CITY AND COUNTY OF SAN FRANCISCO

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MEMORANDUM

TO: Carmen Chu, Assessor-Recorder
Karen Hong Yee, Director of the San Francisco County Clerk's Office

FROM: Dennis J. Herrrera, City Attorney (DJH)
Therese M. Stewart, Chief Deputy City Attorney TMS
Mollie M. Lee, Deputy City Attorney (ML)

DATE: June 11, 2013

RE: *Hollingsworth v. Perry*: Possible Outcomes and Next Steps

As you know, the United States Supreme Court is currently considering a federal challenge to Proposition 8, the ballot measure that eliminated same-sex couples' right to marry in California. The Supreme Court heard arguments in *Hollingsworth v. Perry* on March 26, 2013 and will likely issue a decision by the end of June. The Court could decide the case on the merits, dismiss the case, or decide that Proposition 8's proponents lacked standing to appeal the District Court decision. Or there could be a split decision based on more than one of these grounds. This memorandum describes the court procedures that would follow each of these outcomes and estimates when you could begin issuing marriage licenses to same-sex couples.

We provide this information to aid you in preparing for a possible change in the State's marriage laws. Please be aware that the dates in this memorandum are estimates, and the precise timing and procedures will depend on the Supreme Court's decision. While this memorandum addresses the most likely potential outcomes at the Supreme Court, it would be impossible to predict and evaluate every possibility. We will be available to provide further advice after the Supreme Court issues its decision. You may also receive direction from the State Registrar or other State officials, who have authority to oversee local officials' implementation and enforcement of California's marriage laws.

Summary of Advice

Based on past practice, the Supreme Court will likely announce its decision in *Hollingsworth* in mid-to-late June. We expect the Supreme Court's decision to become final about a month later, and the Ninth Circuit will resume jurisdiction over the case at that time. The Ninth Circuit will then issue its formal notice of decision in the case ("the mandate"), and the decision will take effect. Depending on how the Supreme Court decides the case, marriages could resume as soon as mid-to-late July, although there is an unlikely possibility that marriages could resume even faster, as we discuss below in footnote 2. The five scenarios we see as reasonably possible, and your obligations under each, are as follows (not in order of likelihood).

Scenario 1: The Supreme Court reverses the Ninth Circuit and upholds Proposition 8. Unless and until there are future legislative or judicial developments, you may not issue marriage licenses to same-sex couples.

Scenario 2: The Supreme Court affirms the Ninth Circuit decision and invalidates Proposition 8. The Supreme Court decision will be the final decision in the case and will become effective as soon as the Ninth Circuit issues the mandate. You must issue marriage licenses to same-sex couples at that time. There is no specific rule about timing of the mandate, but we

anticipate that the Ninth Circuit will issue it promptly after resuming jurisdiction over the case. Therefore, you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July.

Scenario 3: The Supreme Court dismisses the petition for certiorari as improvidently granted. The Ninth Circuit decision will be the final decision in the case and become effective as soon as the Ninth Circuit issues the mandate. You must issue marriage licenses to same-sex couples at that time. We anticipate that the Ninth Circuit will issue the mandate promptly after resuming jurisdiction over the case, and you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July.

Scenario 4: The Supreme Court affirms the decision based on a combination of rationales (merits, lack of standing and/or dismissal of certiorari). If there is not a majority for any one rationale, the Ninth Circuit decision will likely be the final decision in the case and become effective as soon as the Ninth Circuit issues the mandate. Your obligations would be the same as in Scenario 3.

Scenario 5: The Supreme Court decides that the Proposition 8 proponents lacked standing to appeal. The Ninth Circuit opinion will be vacated and the District Court opinion will be the final decision in the case. The District Court judgment will go into effect as soon as the Ninth Circuit issues a mandate dismissing the appeal. We anticipate that the Ninth Circuit will issue the mandate promptly after resuming jurisdiction over the case, and you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July.

While we expect that the first four scenarios would proceed uneventfully, there is a possibility of further litigation if the Court holds that proponents lacked standing to appeal. The proponents and some commentators have suggested that a standing decision would result in a limited judgment that would apply only to the two couples who are plaintiffs in the lawsuit, or only to Alameda and Los Angeles, the counties that are named defendants to the lawsuit. Those suggestions are incorrect. As an initial matter, even if the proponents were correct about the scope of the judgment, San Francisco would benefit from the judgment and be bound by the injunction because it is a plaintiff-intervenor in the lawsuit and the District Court ruled in its favor. Furthermore, the District Court judgment applies statewide because it binds all persons under the control or supervision of the named state defendants. State law establishes that county clerks and recorders are state officers with respect to marriage and perform marriage-related duties under the supervision of state officials, specifically the State Registrar. Additionally, under Rule 65(d)(2) of the Federal Rules of Civil Procedure, the injunction applies to the named parties' officers and agents, and anyone who acts in concert with them. This includes county clerks and recorders, who administer marriage laws under the direction of the named state defendants. For these reasons, the District Court judgment binds county clerks and recorders throughout California, regardless of whether they were individually named in the lawsuit.

