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10  
11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

14 KRISTIN M. PERRY, et al., ) Case No. 09-CV-02292 VRW  
15 Plaintiffs, )  
16 CITY AND COUNTY OF SAN ) **THE ADMINISTRATION'S OPPOSITION**  
FRANCISCO, ) **TO DEFENDANT-INTERVENORS'**  
17 Plaintiff-Intervenor, ) **MOTION FOR STAY PENDING APPEAL**  
18 ) No Hearing Date Set  
v. ) The Honorable Vaughn R. Walker  
19 )  
20 ARNOLD SCHWARZENEGGER, in his )  
official capacity as Governor of California, )  
21 et al., )  
22 Defendants, )  
23 and )  
24 PROPOSITION 8 OFFICIAL )  
PROPOSERS DENNIS )  
25 HOLLINGSWORTH, et al., )  
26 Defendant-Intervenors. )

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1 I.

2 INTRODUCTION

3 Defendants Arnold Schwarzenegger, in his official capacity as Governor of  
4 California, Mark B. Horton, in his official capacity as Director of the California  
5 Department of Public Health and State Registrar of Vital Statistics, and Linette Scott, in  
6 her official capacity as Deputy Director of Health Information & Strategic Planning for  
7 the California Department of Public Health (collectively, “the Administration”), oppose  
8 defendant-intervenors’ “Motion for Stay Pending Appeal.” Doc #705.

9 From the outset, the Administration has urged the Court to resolve the  
10 important constitutional questions at issue in this case as expeditiously as possible. Now,  
11 after extensive discovery, a lengthy trial, thorough briefing, and development of a  
12 complete evidentiary record, the Court has done so. After cataloging the evidence and  
13 making detailed factual findings and legal conclusions, the Court has enjoined  
14 enforcement of Proposition 8 and, in effect, ordered California to resume issuing marriage  
15 licenses in a gender-neutral manner, as had been done before Proposition 8 went into  
16 effect. In doing so, the Court has fulfilled its constitutional duty to determine  
17 fundamental questions of due process, equal protection, and freedom from discrimination.

18 The Administration believes the public interest is best served by permitting  
19 the Court’s judgment to go into effect, thereby restoring the right of same-sex couples to  
20 marry in California. Doing so is consistent with California’s long history of treating all  
21 people and their relationships with equal dignity and respect. Conversely, the  
22 Administration submits that staying the Court’s judgment pending appeal is not necessary  
23 to protect any governmental or public interest. As the Court has pointed out, California  
24 has already issued 18,000 marriage licenses to same-sex couples without suffering any  
25 resulting harm. Government officials can resume issuing such licenses without  
26 administrative delay or difficulty. For these reasons, the Administration respectfully  
27 requests that the Court deny defendant-intervenors’ motion for stay.

1 **II.**

2 **ANALYSIS**

3 **A. A Stay Pending Appeal Is an Extraordinary Remedy, and**  
4 **Defendant-Intervenors Carry a Heavy Burden to Demonstrate**  
5 **that a Stay Is Warranted Here**

6 Federal Rule of Civil Procedure 62(c) permits a court to “suspend . . . an  
7 injunction” pending appeal. But, as the United States Supreme Court recently observed,  
8 “A stay is an ‘intrusion into the ordinary processes of administration and judicial review,’  
9 and accordingly ‘is not a matter of right, even if irreparable injury might otherwise result  
10 to the appellant.’” *Nken v. Holder*, \_\_ U.S. \_\_, 129 S. Ct. 1749, 1757 (2009) (citation  
11 omitted). “It is instead an ‘exercise of judicial discretion,’ and ‘the propriety of its issue  
12 is dependent upon the circumstances of the particular case.’” *Id.* at 1760. Thus, “[t]he  
13 party requesting a stay bears the burden of showing that the circumstances justify an  
14 exercise of that discretion.” *Id.* at 1761. The moving party’s burden is not a light one; on  
15 the contrary, “granting a stay pending appeal is ‘always an extraordinary remedy, and . . .  
16 the moving party carries a heavy burden to demonstrate that the stay is warranted.’”  
17 *McCammon v. United States*, 584 F. Supp. 2d 193, 197 (D.D.C. 2008) (denying stay); *see*  
18 *also Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973) (denying stay; “The relief  
19 here requested has been termed an extraordinary remedy.”); *Grutter v. Bollinger*, 137 F.  
20 Supp. 2d 874, 876 (E.D. Mich. 2001) (denying stay; “Because the burden of meeting this  
21 standard is a heavy one, more commonly stay requests will not meet this standard and  
22 will be denied.”).

