S212172

Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERNEST J. DRONENBURG, JR., in his official capacity as County Clerk of San Diego County,

Petitioner,

v.

EDMUND G. BROWN JR., in his official capacity as Governor ~~of the~~ State of California; KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California; RON CHAPMAN, in his official capacity as Director of the California Department of Public Health; TONY AGURTO, in his official capacity as State Registrar of Vital Statistics and Assistant Deputy Director of Health Information and Strategic Planning of the California Department of Public Health,

Respondents.

VERIFIED PETITION FOR WRIT OF MANDATE AND REQUEST FOR IMMEDIATE TEMPORARY STAY; MEMORANDUM OF POINTS AND AUTHORITIES

TEMPORARY STAY REQUESTED CONCERNING THE ISSUANCE OF MARRIAGE LICENSES

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*Charles S. LiMandri [SBN 110841]
Teresa L. Mendoza [SBN 185820]
Freedom of Conscience Defense Fund
P.O. Box 9520
Rancho Santa Fe, California 92067
Tel: (858) 759-9948
Fax: (858) 759-9938
E-mail: climandri@limandri.com

Attorneys for Petitioner

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E-mail: climandri@limandri.com

Attorneys for Petitioner

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioner certifies that he is not aware of any entity or person that rules 8.208 and 8.488 of the California Rules of Court require him to list in this Certificate.

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VERIFIED PETITION FOR WRIT OF MANDATE AND REQUEST FOR IMMEDIATE TEMPORARY STAY

INTRODUCTION AND JURISDICTIONAL STATEMENT

1. By this Verified Petition for Writ of Mandate, Petitioner Ernest J. Dronenburg, Jr., in his official capacity as County Clerk of San Diego County, hereby respectfully requests a writ of mandate ordering Respondents—Edmund G. Brown Jr., in his official capacity as Governor of the State of California; Kamala D. Harris, in her official capacity as Attorney General of the State of California; Dr. Ron Chapman, in his official capacity as Director of the California Department of Public Health; and Tony Agurto, in his official capacity as State Registrar of Vital Statistics and Assistant Deputy Director of Health Information and Strategic Planning of the California Department of Public Health (hereafter referred to as the State Registrar)—to execute their supervisory duties, which do not include control over county clerks issuing marriage licenses, consistent with state law limitations.

2. Petitioner also requests an immediate temporary stay during the pendency of these writ proceedings (1) that orders Respondents not to enforce the State Registrar's directive commanding county clerks to issue marriage licenses contrary to state law defining marriage as the union between one man and one woman, and (2) that directs Petitioner to refrain from issuing marriage licenses contrary to state law defining marriage as the union between one man and one woman until this Court settles the important issues raised in this Petition. Petitioner has been placed in an unsustainable position because, among other things, he has been threatened with legal action by the Attorney General for exercising his public duties consistent with state law defining marriage as the union between one man and one woman. The urgency demanding this immediate temporary stay

derives primarily from the need to provide legal clarity regarding Petitioner's duty to issue marriage licenses in accordance with state law.

3. Petitioner respectfully invokes the original jurisdiction of this Court under article VI, section 10 of the California Constitution, sections 1085 and 1086 of the California Code of Civil Procedure, and rules 8.485 through 8.493 of the California Rules of Court. The legal issues raised by this Petition are of significant importance and require immediate resolution, and deciding those important legal issues does not require this Court to resolve factual questions. This Court should exercise its original jurisdiction.

4. This Petition raises fundamental questions of state law that affect Petitioner's legal duty to issue marriage licenses. Respondents have ordered Petitioner to stop enforcing state law that defines marriage as the union between one man and one woman. In support of their order, Respondents claim that Petitioner is bound by a federal court injunction that prohibits enforcement of that state marriage law because, according to Respondents, state law provides them with authority to supervise or control county clerks issuing marriage licenses. Petitioner, however, asserts that state law does not give Respondents this authority over him, and for this reason, among others discussed in the accompanying Memorandum of Points and Authorities, Petitioner contends that he is not bound by the federal court's injunction. Once this Court settles this important issue of state law concerning Respondents lack of supervisory control over county clerks issuing marriage licenses, that ruling will have the effect of clarifying that Petitioner is not bound by the injunction. Because the injunction does not apply to Petitioner, article III, section 3.5 of the California Constitution and the state law principles discussed by this Court in *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055 (hereafter *Lockyer*) require Petitioner to continue enforcing state law

defining marriage as the union between one man and one woman. This Court should exercise its original jurisdiction and decide these important questions of state law.

5. This Court should grant the relief requested in this Petition because state law defining marriage as a union between a man and a woman continues to govern throughout the State; Respondents' clear and present duties do not afford them supervisory control over Petitioner; Respondents have ordered Petitioner not to enforce state law defining marriage as a union between a man and a woman; Petitioner has a beneficial interest in enforcing state marriage law as provided in duly enacted constitutional and statutory provisions free of unlawful supervision or directives; Petitioner has a beneficial interest in obtaining legal clarity regarding his duty to issue marriage licenses in accordance with state law; and (since Petitioner is not bound by the above-mentioned federal court injunction) Petitioner must enforce state marriage law notwithstanding Respondents' contrary order.

6. Petitioner does not have a plain, speedy, and adequate remedy available at law. No other remedy or proceeding would enable Petitioner to obtain a speedy and final resolution of this challenge to Respondents' actions or to obtain the clarity needed for him to perform his public functions.

7. Petitioner has been named as a respondent in the related original writ action captioned *Hollingsworth v. O'Connell* (No. S211990) that is currently pending before this Court. A substantive ruling from this Court in those proceedings has the potential to provide the legal clarity that Petitioner so desperately needs. But it remains unclear whether this Court will take up the merits of that case. So Petitioner, given his precarious ongoing situation filled with uncertainty, deems it prudent to file his own writ petition. If the important state law questions raised in this and the *Hollingsworth* Petitions are not settled by this Court, doubt will continue to

pervade Petitioner's duty to issue marriage licenses in accordance with state law. Such ongoing ambiguity has caused, and will continue to inflict, harm on Petitioner.[1]

8. Although Petitioner recognizes that this Court denied "[t]he request for an immediate stay or injunctive relief" in the pending *Hollingsworth* case (see *Hollingsworth v. O'Connell* (Cal. July 15, 2013, No. S211990) Order), Petitioner nevertheless raises his own request for an immediate temporary stay because, as a public official whose duties are directly impacted by Respondents' actions, Petitioner presents unique interests and injuries that are particularized to him. The current state of uncertainty (heightened by threats of punishment and litigation) is causing Petitioner ongoing and irreparable harm, and risks creating additional harm in the absence of a temporary stay.

9. The Attorney General has threatened legal action against Petitioner and any other county clerk who declines to follow the Attorney General's belief that Respondents have been given supervisory authority over county clerks issuing marriage licenses. Petitioner thus fears that the Attorney General or other Respondents will attempt to sue or otherwise punish Petitioner if he enforces state law defining marriage as a union between one man and one woman. Because of this fear of imminent legal action against him, Petitioner has not (prior to this point) publicly disagreed with the Attorney General's claim that state officials have authority to supervise or control county clerks when they issue marriage licenses. Despite this fear, Petitioner files this Petition to obtain definitive guidance from this Court impacting his ongoing official duties.

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[1] Given the similarities between the issues raised in this Petition and the issues raised in the *Hollingsworth v. O'Connell* Petition, Petitioner requests that this Court hear the two cases together.

PARTIES

10. Petitioner Ernest J. Dronenburg, Jr. is the County Clerk of San Diego County. His ministerial duties as a county clerk include ensuring that couples satisfy the statutory requirements for obtaining a marriage license and issuing marriage licenses to eligible couples. He is not supervised or controlled by any state official when performing those duties.

11. Respondent Edmund G. Brown Jr., is Governor of the State of California. He is the chief executive officer in the State. Upon information and belief, he ordered state executive officials to direct county clerks to stop enforcing state law defining marriage as the union between one man and one woman. He is named solely in his official capacity.

12. Respondent Kamala D. Harris is Attorney General of the State of California. Her official duties include enforcing the laws of the State. Upon information and belief, she ordered state executive officials to direct county clerks to stop enforcing state law defining marriage as the union between one man and one woman. She is named solely in her official capacity.

13. Respondent Dr. Ron Chapman is Director of the California Department of Public Health. He is charged with administering the executive-branch agency that is responsible for recording marriage and other vital records. Upon information and belief, he directed or permitted his subordinate, the State Registrar, to direct county clerks to stop enforcing state law defining marriage as the union between one man and one woman. He is named solely in his official capacity.

14. Respondent Tony Agurto is State Registrar of Vital Statistics and Assistant Deputy Director of Health Information and Strategic Planning of the California Department of Public Health. He is the state record-keeper charged with recording marriage and other vital records. He directed county clerks to stop enforcing state law defining marriage as the

union between one man and one woman. He is named solely in his official capacity.

FACTS

15. "From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 792.) The People reinforced this understanding of marriage in 2000 by approving Proposition 22, a statutory initiative, codified as Family Code section 308.5, stating that "[o]nly marriage between a man and a woman is valid or recognized in California."

16. In February 2004, the San Francisco county clerk began issuing marriage licenses to same-sex couples in violation of state law. Then-Attorney General Bill Lockyer and a group of citizens filed two petitions with this Court seeking a writ of mandate ordering the San Francisco county clerk to stop issuing unlawful marriage licenses and to enforce state law that defines marriage as a union between a man and a woman. Soon after those petitions were filed, this Court entered an immediate order directing the county clerk "to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions" pending the outcome of those proceedings. (*Lockyer* (2004) 33 Cal.4th at p. 1073.) In August 2004, this Court ruled in the petitioners' favor and issued a writ of mandate directing the county clerk "to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes." (*Id.* at p. 1120.)

17. Meanwhile, various parties filed a number of cases in California state courts alleging that state marriage laws, by defining marriage as a union between a man and a woman, violated the California

Constitution. In May 2008, this Court agreed with those challenges. (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 855-856.)

18. On November 4, 2008, a majority of California voters approved Proposition 8 as article I, section 7.5 of the California Constitution, which states that "[o]nly marriage between a man and a woman is valid or recognized in California."

19. The following day, on November 5, 2008, various parties filed petitions for a writ of mandate with this Court, seeking to strike down Proposition 8 as an invalid revision of the California Constitution and prevent government officials from enforcing it. The Attorney General (who at the time was Edmund G. Brown Jr.) declined to defend Proposition 8 in those proceedings. The Proposition 8 Proponents (hereafter Proponents) intervened there and defended Proposition 8. In May 2009, this Court rejected those legal challenges and affirmed Proposition 8's validity under the California Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 474.)

