Case No. S211990

In The Supreme Court Of The State of California

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ, MARK A. JANSSON; AND PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

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.

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE BY RESPONDENTS KAREN HONG YEE, DIRECTOR OF THE SAN FRANCISCO COUNTY CLERK'S OFFICE; REGINA ALCOMENDRAS, CLERK-RECORDER OF THE COUNTY OF SANTA CLARA; GAIL PELLERIN, SANTA CRUZ COUNTY CLERK; WILLIAM ROUSSEAU, COUNTY OF SONOMA CLERK-RECORDER

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Date: July 22, 2013

Respectfully submitted,

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INTRODUCTION

Respondents, county officials responsible for issuing marriage licenses in the counties of San Francisco, Santa Clara, Santa Cruz, and Sonoma, respectfully submit this brief in opposition to the Petition for Writ of Mandate filed by Petitioners Dennis Hollingsworth *et al*. Respondents join in the contention, made in separate briefs by the Real Parties in Interest and by Monterey County *et al.*, that officials of the California Department of Public Health exercise supervisory authority over local officials in their administration of California's marriage laws. Respondents write separately to further explain why the district court in *Perry v. Brown* acted well within its discretion when it struck down Proposition 8 on its face and enjoined the defendants in that case from enforcing it in any respect. Because the district court did not act in excess of its fundamental jurisdiction, its order remains enforceable unless that court vacates or modifies it, and Petitioners cannot collaterally attack the injunction in this action. This Court should therefore deny the writ.

RELEVANT BACKGROUND

Four individual plaintiffs brought a challenge to Proposition 8 in *Perry v. Brown*, N.D. Cal. Case No. 09-2292. Plaintiffs did not style their case as a class action. Instead, they brought a facial challenge to Proposition 8, seeking a declaration and injunction to prevent its enforcement in any respect. (See, *e.g.*, Complaint for Declaratory, Injunctive or Other Relief, *Perry v. Brown*, No. 09-2292, ¶ 2, at Petitioner's Appendix p. 3 ["Plaintiffs ask this Court to enjoin, preliminarily and permanently, all enforcement of Prop 8 and any other California statutes that seek to exclude gays and lesbians from access to civil marriage."]; *id.* at p. 12 [prayer for relief].) The defendants named in the complaint—each of whom appeared in the case—were the Governor of California, the Attorney General of California, the Director of the California Department of Public

Health and State Registrar of Vital Statistics, the Deputy Director of Health Information & Strategic Planning for the California Department of Public Health, the Clerk-Recorder of the County of Alameda, and the Registrar-Recorder/County Clerk for the County of Los Angeles. The official proponents of Proposition 8—all of the Petitioners in the present case, plus William Hak-Shing Tam—intervened to defend Proposition 8. In addition, the City and County of San Francisco intervened as a plaintiff. (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F. Supp. 2d 921, 928-29.) As plaintiff-intervenor, San Francisco filed a complaint in intervention, contending that enforcing Proposition 8 required it to violate the constitutional rights of its citizens and seeking a declaration of Proposition 8's unconstitutionality. (Exhibit A to Request for Judicial Notice.)

Plaintiffs' case proceeded to trial, which spanned 12 days of testimony from the four plaintiffs, one of the official proponents of Proposition 8, three additional lay witnesses and eleven expert witnesses, covering subjects ranging from the history of discrimination against gay people, to the stigma gay people and their children suffer as a result of their second class status and the prejudice-laden messaging of the Proposition 8 campaign. After considering this "overwhelming" evidence, the district court determined that Proposition 8 violates the federal Due Process and Equal Protection Clauses. (*Perry*, *supra*, 704 F. Supp. 2d at p. 1003.) The district court issued extensive findings of fact in support of this determination, some of which are discussed further in Section I.A. of this brief. The court concluded:

> 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.) The district court subsequently entered a separate injunction enjoining enforcement of Proposition 8 by the defendants and all those acting under their control or

supervision. (Petitioners' Appendix at p. 15.) It also entered a separate judgment in favor of plaintiffs and in favor of San Francisco and against Petitioners and the state and local officials who were defendants. (Exhibit B to Request for Judicial Notice.) In light of the breadth of the injunction, it is clear that the district court intended it to be applied statewide, to all lesbian and gay couples in California. Indeed, all parties to *Perry* understood the breadth of the injunction, and no party to that case ever requested that the district court reconsider its injunction, limit it to the four plaintiffs only, or clarify that it applied only in Los Angeles and Alameda Counties.