23 As defendant-intervenors have noted, courts employ a four-part test in  
24 determining whether the balance of equities favors a stay pending appeal, considering

- 25 (1) whether the stay applicant has made a strong showing that  
26 he is likely to succeed on the merits; (2) whether the applicant  
27 will be irreparably injured absent a stay; (3) whether issuance  
28

1 of the stay will substantially injure other persons interested in  
2 the proceeding; and (4) where the public interest lies.<sup>1</sup>

3 *Nken*, 129 S. Ct. at 1761. The Administration will leave it for others to address the first  
4 three factors. But, as to the fourth factor, the Administration submits that the public  
5 interest lies in allowing the Court’s judgment to go into effect without delay.

6 **B. Denying the Extraordinary Relief of a Stay, and Allowing the**  
7 **Court’s Judgment to Take Effect, Furthers the Public Interest**  
8 **and Does Not Burden the State**

9 **1. Allowing the Court’s Judgment to Go Into Effect Furthers**  
10 **the Public Interest in Ensuring Equality for All**  
11 **Californians**

12 Allowing the Court’s judgment to take effect serves the public interest.

13 Following a thorough evaluation of the evidence, the Court has concluded that plaintiffs  
14 “demonstrated by overwhelming evidence that Proposition 8 violates their due process  
15 and equal protection rights and that they will continue to suffer these constitutional  
16 violations until state officials cease enforcement of Proposition 8.” Pretrial Proceedings  
17 and Trial Evidence, Credibility Determinations, Findings of Fact, Conclusions of Law,  
18 and Order (“Order”) at 136:2-6. Upholding the rights and liberties guaranteed by the  
19 federal Constitution is of paramount importance to the American public. *See Preminger*  
20 *v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (“all citizens have a stake in upholding the  
21 Constitution”); *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (“it is always in the

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21 <sup>1</sup> As the Supreme Court has noted, although there is “substantial overlap  
22 between these and the factors governing preliminary injunctions,” the two are not “one  
23 and the same.” *Nken*, 129 S. Ct. at 1761. Rather, “the balancing process is not identical  
24 due to the different procedural posture in which each judicial determination arises.”  
25 *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153  
26 (6th Cir. 1991). “Upon a motion for a preliminary injunction, the court must make a  
27 decision based upon ‘incomplete factual findings and legal research.’” *Id.* “Conversely,  
28 a motion for a stay pending appeal is generally made after the district court has  
considered fully the merits of the underlying action and issued judgment, usually  
following completion of discovery.” *Id.* Thus, parties seeking a stay pending appeal face  
a heavier burden than those seeking a preliminary injunction, as the former “will have  
greater difficulty in demonstrating a likelihood of success on the merits.” *Id.*

1 public interest to prevent the violation of a party’s constitutional rights”); *Planned*  
2 *Parenthood Assoc. v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (“the public is  
3 certainly interested in the prevention of enforcement of ordinances which may be  
4 unconstitutional”).

5 Thus, federal courts have consistently recognized a strong public interest in  
6 eradicating unlawful discrimination and its detrimental consequences. *See, e.g.*,  
7 *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1019 (6th Cir. 1994)  
8 (permitting “vestiges of past discrimination” to linger is “detrimental to the public  
9 interest”); *Oliver v. Kalamazoo Bd. of Educ.*, 548 F. Supp. 646, 649-50 (W.D. Mich.  
10 1982) (noting strong public interest in “eliminating the vestiges of past discrimination”).  
11 And, in particular, courts have held that the public’s interest lies squarely on the side of  
12 policies eliminating discrimination based on sexual orientation. *See Colin ex rel. Colin v.*  
13 *Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000) (seeking to “end  
14 discrimination on the basis of sexual orientation” is “consistent with [California] state  
15 public policy and in the public interest”); *South Boston Allied War Veterans Council v.*  
16 *City of Boston*, 875 F. Supp. 891, 895 (D. Mass. 1995) (recognizing “the compelling  
17 public interest in combating discrimination based on sexual orientation”).

18 Under these principles, implementing the Court’s order now, without  
19 further delay, serves the public interest. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976)  
20 (suspending individual constitutional rights “for even minimal periods of time” is  
21 harmful). California has long been committed to eliminating discrimination on the basis  
22 of sexual orientation and respecting the familial rights of same-sex couples. *See In re*  
23 *Marriage Cases*, 43 Cal. 4th 757, 782 (2008) (“our state now recognizes that an  
24 individual’s capacity to establish a loving and long-term committed relationship with  
25 another person and responsibly to care for and raise children does not depend upon the  
26 individual’s sexual orientation”). The Court’s decision here is consistent with  
27 California’s long history of leading the way in recognizing the rights of gay and lesbian

1 families to order their relationships and manage their day-to-day lives. For that reason,  
2 California’s public interest is served by giving the Court’s judgment effect now.

