, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics, and Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health (collectively "the Administration"), oppose Plaintiffs' application for preliminary injunctive relief for prudential reasons.

Plaintiffs ask this Court to issue a preliminary order directing state officials and two county clerks to issue marriage licenses to same-sex couples. They argue that the United States Constitution precludes the State of California from limiting the definition of marriage to opposite-sex couples and obligates the State to issue marriage licenses in a gender-neutral manner. Plaintiffs present federal constitutional questions of national interest. Those issues will surely be decided in the appellate courts, perhaps in the United States Supreme Court.

The State of California and its citizens have already confronted the uncertainty that results when marriage licenses are issued in a gender-neutral manner prior to the issuance of a final, judicial determination of legal and constitutional issues. The State and its citizens have a profound interest in not having to confront that uncertainty again. The federal constitutional issues that Plaintiffs raise are important and difficult, but those issues should be decided *before* any court orders the State and its public officials to issue marriages licenses in a gender-neutral manner. For these and the other reasons explained below, the Court should deny Plaintiffs' application for preliminary injunctive relief.

II.

BACKGROUND

California's statutes have long defined marriage as being between a man and a woman. Fam. Code §§ 300, 308.5. In 2004, legal challenges to those statutes began to arise.

In February 2004, the county clerk for the City and County of San Francisco began issuing marriage licenses to same-sex couples. That prompted state Attorney General Bill Lockyer to bring an original mandate proceeding in the California Supreme Court. In March 2004, that court issued an order to show cause why a writ of mandate should not issue requiring county officials to abide by the California marriage statutes in the absence of a judicial determination that those statutes were unconstitutional. The court also issued an order directing county officials to enforce the State's marriage statutes and to refrain from issuing marriage licenses not authorized by those statutes. The court added, though, that its order did not preclude the filing of a declaratory relief action raising a substantive constitutional challenge to the State's marriage statutes. *See Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1069-74 (2004) (describing the events that gave rise to the initial judicial proceedings).

In the interim, between February 12, 2004, and March 11, 2004, approximately 4,000 same-sex marriages were performed under licenses issued by the county clerk of the City and County of San Francisco. In August 2004, the state Supreme Court issued its decision in *Lockyer*, ruling that local officials had overstepped their legal authority in issuing marriage licenses to same-sex couples. The court also ruled that the same-sex marriages entered into pursuant to those licenses were invalid. *Id.* at 1113-1119. In doing so, the court declined to leave those marriages intact pending a determination of the constitutionality of the state's marriage statutes. The court stated: "Now that we have confirmed that the city officials lack this authority [to issue marriage licenses to same-sex couples], we do not believe that these couples have a persuasive equitable claim to have the validity of the marriages left in doubt at this point in time, creating uncertainty and potential harm to others who may need to know whether the marriages are valid or not." *Id.* at 1118.

While the *Lockyer* case was pending, the City and County of San Francisco initiated a declaratory relief action in superior court, seeking a declaration that California's marriage statutes violated the California Constitution. In April 2005, the superior court ruled that California's marriage statutes were unconstitutional, but the trial court stayed enforcement of its judgment pending appeal. In May 2008, in a 4-3 decision, the California Supreme Court ruled

that California's marriage statutes violated the California Constitution because they precluded same-sex couples from marrying. *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

In response, in November 2008, California voters passed Proposition 8. That initiative measure added a new section to the California Constitution, providing: "Only marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5. Opponents immediately challenged the constitutionality of that measure under the state constitution. On May 26, 2009, in a 6-1 decision, the California Supreme Court upheld Proposition 8. *See Strauss v. Horton*, 93 Cal. Rptr. 3d 591, 2009 Cal. LEXIS 4626 (2009).

Plaintiffs served this action the next day.[1] Plaintiffs seek a preliminary injunction ordering various public officials "to issue marriage licenses to otherwise-qualified same-sex couples." Motion, at 18:15-16 (Doc # 7, at 23). This opposition addresses that application.

III.