Proposition 8's proponents and some commentators have also suggested that the District Court improperly enjoined the defendants from applying Proposition 8 to anyone in California rather than merely to the four named plaintiffs. This suggestion is incorrect. Because the District Court held that Proposition 8 is facially unconstitutional, there is no circumstance in which it can constitutionally be applied by the defendants or anyone acting under their supervision. Therefore, these officials cannot apply Proposition 8 to anyone. We are confident that we would prevail in any litigation challenging the scope of the injunction.

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Discussion

I. BACKGROUND

A. *Lockyer v. City and County of San Francisco*

The legal battle for marriage equality in California began in February 2004, when San Francisco began issuing and recording marriage licenses for same-sex couples. The State Registrar instructed San Francisco to stop, San Francisco ignored this directive, and then-Attorney General Bill Lockyer sued San Francisco in the California Supreme Court. The Court held that local officials in San Francisco lacked the authority to disregard the State's marriage statutes, which at the time prohibited marriage between members of the same sex. *See Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1104-05 (2004). The Court also explained that in performing duties related to marriage, county clerks and recorders are subordinate to the California Director of Health Services, who also serves as the State Registrar of Vital Statistics and "has general supervisory authority over the marriage license and marriage certificate process." *Id.* at 1118. Accordingly, the writ in *Lockyer* directed San Francisco's officials to take corrective action "under the supervision of the California Director of Health Services." *Id.* at 1120.

B. *In re Marriage Cases*

In March 2004, San Francisco and private plaintiffs filed lawsuits arguing that California's marriage statutes violated the California Constitution. These cases were litigated together under the title *In re Marriage Cases*, 43 Cal.4th 757 (2008). Three of the four coordinated cases named the State of California or the State Attorney General as the defendant. *Id.* at 786. Only one named a county, and that county did not actively defend against the challenge. In May 2008, the California Supreme Court held that the equal protection, due process and privacy provisions of the California Constitution guarantee same-sex couples the right to marry. *Id.* at 839-56. Even though only two counties were party to the coordinated cases – San Francisco as a plaintiff and Los Angeles as a nominal defendant – the court issued statewide relief that applied to all counties. It directed "the appropriate state officials to take all actions necessary to effectuate [the] ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." *Id.* at 857.

To implement the *In re Marriage Cases* decision, the State Registrar prepared revised marriage-related forms that replaced previous designations for "Bride" and "Groom" with the words "Party A" and "Party B." The State Office of Vital Records provided local officials with these revised forms and instructions "to ensure uniformity throughout the state in complying with the California Supreme Court's directions." *See* Letter from Linette Scott to County Clerks and County Recorders (May 28, 2008).

C. *Perry v. Schwarzenegger*

In November 2008, California voters narrowly enacted Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. 1, § 7.5. On May 22, 2009, two same-sex couples – Sandra Stier and Kristin Perry of Alameda County, and Paul Katami and Jeffrey Zarrillo of Los Angeles County – brought a facial challenge to Proposition 8 in federal court, alleging that it

violates the Equal Protection and Due Process Clauses of the United States Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928-29 (N.D. Cal. 2010).

The lawsuit named as defendants the statewide officials responsible for the execution and administration of the marriage laws: the California Governor, the California Attorney General, the California Director of Public Health, and California's Deputy Director of Health Information and Strategic Planning. *Id.* at 928. The complaint also named as defendants Patrick O'Connell, the county clerk and recorder for Alameda County, and Dean Logan, the county clerk and recorder for Los Angeles County, because the couples resided in those counties and wished to obtain marriage licenses from the clerks there. *Id.* The statewide and county defendants filed answers and continued to enforce Proposition 8, although they declined to defend its constitutionality. *Id.*

The Court permitted the official proponents of Proposition 8 to intervene as defendants, and it permitted San Francisco to intervene as a plaintiff. *Id.* at 928-29. It denied other motions to intervene, including Imperial County's motion to intervene as a defendant. *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Aug. 4, 2010) (order denying motion to intervene). Quoting at length from the California Supreme Court's decision in *Lockyer*, the Court explained that Imperial and its officials possessed no independent discretion regarding litigation decisions or any other matter relating to marriage because the Imperial officials served as state officers with respect to the administration of marriage, and their duties were purely ministerial ones, subject to the supervision of higher-level statewide officials. *Id.*

