

No. 10-16696

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

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

No. 09-cv-2292 VRW
Honorable Vaughn R. Walker, District Court Judge

**ATTORNEY GENERAL'S OPPOSITION TO
EMERGENCY MOTION FOR STAY
PENDING APPEAL**

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The Attorney General opposes Appellant-Intervenors' Request for a Stay Pending Appeal of the district court's Order permanently enjoining the application or enforcement of Proposition 8. As the Attorney General has consistently stated and as was convincingly demonstrated after a full trial on the merits, Proposition 8, which prohibits same-sex couples from marrying, violates the Fourteenth Amendment of the United States Constitution. Appellant-Intervenors thus cannot demonstrate a likelihood of success on the merits in their appeal. Moreover, as the district court has concluded that Proposition 8 is unconstitutional, the public interest weighs against its continued enforcement.

Appellant-Intervenors' argument that the Attorney General's opposition to Plaintiffs' initial request for a preliminary injunction supports their request for a stay pending appeal ignores the fact that there has now been a trial on the merits that conclusively demonstrated that Proposition 8 is unconstitutional. In opposing the request for a preliminary injunction, the Attorney General argued that "the parties, the [district court], and, indeed, the general public would benefit" from having the constitutionality of Proposition 8 "decided on the merits following full briefing and argument by the parties." That has now occurred. And while there is still the potential

for limited administrative burdens should future marriages of same-sex couples be later declared invalid, these potential burdens are outweighed by the district court's conclusion, based on the overwhelming evidence, that Proposition 8 is unconstitutional. Accordingly, the harm to Appellees outweighs any harm to the state defendants.

There is now a final determination that Proposition 8 is unconstitutional. Each of the four factors this Court must consider in determining whether a stay is warranted weigh against a stay. *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 115 (9th Cir. 2008). Thus, Appellant-Intervenors have not shown that they are entitled to a stay even if this Court were to conclude they have standing. To the extent the decision of the Attorney General not to file an appeal has bearing on this Court's decision of whether to grant a stay, however, the Attorney General will not be appealing the district court's Order permanently enjoining the enforcement of Proposition 8.

For the foregoing reasons, the Attorney General respectfully requests that Appellant-Intervenors' request for a stay pending appeal be denied.

Dated: August 13, 2010

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 3:09-cv-02292-VRW**

I certify that: (check (x) appropriate option(s))

1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because

This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

This brief complies with a page or size-volume limitation established by separate court order dated __August 13, 2010____ and is 3 Pages

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This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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4. **Amicus Briefs.**

Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

August 13, 2010

Dated

s/ Daniel J. Powell

Daniel J. Powell

Deputy Attorney General