NO. 10-16696

ARGUED DECEMBER 6, 2010
(CIRCUIT JUDGES STEPHEN REINHARDT, MICHAEL HAWKINS, & N.R. SMITH)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN PERRY, et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants,

and

DENNIS HOLLINGSWORTH, et al.,
Defendant-Intervenors-Appellants.

On Appeal from United States District Court for the Northern District of California
Civil Case No. 09-CV-2292 JW (Honorable James Ware)

APPELLANTS' OPPOSITION TO MOTION TO VACATE STAY PENDING APPEAL

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ARGUMENT

In granting Proponents' motion for a stay pending appeal, this Court necessarily determined that a stay was warranted under the "sound legal principles" governing the exercise of its discretion. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (quotation marks omitted). "[T]hose legal principles have been distilled into consideration of four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " *Id*. (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). In granting the stay, this Court thus necessarily held that Proponents had demonstrated a sufficient likelihood of success on the merits and irreparable injury absent a stay, and that the balance of equities favored a stay.

Plaintiffs acknowledge that "vacatur of this Court's decision to grant a stay pending appeal" must be warranted by "materially changed circumstances." Pls. Mot. Vacate 4 (citing *SEACC v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006)). Indeed, binding precedent makes clear that in considering Plaintiffs' motion to vacate the stay, this Court will not revisit the "propriety of the underlying order" granting the stay. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Rather, this Court must "limit [its] review to the new material

presented with respect" to Plaintiffs' motion, and that Plaintiffs "bear[] the burden of establishing that a significant change in facts or law warrants" vacating the stay. *Id.*; *see also SEACC*, 472 F.3d at 1101 (party seeking to vacate stay "must demonstrate that facts have changed sufficiently since the court issued its order") (citing *Sharp*, 233 F.3d at 1170). While plaintiffs pay lip service to this demanding standard, their motion is in large part little more than a thinly disguised effort to relitigate the stay.

In all events, Plaintiffs plainly fail to meet the burden established by this Court's precedents, for, the three "new developments" they cite neither singularly nor collectively constitute "a significant change in facts or law" that would warrant upsetting this Court's sound decision to stay the district court's judgment pending appeal.

1. The Obama Administration's decision to abandon its purported defense of Section 3 of the federal Defense of Marriage Act ("DOMA"), as applied to same-sex couples who are legally married under state law, does nothing to undermine Proponents' likelihood of success on the merits in this appeal.

As an initial matter, Section 3 of DOMA defines marriage only for purposes of *federal* law, establishing that "the word 'marriage' means only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. And according to the Department of Justice, the Administration takes the position only

that this provision is unconstitutional "as applied to legally married same-sex couples." Attorney General Letter 5 (attached as Ex. A to Pls. Mot. Vacate). But whether this provision may constitutionally be applied to same-sex couples who are legally married under state law is a different question than whether a *state* must redefine marriage to include same-sex couples. Indeed, the Administration has not questioned the constitutionality of Section 2 of DOMA, which provides that no state shall be required to give effect to a same-sex marriage recognized under the laws of another state. *See* 28 U.S.C. § 1738C.

Further, the Administration's determination to continue enforcing Section 3 of DOMA "unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality," Attorney General's Letter 5, strongly supports the equitable balance this Court struck in entering the stay in this case. Far from undermining the stay, the Obama Administration's decision to maintain the status quo and not disrupt the operation of Section 3 of DOMA, which has been duly enacted into law, confirms the soundness of this Court's conclusion that Proposition 8 likewise should not be precipitately suspended prior to a final judicial interpretation that such action is constitutionally required.[1]

[1] It is plain that the Administration does not regard the as yet unreviewed district court decision holding Section 3 of DOMA unconstitutional in *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) as "a

Finally, the Attorney General's letter explaining the Administration's about-face *underscores* the likelihood that Proponents will prevail in this Court. The Administration's conclusion that Section 3 is unconstitutional explicitly rests on its belief that the provision should be subject to heightened equal protection scrutiny and was sparked by lawsuits challenging Section 3 of DOMA filed in jurisdictions where the level of scrutiny applicable to classifications based on sexual orientation is an open question. *See* Attorney General Letter 1, 5. As Attorney General Holder noted: "Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the *binding* standard that has applied in those cases." *Id*. at 1-2 (emphasis added). Tellingly, *this Court* established the "binding standard" of rational basis review in four of the six cases identified by the Administration. *Id*. at 2 n.2. The Administration's letter thus supports Proponents' argument that this Court's decision in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), mandates the application of rational-basis scrutiny to Plaintiffs' Equal Protection claim.[2]

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definitive verdict against the law's constitutionality" by the judicial branch. Nor can the still unreviewed district court's decision in this case be viewed as "a definitive verdict against" Proposition 8's constitutionality.

