No. 10-16696
Argued December 6, 2010
(Reinhardt, Hawkins, N. Smith)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors-Appellants.

On Appeal From The United States District Court
For The Northern District Of California
No. CV-09-02292 VRW (Honorable Vaughn R. Walker)

REPLY IN SUPPORT OF MOTION TO VACATE STAY PENDING APPEAL OF PLAINTIFFS-APPELLEES KRISTIN M. PERRY ET AL.

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INTRODUCTION

This Court should lift the stay of the Order of the district court enjoining enforcement of Proposition 8, and allow loving and committed gay and lesbian couples in California to marry while the challenge to the judgment by Proponents proceeds to its conclusion. The mandatory requirements of a stay are plainly not met, and the circumstances that existed at the time the stay was first imposed have now changed materially against any arguable justification for a stay.

ARGUMENT

Proponents' assertion in their Opposition that there has been no "significant change in facts or law" (Opp. 2) blinks reality. The events identified by Plaintiffs in their motion to vacate the stay pending appeal are unquestionably "significant" and should compel this Court to lift the stay.

1. This Court's determination that it requires "an authoritative statement of California law," *Perry v. Schwarzenegger*, 628 F.3d 1191, 1196 (9th Cir. 2011), before it can determine whether Proponents have standing, and therefore, whether this Court even has jurisdiction, is unquestionably significant. Indeed, it abnegates this Court's authority to issue or maintain provisional relief. *See Demosthenes v. Baal*, 495 U.S. 731, 736 (1990).

Of course it is true, as Proponents observe, that this Court has jurisdiction to determine its jurisdiction and may issue orders, such as orders compelling jurisdictional

discovery, to facilitate its determination. *See United States Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79 (1988). That principle is not questioned by Plaintiffs' motion.[1] The question is whether this Court has authority to grant provisional relief in the form of a stay pending appeal—or to maintain such relief—when this Court's jurisdiction is in doubt. As the City and County of San Francisco has persuasively explained, the Supreme Court, in the most compelling factual circumstances imaginable, has definitively resolved that question, holding that "*[b]efore* granting a stay . . . federal courts must *make certain* that an adequate basis exists for the exercise of federal power." *Demonthenes*, 495 U.S. at 737 (emphasis added).

There can be no doubt that this Court, as in *Demosthenes*, has not "ma[d]e certain" that it has Article III jurisdiction. This Court has referred to a coordinate tribunal questions of state law that this Court itself declared to be "dispositive" of Proponents' claim of standing, and it has done so against the background of an unanimous

1 Nor does Plaintiffs' motion question whether a court may issue provisional relief to protect its jurisdiction to determine its jurisdiction. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947). Proponents suggest that, in the absence of the stay, Plaintiffs could "moot[] the case" by marrying and thereby "evad[e] appellate review." Opp. 12. But because Proponents dispute that marriages performed during the pendency of the appeal would be valid if Proposition 8 ultimately were upheld, that suggestion is baseless. If Proponents have standing to appeal at all, their controversy would remain live even after Plaintiffs married.

decision of the Supreme Court that expressed "grave doubts" whether ballot proposition proponents (as a class, not just those before it) could have standing to challenge an order invalidating the proposition they had sponsored. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997). A court that lacks power to stay an execution for even a week cannot conceivably retain the authority to stay indefinitely an order that brings an end to a manifestly harmful act of state-sponsored invidious discrimination. On what basis could such a distinction be warranted? Surely not the harm imposed on the applicant in the absence of a stay. When the stay was lifted in *Demosthenes*, Mr. and Mrs. Baal's son was put to death. If the stay were lifted here, Proponents would suffer nothing but the psychic harm they alleged in living in a society in which loving couples of the same sex may be married, joining the thousands who married before Proposition 8 and who remain married today.

Even if this Court has the authority under Article III to maintain a stay when it harbors doubts as to its own jurisdiction, the existence of such doubts means that the maintenance of a stay is inappropriate because the absence of a *clear path* to jurisdiction precludes the possibility that the party asserting jurisdiction has made the requisite "strong showing" of likelihood of success on the merits. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). Proponents have no answer to this argument except to pronounce repeatedly "the strength of Proponents' arguments for standing." Opp. 9. But

this Court heard all of *those* arguments and determined that they were *not* a sufficient basis for the exercise of federal jurisdiction. "[W]e lack an authoritative statement of California law that would establish proponents' right to defend the validity of their initiatives." *Perry*, 628 F.3d at 1199. The Court thus referred the issue to the California Supreme Court to seek what it referred to as "an authoritative determination" of Proponents' status under state law—a determination that this Court characterized as "dispositive of [its] very ability to hear the case." *Id.* at 1195, 1199.

A cascade of contingencies—a *possibility* that the California Supreme Court might provide the "authoritative determination" Proponents seek, tethered to a *chance* that such a state-law determination might suffice to confer Article III standing on Proponents, which then opens the *possibility* that this Court could adopt Proponents' arguments on the merits—is not the type of "strong showing" of a likelihood of success that Supreme Court precedent remotely demands. *Nken*, 129 S. Ct. at 1761. Indeed, given the significant hurdles now before them, Proponents have made *no* showing, let alone a *strong* showing, that they are *likely* to succeed at the end of the day.[2]

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2 Proponents' suggestion that this Court should overlook their inability to demonstrate their standing to appeal because the district court purportedly "exceeded its jurisdiction by granting relief that extends beyond the four plaintiffs that were before it" (Opp. 10) is risible. Plaintiffs did not challenge Proposition 8 only as applied to themselves. They sought, and the district court indisputably had jurisdiction to enter, a declaratory judgment that

2. Assuming that the jurisdictional contingencies *all* are resolved in Proponents favor, whatever possibility of success on the merits Proponents might have had in August has been severely undermined by the determination of the Attorney General of the United States, and the President, that laws discriminating against gay men and lesbians are subject to heightened scrutiny. *See* Mot. Ex. A at 2.