20. On May 22, 2009, a group of plaintiffs filed a lawsuit captioned *Perry v. Schwarzenegger* in United States District Court for the Northern District of California, alleging that Proposition 8 violates the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution. The named defendants, all sued in their official capacities, were the Governor, Attorney General, State Registrar, Deputy Director of Health Information and Strategic Planning, Auditor Controller/Clerk Recorder of Alameda County, and Registrar-Recorder/County Clerk of Los Angeles County. All the defendants declined to defend Proposition 8, and the Attorney General (similar to what he did in the *Strauss* case) agreed with the plaintiffs that Proposition 8 should be struck down. Proponents intervened and defended Proposition 8. Petitioner was not a party to that case.

21. In August 2010, the *Perry* district court ruled against Proposition 8 (see *Perry v. Schwarzenegger* (N.D.Cal. 2010) 704 F.Supp.2d 921), and entered a permanent injunction ordering that "Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article 1, § 7.5 of the California Constitution." (*Perry v. Schwarzenegger* (N.D.Cal. Aug. 12, 2010, No. C 09-2292 VRW) Permanent Injunction, Doc. No. 728) (Exhibit A).)[2] None of the named government defendants appealed that decision. Proponents nevertheless sought review from the United States Court of Appeals for the Ninth Circuit.

22. After the Ninth Circuit certified a standing-related question to this Court and after this Court decided that question, the Ninth Circuit affirmed the district court's judgment on February 7, 2012. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1063-1064.)

23. Proponents filed a cert petition with the Supreme Court of the United States, and the Court granted review. (*Hollingsworth v. Perry* (2012) ___ U.S. ___ [133 S.Ct. 786].)

24. On June 26, 2013, the Supreme Court concluded that Proponents lack standing to defend Proposition 8 in federal court and, as a result, declined to resolve the law's constitutionality. (*Hollingsworth v. Perry* (June 26, 2013, No. 12-144) ___ U.S. ___ [2013 WL 3196927].)

25. The Supreme Court's holding that Proponents lack standing to defend Proposition 8 in federal court vacates the Ninth Circuit's decision in *Perry v. Brown* because the only appellant lacked standing to appeal. (*Hollingsworth, supra*, 2013 WL 3196927, at p. *14.)

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[2] Petitioner attaches supporting documents as exhibits to this Petition and the supporting Memorandum of Points and Authorities. Petitioner verifies that all the exhibits are true and correct copies of the submitted documents.

26. The same day as the Supreme Court's decision, the State Registrar issued a letter to county clerks stating that the Attorney General has "conclude[d] that the [*Perry* court's] injunction applies statewide, and that county clerks . . . in all 58 counties must comply with it." (State Registrar Tony Agurto, letter to County Clerks and County Recorders, June 26, 2013, p. 1 <gov.ca.gov/docs/Letter_to_County_Officials.pdf>) (Exhibit B).) The letter then stated that "[t]he effect of the district court's injunction is that same-sex couples will once again be allowed to marry in California" after "the Ninth Circuit issues a further order dissolving a stay of the injunction that has been in place throughout the appeal process." (*Ibid.*)

27. The Attorney General explained in a letter to the Governor, dated June 3, 2013, the basis for her belief that all county clerks are bound by the *Perry* injunction. (Attorney General Kamala D. Harris, letter to Governor Edmund G. Brown Jr., June 3, 2013 <gov.ca.gov/docs/AG_Letter.pdf> (Exhibit C).) In short, she believes that all county clerks are bound by the injunction because she claims that the Department of Health and its Director, who also serves as the State Registrar, has state law authority to supervise or control county clerks issuing marriage licenses. (*Id.* at pp. 4-5.)

28. Two days later, on June 28, 2013, the Ninth Circuit in the *Perry* case issued an order stating that "[t]he stay in the above matter is dissolved effective immediately." (*Perry v. Brown* (9th Cir. June 28, 2013, No. 10-16696) Order, Doc. No. 432 (Exhibit D).)

29. That same day, the State Registrar issued another letter to county clerks stating as follows:

> On June 28, 2013, the U.S. Court of Appeals for the Ninth Circuit dissolved the stay of the order enjoining enforcement of Proposition 8. As explained in the notice dated June 26, 2013, this order applies to all 58 county clerks . . . . This means that same-sex marriage is again legal in California.

Effective immediately, county clerks shall issue marriage licenses to same-sex couples in California.

(State Registrar Tony Agurto, letter to County Clerks and County Recorders, June 28, 2013, p. 1 <cdph.ca.gov/Documents/CDPH_ ACL06282013.pdf> (Exhibit E).)

30. Upon information and belief, ever since the Ninth Circuit issued its order and the State Registrar issued his directive, many county clerks have been issuing marriage licenses to same-sex couples. (See, e.g., Lisa Leff, *Proposition 8 Gay Marriage Hold Lifted by Appeals Court, California Begins Issuing Licenses*, Huffington Post (Jun. 28, 2013) <http://www.huffingtonpost.com/2013/06/28/proposition-8-gay-marriage_n_3519340.html?view=print&comm_ref=false> (Exhibit F).)

31. Upon information and belief, all four plaintiffs in the *Perry* case have been married. (See *ibid.*)

32. Respondent Harris has publicly threatened that if county clerks decide not to enforce this injunction, the Attorney General's Office will take legal action against them. (See California Attorney General Kamala Harris's Twitter Post (Jun. 26, 2013) <https://twitter.com/KamalaHarris/status/349951321555734528> (Exhibit G).)

33. Petitioner fears that the Attorney General or other Respondents will attempt to sue or otherwise punish Petitioner if he enforces California law defining marriage as a union between one man and one woman.

34. Prior to the filing of this Petition, Petitioner did not publicly disagree with the Attorney General's claim that state officials have authority to supervise or control county clerks when they issue marriage licenses. Petitioner's prior silence was due to the fear created by the Attorney General's promise to pursue legal action against any county clerk who declines to adhere to her interpretation of state law.

35. Respondents each have clear and present supervisory duties that they must exercise in accordance with state law. Those duties do not include exercising supervisory control over county clerks issuing marriage licenses.

36. The State Registrar, at the direction and with the approval of other Respondents, has asserted and attempted to exercise supervisory control over county clerks issuing marriage licenses.

37. Petitioner is beneficially interested in enforcing state marriage law as provided in duly enacted constitutional and statutory provisions free from unlawful supervision or directives. Petitioner is also beneficially interested in obtaining legal clarity regarding his duty to issue marriage licenses in accordance with state law.

CLAIMS ASSERTED

38. California law does not afford Respondents supervisory control over Petitioner when he issues marriage licenses. Despite this absence of legal authority, the State Registrar, at the direction and with the approval of other Respondents, has ordered Petitioner to issue marriage licenses to same-sex couples in violation of state law defining marriage as a union between a man and a woman.

39. Article III, section 3.5 of the California Constitution prohibits government agencies and officials (like Petitioner) from declining to enforce state law on the basis that the law is unconstitutional, unless an appellate court has first made that determination. No governing appellate decision has held that Proposition 8 is unconstitutional. Nevertheless, the State Registrar, at the direction and with the approval of other Respondents, issued a directive commanding Petitioner to stop enforcing state law defining marriage as a union between a man and a woman. If Petitioner were to heed this directive, he would violate article III, section 3.5 of the California Constitution. Therefore, Petitioner is entitled to a writ of

mandate requiring Respondents to execute their supervisory duties, which do not include control over county clerks issuing marriage licenses, consistent with state law limitations.

40. This Court's case law requires county clerks charged with ministerial duties (like Petitioner is here) to execute those duties in accordance with state law, regardless of directives issued by other officials lacking supervisory authority over them, and regardless of the clerks' personal views about the constitutionality of the laws imposing those duties. The State Registrar, at the direction and with the approval of other Respondents, nevertheless issued a directive purporting to command Petitioner not to enforce state law defining marriage as a union between a man and a woman. If Petitioner were to heed this directive, he would violate this Court's case law requiring executive officials like Petitioner to comply with duly enacted laws. Therefore, Petitioner is entitled to a writ of mandate requiring Respondents to execute their supervisory duties, which do not include control over county clerks issuing marriage licenses, consistent with the state law limitations.

41. Petitioner is suffering, and will continue to suffer, irreparable injury and damage unless this Court requires Respondents to execute their supervisory duties, which do not include control over county clerks issuing marriage licenses, consistent with state law limitations.

42. Petitioner is suffering, and will continue to suffer, irreparable injury and damage unless this Court issues an immediate temporary stay during the pendency of these writ proceedings (1) that orders Respondents not to enforce the State Registrar's directive commanding county clerks to issue marriage licenses contrary to state law defining marriage as the union between one man and one woman, and (2) that directs Petitioner to refrain from issuing marriage licenses contrary to state law defining marriage as

the union between one man and one woman until this Court settles the important issues raised in this Petition.

43. Petitioner asserts that he need not plead "demand and refusal" under these circumstances. Without prejudice to that position, Petitioner alleges that it would have been futile for him to have demanded that Respondents execute their supervisory duties consistent with the limitations recognized in state law.

RELIEF SOUGHT

Wherefore, Petitioner respectfully requests the following relief:

44. That this Court issue an immediate temporary stay during the pendency of these writ proceedings (1) that orders Respondents not to enforce the State Registrar's directive commanding county clerks to issue marriage licenses contrary to state law defining marriage as the union between one man and one woman, and (2) that directs Petitioner to refrain from issuing marriage licenses contrary to state law defining marriage as the union between one man and one woman until this Court settles the important issues raised in this Petition;

45. That this Court issue an alternative writ of mandate ordering Respondents to execute their supervisory duties, which do not include control over county clerks issuing marriage licenses, consistent with state law limitations, or in the alternative, to show cause before this Court at a specified time and place why Respondents will not do so;

46. That, upon Respondents' return to the alternative writ of mandate, this Court hold a hearing at the earliest practicable time so that the important legal issues raised by this Petition may be resolved promptly;

47. That, following the hearing, this Court issue a peremptory writ of mandate or other appropriate equitable relief ordering Respondents to execute their supervisory duties, which do not include control over

county clerks issuing marriage licenses, consistent with state law limitations;

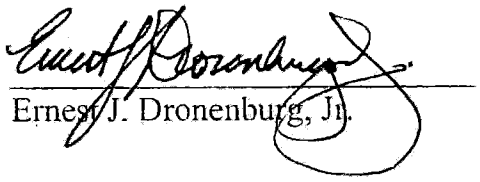
48. That this Court award Petitioner his attorneys' fees and costs of suit; and

49. That this Court award other and further relief as it may deem just and equitable.

VERIFICATION

I, Ernest J. Dronenburg, Jr., County Clerk of San Diego County, am Petitioner in the above-captioned action. I have read the foregoing Petition and know the contents thereof. I am informed, believe, and allege based on that information and belief that the contents of the foregoing Petition are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of July, 2013, in Rancho Santa Fe, California.