[2] The Obama Administration also rejects Plaintiffs' claim that *High Tech Gays* fails to survive the overruling of *Bowers v. Hardwick*, 478 U.S. 186 (1986),

In any event, even if this Court's precedent did not already compel the answer to this question, the Administration's view on the standard of review applicable to laws thought to classify on the basis of sexual orientation is plainly not binding authority, and the Attorney General's weakly reasoned letter adds nothing of consequence to the arguments for and against heightened scrutiny set forth in the parties' papers in this case.

2. This Court's order certifying to the California Supreme Court the question of the State-law predicates for Proponents' standing to appeal likewise does not in any way indicate that Proponents' likelihood of success on the merits has somehow decreased from when this Court granted their stay application.[3] Indeed, in the same order in which it granted the stay motion this Court directed Proponents "to include in their opening brief a discussion of why this appeal should not be dismissed for lack of Article III standing." Order of Aug. 16, 2010, Doc. No. 14 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997)) .

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by *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* Attorney General 3 & n.4 (excluding *High Tech Gays* from list of cases that "reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate—a line of reasoning that does not survive the overruling of *Bowers*"); *id*. at 3 & n.5 (discussing additional aspects of *High Tech Gays* analysis).

[3] In addition, this Court's certification order indicates that "further proceedings in this court are stayed pending final action by the Supreme Court of California." Certification Order, Doc. No. 292 at 19. It is thus unclear whether Plaintiffs' motion is even procedurally proper at this time.

Furthermore, like Attorney General Holder's letter addressing the Administration's position on Section 3 of DOMA, this Court's certification order only serves to underscore the strength of Proponents' case. As the Court explained, "the Governor has no veto power over initiatives," and it is thus "not clear whether he may, consistent with the California Constitution, achieve through a refusal to litigate what he may not do directly: effectively veto the initiative by refusing to defend it or appeal a judgment invalidating it." Certification Order, Doc. No. 292 at 12.[4] The Court recognized, moreover, that "the [California] Constitution's purpose in reserving the initiative power to the People would appear to be ill-served by allowing elected officials to nullify either proponents' efforts to propose statutes and amendments to the Constitution or the People's right to adopt or reject such propositions," *id.* at 12-13 (quotation marks omitted); that the California courts "have a solemn duty to jealously guard [the initiative] right, and to prevent any action which would improperly annul that right," *id*. at 11 (quotation marks and citations omitted), and that "all the cases cited underscore the significant interest initiative proponents have in defending their measures in the courts," *id.* at 17; *see also* Concurrence to Certification Order, Doc. No. 294 at 9 (Reinhardt, J.) (explaining that "Proponents advance a strong argument" on the certified question). Yet "[r]ather than rely[ing] on [its] own understanding of th[e]

[4] Page citations for docketed entries refer to the docket pagination marked at the top of each page.

balance of power under the California Constitution," this Court chose to certify the question to the California Supreme Court to obtain "an authoritative statement of California law that would establish proponents' rights to defend the validity of their initiatives." Certification Order, Doc. No. 292 at 13, 17. In short, though the certification order declines to definitively resolve the state-law predicates of Proponents' standing and instead requests an authoritative ruling from the California Supreme Court on these issues, this Court's order plainly recognizes the strength of Proponents' arguments under California law.[5]

The City and County of San Francisco's argument that this Court lacks authority to issue a stay until it definitively determines that Proponents have standing is likewise unavailing. San Francisco relies primarily on a handful of cases involving unsuccessful attempts by third parties to establish next-friend standing to seek relief from death sentences on behalf of individuals who did not wish such relief. *See Demosthenes v. Baal*, 495 U.S. 731, 733 (1990); *Dennis v. Budge*, 378 F.3d 880, 882 (9th Cir. 2004); *Brewer v. Lewis*, 989 F.2d 1021, 1024