ARGUMENT

A. As Plaintiffs Seeking a Preliminary Injunction that Would Alter the Status Quo, Plaintiffs Bear a Heavy Burden.

A preliminary injunction is "an extraordinary remedy never awarded as of right," granted only "upon by a clear showing that the plaintiff is entitled to relief." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). *See also Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) ("[a] preliminary injunction is an 'extraordinary and drastic remedy'"); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion" (emphasis in original); quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, at 129-30 (2d ed. 1995)).

Plaintiffs who seek a preliminary injunction must establish all of the following: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the

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[1] Although Plaintiffs served this action on May 27, 2009, they filed it on May 22, 2009, in apparent anticipation of the *Strauss* decision.

absence of preliminary relief; (3) the "balance of equities" tips in their favor; and (4) an injunction is in the public interest. *Winter*, 129 S. Ct. at 374; *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Reiffin v. Microsoft Corp.*, 158 F. Supp. 2d 1016, 1028 (N.D. Cal 2001). As to the fourth consideration, the Supreme Court recently reiterated that courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-377 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Preliminary injunctive relief is intended as an equitable device to preserve the status quo. *See University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981) (the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held"); *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001) (preliminary injunction is "a device for preserving the status quo").

As the Ninth Circuit has repeatedly stated, "mandatory" injunctions (that is, injunctions that compel a party to take action, as opposed to injunctions that restrain a party from taking a certain action) are categorically disfavored. *See, e.g., Anderson v. United States,* 612 F.2d 1112, 1114 (9th Cir. 1979) ("generally an injunction will not lie except in prohibitory form"); *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (mandatory injunctive relief generally denied "unless the facts and law clearly favor the moving party"). Thus, requests for "mandatory" injunctions that would disrupt, rather than preserve, the status quo warrant heightened scrutiny. *See Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1992) (injunctive relief mandating "affirmative conduct" is "subject to heightened scrutiny"); *Martin v. International Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984) ("courts should be extremely cautious about issuing a preliminary injunction" where the moving party "seeks mandatory relief that goes well beyond maintaining the status quo").

Extreme caution is also warranted where, as here, complete relief is sought through preliminary injunction. *See Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963) ("it is not usually proper to grant the moving party [seeking preliminary injunction] the full relief to which he might be entitled if successful at the conclusion of trial.").

B. Plaintiffs Have Not Met Their Burden and Do Not Qualify for Mandatory Injunctive Relief.

1. Plaintiffs Cannot Demonstrate that Existing Federal Precedent "Clearly Favors" Their Position.

Because Plaintiffs seek a mandatory injunction, they must show that the law "clearly favors" their position. *Dahl*, 7 F.3d at 1403; *see also International Molders' and Allied Workers' Local Union v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) ("In deciding a motion for preliminary injunction, the district court is not bound to decide doubtful and difficult questions of law . . . ."). Plaintiffs cannot meet this burden for two reasons. First, no United States Supreme Court or Ninth Circuit authority holds that the federal constitution obligates the States to define marriage in gender-neutral terms. Second, none of the right-to-marry cases addresses the unique context presented by Proposition 8 as interpreted by the California Supreme Court.

The United States Supreme Court last considered whether same-sex couples have a constitutional right to marry more than thirty years ago, in *Baker v. Nelson*, 409 U.S. 810 (1972). That case reached the Court after the Minnesota Supreme Court rejected a claim by two men that they had a constitutional right to marry. *See Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). The state court had held that limiting Minnesota's marriage statute to opposite-sex marriages did not violate either the equal protection or due process guarantees of the Fourteenth Amendment. In so holding, the Minnesota court rejected plaintiffs' argument that the United States Supreme Court's decisions in *Skinner v. Oklahoma*, 316 U.S. 535 (1941), *Griswold v. Connecticut*, 381 U.S. 469 (1965), and *Loving v. Virginia*, 388 U.S. 1 (1967), required that same-sex couples be afforded the right to marry. *Baker v. Nelson*, 191 N.W.2d at 187. Plaintiffs appealed to the United States Supreme Court, as federal law then permitted. The Supreme Court summarily decided the case and dismissed the appeal "for want of [a] substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972).