Ernest J. Dronenburg, Jr.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioner is a county clerk caught in the crossfire of a legal struggle over the definition of marriage. As a public official charged with the duty of issuing marriage licenses, Petitioner's interest in this controversy is unique, particularized, and practical. He, quite simply, seeks to determine what state law requires of him when performing his official duties. Must he, as Respondents insist, issue marriage licenses not authorized by state law defining marriage as the union between one man and one woman? Or is Petitioner, as state marriage law plainly states, required only to issue marriage licenses to couples consisting of one man and one woman? Petitioner needs definitive guidance from this Court on this critical question of state law. Without a ruling from this Court, Petitioner will remain in legal limbo and continue to endure ongoing and irreparable harm.

Respondents, at bottom, are attempting to nullify a voter-enacted initiative measure by claiming supervisory control over Petitioner when he issues marriage licenses. But the Legislature has not granted that sort of authority to Respondents. Instead, when Petitioner issues marriage licenses, he is guided by the laws of this State (not the orders of Respondents). Petitioner thus asks this Court to affirm the state law limitations on Respondents' supervisory authority and declare that Petitioner remains obligated to enforce Proposition 8—the voter-enacted initiative defining marriage as the union between one man and one woman.

DISCUSSION

I. This Court Should Exercise its Original Jurisdiction.

The California Constitution affords this Court original jurisdiction over petitions for writ of mandate. (Cal. Const., art. VI, § 10; *Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 252 (hereafter *Matosantos*).) This Court "will invoke [this] original jurisdiction where the

matters to be decided are of sufficiently great importance and require immediate resolution." (*Matosantos*, *supra*, 53 Cal.4th at p. 253; see also *Amador Valley J. Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 (hereafter *Amador Valley*).)

This Petition presents questions of great importance concerning the rule of law and limitations on public officials' authority. In *Lockyer*, *supra*, 33 Cal.4th at pp. 1066-1067, this Court exercised its original jurisdiction and issued a writ of mandate ordering the San Francisco county clerk not to issue marriage licenses in violation of state law, notwithstanding contrary orders that she received from officials lacking supervisory authority over her. *Lockyer* identified as "important" the question whether an "executive official who is charged with the ministerial duty of enforcing a state statute exceeds his or her authority" when that official declines to enforce state law. (*Ibid.*) That question "implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them." (*Id.* at p. 1068.) It presents "a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being 'a government of laws, and not of men' (or women)." (*Ibid.*) Here, Respondents have exceeded their authority under the law by purporting to exercise supervisory authority over county clerks—authority that they do not possess. Similar to the situation that this Court addressed in *Lockyer*, Respondents' improper arrogation of power here, and the resulting infringement on the authority of Petitioner, raises important questions and fundamental concerns at the heart of California's system of government.

This Petition also raises questions of great importance because resolving these issues will determine the future of a state constitutional initiative—Proposition 8. Respondents' challenged actions seek to nullify that initiative, relegating it to an historical relic rather than a governing

constitutional provision. Under these circumstances, where the future of a constitutional initiative hangs in the balance, it simply cannot be doubted that a writ petition raises important legal questions. (See *Amador Valley*, *supra*, 22 Cal.3d at p. 248, quotation marks omitted [recognizing that the People's initiative power is "one of the most precious rights of our democratic process"].) As this Court exercised its original jurisdiction in *Strauss*, a case questioning the validity of Proposition 8 (see *Strauss v. Horton*, *supra*, 46 Cal.4th at pp. 398-399), this Court should likewise exercise its original jurisdiction here, where the future enforcement of Proposition 8 is at issue.

This Petition additionally presents questions of great importance because county clerks like Petitioner are unsure how to proceed in carrying out their public duty to issue marriage licenses in accordance with state law. (See Fam. Code, § 350, subd. (a) [indicating that county clerks issue marriage licenses]; Fam. Code, § 359, subd. (a) [same].) The Attorney General asserts that Respondents exercise supervisory authority over all county clerks issuing marriage licenses and thus that all clerks are bound by the injunction issued by the *Perry* court. In contrast, Petitioner contends that state law does not grant Respondents supervisory control over county clerks issuing marriage licenses, that (as a result) Petitioner is not bound by the *Perry* injunction, and that (because Petitioner is not bound by that injunction) state law requires Petitioner to enforce state law defining marriage as the union between one man and one woman. This ambiguity concerning county clerks' legal duties threatens marriage-related uncertainty and a lack of uniformity throughout the State. This further demonstrates the importance of the legal issues raised in this Petition.

Moreover, the important issues raised in this Petition require prompt resolution. With every passing day, Petitioner remains in an unsustainable position. On the one hand, Respondents have ordered him not to enforce

state law and are threatening to punish him if he does not comply with that order. On the other hand, Petitioner has an independent constitutional and statutory obligation to enforce California law defining marriage as a union of a man and a woman. If Petitioner submits to the State Registrar's directive, he will violate his legal duty to enforce the State's marriage laws and face mandamus proceedings like the action recently filed by the Proposition 8 Proponents. (See *Hollingsworth v. O'Connell* (Cal. July 12, 2013, No. S211990) Petition for Writ of Mandate [seeking a writ of mandate requiring county clerks to enforce state law].) But if Petitioner disregards the State Registrar's order, he will face punishment from the Attorney General. There is no question, under these circumstances, that immediate intervention and definitive resolution by this Court is warranted.

The same need for legal clarity and predictability that demanded an immediate ruling in *Lockyer* calls for this Court's attention here. If this Court does not confine Respondents to the limits of their power, many county clerks will continue issuing marriage licenses to same-sex couples, and there will be uncertainty about the validity of the marriages that result from those licenses. "[I]t would not be prudent or wise" to permit county clerks to continue issuing marriage licenses of disputed validity "given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail." (*Lockyer*, *supra*, 33 Cal.4th at p. 1117.) "[D]elaying a ruling," which will result in the issuance of more marriage licenses of uncertain validity, "might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm." (*Ibid.*)

II. This Court Should Issue an Immediate Temporary Stay.

This Court has authority to enter a temporary stay during original action writ proceedings. (See, e.g., *Lockyer*, *supra*, 33 Cal.4th at p. 1073

[issuing a temporary stay, "[p]ending [this Court's] determination of the[] matter[]," that directed county clerks "to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions"]; *Matosantos*, *supra*, 53 Cal.4th at p. 241 [noting that this Court in an original writ proceeding "issued an order" that "partially stayed" the two challenged legislative "measures intended to stabilize school funding"]; see also Cal. Rules of Court, rule 8.486(a)(7) [permitting petitioners to request "a temporary stay"].) In this case, the Court should immediately enter a temporary stay during the pendency of these writ proceedings (1) that orders Respondents not to enforce the State Registrar's directive commanding county clerks to issue marriage licenses contrary to state law defining marriage as the union between one man and one woman, and (2) that directs Petitioner to refrain from issuing marriage licenses contrary to state law defining marriage as the union between one man and one woman until this Court settles the important issues raised in this Petition.

Petitioner is entitled to the requested temporary stay. As mentioned in Section (I) above, Petitioner faces an intolerable situation, with uncertainty and threatened legal action around every corner. Petitioner must choose to, on the one hand, ignore the State Registrar's directive, enforce state law, and endure the Attorney General's promised punishment, or, on the other hand, surrender to the State Registrar's directive, violate his duty to enforce state law, and endure citizen-initiated writ proceedings requiring him to enforce state law. Petitioner thus is in immediate need of a temporary stay suspending the crisis he now faces.

Without this temporary relief, Petitioner will endure irreparable harm. This harm exists every minute that Petitioner, who has a legal duty to issue marriage licenses, faces conflicting directives (each backed by a threat of litigation or punishment) concerning the execution of that duty. On the

one hand, Respondents have ordered Petitioner to issue marriage licenses to couples who are ineligible under state law, but on the other hand, the California Constitution compels Petitioner to issue marriage licenses only to couples comprising one man and one woman. Navigating this landmine of uncertainty on a daily basis is an ongoing and ever-present injury that is irreparable.

In the absence of a stay, Petitioner will experience other forms of irreparable injury. If he is forced to issue marriage licenses in violation of state law and eventually this Court concludes that he erred in doing so, he likely will be required, like the county officials were in *Lockyer*, to notify all same-sex couples regarding the validity of marriages licenses issued to them. (See *Lockyer*, *supra*, 33 Cal.4th at pp. 1118-1119.) Requiring these logistical efforts will impose irreparable administrative costs and hardships on Petitioner. Also, if Petitioner issues marriage licenses that are later declared invalid, he might face lawsuits from couples or other third parties who relied on those marriage licenses to their detriment.

To avoid this ongoing and irreparable harm, this Court should enter an immediate temporary stay during the pendency of these proceedings.

III. This Court Should Issue the Requested Writ of Mandate.

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) The writ may be issued "not only to compel the performance of a ministerial act," but also "to annul or restrain administrative action" that is "in violation of law." *Bodinson Manufacturing Co. v. Cal. Employment Com.* (1941) 17 Cal.2d 321, 329-330; see also *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751 ["Mandamus is also appropriate for challenging the . . . validity of . . . official acts."].) "The writ must be issued in all cases where there is not a

plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.)

A petitioner is thus entitled to a writ of mandate as a matter of law when that petitioner shows that (1) there is not a plain, speedy, and adequate remedy in the ordinary course of law, (2) the respondent breached a clear duty or otherwise acted in violation of the law, and (3) the petitioner is beneficially interested in, or otherwise has standing to seek, the requested relief. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540 [quotation marks and alterations omitted], superseded by statute on other grounds as recognized in *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077; *Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 203-204.) These requirements are satisfied here, and so this Court should issue the requested writ of mandate.

A. Petitioner Does Not Have a Plain, Speedy, and Adequate Remedy in the Ordinary Course of Law.

Section (I) above demonstrates that providing clarity to Petitioner regarding his ministerial duty to issue marriage licenses, affirming the limitations on Respondents' supervisory authority, and confirming Petitioner's duty to enforce state marriage law are all important state law questions that require the immediate attention of this Court. No remedy other than a writ of mandate, and no proceeding other than an original writ action filed with this Court, can afford the speedy relief necessary under the circumstances.

Section (II) above similarly shows that absent an immediate stay, Petitioner will remain in limbo, forced to choose between complying with the State Registrar's directive, which will prompt writ-of-mandate suits for Petitioner's failure to enforce state marriage law, and disregarding that

directive, which will expose Petitioner to punishment and retribution by Respondents. Section (II) above additionally illustrates that Petitioner is experiencing ongoing and irreparable harm. Nothing other than these writ proceedings can avert those harms.

Petitioner therefore does not have a plain, speedy, and adequate remedy in the ordinary course of law.

B. Respondents Have Violated Their Supervisory Duties as Prescribed by State Law, and Respondents Have Engaged in Unlawful Official Actions.

A petitioner is entitled to a writ of mandate when executive officials violate their public duties by exceeding the authority granted to them under state law. (See *Lockyer*, *supra*, 33 Cal.4th at p. 1120 [granting a writ of mandate that required public officials not to exceed the authority given them under state law].) By purporting to control county clerks when they issue marriage licenses, Respondents have failed to exercise their supervisory duties as prescribed by state law because, as explained in Section (IV)(A) below, Respondents' supervisory duties do not include the authority to control county clerks issuing marriage licenses.