As Real Parties in Interest recount in more detail in their brief in opposition to the writ petition, Petitioners appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit, which stayed the judgment pending appeal and affirmed the judgment. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1096 & n.27.) But the United States Supreme Court ultimately determined that Petitioners lacked standing to appeal the district court's judgment. (*Hollingsworth v. Perry* (2013) – U.S. –, 133 S. Ct. 2652, 2668.) It vacated the Ninth Circuit's judgment with instructions to dismiss this appeal. (*Id.*) This disposition leaves the district court's judgment and injunction intact. (*Karcher v. May* (1987) 484 U.S. 72, 81-83.)

On June 28, 2013, the Ninth Circuit vacated its stay pending judgment. (Petitioners' Appendix p. 22.) The California Department of Public Health subsequently issued notice to all county clerks and recorders that they must stop enforcing Proposition 8 pursuant to the district court's injunction. (Petitioner's Appendix at p. 24.) Since June 28, 2013, all of the counties who are signatories of this brief have issued marriage licenses to same-sex couples on the same basis as to opposite-sex couples.

SUMMARY OF ARGUMENT

The Petition presents a series of arguments that Proposition 8 must continue to be enforced throughout California. This brief addresses one of their arguments: that the *Perry* district court exceeded its authority in entering an injunction affecting the rights of anyone other than the four *Perry* plaintiffs. (Petition at pp. 33-34.) From this contention they argue first that the *Perry* judgment cannot require counties other than Alameda and Los Angeles to issue marriage licenses to same-sex couples (*id.*); and second that even the counties who were parties to *Perry* must disregard the injunction as to same-sex couples other than the *Perry* plaintiffs (*id.* at p. 50).

Both of these arguments are fatally flawed. Federal cases make clear that a district court has the fundamental authority to strike down invalid laws and to enter orders benefiting people not before the court, even where no class was certified. In this case, the district court's injunction was a necessary remedy to make plaintiffs whole, and it was justified because plaintiffs and San Francisco succeeded in demonstrating that Proposition 8 was invalid and unconstitutional in all of its applications. Because the district court acted well within its jurisdiction, Petitioners' challenge fails as a collateral attack on a final judgment. Only the district court has the authority to narrow the scope of the injunction, as Petitioners suggest. In addition, Petitioners' argument that even Alameda and Los Angeles Counties are required to enforce Proposition 8, notwithstanding the plain language of the *Perry* injunction, must fail because they request an order that directly contravenes the injunction. The same is true for the City and County of San Francisco: because San Francisco obtained a judgment in the *Perry* case, running against Petitioners here, that Proposition 8 is unconstitutional, Petitioners may not make an end-run around that judgment in this Court.

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS JURISDICTION IN ENJOINING ANY ENFORCEMENT OF PROPOSITION 8.

Whether a remedial order is overbroad is a question of the district court's discretion, not its jurisdiction. (See *Monsanto Co. v. Geertson Seed Farms* (2010) __ U.S. __, 130 S. Ct. 2743, 2761.) Even absent a class action, a federal district court has the authority to enjoin any application of a challenged law in appropriate circumstances. A blanket injunction is proper where only a sweeping injunction will cure the harm that the plaintiffs proved, or where plaintiffs bring a facial challenge and demonstrate that a law is intolerable in all its applications. Both circumstances are present here.

A. A Statewide Injunction Is Justified By The Nature Of The Harms Proposition 8 Inflicts.

Contrary to Petitioners' assertion, there is no rule that a district court may only issue a broad injunction where a class has been certified. Instead, under federal law, a district court has the discretion to craft a remedy that is appropriate to the violation. (See *Califano v. Yamasaki* (1979) 442 U.S. 682, 702 ["relief is dictated by the extent of the violation established"].) Indeed, the Ninth Circuit has stated that "an injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." (*Bresgal v. Brock* (9th Cir. 1987) 843 F.2d 1163, 1170-71.) Thus, "[c]lass-wide relief may be appropriate even in an individual action." (*Id.* at p. 1171.)

Here, the district court's careful findings of fact about the wrongs inflicted on lesbian and gay couples by Proposition 8 fully justified its entry of broad relief even in an individual action. The court heard and credited testimony that Proposition 8, by reserving marriage to opposite-sex couples and relegating same-sex couples to domestic partnerships, inflicts stigma and psychological harm on lesbians and gay men in

California. (*Perry*, *supra*, 704 F. Supp. 2d at pp. 942-43, 973-74.) The court determined that "domestic partnership does not provide gays and lesbians with a status equivalent to marriage." (*Id.* at p. 971.) Instead, withholding the status of marriage from gay and lesbian couples "places the force of law behind stigmas against gays and lesbians, including [that] gay and lesbian relationships do not deserve the full recognition of society." (*Id.* at p. 973.) Indeed, the district court found that the very purpose of the designation "domestic partnership" is to distinguish lesbian and gay relationships from marriages, and declare the former to be less worthy than the latter. (*Id.* at p. 994.) The court also found that relegating lesbian and gay relationships to the lesser status of domestic partnership harmed the children of these couples by denying them the stability and intangible benefits of marriage. (*Id.* at p. 1000.)