Although there have been significant developments in the jurisprudence regarding the constitutional rights of gay men and lesbians since 1972, the Court has never overruled *Baker* or revisited the issue of whether state statutes barring same-sex marriages are constitutional.

Despite this silence, Plaintiffs argue that they have a substantial probability of succeeding on the merits under the Supreme Court's more recent decisions in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). But, while those decisions recognize the rights of gays and lesbians to seek assistance from the government in combating discrimination based on sexual orientation (*Romer*) and to engage in private sexual conduct (*Lawrence*), they do not recognize a right for same-sex couples to marry.

Indeed, in *Lawrence*, the Court acknowledged the issue and confirmed that it was not addressing it. In *Lawrence*, the Court overturned a Texas statute that criminalized certain private consensual conduct between consenting same-sex adults, holding that the statute offended liberty interests protected by the Due Process Clause. But, in doing so, the Court was careful to note: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578; *see also id.* at 585 (O'Connor, J., concurring) ("Unlike the moral disapproval of same-sex relations -- the asserted state interest in this case -- other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

In addition, forecasting the ultimate outcome of this case based on high court precedents is complicated by the unique context of California law. This challenge to Proposition 8 presents the issue of the constitutionality of state law in a different context than is found in any prior right-to-marry case, including *Baker*. The California Supreme Court recently held that "it is only the designation of marriage -- albeit significant -- that has been removed by" Proposition 8. *Strauss v. Horton*, 93 Cal. Rptr. 3d 591, 2009 Cal. LEXIS 4626 (2009). The Court explained:

> [A]lthough Proposition 8 eliminates the ability of same-sex couples to enter into an official relationship designated "marriage," in all other respects those couples continue to possess, under the state constitutional privacy and due process clauses, "the core set of basic substantive legal rights and attributes traditionally associated with marriage," including, "most fundamentally, the opportunity of an individual to establish -- with the person with whom the individual has chosen to share his or her life -- an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage." . . . Like opposite-sex couples, same-sex couples enjoy this protection not as a matter of legislative grace, but of constitutional right.

Id. at 627 (quoting *In re Marriage Cases*, 43 Cal. 4th 757, 781 (2008)). Since federal courts are bound to follow the interpretation of state high courts when interpreting state law (*see S.D. Myers v. City and County of San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001)), the issue presented to this Court is whether Proposition 8, as thus construed by the California Supreme Court, violates the United States Constitution. No court has previously addressed this narrow issue.

The issues presented here are issues that will surely be decided by either the Ninth Circuit or the United States Supreme Court. The available precedent from those courts does not allow Plaintiffs to show that the law "clearly favors" their legal position on these "difficult questions of law." *See Dahl*, 7 F.3d at 1403; *International Molders*, 799 F.2d at 551. For this reason, their motion for preliminary injunction should be denied.

2. The Consequences of Ordering Two of California 58 County Clerks to Issue Marriage Licenses to Same-Sex Couples Argue Against Issuance of a Preliminary Injunction.

The Supreme Court recently reiterated: "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-377 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Here, Plaintiffs seek a preliminary injunction that would obligate public officials in the State of California to issue marriage licenses to same-sex couples.[2] Such relief would be potentially disruptive, in a number of respects.

If the Court granted the requested relief, and if a higher court later reverses this Court's decision and vacates the injunction, what would become of marriages entered while the injunction was in effect? The issuance of a preliminary injunction ordering the State to permit same-sex marriages in contravention of Proposition 8 would lead to profound uncertainty

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[2] Plaintiffs make some attempt to characterize the relief they seek as a prohibitory injunction. But Plaintiffs plainly seek *mandatory* injunctive relief. In their papers, Plaintiffs acknowledge that they seek an order "requiring the State of California to issue marriage licenses to otherwise-qualified same-sex couples." Doc # 7, at 23 (Plaintiff's Motion, at 18:15-16). The preliminary relief that Plaintiffs seek would obligate the State to take affirmative steps, and would plainly alter the status quo.