Additionally, a petitioner is entitled to a writ of mandate "to annul or restrain" public officials' actions that are "in violation of law." (*Bodinson Manufacturing Co. v. Cal. Employment Com.*, *supra*, 17 Cal.2d at pp. 329-330; see also *Wenke v. Hitchcock*, *supra*, 6 Cal.3d at p. 751 ["Mandamus is also appropriate for challenging the . . . validity of . . . official acts."].) In this case, the State Registrar has issued a directive ordering all county clerks to stop enforcing Proposition 8. Yet as explained in Section (IV)(A)(1) below, the State Registrar does not have lawful authority to control county clerks in their issuance of marriage licenses. These circumstances thus warrant a writ of mandate requiring Respondents to

abide by the limitations of their authority when exercising their public duties.

C. Petitioner Has Standing to Obtain the Requested Writ of Mandate.

To establish standing to seek a writ of mandate, a petitioner typically must be "beneficially interested" in the relief sought. (Code Civ. Proc., § 1086.) "The requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165 [citation and quotation marks omitted].)

Petitioner readily satisfies the beneficial-interest requirement. Petitioner has specific rights and interests at issue in this controversy involving the future enforcement of Proposition 8. For Petitioner's official duties require him, unlike members of the general public, to enforce state marriage law. Petitioner must "ensure that the statutory requirements for obtaining a marriage license are satisfied." (*Lockyer*, *supra*, 33 Cal.4th at p. 1076 [citing Fam. Code, § 354].) And Petitioner must distribute marriage licenses to eligible couples. (Fam. Code, § 350, subd. (a) ["[P]arties shall first obtain a marriage license from a county clerk."]; Fam. Code, § 359, subd. (a) ["[A]pplicants to be married shall first appear together in person before the county clerk to obtain a marriage license"].) Petitioner's official duties thus demonstrate that he has a direct interest in resolving the conflict between his ongoing responsibility to enforce Proposition 8 and the State Registrar's contrary directive.

The United States Supreme Court's decision in *Board of Education v. Allen* (1968) 392 U.S. 236, 241, fn. 5 (hereafter *Allen*), which was discussed by this Court in *Lockyer*, *supra*, 33 Cal. 4th at p. 1101, fn. 29,

confirms that Petitioner has a beneficial interest in this case. (See also *Richardson v. Ramirez* (1974) 418 U.S. 24, 34-40 [finding "a live case or controversy" when a California county clerk filed an appeal to the Supreme Court].) In *Allen*, the Court upheld the right of school district officials to bring an action to determine whether they should stop complying with a statute because of their belief that it might be unconstitutional. The Supreme Court reasoned:

> [The officials] have taken an oath to support the . . . Constitution. Believing [the statute] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the statute]—that would be likely to bring their expulsion from office . . . . There can be no doubt that [the officials] thus have a 'personal stake in the outcome' of this litigation.

(*Allen, supra*, 392 U.S. at p. 241, fn. 5.) After quoting that language, this Court in *Lockyer* stated that a local official's "personal stake" in such a case likely "afford[s] them standing *to bring a court action*." (*Lockyer, supra*, 33 Cal.4th at p. 1101, fn. 29.)

Analogous reasoning applies here. Petitioner has taken an oath to uphold the California Constitution, which includes Proposition 8. Faced with the State Registrar's directive, Petitioner is in the position of choosing between, on the one hand, violating his oath by declining to enforce Proposition 8 (thus exposing himself to a lawsuit (see generally *Lockyer, supra*, 33 Cal.4th at pp. 1071-1072)) and, on the other hand, ignoring that unlawful directive and continuing to enforce Proposition 8 (thus risking punishment or a lawsuit from the Attorney General or other Respondents). In short, if Petitioner chooses the wrong course, he risks opening himself to suit and possibly losing his office. Under these circumstances, "[t]here can be no doubt that [Petitioner] . . . ha[s] a 'personal stake in the outcome' of this litigation." (*Allen, supra*, 392 U.S. at p. 241, fn. 5.)

The Ninth Circuit's decision denying the Imperial County *Deputy Clerk*'s attempt to intervene in the *Perry* litigation does not undermine Petitioner's standing here. (See *Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898.) The Ninth Circuit court expressly stated that the attempt to intervene "might have [had] merit" if "Imperial County's elected County Clerk [were] the applicant for intervention," but reasoned that because the county clerk was not before the court, the decision did not need to resolve whether an official county clerk would have had a sufficient interest to intervene in that case. (*Id.* at 903.) Here, however, Petitioner is the elected County Clerk of San Diego County, and as a result, the Ninth Circuit's decision is irrelevant to assessing Petitioner's beneficial interest in obtaining the relief sought in this case.

IV. The *Perry* Injunction Does Not Bind Petitioner, and Thus It Cannot Excuse Respondents' Unlawful Actions.

Respondents seek to justify the State Registrar's directive to county clerks by claiming that "the [*Perry* court's] injunction applies statewide, and that county clerks . . . in all 58 counties must comply with it." (State Registrar Tony Agurto, letter to County Clerks and County Recorders, June 26, 2013, p. 1 <gov.ca.gov/docs/Letter_to_County_ Officials.pdf>) (Exhibit B).) But their reliance on that injunction is misplaced.

This Court construes federal court judgments and injunctions to give them the same effect that they would have in federal court. (*Younger v. Jensen* (1980) 26 Cal.3d 397, 411 [quotation marks omitted] ["A federal judgment has the same effect in the courts of this state as it would have in a federal court."].) The *Perry* district court entered an injunction ordering that the "[d]efendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution." (*Perry*

v. Schwarzenegger (N.D.Cal. Aug. 12, 2010, No. C 09-2292 VRW) Permanent Injunction, Doc. No. 728) (Exhibit A).

That injunction, however, does not bind Petitioner because, to begin with, he was not a named defendant in the *Perry* case. Counsel for the *Perry* plaintiffs agreed at oral argument before the Ninth Circuit that "the scope of the injunction is quite limited," and acknowledged that a county clerk like Petitioner is "not directly bound by the injunction." (*Perry v. Brown*, Ninth Circuit Oral Argument Audio (Dec. 6, 2010, No. 10-16696) at 31:57-32:06, 37:40-37:45, 53:18-53:25 <http://cdn.ca9.uscourts.gov/datastore/media/2010/12/06/10-16696.wma> (hereafter Ninth Circuit *Perry* Audio); accord *Perry v. Brown*, Ninth Circuit Unofficial Oral Argument Transcript (Dec. 6, 2010, No. 10-16696) at 13-14, 16, 22 <http://www.docstoc.com/docs/83536462/120610-Oral-Argument-Unofficial-Transcript-Standing> (hereafter Unofficial Ninth Circuit *Perry* Transcript). Indeed, the plaintiffs' counsel conceded that a county clerk in Petitioner's position could "refuse a marriage license to a same-sex couple" "without violating th[e] injunction." (Ninth Circuit *Perry* Audio, *supra*, at 32:26-32:42, 55:09-55:22; accord Unofficial Ninth Circuit *Perry* Transcript, *supra*, at pp. 14, 23.)

The Ninth Circuit judges recounted, without objection, this position of the *Perry* plaintiffs. The three-judge panel wrote, in its order certifying a question to this Court, that "[a]t oral argument," the plaintiffs' counsel stated that if the court were to conclude that Official "Proponents have no standing and . . . dismiss th[e] appeal," "the district court decision would be binding on the named state officers and on the county clerks in two counties only, Los Angeles and Alameda." (*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1195, fn. 2.) Even more to the point, Judge Reinhardt acknowledged this in his concurring opinion, where he wrote that "according to what [the plaintiffs'] counsel represented to [the court] at oral

argument, the complaint they filed and the injunction they obtained determines only that Proposition 8 may not be enforced in two of California's fifty-eight counties." (*Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 907 [Reinhardt, J., concurring].) This Court should thus affirm what the *Perry* plaintiffs have unambiguously admitted: that the *Perry* injunction does not bind county clerks, such as Petitioner, who were not parties to the *Perry* case. The following reasons demonstrate why that is so.

A. The *Perry* Injunction Cannot Bind Petitioner Because He Is Not a Person under the Control or Supervision of State Officials.

Assuming the *Perry* district court had authority over the named state officials, a point disputed below, that court's injunction would not bind Petitioner because he is not "under the control or supervision" of the State Registrar, Governor, or Attorney General. When determining whether any of these state officers have lawful authority to control or supervise county clerks when they issue marriage licenses, the analysis should focus on the power granted by state statutes, for "'the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated[.]'" (*Lockyer*, *supra*, 33 Cal.4th at p. 1074 [quoting *McClure v. Donovan* (1949) 33 Cal.2d 717, 728].) The Legislature has designated county clerks as the only government officials with authority to issue marriage licenses. (Fam. Code, § 350, subd. (a); Fam. Code, § 359, subd. (a).) The Legislature has not directed any state official to oversee or control county clerks when they are carrying out that duty.

1. The State Registrar Does Not Have Authority to Supervise or Control Petitioner When He Issues Marriage Licenses.

The Legislature has not given the State Registrar authority to supervise or control county clerks like Petitioner when they issue marriage licenses. The State Registrar is a record-keeper who ensures that each "marriage that occurs in the state shall be registered." (Health & Saf. Code, § 102100.)[3] As it relates to marriage, the State Registrar's job includes two sets of duties. First, he prepares marriage forms. (See Health & Saf. Code, § 102200 ["The State Registrar shall prescribe . . . all record forms for use in carrying out the purposes of this part . . . , and no record forms or formats other than those prescribed shall be used."]; Health & Saf. Code, § 103125 ["The forms for the marriage license shall be prescribed by the State Registrar."]. Second, he receives, reviews, stores, and maintains completed marriage records. (See Health & Saf. Code, § 102355 ["The local registrar of marriages shall transmit to the State Registrar . . . all original marriage certificates accepted for registration"]; Health & Saf. Code, § 102225 ["The State Registrar shall carefully examine the marriage certificates received"].) None of the State Registrar's duties require him to issue marriage licenses or oversee the issuance of marriage licenses.

The State Registrar's claim of authority over all county clerks confuses local registrars[4] with county clerks.[5] The State Registrar plainly

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[3] (See also Health & Saf. Code, § 102180 [charging the State Registrar "with the execution of this part" which involves the recording of marriage and other vital records]; Health & Saf. Code, § 102205 [requiring the State Registrar "to procure . . . the maintenance of a satisfactory system of registration"].)

[4] "The county recorder is the local registrar of marriages." (Health & Saf. Code, § 102285.)