These findings—strikingly similar to this Court's prior conclusion that reserving the separate and lesser status of "domestic partners" to gay and lesbian couples would risk creating "a mark of second-class citizenship" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 846), and to the United States Supreme Court's determination laws singling out lesbians and gay men for disadvantage impose stigma on them (*United States v. Windsor* (2013) – U.S. –, 133 S. Ct. 2675, 2693)—justified the district court's conclusion that, in order to remedy the harm that Proposition 8 had done to the four plaintiffs before it, Proposition 8's stigmatizing message must be swept away entirely. To allow the state to enforce Proposition 8 against anyone would continue to send the government-endorsed message that lesbians and gay men are second-class citizens, and would thus deny the four plaintiffs a major aspect of the relief to which they were entitled. (See *Easyriders Freedom F.I.G.H.T. v. Hannigan* (9th Cir. 1996) 92 F.3d 1486, 1502 [approving statewide injunction in non-class claim where necessary to provide complete relief to the individual plaintiffs].) Plaintiffs (and those who were legally married prior to Proposition 8's enactment), as well as their children, would continue to suffer the indignity of having

their marriages viewed as "not real" and as inferior. It was therefore well within the district court's power to enter an injunction that put an end to this serious harm.

B. A Statewide Injunction Is Appropriate In A Facial Challenge.

The district court's broad order was also appropriate because plaintiffs brought their lawsuit as a facial challenge, contending that Proposition 8 could not lawfully be applied to anyone. A successful facial challenge to a statute generally results in a ruling that the government may not enforce a statute at all. (See *Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017, 1025 [where a "statutory scheme [is] unconstitutional on its face," the statutory provisions are "not unconstitutional as to [plaintiffs] alone, but as to any to whom they might be applied"].)

The reason is that facial invalidation, by definition, means there is no set of circumstances in which the government could constitutionally apply the statute. (See *United States v. Salerno* (1987) 481 U.S. 739, 746.) Instead, where a law is facially invalid, "there is a one hundred percent correlation between those whom the statute affects and its constitutional invalidity as applied to them." (*Isaacson v. Horne* (9th Cir. 2013) 716 F.3d 1213, 1230.) In such a case, the "usual concern" that arises from a court's order invalidating a law—"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.) Therefore, the relief that follows from a facial challenge will necessarily "reach beyond the particular circumstances of the[] plaintiffs." (*Doe v. Reed* (2010) __ U.S. __, 130 S. Ct. 2811, 2817; see also *Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 698 ["In a facial challenge . . ., the claimed constitutional violation inheres in the terms of the statute, not its application . . . . The remedy is necessarily directed at the statute itself and *must* be injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied *to*

anyone."] [emphasis in original].) Thus, because the district court determined that Proposition 8 violated the equal protection and due process rights of all lesbian and gay Californians, its order permanently enjoining enforcement of Proposition 8 was justified.

Petitioners do not cite any authority that stands for the contrary proposition. They largely rely on a series of cases concerning the doctrine of third-party standing, the ability of one person to litigate the claims of another person not before the court. (See Petition at p. 34.) But third-party standing cases involve a litigant who *does not share* the injuries of the person whose rights he seeks to vindicate. (See, *e.g.*, *Village of Arlington Heights v. Metro. Housing Dev. Co.* (1977) 429 U.S. 252, 263 [permitting housing development corporation to assert race discrimination claims].) The *Perry* plaintiffs share the same constitutional injury that Proposition 8 inflicts on every gay or lesbian resident of California. These cases have no application here. More importantly, the federal third-party standing doctrine is a "prudential limitation," not a jurisdictional limitation. (*Id.*; see also *Warth v. Seldin* (1975) 422 U.S. 490, 500-01 [discussing "prudential rule[] of standing" that federal courts should be "reluctan[t]" to decide cases when "the plaintiff's claim to relief rests on the legal rights of third parties"].) Thus, Petitioners' contention is without merit.

II. BECAUSE THE DISTRICT COURT ACTED WITHIN ITS JURISDICTION IN ENTERING THE INJUNCTION, PETITIONERS CANNOT OBTAIN AN ORDER REWRITING IT.