3 **2. Allowing the Court’s Judgment to Go Into Effect Does Not**  
4 **Burden Any Governmental Interest**

5 Citing the governmental defendants’ briefing in opposition to plaintiffs’  
6 motion for preliminary injunction, defendant-intervenors argue a stay is necessary  
7 because issuing gender-neutral marriage licenses will “place administrative burdens on  
8 the State” and cause uncertainty to same-sex couples who choose to marry while an  
9 appeal is pending. Defendant-Intervenors’ Motion for Stay Pending Appeal at 5, 6. But  
10 that motion was brought shortly after this lawsuit was filed, before any discovery was  
11 conducted, and long before trial.

12 The Administration observed then, at the outset of the case, that “Plaintiffs  
13 present[ed] important federal constitutional issues that require and warrant judicial  
14 determination.” Doc #33, at 9:17-18. Now, after a lengthy trial, this Court -- the branch  
15 of government entrusted with constitutional determinations -- has ruled on those  
16 important constitutional questions. Having heard extensive testimony and having  
17 considered thorough briefing, the Court determined that Proposition 8 violates the federal  
18 constitutional promise of due process and equal protection by depriving certain  
19 individuals of the fundamental right to marry the person of their choice. Order at 120.  
20 With the branch of government charged with making constitutional determinations now  
21 having made those determinations here, the Court’s ruling should take effect.

22 Moreover, the Administration has never claimed that administering  
23 California’s marriage statutes in a gender-neutral manner would place administrative  
24 burdens on the State. On the contrary, as the Court has pointed out, “the evidence shows  
25 that allowing same-sex couples to marry will be simple for California to implement  
26 because it has already done so; no change need be phased in.” Order at 126:17-20; *see*  
27 *also id.* at 126:9-12 (“The process of allowing same-sex couples to marry is

1 straightforward, and no evidence suggests that the state needs any significant lead time to  
2 integrate same-sex couples into marriage.”); 123:7-11 (“marriage licenses in California  
3 are not a limited commodity, and the existence of 18,000 same-sex married couples in  
4 California shows that the state has the resources to allow both same-sex and opposite-sex  
5 couples to wed”).<sup>2</sup>

6 **III.**  
7 **CONCLUSION**

8 The United States Supreme Court has cautioned lower courts against  
9 “reflexively holding a final order in abeyance pending review.” *Nken*, 129 S. Ct. at 1757.  
10 Such caution is warranted here. Allowing this Court’s judgment to take effect, and  
11 denying the extraordinary relief of a stay, furthers California’s vital interest in respecting  
12 the relationships of same-sex couples and does not burden any governmental interest.  
13 Accordingly, the Administration respectfully requests that the Court deny defendant-  
14 intervenors’ motion for stay pending appeal.

15 Dated: August 6, 2010

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23 official capacity as Deputy Director of Health  
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24 California Department of Public Health

25  
26 <sup>2</sup> As for the argument that plaintiffs and similarly situated couples will be  
27 harmed by uncertainty as to their ultimate marital status if they choose to marry pending  
28 appeal, that is an argument better addressed by plaintiffs themselves.



1 Case Name: *Perry, et al. v. Schwarzenegger, et al.*;  
2 Case No: US District Court, Northern District, Case No. 3:09-cv-2292 VRW

3 **CERTIFICATE OF SERVICE**

4 I declare as follows:

5 I am a resident of the State of California and over the age of eighteen years, and  
6 not a party to the within action; my business address is 980 9th Street, Suite 1700, Sacramento,  
California 95814. On August 6, 2010, I served the within document(s):

7 **THE ADMINISTRATION'S OPPOSITION TO DEFENDANT-INTERVENORS'**  
8 **MOTION FOR STAY PENDING APPEAL**

9

by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and delivering to a Federal Express agent for delivery.

10

11 by placing the document(s) listed above in a sealed envelope, with postage thereon fully prepared, in the United States mail at Sacramento, California addressed as set forth below.

12 **SEE ATTACHED SERVICE LIST**

13 I am readily familiar with the firm's practice of collection and processing  
14 correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal  
15 Service on that same day with postage thereon fully prepared in the ordinary course of business.

16 I declare that I am employed in the office of a member of the bar of this Court at  
whose direction this service was made.

17 Executed on August 6, 2010, at Sacramento, California.

18  
19 /s/ Melissa Haagensen  
Melissa Haagensen

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