[5] The offices of county clerk and county recorder are separate. (See Gov. Code, § 24000, subds. (c), (g).) In some counties, the Board of Supervisors

has "supervisory power over local registrars." (Health & Saf. Code, § 102180; see also Health & Saf. Code, § 102295 ["Each local registrar is hereby charged with the enforcement of this part . . . under the supervision and the direction of the State Registrar"]. But the duties of the local registrars, like those of the State Registrar, relate to maintaining and storing completed marriage records—not to issuing marriage licenses. (See Health & Saf. Code, § 102310 ["The local registrar of marriages shall carefully examine each license"]; Health & Saf. Code, § 102325 ["The local registrar shall number each marriage certificate consecutively"]; Health & Saf. Code, § 102330 ["The local registrar shall make a complete and accurate copy of each certificate accepted for registration and shall preserve it in his or her office"]; Health & Saf. Code, § 102355 ["The local registrar of marriages shall transmit to the State Registrar . . . all original marriage certificates accepted for registration"].)[6]

While the State Registrar and local registrars are in charge of record keeping, the county clerks are tasked with issuing marriage licenses. (See Fam. Code, §§ 350, subd. (a), 354, 359, subd. (a), 401.) No statute permits

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may consolidate the offices of the county clerk and county recorder. (See Gov. Code, § 24300, subds. (c), (e).) Nevertheless, "[t]he offices of county clerk and of county recorder are distinct offices, though they may be held by the same person[.]" (*People ex rel. Anderson v. Durick* (1862) 20 Cal. 94, 95.)

[6] State law requires local registrars to perform many of the same record-keeping duties that it imposes on the State Registrar. (Compare Health & Saf. Code, § 102225 [requiring the State Registrar to "carefully examine" marriage certificates and, "if they are incomplete or unsatisfactory," to "require any further information that may be necessary"], with Health & Saf. Code, § 102310 [requiring the same of local registrars]; see also Health & Saf. Code, § 103225 [instructing persons wanting to correct errors in any marriage certificate to file an affidavit "with the state or local registrar"]; Health & Saf. Code, § 103525, subd. (a) ["[T]he State Registrar, local registrar, or county recorder shall . . . supply to an applicant a certified copy of the record of a . . . marriage"].)

the State Registrar to supervise or control county clerks when carrying out those duties. County clerks thus are not persons supervised or controlled by the State Registrar when they issue marriage licenses.

2. The Governor and Attorney General Do Not Have Authority to Supervise or Control Petitioner When He Issues Marriage Licenses.

The Governor and Attorney General do not have authority to supervise or control county clerks like Petitioner when they issue marriage licenses, because no state statute or constitutional provision expressly provides the Governor or Attorney General with that power.

County clerks carry out their duties, including the issuance of marriage licenses, without supervision or control by the Governor or Attorney General. Indeed, no statute requires county clerks to report to the Governor or Attorney General. (Cf. Gov. Code, § 12522 ["[T]he Attorney General shall report to the Governor"].) County clerks are not appointed or removable by the Governor or Attorney General. (See Gov. Code, § 24009, subd. (a) ["[T]he county officers to be elected by the people [include] the . . . county clerk"].) And the marriage-related litigation decisions of county clerks are not controlled by the Governor or Attorney General. (See *Perry v. Brown* (2011) 52 Cal.4th 1116, 1159 ["[H]ad any of the other public officials [such as the county clerks] who were named as defendants [in *Perry*] chosen to present a substantive defense of the challenged measure or to appeal the adverse judgment entered by the trial court, the Attorney General could not have prevented that public official from presenting a defense or filing an appeal"].)

Section 102195 of the Health and Safety Code authorizes the Attorney General, "upon request of the State Registrar," to "assist in the enforcement of this part [of the Code]." (Health & Saf. Code, § 102195.) But that enforcement power is limited to the record-keeping duties of the

State Registrar and local registrars discussed in that part of the Health & Safety Code. It does not extend to the county clerks' duties in issuing marriage licenses.

The Governor and Attorney General also have general duties to see that the law is faithfully executed and enforced. (See Cal. Const., art. V, § 1; Cal. Const., art. V, § 13.) But this nonspecific authority does not give those state officials supervisory control over county clerks issuing marriage licenses. Just as San Francisco's former Mayor lacked authority to direct the county clerk regarding the issuance of marriage licenses because "[t]he statutes d[id] not authorize the mayor . . . to take any action with regard to the process of issuing marriage licenses" or overseeing that process (*Lockyer*, *supra*, 33 Cal.4th at p. 1080), the Governor and Attorney General do not supervise or control county clerks when issuing marriage licenses because no statute or constitutional provision gives them that specific authority.

3. This Court's Decision in *Lockyer* and Sound Policy Considerations Confirm that No State Official Has Authority to Supervise or Control Petitioner When He Issues Marriage Licenses.

The Attorney General has argued that this Court's decision in *Lockyer* establishes that state officials have authority to supervise or control county clerks. (See Attorney General Kamala D. Harris, letter to Governor Edmund G. Brown Jr., June 3, 2013 <gov.ca.gov/docs/AG_Letter.pdf> (Exhibit C).) Yet *Lockyer* supports the opposite conclusion. To begin with, the actions of then-State Registrar Michael L. Rodrian illustrate that he did not have supervisory authority over the San Francisco County Clerk. For although the State Registrar issued "a directive" to the "San Francisco County Recorder" instructing her to "cease[] the practice of registering marriage certificates submitted by same-sex couples," he did not send a

comparable directive to the county clerk. (*Lockyer*, *supra*, 33 Cal.4th at p. 1072.)

Moreover, nothing in the *Lockyer* decision establishes that state officials have authority to supervise county clerks when they issue marriage licenses. While *Lockyer* surely acknowledges what is reflected in state statutes—that the State Registrar has supervisory authority over the local registrar/county recorder (see *Lockyer*, *supra*, 33 Cal.4th at p. 1078)—the Court's decision does not hold that the State Registrar has similar authority over county clerks when they issue marriage licenses. Indeed, *Lockyer* held *not* that county clerks must comply with future directives of state officials concerning the issuance of marriage licenses, but that county clerks must enforce the marriage law as reflected in state statutes. (See *id.* at pp. 1104 [concluding that county clerks lack "authority to refuse to perform their ministerial duty in conformity with the current California marriage statutes"].)

Although the *Lockyer* Court "direct[ed] the county clerk and the county recorder . . . to take . . . corrective actions under the supervision of the California Director of Health Services" (*Lockyer*, *supra*, 33 Cal.4th at p. 1120), those "corrective actions," undertaken by both the clerk and the recorder, consisted of notifying couples that their marriages were invalid, correcting records, and offering refunds. (*Id.* at 1118-1119.) Those actions did not involve the issuance of marriage licenses. Furthermore, even if that directive from the *Lockyer* Court could be read to judicially imbue state officials with temporary authority over county clerks, that authority no longer applies because San Francisco officials long ago completed the corrective actions ordered in 2004.[7] In short, *Lockyer* belies, rather than

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[7] At one point the *Lockyer* decision states, without explanation, that the county clerk and county recorder function as "state officer[s]" when they

supports, Respondents' purported authority over county clerks issuing marriage licenses.

The fact that county clerks operate free from control by state officials is not at all troublesome as a matter of legal policy. Issuing marriage licenses is ministerial in nature, and does not require the exercise of discretion. (*Lockyer*, *supra*, 33 Cal.4th at pp. 1081-1082.) County clerks thus need no oversight when performing that nondiscretionary duty. In addition, writ-of-mandate proceedings ensure uniform compliance with state marriage law by all county clerks. (*See, e.g.*, *id.* at p. 1120 [issuing a writ of mandate compelling the county clerk to comply with her ministerial duties].) Because of this, supervision by a state official is not necessary to ensure uniform operation of the marriage laws statewide. Consequently, as state statutes reflect, county clerks issuing marriage licenses are not persons under the control or supervision of any state official.

B. The *Perry* Injunction Cannot Bind the Named State Official Defendants, and Thus Cannot Reach through Those Officials to Bind Petitioner.

Even if one of the state defendants named in *Perry*—the Governor, Attorney General, or State Registrar—has state law authority to supervise or control Petitioner, Petitioner is not bound by the *Perry* injunction because that federal court does not have power over those state defendants. As a result, the injunction cannot reach through those state officials to bind Petitioner.

Federal courts cannot bind state officers that do not possess direct "authority to enforce the complained-of provision." (*Bronson v. Swensen*

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perform their marriage-related duties. (*Lockyer*, *supra*, 33 Cal.4th at pp. 1080-81). This passing statement, which simply means that these county officials are performing duties mandated by state law, does not establish that county clerks, when they issue marriage licenses, are subject to the control of the Governor, Attorney General, or State Registrar.

(10th Cir. 2007) 500 F.3d 1099, 1110; see also *Okpalobi v. Foster* (5th Cir. 2001) 244 F.3d 405, 426 [en banc] [a federal court is without authority over state officials who lack the "power to enforce the complained-of statute"]; *Socialist Workers Party v. Leahy* (11th Cir. 1998) 145 F.3d 1240, 1248 [state officials "cannot be proper defendants" in federal court where they lack "power to enforce" the challenged law].) The alleged injury in *Perry*, as mentioned above, was the denial of marriage licenses. County clerks, not the named state officials, are the government officers charged with issuing marriage licenses. (See Fam. Code, § 350, subd. (a); Fam. Code, § 359, subd. (a).) Thus, because that case involved the denial of marriage licenses, and because the effect of the injunction is to mandate the issuance of marriage licenses, the district court lacks authority over the named state officials.

In particular, the *Perry* court has no authority over the Governor and Attorney General. "General authority to enforce the laws of the state"—the power possessed by the Governor and Attorney General here (see Cal. Const., art. V, § 1; Cal. Const., art. V, § 13)—"is not sufficient to make government officials the proper parties to litigation challenging the law," unless no other official has specific authority to enforce that law against the plaintiff. (*1st Westco Corp. v. School Dist. of Philadelphia* (3d Cir. 1993) 6 F.3d 108, 113.) Federal courts thus have held that a governor's and attorney general's "generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment [defining marriage]"—a constitutional provision that "they have no specific duty to enforce." (*Bishop v. Oklahoma* (10th Cir. 2009) 333 F. App'x 361, 365 [challenging Oklahoma marriage law]; see also *Walker v. United States* (S.D.Cal. Nov. 25, 2008, No. 08-1314 JAH) 2008 U.S. Dist. LEXIS 107664 *9-10 [challenging California marriage law].)

In addition, the district court in *Perry* also has no authority over the State Registrar. A federal court cannot bind a state official whose only connection to the challenged law is supervisory authority over the government officer directly charged with enforcing that law. (See *Southern Pacific Transportation Co. v. Brown* (9th Cir. 1980) 651 F.2d 613, 615 [finding that the court did not have authority over the Attorney General because he did not directly enforce the challenged law, but merely had the "power to direct" the officials who enforced that law]; see also *Planned Parenthood of Idaho, Inc. v. Wasden* (9th Cir. 2004) 376 F.3d 908, 919-920 ["[A] generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit."].) Thus, even if the State Registrar has supervisory control over county clerks charged with issuing marriage licenses, which is not true in any event (as discussed above), such supervisory control would not have bestowed power on the district court to bind the State Registrar (or, by extension, Petitioner).

