IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor-Appellee,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants,

DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors-Appellants.

No. 10-16696

Argued December 6, 2010

U.S. District Court
Case No. 09-cv-02292 VRW

PLAINTIFF-INTERVENOR-APPELLEE CITY AND COUNTY OF SAN FRANCISCO'S JOINDER IN MOTION TO VACATE STAY PENDING APPEAL

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

The Honorable Vaughn R. Walker

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In a motion filed yesterday, plaintiffs ask this Court to lift its stay of the district court's judgment pending appeal. As plaintiffs demonstrate, the Proposition 8 Proponents cannot make a strong showing that they are likely to succeed on the merits of their appeal, there is no harm to them from lifting the stay, and there is grave and irreparable harm that is inflicted on lesbian and gay couples and their families by California's denial of the right to marry. The City and County of San Francisco joins plaintiffs' motion.

But the City writes separately to raise an additional ground for lifting the stay immediately: in certifying the standing question to the California Supreme Court, this Court acknowledged that its jurisdiction is, at a minimum, uncertain. Before granting a stay, federal courts "must make *certain* that an adequate basis exists for the exercise of federal power." *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (emphasis added). This rule applies even if a stay would prevent someone from being put to death. *Id.* This Court therefore lacks jurisdiction to maintain its stay.

Federal courts are courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994), and "[t]hey possess only that power authorized by Constitution and statute." *Id.* The burden of establishing federal jurisdiction rests with the party invoking it. *See DaimlerChrysler v. Cuno*, 547 U.S. 332, 342 (2006). Here, after the district court entered judgment, the Proponents filed an emergency motion in this Court asserting their standing to appeal the judgment either on their own behalf or on behalf of the State of California, Doc. 4-1 at 19-23, and claiming that the State would suffer irreparable harm if one of its laws were enjoined. *Id.* at 66. This Court granted the stay but ordered expedited briefing, including a discussion of whether " this appeal should not be dismissed for lack of

Article III standing." Doc. 14 at 2. Following briefing and oral argument, the Court certified a question to the California Supreme Court, noting that it "request[ed] clarification in order to determine whether [it has] jurisdiction to decide this case." *Id.* at 8. With certification of that issue, the Court made plain that the Proponents have not to date met their burden to establish this Court's jurisdiction. As a result, they are not entitled to a continuing stay of the district court's judgment.

"Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1868). "'The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Thus, "[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id*. at 101-02. Here, because this Court's jurisdiction has not been established—indeed, turns on an unsettled question of California law—the Court cannot issue an order resting on an evaluation of the parties' relative likelihood of success on the merits, as a stay order necessarily does.

As this Court explained in *Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993), "[a] grant of a stay is an exercise of judicial power, and [federal courts] are not authorized to exercise such power on behalf of a party who has not first established standing." *Accord Demosthenes*, 495 U.S. at 737 ("before granting a stay, . . . federal courts must make certain that an adequate basis exists for the exercise of federal power."); *Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 895 (9th Cir. 2004) ("As [the petitioner] lacks standing, we also lack jurisdiction to stay the

execution."); *see also Nonella v. United States*, 16 Cl. Ct. 290 (1989) ("'A court may not in any case, even in the interest of justice, extend its jurisdiction where none exists.' . . . Absent jurisdiction, the court simply has no power to grant a stay") (quoting *Johns-Manville v. United States*, 855 F.2d 1556, 1565 (Fed.Cir.1988)); *In re Sunset Sales, Inc.*, 222 B.R. 914, 917 (B.A.P. 10th Cir. 1998) *aff'd*, 195 F.3d 568 (10th Cir. 1999) (where mandate had issued, "it [was] impossible to stay the issuance of the mandate" because jurisdiction had passed).

As to whether the court may grant plaintiff a stay in the absence of jurisdiction over the case, the answer is clearly negative. *Brewer*, *Demosthenes*, and *Butko* arise in the habeas corpus context, and each holds that a federal appellate court lacks the power even to stay an imminent execution if a putative next friend invoking the court's habeas jurisdiction has not established the prerequisites of next friend status and met the burden of showing jurisdiction. If, as these cases hold, a federal appellate court may not enter a stay unless its jurisdiction is affirmatively established even where the consequence of denying a stay may be a wrongful execution, then it certainly cannot have that power where the only claimed injury is an unsubstantiated and hypothetical set of unspecified social ills that Proponents fear may somehow befall them and the rest of society if lesbians and gay men are allowed to marry.

Nor is this a case where a stay is necessary to maintain the status quo to preserve jurisdiction. Should it happen that Proponents are eventually determined to have standing to maintain an appeal, the fact that some lesbian and gay citizens of California have married while the appeal was pending would not impair this Court's ability to review the district court's judgment any more than the 18,000 marriages of same-sex couples that occurred in California before Proposition 8 was enacted have impaired any court's ability to test Proposition 8 against constitutional

standards. Because this Court has held that it requires "an authoritative determination by the [California Supreme] Court" of Proponents' rights and interests under California law "before [it] can determine whether Proponents have standing to maintain this appeal," Doc. 14 at 17, the City respectfully submits that the Court presently lacks jurisdiction to maintain a stay of the judgment.

As the Supreme Court has held, when jurisdiction is unsettled a stay of judgment cannot be maintained. Here, this Court's certification order makes plain that Proponents have not, to date, met their burden. The stay should be lifted unless and until Proponents establish that this Court has the power to hear their appeal.

Dated: February 24, 2011

Respectfully submitted,

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