Proponents cannot seriously believe their assertions that the position of the chief law enforcement officers of the United States "adds nothing of consequence" to this case. Opp. 5. In his letter to the Speaker of the House, the Attorney General

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[Footnote continued from previous page]

> Proposition 8 is unconstitutional on its face. Decades of precedent establishes that such an order is sufficient to prohibit the application of an unconstitutional measure against any person, even where a class has not been certified. *See, e.g.*, *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (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"). Moreover, the district court's injunction prohibiting the Governor and Attorney General—and any state official under their control—from enforcing this discriminatory measure (which the district also indisputably had jurisdiction to enter) plainly suffices to prohibit the enforcement of Proposition 8 throughout the state. That is because "*there can be no question but that marriage is a matter of 'statewide concern' rather than a 'municipal affair*.'" *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 471 (Cal. 2004) (emphasis added). State officials "establish[] the substantive standards for eligibility for marriage" and those "uniform rules and procedures apply throughout the state." *Id*. The district court's injunction requires all of the relevant state officials to change the substantive standards for eligibility for marriage to enable same-sex couples to marry, and municipal officials have no discretion whatsoever to disregard those directives.

(speaking for himself and the President) rejects the conclusion of this Court in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), that "[h]omosexuality is . . . behavioral" (*id*. at 573) as irreconcilable "with more recent social science understandings." Mot. Ex. A at 3 & n.5. And although Attorney General Holder's letter did not specifically identify *High Tech Gays* as among those circuit court decisions "applying rational basis review to sexual orientation classifications" that "do[] not survive" *Lawrence v. Texas*, 538 U.S. 558 (2003), even a cursory reading of *High Tech Gays* demonstrates that it is undistinguished from those decisions in that respect. *High Tech Gays* reasons that "because homosexual conduct can [] be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes." 895 F.2d at 571. But the premise is no longer true. Homosexual conduct cannot be criminalized. Therefore, that line of reasoning is utterly indistinguishable from that which the Attorney General determined to be unsustainable: "if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate." Mot. Ex. A at 3. Indeed, *High Tech Gays* itself relies on two decisions—*Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989) and *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cit. 1989)—that the Attorney General identified as not surviving *Lawrence*. *See* Mot. Ex. A at 3 & n.4.

The Attorney General's determination that classifications based on sexual orientation should be subject to heightened scrutiny further demonstrates that the foundation *High Tech Gays* has crumbled and can no longer be viewed as controlling precedent. If, as the Attorney General has determined, heightened scrutiny is the appropriate standard of review, Proponents have no likelihood of success on the merits. They do not—because they cannot—seriously defend Proposition 8's state-sponsored discrimination under that standard.

3. Finally, the fact that the California Supreme Court has determined it needs most of a year to answer this Court's certified questions materially alters the stay analysis. That analysis requires a court to determine "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Nken*, 129 S. Ct. at 1761. The motions panel presumably determined that a brief delay of a few months occasioned by an expedited appeal would not substantially injure Plaintiffs. Whatever the validity of that decision, the question now is a different one: whether a stay that keeps Proposition 8 in effect at least until the end of 2011, and possibly longer, will substantially injure Plaintiffs. There can be no serious dispute that denying Plaintiffs and other gay and lesbian individuals throughout California their fundamental right to marry for an additional year constitutes a "substantial injur[y]" that should weigh heavily against maintaining a stay. And the weight against continuing

such provisional relief is particularly heavy here where the Attorney General of California has confirmed that lifting the stay will bring no harm to California or its citizens. *See* AG's Stmt., Dkt. 311-1.

Proponents suggest that Plaintiffs and other gay men and lesbians in California should have no difficulty waiting out the "orderly[] disposition of this appeal." Opp. 11. Proponents' trivialization of the harms suffered by California's gay men and lesbians as a result of Proposition 8's stigmatization of them and their families, which is the subject of clear, specific, and unequivocal factual findings by the district court, is particularly audacious emanating as it does, from the individuals who led the effort to impose these harms. But, of course, it is not Proponents' fundamental right to marry that has been abolished; they are not the ones who have been declared to be unworthy of marriage, and they are not suffering the daily infliction of discrimination as long as Proposition 8 remains in effect.

Proposition 8—and the stay that allows it to remain in force—is causing great damage. It is not merely deferring wedding dates, as Proponents suggest. For those near the end of life, it is denying the right to marry outright. But beyond the damage done to loving couples' wishes to marry, Proposition 8 carries an unmistakable message—transmitted and enforced by the State and tolerated by this Court—that gay men and lesbians are members of a class of persons unworthy of the fundamental right

of marriage and the "protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Each day that California's constitution stigmatizes and disables Plaintiffs and others like them, it inflicts great and lasting damage. That constitutional injustice must not be allowed to continue.

CONCLUSION

For the foregoing reasons, the Court should vacate the stay pending appeal.

Dated: March 17, 2011

Respectfully submitted,

/s/ Theodore B. Olson

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9th Circuit Case Number(s) 10-16696

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