C. The *Perry* Injunction Cannot Mandate Relief beyond the Four Plaintiffs, and Because All Appropriate Relief Has Already Been Provided, that Injunction Cannot Bind Petitioner.

The *Perry* court cannot mandate relief beyond the four plaintiffs because federal court remedies are limited to addressing "the inadequacy that produced the injury in fact that the plaintiff has established." (*Lewis v. Casey* (1996) 518 U.S. 343, 357.) The injury alleged by the plaintiffs in *Perry* was the denial of a marriage license. The injunction issued by the *Perry* court thus required the named county clerks to issue marriage licenses to the four plaintiffs. But the *Perry* injunction cannot mandate relief benefiting anyone other than the four plaintiffs.

It bears emphasizing that the plaintiffs in *Perry* did not represent a class; thus an injunction permitting them, and only them, to marry provides

them complete relief for the injury they alleged. (See *Monsanto Co. v. Geertson Seed Farms* (2010) 130 S.Ct. 2743, 2760 & fn. 6; *Califano v. Yamasaki* (1979) 442 U.S. 682, 702.) Nor did the *Perry* plaintiffs have the right to seek relief for the injuries of third parties not before the federal court. (See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 263 ["In the ordinary case, a party is denied standing to assert the rights of third persons"]; *Warth v. Seldin* (1975) 422 U.S. 490, 499 ["[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"].) The effect of the *Perry* injunction thus cannot "directly interfere with enforcement of contested [laws] . . . except with respect to the particular federal plaintiffs." (See *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 931.)

Because the *Perry* injunction mandates relief only for the four plaintiffs, and because those plaintiffs have already been married, all relief afforded by the district court's injunction has been provided. As a result, the *Perry* injunction cannot bind Petitioner.

V. The California Constitution and this Court's Case Law Require Petitioner to Enforce State Marriage Laws.

Because Petitioner is not bound by the *Perry* injunction, the California Constitution and this Court's case law require Petitioner to enforce state law defining marriage as the union between one man and one woman. First, article III, section 3.5 of the California Constitution (hereafter section 3.5) forbids executive agencies and officials from "refus[ing] to enforce a statute[] on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional[.]" (Cal. Const., art. III, § 3.5, subd. (a).) Second, this Court's case law, particularly *Lockyer*, recognizes "the established rule that an executive official generally does not have the authority to refuse to

comply with a ministerial duty imposed by [law]." (*Lockyer*, *supra*, 33 Cal.4th at p. 1109.) Both section 3.5 and the principles recognized in *Lockyer* require Petitioner to enforce state law defining marriage as a union between a man and a woman.

A. The California Constitution Requires Petitioner to Enforce State Marriage Laws.

Article III, section 3.5 of the California Constitution provides that "[a]n administrative agency . . . has no power . . . [t]o . . . refuse to enforce a statute[] on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional[.]" (Cal. Const., art. III, § 3.5, subd. (a).)[8] Because the United States Supreme Court's decision in *Hollingsworth v. Perry* vacates the Ninth Circuit's decision (see *Hollingsworth*, *supra*, 2013 WL 3196927, at p. *14), there is no governing appellate decision holding that Proposition 8 is unconstitutional. As a result, section 3.5 requires Petitioner to enforce state law defining marriage as a union between a man and a woman.

Section 3.5 applies generally to state executive agencies and officials. (See, e.g., *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 48-49 [the State Lottery Commission and its "director lack the

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[8] The full text of article III, section 3.5 provides as follows:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> (b) To declare a statute unconstitutional;
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

authority" because of section 3.5 "to cure a facially unconstitutional statute by refusing to enforce it as written"]; *Regents of Univ. of Cal. v. Superior Court of Los Angeles County* (1990) 225 Cal.App.3d 972, 976 ["A trial court declaration that a state statute is unconstitutional does not bind state agencies or officials."]; *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969 ["Administrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional."]; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 780 [the State Controller and the Public Employees' Retirement System Board of Administration "are under a constitutional duty to comply with the contested provisions . . . unless and until an appellate court declares them unconstitutional"].)

Section 3.5 also applies to local executive agencies and officials when they administer state law. This Court left that question open in *Lockyer*. (See *Lockyer*, *supra*, 33 Cal.4th at p. 1085 ["[W]e have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5"].) But "one Court of Appeal decision [*Billig v. Voges*, *supra*, 223 Cal.App.3d at p. 969] contains language directly supporting . . . that article III, section 3.5's reference to administrative agencies properly is interpreted to include local executive officials such as county clerks." (*Lockyer*, *supra*, 33 Cal.4th at p. 1084.) The *Billig* court stated:

> Administrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.) [The relevant elections statute] has not been declared unconstitutional by an appellate court in this state. Consequently, the offices of city clerks throughout the

> state are mandated by the constitution to implement and enforce the statute's procedural requirements. In the instant case, respondent had the clear and present ministerial duty to refuse to process [the] petition because it did not comply with the procedural requirements of [the statute].

(*Billig v. Voges*, *supra*, 223 Cal.App.3d at p. 969.) This discussion of section 3.5, which is admittedly dictum (see *Lockyer*, *supra*, 33 Cal.4th at p. 1085, fn. 17), expressly endorses section 3.5's application to local executive officials like Petitioner. This Court should thus decide the question that it reserved in *Lockyer* and hold that section 3.5 applies to local executive officials like county clerks when they administer state law.

Because section 3.5 applies to county clerks issuing marriage licenses, and because no governing appellate court decision holds that state law defining marriage as the union between one man and one woman is unconstitutional, section 3.5 requires Petitioner to enforce that state marriage law.

B. This Court's Case Law Requires Petitioner to Enforce State Marriage Laws.

This Court in *Lockyer* recognized and applied "the established rule that an executive official generally does not have the authority to refuse to comply with a ministerial duty imposed by [law]." (*Lockyer*, *supra*, 33 Cal.4th at p. 1109.) The public officers whose actions were challenged in *Lockyer* acted "in the absence of [any] judicial determination of unconstitutionality" (*id.* at p. 1082), whereas here a nonbinding federal district court decision insulated from review by Respondents' decision not to appeal concludes that Proposition 8 is unconstitutional. Nevertheless the limitation on executive officials recognized in *Lockyer* applies under these circumstances.

To begin with, a federal district court decision does not establish governing precedent. (See *Starbuck v. City & County of San Francisco* (9th Cir. 1977) 556 F.2d 450, 457, fn. 13 ["The doctrine of stare decisis does not

compel one district court judge to follow the decision of another."]; *People v. Bradley* (1969) 1 Cal.3d 80, 86 ["[A]lthough we are bound by decisions of the United States Supreme Court interpreting the federal Constitution, we are not bound by the decisions of the lower federal courts even on federal questions."].) Because a district court decision does not bind the judicial rulings of other state or federal courts, neither does it dictate the actions of executive officials who are not parties to that case.

Given that a nonbinding federal district court decision does not dictate the actions of executive officials who are not parties to that case, some local officials might decide to follow the law as prescribed, while others, persuaded by the district court's analysis, decline to enforce it. But as this Court explained in *Lockyer*:

> [T]here are thousands of elected and appointed public officials in California's 58 counties charged with the ministerial duty of enforcing thousands of state statutes. If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos . . . .

(*Lockyer*, *supra*, 33 Cal.4th at p. 1108.)

Allowing public officials to decline to enforce governing state law because of a nonbinding federal district court decision encourages legal gamesmanship and manipulation. For instance, in response to a lawsuit challenging a state law, a local official who disapproves of the law might, as the Attorney General did in *Perry*, agree that the law is unconstitutional and decline to appeal an adverse trial court ruling, thereby achieving that official's desired outcome and shielding that result from review. This would allow a public official with no veto power over a law to achieve indirectly what she cannot do directly. (Cf. *Perry v. Brown*, *supra*, 52 Cal.4th at pp. 1126-1127.) Furthermore, if local executive officials were

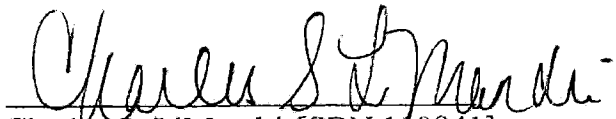
able to decline to enforce a duly enacted law because of a nonbinding district court decision, "it is not difficult to anticipate that private individuals who oppose enforcement of a [law] and question its constitutionality would attempt to influence [executive] officials . . . to exercise—on behalf of such opponents—the officials' newly recognized authority" not to enforce state law. (*Lockyer*, *supra*, 33 Cal.4th at p. 1109.) The law should not encourage this sort of underhanded dealing.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the relief sought in the Verified Petition for Writ of Mandate and Request for Immediate Temporary Stay.

Dated: July 18, 2013

Respectfully submitted,

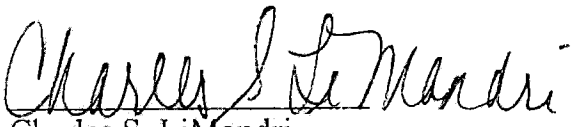


Charles S. LiMandri [SBN 110841]
Teresa L. Mendoza [SBN 185820]
Freedom of Conscience Defense Fund
P.O. Box 9520
Rancho Santa Fe, California 92067
Tel: (858) 759-9948
Fax: (858) 759-9938
E-mail: climandri@limandri.com

Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioner, relying on the word count function of Microsoft Word, the computer program used to prepare this document, certify that the foregoing Petition and Memorandum of Points and Authorities contain 12,038 words, excluding the words in the sections that California Rules of Court, rules 8.204(c)(3) and 8.486(a)(6) instruct counsel to exclude.



Charles S. LiMandri

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

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 of the County of Alameda; and DEAN C LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

PERMANENT INJUNCTION

This action having come before and tried by the court and the court considered the same pursuant to FRCP 52(a), on August 4, 2010, ordered entry of judgment in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors and each of them, Doc #708, now therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.

Dated: August 12, 2010

Cora Klein

Cora Klein, Deputy Clerk
Chief Judge Vaughn R Walker

State of California—Health and Human Services Agency
California Department of Public Health

RON CHAPMAN, MD, MPH
Director & State Health Officer

EDMUND G. BROWN JR.
Governor

June 26, 2013

13-15

TO: COUNTY CLERKS
COUNTY RECORDERS

SUBJECT: RULING BY THE U.S. SUPREME COURT REGARDING SAME-SEX MARRIAGES

On June 26, 2013, the U.S. Supreme Court dismissed the appeal of the decision invalidating Proposition 8, leaving intact the court order enjoining enforcement of Proposition 8. At our request, the Attorney General has provided legal advice regarding the scope of the district court's injunction. In her letter, the Attorney General concludes that the injunction applies statewide, and that county clerks and county recorders in all 58 counties must comply with it. A copy of the Attorney General's letter and the district court's injunction are attached to this notice.