The district court had jurisdiction to enter a statewide remedial order—notwithstanding Petitioners' disagreement with that order. Because the court had jurisdiction, its injunction cannot be collaterally attacked or revised by a different court. (See, *e.g.*, *Estate of Buck* (1994) 29 Cal.App.4th 1846, 1854; *Pacific Mut. Life Ins. Co. v. McConnell* (1995) 44 Cal.2d 715, 725 [stating the general rule that a final judgment or order is not subject to collateral attack regardless of its merits "where the court has

jurisdiction in the fundamental sense, *i.e*., of the subject matter and the parties"].) Instead, only the district court has the authority to narrow or vacate its own injunction. (See *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15 (1945) [party who has doubts about applicability of injunction "may petition the court granting it for a modification or construction of the order"]; *In re Establishment Inspection of Hern Iron Works, Inc*. (9th Cir. 1989) 881 F.2d 722, 726 ["The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."] [internal quotation marks and citation omitted]; *Lapin v. Shulton* (9th Cir. 1964) 333 F.2d 169, 171-72 [reconsideration or relief from judgment must be sought from court that rendered it]; Wright & Miller, Enforcement of and Collateral Attack on Injunctions, 11A Fed. Prac. & Proc. Civ. § 2960 (2d ed.).) To hold otherwise would interfere with the initial 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, supra*, 333 F.2d at p. 172 ["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 . . . ."].)

Thus, the plain meaning of the injunction—that the state and local defendants and anyone under their supervision may not enforce Proposition 8 against anyone—should

not be overturned or revised by this Court. Only the district court has the power to modify its own injunction.[1]

Under the injunction as issued, then, any county officials who are under the supervision of the state officials who were defendants in *Perry* are prohibited from enforcing Proposition 8. The counties filing this brief agree with the arguments of the Real Parties in Interest and of respondents the County of Monterey *et al.* that the State Registrar supervises county officials in their administration of California's marriage laws. County officials throughout the State must therefore cease enforcing Proposition 8 pursuant to the State Registrar's directive, and pursuant to Federal Rule of Civil Procedure 65(d)(2), which provides that an injunctive order binds not only the parties to the order but also entities who are controlled by a party as well as "other persons who are in active concert or participation" with a party.

Even if all 58 counties in California were not obliged to follow the injunction—which they are—there can be no question that the counties of Alameda, Los Angeles, and San Francisco must not enforce Proposition 8. The injunction by its terms operates directly against Alameda and Los Angeles counties: They are among the "[d]efendants" who are "permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution." (Petitioners' Appendix at p. 15.) For this Court to issue an order directing Alameda and Los Angeles Counties to enforce Proposition 8 would therefore subject them to conflicting obligations under the orders of two different courts.

[1] This is not to say that Petitioners necessarily have the right to return to the district court to litigate the constitutionality of Proposition 8 anew, or to seek relief from the injunction. Petitioners had every opportunity to raise this issue during the proceedings, but failed to do so despite recognition by all involved that the injunction was intended to apply, and did apply by its terms, statewide. The district court's judgment is now final, and only narrow circumstances would justify revisiting it. (See Fed. R. Civ. P. 60(b) [allowing district court to "relieve a party or its legal representative from a final judgment" under specified conditions].) But any argument that those circumstances are present here must be made in the first instance to the federal district court.

The same is true for the City and County of San Francisco, which was a plaintiff-intervenor in the *Perry* action. (*Perry, supra*, 704 F. Supp. 2d at pp. 928-29.) When the *Perry* court entered final judgment, it entered its judgment "in favor of . . . Plaintiff-Intervenor City and County of San Francisco and against . . . Defendant-Intervenors Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Hak-Shing William Tam; Mark A. Jansson; and ProtectMarriage.com." (Exhibit B to Request for Judicial Notice.) San Francisco sued for, and won, the right to not enforce Proposition 8. To issue an order directing San Francisco to enforce Proposition 8 would deprive it of the benefit of the judgment.[2]

CONCLUSION

Because the Petition contravenes a final district court injunction, entered by a district court acting within its jurisdiction, Petitioners' efforts to narrow the injunction in this Court amount to an impermissible collateral attack. This Court should deny the Petition.

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[2] For their factual claim that plaintiffs Kristin Perry and Sandra Stier have married—and therefore that no further injunctive relief is warranted—Petitioners cite to an article noting that the happy occasion took place in San Francisco City Hall. (Petitioners' Appendix at pp. 29-30.) Apparently, Petitioners impliedly concede that San Francisco, too, is bound by the district court's order. They do not contend, for example, that the marriage of Perry and Stier is invalid because those plaintiffs did not obtain their license in Alameda County.

Date: July 22, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3,721 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on July 22, 2013.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On July 22, 2013, I served the following document(s):

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address: pamela.cheeseborough@sfgov.org ☐ in portable document format ("PDF") Adobe Acrobat or ☐ in Word document format.

☐ **BY FACSIMILE**: Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number 415-554-4699 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and **a copy of the transmission report** ☐ **is attached** or ☐ **will be filed separately with the court**.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 22, 2013, at San Francisco, California.

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Pamela Cheeseborough