

No. 10-16696

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

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

No. 09-cv-2292 VRW
Honorable Vaughn R. Walker, District Court Judge

Argued December 6, 2010
(Reinhardt, Hawkins, N.R. Smith)

**ATTORNEY GENERAL'S STATEMENT IN
SUPPORT OF MOTION TO VACATE STAY
PENDING APPEAL**

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Attorney General Kamala D. Harris files this statement in support of the motion to vacate the Court's stay of the district court's Order permanently enjoining the application or enforcement of Proposition 8, which prohibits same-sex couples from marrying in California.

Attorney General Edmund G. Brown Jr. opposed entry of the stay pending appeal last year. Since then, events have demonstrated that if the stay ever was justified, it is no longer. Each of the four factors this Court must consider in determining whether a stay is warranted – whether the stay applicant has made a strong showing of likelihood of success on the merits, whether the applicant will be irreparably injured absent a stay, whether issuance of stay will substantially injure other parties interested in the proceeding, and where the public interest lies – all weigh in favor of vacating the stay. *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *see also In re World Trade Center Disaster Site Litigation*, 503 F.3d 167, 170 (2d Cir. 2007) (holding that the same standard applies on a motion to vacate a stay as applies on a motion to enter a stay pending appeal).

As Plaintiffs and Plaintiff-Intervenor have demonstrated, the likelihood that the appeal will succeed on the merits has been substantially diminished both by the United States Attorney General's conclusion that classifications based on sexual

orientation cannot survive constitutional scrutiny and by this Court's certification order to the California Supreme Court, which seriously questions the Court's jurisdiction to decide the merits of the case. Intervenor-Appellants have been utterly unable to demonstrate that injury will befall them in the absence of a stay because there is no injury that the proponents of Proposition 8 will suffer if same-sex couples are permitted to enter into civil marriages in California. Indeed, because the stay continues in effect a law that has been adjudged to violate the plaintiffs' due process and equal protection rights and therefore perpetuates unconstitutional discrimination, it is plaintiffs who continue to suffer substantial injury. Finally, the public interest weighs heavily against the government sanctioning such discrimination by permitting it to continue after it has been judged unconstitutional.

The President and the United States Attorney General have determined that they will not continue to defend the Defense of Marriage Act ("DOMA") because it enforces a classification that fails to meet the heightened standard of scrutiny that should apply for equal protection analysis under the Fifth Amendment. While it lacks the force of law, Attorney General Holder's reasoned analysis is entitled to consideration. *See Schick v. Reed*, 419 U.S. 256, 275 n.12 (1974). It is also consistent with the California Attorney General's long-standing position,

convincingly validated after a full trial on the merits, that Proposition 8 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

For 846 days Proposition 8 has denied equality under law to gay and lesbian couples. Each and every one of those days, same-sex couples have been denied their right to convene loved ones and friends to celebrate marriages sanctioned and protected by California law. Each one of those days, loved ones have been lost, moments have been missed, and justice has been denied. The preconditions for a stay are lacking on this record. The stay should be vacated.

Dated: March 1, 2011

Respectfully Submitted,

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Acting Senior Assistant Attorney General
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Supervising Deputy Attorney General

/s/ Tamar Pachter

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 3:09-cv-02292-VRW**

I certify that: (check (x) appropriate option(s))

1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because

This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

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3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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4. **Amicus Briefs.**

Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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or is

Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

March 1, 2011

Dated

/s/ Tamar Pachter

Tamar Pachter

Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Kristin M. Perry, et al. v.
Arnold Schwarzenegger, et al.
(On Appeal 9th COA)** No. **10-16696**

I hereby certify that on March 1, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On March 1, 2011, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 1, 2011, at San Francisco, California.

A. Bermudez
Declarant

s/ A. Bermudez
Signature