[5] Though the current Attorney General supports Plaintiffs' motion to vacate the stay, her predecessor plainly recognized the force of Proponents' arguments for standing. Indeed, in successfully opposing Proponents' motion for realignment, the Attorney Generally forcefully argued that "[t]here is also an actual controversy between the Plaintiffs and San Francisco, on the one hand, and the Proponents on the other, about whether Proposition 8 violates the Due Process and Equal Protection clauses of the Fourteenth Amendment," and that "[t]his adversity of interests satisfies the constitutional 'case or controversy' limitation on federal jurisdiction found in Article III, section 2 of the Constitution." *Perry v. Schwarzenegger*, No. 09-2292 (N.D. CA) (Doc. No. 239 at 10).

(9th Cir. 1993). To establish next-friend standing, a petitioner must demonstrate, *inter alia*, "that the real party in interest is unable to litigate his own cause due to mental incapacity." *Demosthenes*, 495 U.S. at 734.

In the cases on which San Francisco relies, the courts denied stays not because the issue of standing had not yet been resolved, but because they definitively determined that standing was lacking. *See id*. at 737 (finding that "an adequate basis" for the exercise of federal power "was plainly lacking" and that "there was no evidentiary basis" for the Court of Appeals' contrary conclusion); *Dennis*, 378 F.3d at 895 ("As Butko lacks next friend standing, we lack jurisdiction to issue a stay."); *Brewer*, 989 F.2d at 1025 (holding that "[t]he district court held a hearing . . . for the purpose of determining whether petitioner has standing as next friend of John Brewer, and correctly concluded she does not"); *id*. at 1027 ("we affirm the judgment of the district court and dismiss Ms. Brewer's appeal for lack of jurisdiction").

By contrast, where this Court found that a would-be next-friend petitioner had made a substantial showing that the individual she sought to represent might well be incompetent, this Court granted a stay to allow for an evidentiary hearing to resolve that issue. *Vargas v. Lambert*, 159 F.3d 1161, 1171 (9th Cir. 1998). In so holding the Court rejected the argument – similar to that raised by San Francisco here – that it must definitively find that next-friend standing was proper

before it could grant a stay. As this Court explained, "No authority requires that this court determine on the merits that Sagastegui is not competent before we can grant a stay of execution to allow the state to conduct an evidentiary hearing to determine if he is competent." *Id*. at 1167. Given the strength of Proponents' arguments for standing, this court likewise plainly has the authority to stay the district court's judgment while a separate proceeding resolves the state-law predicates of Proponents' arguments.

More generally, San Francisco's claim that this Court lacks jurisdiction to issue a stay until it definitely determines that Proponents have standing contradicts well-settled jurisdictional first principles. For one thing, "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *see also United States Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79 (1988) (noting "the inherent and legitimate authority of the court to issue process and other binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction"). For another, an appellate court plainly has jurisdiction – and an obligation – to determine whether jurisdiction was proper in the lower court even if the appellant lacks standing to appeal. *See Arizonans*, 520 U.S. at 73.

Indeed, if this Court ultimately were to vacate its stay because Proponents lack standing, it would be necessary to vacate the district court's judgment as well

because that court exceeded its jurisdiction by granting relief that extends beyond the four plaintiffs that were before it. *See* Prop. Br., Doc. No. 21 at 47-49; Prop. Reply Br., Doc. No. 243-1 at 18-24. It plainly would be improper to lift the stay of the district court's judgment on the basis of a theory that would ultimately require vacatur of that judgment, especially given that the most likely result of lifting the stay would not be the marriage of the plaintiffs (who have never stated that they would marry during the pendency of the appeal if the stay were lifted, *see infra* at 11) but the marriage of other gay couples who are strangers to this lawsuit and would not be entitled to relief under a properly limited district court judgment. And while, for the reasons demonstrated above, San Francisco's jurisdictional arguments do not support vacating the stay, they certainly counsel against allowing the statewide disregard of a constitutional provision duly enacted by the People of California on the strength of an unreviewed district court ruling that almost certainly exceeded that court's jurisdiction.