regarding the legal status of those marriages, both during and after the final resolution of this case. Would those marriages be valid? *See, e.g.*, *Strauss v. Horton*, 93 Cal. Rptr. 3d 591, 2009 Cal. LEXIS 4626 (2009) (upholding the validity of marriages entered into after the California Supreme Court's ruling in *In re Marriage Cases* but before the passage of Proposition 8). Or, would such marriages be invalid? *See, e.g. Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1118 (2004) ("[A]s part of the remedy for the city officials' unauthorized and unlawful actions, we believe it is appropriate to make clear that the same-sex marriages that already have purportedly come into being must be considered void from their inception."). The uncertainty and potential harm to others who may need to know whether the marriages are valid is obvious. *See id.* 1118 (noting the "uncertainty and potential harm to others who may need to know whether the marriages are valid or not" that ensued after marriage licenses were issued to same-sex couples prior to any judicial determination that California's marriage statutes were unconstitutional); *see also Smelt v. County of Orange*, 447 F.3d 673, 679-680 (9th Cir. 2006) (noting that marriage is a "sensitive area of social policy" in abstaining from challenge to state marriage statutes).

Moreover, if the Court granted the requested relief, there would be confusion -- if not inconsistency -- within California as to the scope of the preliminary relief. California has 58 counties, but Plaintiffs have named the county clerks in only two of those counties (Alameda and Los Angeles) as defendants. As for the county clerks in the other 56 counties, in the absence of a judicial order from a court having personal jurisdiction over them, it would be reasonable to expect that the clerks in those counties would continue to feel bound by Proposition 8. After all, the California Supreme Court recently instructed county clerks that they may not disregard California's marriage laws in the absence of a judicial order. *See Lockyer*, 33 Cal. 4th at 1082 ("we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional"). If the Court issued preliminary relief affecting only two county clerks, there is no reason to anticipate that all other county clerks would voluntarily comply with any such

injunction. This would create an anomaly in that same-sex couples could marry in Alameda County and Los Angeles County, but not elsewhere in California.

3. A Preliminary Injunction Is Further Unwarranted Because It Would Provide Plaintiffs With Substantially All of the Relief They Seek at Trial.

Finally, under the aforementioned standards regarding the issuance of preliminary relief, several considerations counsel against the issuance of preliminary relief here. One of the primary purposes of preliminary relief is to preserve the status quo; here, Plaintiffs seek to alter the status quo. Also, the Ninth Circuit has said that "it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of the trial." *Tanner Motor Livery*, 316 F.2d at 808 (reversing preliminary injunction that granted moving parties "substantially all injunctive relief that they could have obtained after a plenary trial on the merits"). Here, Plaintiffs seek preliminary relief so that they may lawfully marry in California, which is the very relief they seek on the merits.

C. Expediting Hearing of the Merits, Instead of Issuing a Preliminary Injunction, Would Better Serve the Public Interest.

Plaintiffs present important federal constitutional issues that require and warrant judicial determination. The issues have nationwide significance. Ultimately, the issues will likely be decided by the United States Supreme Court. This reality counsels in favor of having this Court expedite the resolution of this case at this initial stage of the proceedings. But, for the reasons explained above, the public interest is best served by preserving the status quo until there is a *final* resolution of the merits.

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IV.

CONCLUSION

For the foregoing reasons, the Administration respectfully urges the Court (1) to deny the Plaintiffs' application for a preliminary injunction, and (2) to devise a case management plan that will facilitate a prompt, expeditious resolution of the merits.

Dated: June 11, 2009

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Case Name: *Perry, et al. v. Schwarzenegger, et al.;*
Case No: US District Court, Northern District, Case No. 3:09-cv-09-2292 VRW

CERTIFICATE OF SERVICE

I declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 980 9th Street, Suite 1700, Sacramento, California 95814. On June 11, 2009, I served the within documents:

THE ADMINISTRATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

☒ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and delivering to a Federal Express agent for delivery.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepared in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on June 11, 2009, at Sacramento, California.

Angela Knight