The effect of the district court's injunction is that same-sex couples will once again be allowed to marry in California. But they will not be able to marry until the Ninth Circuit issues a further order dissolving a stay of the injunction that has been in place throughout the appeal process. We do not know when the Ninth Circuit will issue this order, but it could take a month or more. **County clerks and recorders should not issue marriage licenses to same-sex couples until this order is issued.** Further instructions will be issued by this office when additional information becomes available.

If you have any questions regarding this matter, please contact the Birth and Marriage Registration Section at (916) 445-8494.

Original signed by:

Tony Agurto, MPA
State Registrar
Assistant Deputy Director
Health Information and Strategic Planning

Attachments

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

June 3, 2013

The Honorable Edmund G. Brown Jr.
Governor of the State of California
State Capitol, First Floor
Sacramento, CA 95814

RE: *Hollingsworth v. Perry*
Supreme Court of the United States, Case No. 12-144

Dear Governor Brown:

Your office has asked us to analyze the scope of the district court's injunction in *Perry v. Schwarzenegger*, should it go into effect. The scope of the injunction will be significant if the United States Supreme Court dismisses the case and vacates the Ninth Circuit's opinion for lack of jurisdiction, leaving the district court's judgment intact. Specifically, we have analyzed whether the county clerks and registrar/recorders who have responsibility for carrying out state marriage laws are bound by the terms of the injunction, and whether the Department of Public Health (DPH) should so advise them. Under the circumstances of this case, we conclude that the injunction would apply statewide to all 58 counties, and effectively reinstate the ruling of the California Supreme Court in *In re Marriage Cases* (2008) 43 Cal.4th 757, 857. We further conclude that DPH can and should instruct county officials that when the district court's injunction goes into effect, they must resume issuing marriage licenses to and recording the marriages of same-sex couples.

BACKGROUND

On November 4, 2008, California voters approved Proposition 8, which amended the California Constitution to provide: "Only marriage between a man and a woman is valid or recognized in California." (Cal. Const., art. I, § 7.5.) After the election, opponents of Proposition 8 challenged the measure in the California Supreme Court, arguing that it was an impermissible revision of the California Constitution rather than an amendment. (Compare Cal. Const., art. II, § 8, subd. (b); *id.*, art. XVIII, § 3 with *id.*, art. XVIII, § 1.) The California

Supreme Court rejected that challenge, and concluded Proposition 8 was a valid amendment to the California Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 388.)

Before the California Supreme Court issued its decision, two same-sex couples filed a facial challenge against the amendment in federal district court, alleging that Proposition 8 violates the Fourteenth Amendment to the U.S. Constitution and seeking declaratory and injunctive relief. (*Perry v. Schwarzenegger* (N.D. Cal. 2010) 704 F.Supp.2d 921 [*Perry I*].) The suit was brought against Governor Arnold Schwarzenegger, Attorney General Edmund G. Brown Jr., 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 intervened on behalf of the defendants, and the City and County of San Francisco intervened on behalf of the plaintiffs.

In answer to the Complaint, Attorney General Brown admitted that Proposition 8 violated the Fourteenth Amendment to the U.S. Constitution. (*Perry I, supra*, 704 F.Supp.2d at p. 928.) Governor Schwarzenegger, DPH, and the county officials refused to take a position on the merits, but stated that they would continue to enforce Proposition 8 until they were enjoined from doing so or there was a final judicial determination that Proposition 8 was unconstitutional. (*Perry I, supra*, Case No. 3:09-cv-02292-JW, Docket No. 41, 42, 46.) Indeed, Proposition 8 continues to be enforced throughout California. The Proponents mounted a thorough defense of the amendment, which included significant discovery and a two-week bench trial.

After trial, the district court issued extensive findings of fact and conclusions of law. It held that Proposition 8 violated the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. (*Perry I, supra*, 704 F.Supp.2d 921, 1003.) Subsequently, it issued the judgment and injunction at issue, which provides in relevant part:

> Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.

(*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1991, 1194 [*Perry II*].) The Ninth Circuit stayed the injunction pending a final decision in the case. (*Ibid.*)

On the same day the district court filed its findings and conclusions, and before the judgment and injunction issued, the Proponents filed a notice of appeal. (*Perry II*, 628 F.3d at p. 1195.) None of the named defendants appealed, however, raising the question of whether the Ninth Circuit had jurisdiction to hear the appeal under Article III of the U.S. Constitution. Article III limits the power of federal courts to deciding cases and controversies, and requires that a party who invokes federal court jurisdiction have standing. Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of

first instance." (*Arizonans for Official English v. Arizona* (1997) 520 U.S. 43, 64.) The Ninth Circuit concluded that "Proponents' claim to standing depends on Proponents' particularized interests created by state law or their authority under state law to defend the constitutionality of the initiative." (*Perry II, supra*, 628 F.3d at p. 1195.) Accordingly, it certified the state law question to the California Supreme Court. (*Id.* at p. 1193.)

The California Supreme Court agreed to answer the certified question and concluded that "in a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1127 [*Perry III*].) Relying on this decision, the Ninth Circuit concluded that the Proponents had Article III standing, and proceeded to reach the merits of the case. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1074 [*Perry IV*].) On the merits, the Ninth Circuit affirmed the district court, although on narrower grounds.

On December 7, 2012, the United States Supreme Court granted Proponents' petition for certiorari. (*Hollingsworth v. Perry* (2012) 133 S.Ct. 786.) In addition to the question presented by the petition, the Court ordered the parties to address "[w]hether [Proponents] have standing under Article III, § 2 of the Constitution in this case." (*Ibid.*) If the Court concludes that Proponents lack standing, then it will likely vacate the Ninth Circuit's decision, but leave the district court's judgment and injunction intact. (See *FW/PBS, Inc. v. City of Dallas* (1990) 493 U.S. 215, 235–236.) It is this particular outcome that our analysis addresses.

DISCUSSION

Throughout the litigation, all parties have expressed their understanding that if the stay were lifted, the injunction would apply statewide.[1] This is unsurprising because this case presents a facial constitutional challenge to state law. Success in a facial constitutional challenge necessarily means that the court has determined there is no possible constitutional application of the law. For the reasons set forth below, we conclude that so long as county officials receive notice, the federal injunction will apply statewide to all county clerks and registrar/recorders. In addition, we conclude that DPH can and should direct county officials to begin issuing marriage licenses to same-sex couples as soon as the district court's injunction goes into effect.

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[1] *Hollingsworth v. Perry*, United States Supreme Court Case No. 12-144, *Brief of Petitioners* at pp. 17–18 [Proponents referencing the "statewide injunction," and failing to challenge plaintiff-intervenor San Francisco's assertion that "the district court's injunction requires the state defendants responsible for uniform execution of the marriage laws to notify county officials of the injunction and instruct them not to enforce Proposition 8"], *Brief of Respondent City and County of San Francisco* at p. 19, fn. 4, and *Brief of Respondents* at p. 19 ["The district court therefore was within its power to enjoin enforcement of the amendment statewide"].)

The district court enjoined defendants and all persons under their control or supervision "from applying or enforcing Article I, § 7.5 of the California Constitution." The injunction effectively restores California law as it was following *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 857. There, the California Supreme Court struck section 308.5 from the Family Code and the words "between a man and a woman" from Family Code section 300, and held that "the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples." (*Ibid.*)

Because they are defendants, the Alameda Clerk-Recorder and Los Angeles Registrar-Recorder/County Clerk are expressly enjoined from enforcing or applying Proposition 8. Should the district court's injunction go into effect, any qualified same-sex couple who applies will be entitled to obtain a marriage license in those counties. If the Alameda Clerk-Recorder or the Los Angeles Registrar-Recorder/County Clerk were then to refuse to issue a license to a couple because they are of the same sex, he would be "applying or enforcing" Proposition 8 in violation of both the injunction and his ministerial duty to enforce state marriage statutes consistent with *In re Marriage Cases*.[2]

The question is whether the injunction applies to officials from the other 56 counties who are not named defendants. We conclude that in the circumstances particular to enforcement of the state's marriage laws, and under Federal Rule of Civil Procedure 65, the injunction does bind all county officials, as well as the named defendants. Specifically, because the injunction operates directly against the Director and Deputy Director of DPH who are named defendants, and because these two officials supervise and control county officials with respect to their enforcement of the marriage laws, the injunction binds the clerks and registrar/recorders in all 58 counties.

County clerks and recorders are state officials subject to the supervision and control of DPH for the limited purpose of enforcing the state's marriage license and certification laws ("marriage laws"). (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1080.) In *Lockyer*, the California Supreme Court considered the validity of marriage licenses issued to same-sex couples in contravention of Prop. 22, the statutory precursor to Prop. 8 that similarly restricted civil marriage to opposite-sex couples. (*Id.* at p. 1067.) In its opinion, the Court conducted an exhaustive review of California's marriage laws and the role of state and local officials. To marry, a couple must obtain a marriage license from a county clerk, who must

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[2] "[T]he duties of the county clerk and the county recorder . . . properly are characterized as ministerial rather than discretionary. When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage." (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1081–1082.)

ensure that the statutory requirements for marriage are met. (Fam. Code, §§ 350, 354.) The form used by the county clerks is prescribed by DPH. (*Id.*, § 355.) In addition, the individual who solemnizes the marriage must sign and endorse a form that is also prepared by DPH. (*Id.*, § 422.) Through the State Registrar of Vital Statistics (who is also the Director of DPH), DPH registers each marriage that occurs in the state. (See Health & Saf. Code, § 102175 [designating the director the Department of Public Health as the State Registrar]; *id.*, § 102100 [requiring marriages to be registered using a form prescribed by the State Registrar].)

In *Lockyer*, the California Supreme Court recognized that DPH supervises and controls both county clerks and county registrar/recorders in the execution of the marriage laws. It emphasized that in addition to giving DPH the authority to "proscribe and furnish all record forms" and prohibiting any other forms from being used (Health & Saf. Code, § 102200), the Health and Safety Code gives DPH "'*supervisory power over local registrars,*[3] *so that there shall be uniform compliance*'" with state law requirements. (*Lockyer*, *supra*, 33 Cal.4th at p. 1078, quoting Health & Saf. Code, § 102180, emphasis in *Lockyer*.) The California Supreme Court also indicated that DPH has implied authority to similarly supervise and control the actions of county *clerks* when they are performing marriage-related functions. It wrote that although a mayor "may have authority . . . to supervise and control the actions of a *county clerk or county recorder* with regard to other subjects" a mayor lacks that authority when those officials are performing marriage-related functions, which are subject to the control of state officials. (*Id.* at p. 1080, emphasis added [citing *Sacramento v. Simmons* (1924) 66 Cal.App. 18, 24–25 for the proposition that "when state statute designated local health officers as local registrars of vital statistics, 'to the extent [such officers] are discharging such duties they are acting as state officers'"].) The existence of this implied authority was substantiated by the relief ordered. After concluding that San Francisco officials could not disregard Prop. 22, the Court issued a writ of mandate directing "the county clerk and the county recorder of the City and County of San Francisco to take [ ] corrective actions *under the supervision of the California Director of Health Services* [now the Director of the Department of Public Health] *who by statute, has general supervisory authority over the marriage license and marriage certification process.*" (*Id.* at p. 1118, emphasis added.)