3. Nor does the California Supreme Court's acceptance of this Court's certification request constitute "a significant change in fact or law" warranting vacatur of this Court's stay. To be sure, that decision, which itself expedites the California Supreme Court's consideration of the issues certified, may have increased the time that it will take for this already highly expedited appeal ultimately to be resolved. But that fact is, obviously, an inescapable consequence

of this Court's successful certification request.[6] Moreover, Plaintiffs (1) were content to let six months pass from the passage of Proposition 8 before even filing this lawsuit while the California Supreme Court considered a state-law challenge to Proposition 8 in *Straus v. Horton*, 207 P.3d 48 (2009); (2) did not appeal the district court's denial of their preliminary injunction motion; (3) opted to go to trial instead of seeking summary judgment, even though every other constitutional challenge to the traditional definition of marriage, save one, has been decided without trial, *see* Prop. Br., Doc. No. 21 at 55 n.15; (4) did not seek review of this Court's initial stay order; and (5) allowed nearly two months to pass from this Court's certification order before filing their motion to vacate the stay. Plaintiffs' complaint that they simply cannot await the expedited, though orderly, disposition of this appeal thus rings hollow. Pl. Mot. Vacate 9.

Furthermore, lifting the stay would likely not advance Plaintiffs' wedding date by a single day, for they have steadfastly refused to state that they would get married during the pendency of this appeal if permitted to do so. Indeed, given their view (which we believe mistaken) that same-sex marriages performed during the pendency of this appeal would remain valid even if Proposition 8 was

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[6] Ironically, though Plaintiffs and their supporters, including amicus Equality California, now bemoan the effect of this Court's successful certification request, the use of the certification procedure in this case was suggested – and may have been *first* suggested – by Equality California itself. *See* Amicus Br. of Equality California, Doc. No. 200-1 at 25 n.2.

ultimately upheld as constitutional, *see* Pl. Stay Opp., Doc. No. 9 at 35, it is highly unlikely that Plaintiffs would risk requiring the vacatur of the district court's judgment by marrying and potentially mooting the case, *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). And regardless of whether Plaintiffs are willing to take that risk, this Court certainly should not afford them the option of potentially mooting the case in this manner and so evading appellate review.

In their papers supporting their successful motion for a stay pending appeal, Proponents demonstrated that irreparable injury was certain absent a stay pending appeal, and that the public interest favored a stay. *See* Proponents' Mot. Stay, Doc. No. 4-1 at 84-91; Proponents' Reply Supp. Mot. Stay, Doc. No. 11 at 14-15. Plaintiffs' arguments disputing the irreparable injury, and harms to the public interest, that would result from lifting the stay amount to nothing more than improper attempts to relitigate issues necessarily decided against them when this Court granted the stay in the first instance. Certainly Plaintiffs have failed to articulate how the threat of irreparable injury, and harm to the public interest, from *not* staying the district court's judgment has in any way decreased since the stay was entered, and plainly none of the so called "materially changed circumstances" they invoke has in any way reduced this threat.

Indeed, this Court's certification order brings into sharp focus the harm to California's initiative process that would flow from the precipitate implementation of the district court's unreviewed, likely erroneous, and plainly overbroad judgment. As this Court recognized, California regards the "the sovereign people's initiative power" as "a fundamental right," indeed, "one of the most precious rights of [California's] democratic process." Certification Order, Doc. No. 292 at 11 (quotation marks omitted). This Court likewise recognized that California Courts "have a solemn duty to jealously guard that right, and to prevent any action which would improperly annul that right." *Id*. (quotation marks and citations omitted). Rather than deciding for itself issues of State law that go to the heart of the integrity of California's initiative process, this Court sought the California Supreme Court's assistance in addressing those issues, assistance that the California Supreme Court has now agreed to provide. Precipitously suspending operation of Proposition 8 while the California Supreme Court is at this Court's request considering issues of profound importance to the State's initiative process would thus mark a sharp departure from the respect this Court's certification order evinces for the initiative process and California's legal system generally and from the principle that it is always "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful

independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (quotation marks omitted).

CONCLUSION

For these reasons, Plaintiffs motion should be denied.

Dated: March 7, 2011

Respectfully Submitted,

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9th Circuit Case Number(s) 10-16696

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