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11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 **KRISTIN M. PERRY, et al.,**

15 Plaintiffs,

16 v.

17 **ARNOLD SCHWARZENEGGER, et al.,**

18 Defendants.
 19

Case No. 09-cv-02292-VRW

**ATTORNEY GENERAL'S OPPOSITION
 TO DEFENDANT-INTERVENORS'
 MOTION FOR STAY PENDING
 APPEAL**

Action Filed: May 27, 2009

21 The Attorney General opposes Defendant-Intervenors' Request for a Stay of this Court's
 22 August 4, 2010 Order permanently enjoining the application or enforcement of Proposition 8
 23 pending appeal of that Order. As the Attorney General has consistently stated and as was
 24 convincingly demonstrated at trial, Proposition 8 violates the Fourteenth Amendment of the
 25 United States Constitution. Defendant-Intervenors thus cannot demonstrate a likelihood of
 26 success on the merits in their appeal of this Court's Order. Moreover, as this Court has concluded
 27
 28

1 that Proposition 8 is unconstitutional, the public interest weighs against its continued
2 enforcement.

3 Defendant-Intervenors' argument that the Attorney General's opposition to Plaintiffs'
4 initial request for a preliminary injunction supports their request for a stay pending appeal ignores
5 the fact that there has now been a trial on the merits that conclusively demonstrated that
6 Proposition 8 is unconstitutional. In opposing the request for a preliminary injunction, the
7 Attorney General argued that "the parties, the Court, and, indeed, the general public would
8 benefit" from having the constitutionality of Proposition 8 "decided on the merits following full
9 briefing and argument by the parties." (Attorney General's Opposition to Plaintiffs' Motion for
10 Preliminary Injunction at 11–12.) That has now occurred. And while there is still the potential
11 for limited administrative burdens should future marriages of same-sex couples be later declared
12 invalid, these potential burdens are outweighed by this Court's conclusion, based on the
13 overwhelming evidence, that Proposition 8 is unconstitutional. Accordingly, the harm to the
14 plaintiffs outweighs any harm to the state defendants.

15 There is now a final determination that Proposition 8 is unconstitutional. Each of the four
16 factors this Court must consider in determining whether a stay is warranted weigh against a stay.
17 *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 115 (9th Cir. 2008). Accordingly,
18 the Attorney General respectfully requests that Defendant-Intervenors' request for a stay pending
19 appeal be denied.

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Dated: August 6, 2010

Respectfully submitted,

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

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,)
and)
23)
24 PROPOSITION 8 OFFICIAL)
PROONENTS DENNIS)
HOLLINGSWORTH, et al.,)
25)
26 Defendant-Intervenors.)
_____)

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I.

INTRODUCTION

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

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

The Administration believes the public interest is best served by permitting the Court’s judgment to go into effect, thereby restoring the right of same-sex couples to marry in California. Doing so is consistent with California’s long history of treating all people and their relationships with equal dignity and respect. Conversely, the Administration submits that staying the Court’s judgment pending appeal is not necessary to protect any governmental or public interest. As the Court has pointed out, California has already issued 18,000 marriage licenses to same-sex couples without suffering any resulting harm. Government officials can resume issuing such licenses without administrative delay or difficulty. For these reasons, the Administration respectfully 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 *McCammom 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.¹

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

21 ¹ 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”).²

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 ² 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 /s/ Melissa Haagensen
19 Melissa Haagensen

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