The understanding that DPH supervises and controls both county clerks and registrar/recorders in their execution of state marriage laws is also reflected in the California Supreme Court's subsequent decision in *In re Marriage Cases*. After the Court determined that Prop. 22 was invalid under the California Constitution, it instructed the superior court to issue a writ of mandate directing state officials to ensure that county officials enforced the marriage laws consistent with the Court's opinion:

> [A]ppropriate state officials [must] take all actions necessary to effectuate our ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their

[3] The county recorder is the local registrar of marriages. (Health & Saf. Code, § 102285.)

> duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court.

(*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 857.) Although the Court did not identify "the appropriate state officials," it is reasonable to conclude that the Court was referring to the director of DPH, who was a respondent. This language indicates that the California Supreme Court did not doubt that it was appropriate, in order to effectuate relief, to order the state officials responsible for ensuring the uniform application of California's marriage laws to ensure that local officials applied the marriage laws in a manner consistent with its decision.

The district court did essentially the same thing in fashioning the injunction in this case, and its language making the injunction directly applicable to anyone under the "supervision and control" of the defendants echoes that of *Lockyer v. City & County of San Francisco*. The district court, relying on *Lockyer*, understood that in fulfilling their duty to discharge the marriage laws, county clerks and county registrar/recorders are subject to the supervision and control of DPH. For example, in denying the motion of Imperial County to intervene, the district court concluded that DPH, not the Imperial County Board of Supervisors, was responsible for supervising county clerks and recorders for purposes of their role in enforcing the marriage laws. (*Perry v. Schwarzenegger* (N.D. Cal. No. 3:09-cv-02292, Aug. 4, 2010) 2010 U.S. Dist. Lexis 78815 at pp. *14–*15.) The district court concluded that "[t]he state, not the county, thus bears the 'ultimate responsibility' to ensure county clerks perform their marriage duties according to California law." (*Id.* at p. *17, citing *Lockyer*, *supra*, 33 Cal.4th at p. 1080.)

The "supervision and control" that DPH exercises with respect to its enforcement of state marriage laws brings county clerks and registrar/recorders within the scope of the district court's injunction. Federal Rule of Civil Procedure 65(d)(2) provides that, in addition to the parties, an injunction also binds "the parties' officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation with anyone" who are parties or their officers, agents, servants, employees, and attorneys. (Fed. R. Civ. P. 65(d)(2).) Although federal courts may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law, Rule 65 "is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them *or subject to their control*." (*Regal Knitwear Co. v. N.L.R.B.* (1945) 324 U.S. 9, 13–14, emphasis added; *Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.* (7th Cir. 2010) 628 F.3d 837, 848.) As set forth above, when performing their ministerial duty to execute the marriage laws, all 58 county clerks and registrar/recorders are subject to the supervision and control of DPH. Consequently, under Rule 65 the injunction binds them, just as it binds DPH.

To be enforceable against any particular county official not a party to the case, the official must have actual notice of the injunction. (Fed. R. Civ. P. 65 [advisory committee note to the 2007 amendment].) Because the injunction binds county clerks and registrar/recorders who have actual notice of the injunction, we conclude that DPH should notify all county officials

of the injunction and instruct them to comply with it. Although the district court did not order DPH to provide notice of the injunction, the state's strong interest in uniform application of marriage laws supports doing so here. (See, e.g., *Lockyer*, *supra*, 33 Cal.4th at pp. 1078–1079 [noting the "repeated emphasis on the importance of having uniform rules and procedures apply throughout the state to the subject of marriage"].) Additionally, providing notice and instruction would be consistent with both DPH's direct compliance obligations under the injunction and its general supervisory role over county officials who enforce state marriage laws.

There is a substantial risk that county officials who were not named defendants will be unaware or uncertain of their obligations under the district court injunction. In the absence of notice and direction from DPH, this uncertainty will inevitably result in a patchwork of decisions that will confuse the public and threaten the uniformity and coherence of state marriage law. As a practical matter, it is difficult to conceive how two parallel marriage systems could operate simultaneously in California. A federal court has ruled, after a full trial of the evidence, that Proposition 8 is facially unconstitutional. The state's interest in uniformity and rational application of the law will be undermined if same-sex couples are artificially restricted to marrying solely in Los Angeles and Alameda counties—particularly if some county officials are inclined to conclude that same-sex marriages performed in those counties cannot be recognized in the rest of the state. To avoid these risks, DPH should act to notify and inform all counties of their obligation to comply with the injunction.

CONCLUSION

If the United States Supreme Court vacates the decision of the Ninth Circuit for lack of jurisdiction, the district court's judgment and injunction will require all county clerks and recorders throughout the state to cease enforcing or applying Proposition 8. Although the injunction does not expressly require state officials to direct counties to issue marriage licenses to qualified same-sex couples, providing such direction is within DPH's authority, and will be necessary to avoid confusion and ensure uniform application of the state's marriage laws.

Sincerely,

KAMALA D. HARRIS
Attorney General

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health & 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; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

No. 10-16696

D.C. No. 3:09-cv-02292-VRW

ORDER

Defendants,

HAK-SHING WILLIAM TAM,

Intervenor-Defendant,

and

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Intervenor-Defendants - Appellants.

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

Plaintiffs - Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Intervenor-Plaintiff - Appellee,

v.

EDMUND G. BROWN, Jr., in his official capacity as Governor of California; KAMALA D. HARRIS, in her official capacity as Attorney General of California;

No. 11-16577

D.C. No. 3:09-cv-02292-JW

MARK B. HORTON, in his official capacity as Director of the California Department of Public Health & 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; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

HAK-SHING WILLIAM TAM,

Intervenor-Defendant,

and

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Intervenor-Defendants - Appellants.

Before: **REINHARDT, HAWKINS**, and **N.R. SMITH**, Circuit Judges.

The stay in the above matter is dissolved effective immediately.

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July 17, 2013

HUFF POST POLITICS

Proposition 8 Gay Marriage Hold Lifted By Appeals Court, California Begins Issuing Licenses

By LISA LEFF 06/28/13 11:38 PM ET EDT AP

SAN FRANCISCO — The four plaintiffs in the U.S. Supreme Court case that overturned California's same-sex marriage ban tied the knot Friday, just hours after a federal appeals court freed gay couples to obtain marriage licenses in the state for the first time in 4 1/2 years.

Attorney General Kamala Harris presided at the San Francisco City Hall wedding of Kris Perry and Sandy Stier as hundreds of supporters looked on and cheered. The couple sued to overturn the state's voter-approved gay marriage ban along with Paul Katami and Jeff Zarrillo, who married at Los Angeles City Hall 90 minutes later with Mayor Antonio Villaraigosa presiding.

"By joining the case against Proposition 8, they represented thousands of couples like themselves in their fight for marriage equality," Harris said during Stier and Perry's brief ceremony. "Through the ups and downs, the struggles and the triumphs, they came out victorious."

Harris declared Perry, 48, and Stier, 50, "spouses for life," but during their vows, the Berkeley couple took each other as "lawfully wedded wife." One of their twin sons served as ring-bearer.

Although the couples fought for the right to wed for years, their nuptials came together in a flurry when a three-judge panel of the 9th U.S. Circuit Court of Appeals issued a brief order Friday afternoon dissolving a stay it had imposed on gay marriages while the lawsuit challenging the ban advanced through the courts.

Sponsors of California's same-sex marriage ban, known as Proposition 8, also were caught off-guard and complained that the San Francisco-based 9th Circuit's swift action made it more difficult for them to ask the Supreme Court to reconsider its decision.

Under Supreme Court rules, the losing side has 25 days to ask the high court to rehear the case, and Proposition 8's backers had not yet announced whether they would do so.

"The resumption of same-sex marriage this day has been obtained by illegitimate means. If our opponents rejoice in achieving their goal in a dishonorable fashion, they should be ashamed," said Andy Pugno, general counsel for a coalition of religious conservative groups that sponsored the 2008 ballot measure.

"It remains to be seen whether the fight can go on, but either way, it is a disgraceful day for California," he said.

The Supreme Court ruled 5-4 Wednesday that Proposition 8's sponsors lacked standing in the case after Harris and Gov. Jerry Brown, both Democrats, refused to defend the ban in court.

The decision lets stand a trial judge's declaration that the ban violates the civil rights of gay Californians and cannot be enforced.

The Supreme Court said earlier this week that it would not finalize its ruling in the Proposition 8 case "at least" until after the 25-day period, which ends July 21.

The appeals court was widely expected to wait until the Supreme Court's judgment was official. Ninth Circuit spokesman David Madden said Friday that the panel's decision to act sooner was "unusual, but not unprecedented," although he could not recall another time the appeals court acted before receiving an official judgment from the high court.

The panel – Judge Stephen Reinhardt, who was named to the 9th Circuit by President Jimmy Carter and has a reputation as the court's liberal lion; Judge Michael Daly Hawkins, an early appointee of President Bill Clinton; and Judge Randy Smith, the last 9th Circuit judge nominated by President George W. Bush – decided on its own to lift the stay, Madden said.

Its order read simply, "The stay in the above matter is dissolved effective immediately."

Vikram Amar, a constitutional law professor at the University of California, Davis, said the Supreme Court's 25-day waiting period to make its decisions final isn't binding on lower courts.

"Some people may think it was in poor form, But it's not illegal," Amar said. "The appeals court may have felt that this case has dragged on long enough."

The same panel of judges ruled 2-1 last year that Proposition 8 was unconstitutional, but it kept same-sex marriages on hold while the case was appealed. But when the Supreme Court decided Proposition 8's backers couldn't defend the ban, it also wiped out the 9th Circuit's opinion.

Proposition 8 passed with 52 percent of the vote in November 2008, 4 1/2 months after same-sex marriages commenced in California the first time. The Williams Institute, a think tank at the University of California, Los Angeles, estimates 18,000 couples from around the country got married in the state during that window.

Shortly after the appeals court issued its order Friday, the governor directed California counties to resume performing same-sex marriages. A memo from the Department of Public Health said "same-sex marriage is again legal in California" and ordered county clerks to comply by making marriage licenses available to gay couples.

Given that word did not come down from the appeals court until mid-afternoon, most counties were not prepared to stay open late to accommodate potential crowds. The clerks in a few counties announced that they would stay open a few hours late Friday before reopening Monday.

A jubilant San Francisco Mayor Ed Lee announced that same-sex couples would be able to marry all weekend in his city, which is hosting its annual gay pride celebration.

Associated Press writers Jason Dearen, Paul Elias and Mihir Zaveri contributed to this story.

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California Attorney General

KAMALA D

KamalaHarris.org

Kamala Harris

KamalaHarris

If a CA county decides to violate the law and not enforce this injunction, CA will take legal action. -Prop8 - MarriageEquality

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