At trial, the Proposition 8 proponents presented a vigorous defense of the measure, while plaintiffs and San Francisco presented the case that Proposition 8 is unconstitutional. The District Court held that Proposition 8 violates the federal Constitution and entered judgment permanently enjoining its enforcement. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 1004. In a written opinion setting forth its findings of fact and conclusions of law, the District Court concluded:

> Because Proposition 8 is unconstitutional under both the Due Process and Equal Protection Clauses, the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8 and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8. The clerk is DIRECTED to enter judgment without bond in favor of plaintiffs and plaintiff-intervenors and against defendants and defendant-intervenors pursuant to FRCP 58.

Id. Thereafter, the Court issued an injunction commanding that the defendants, "and all persons under the control or supervision of the defendants, are permanently enjoined from applying or enforcing" Proposition 8. *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Aug. 12, 2010) (permanent injunction).

The Proposition 8 proponents appealed from the District Court judgment invalidating Proposition 8. *Perry v. Brown*, 671 F.3d 1052, 1070 (9th Cir. 2012). The Ninth Circuit certified to the California Supreme Court questions about the ability of an initiative proponent under state law to defend a measure in litigation where Governor and Attorney General have declined to do so. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011). The California Supreme Court ultimately ruled that an initiative proponent indeed has authority under state law to defend the measure under these circumstances. *Perry v. Brown*, 52 Cal. 4th 1116 (2011). The Ninth Circuit then held that the proponents had standing to appeal, and affirmed the District Court's

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ruling on the merits, holding that Proposition 8 violated the federal constitution. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

After the proponents' petition for rehearing *en banc* was denied, they filed a petition for certiorari with the United States Supreme Court, which the Court granted. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) *cert. granted sub nom. Hollingsworth v. Perry*, 184 L. Ed. 2d 526 (U.S. Dec. 7, 2012) (No. 12–144). The Court held argument on March 26, 2013. It has not yet issued its decision.

II. ANALYSIS

The Supreme Court could issue a decision in *Hollingsworth* at any time, but based on past practice, the Court will likely issue its decision later this month. The Court usually releases opinions at 10 a.m. Eastern Time. It does not provide advance notice about when it will release an opinion in a particular case. After the Court announces its decision, the parties will have 25 days to petition for rehearing. *See* Sup. Ct. Rule 44(1)-(2). These petitions are rarely granted, but the Court generally does not issue a final judgment until the end of the rehearing period. *See* Sup. Ct. Rule 45(2)-(3). In practice, the Court often takes up to 35 days after issuing a decision before issuing the judgment. This means that if the Court announces a decision in late June, it would likely issue the judgment in late July.[1]

After the Supreme Court issues its judgment, the Ninth Circuit will resume jurisdiction over the case. If the Supreme Court reverses the Ninth Circuit, Proposition 8 will remain in effect until there are further legislative or judicial developments. If the Supreme Court affirms the Ninth Circuit or dismisses the case, the Ninth Circuit will promptly issue a mandate making the District Court judgment effective, and same-sex couples will be able to marry as soon as the mandate issues.[2] Finally, if the Supreme Court decides that the Proposition 8 proponents lacked standing to appeal, the Ninth Circuit's opinion will be vacated and the District Court opinion will be the final decision in the case. In that event, it is possible that there will be further litigation about the scope of the District Court judgment, but local officials in San Francisco should begin issuing marriage licenses to same-sex couples immediately once the Ninth Circuit issues its mandate lifting its stay of the District Court order. Each of these scenarios is discussed in further detail below.

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[1] If any party petitions for rehearing, it will take longer for the Court to issue its judgment. The Court will not issue an order about whether to grant rehearing until late July, and it will not issue the judgment until after that. We think it is unlikely that any party will file a petition for rehearing, and the timing estimates in this memorandum assume that no such petition is filed. We will provide a further update if a petition for rehearing is filed.

[2] It is possible that if the Supreme Court affirms on the merits or dismisses the case, you could be required to issue marriage licenses to same-sex couples before the Supreme Court judgment becomes final. The District Court judgment invalidating Proposition 8 is currently stayed by order of the Ninth Circuit, and the Ninth Circuit could decide to lift the stay after the Supreme Court decision, without waiting for the final judgment and issuance of the mandate. If the Ninth Circuit lifts the stay at any point, we will notify you, and you should immediately begin issuing marriage licenses to same-sex couples. However, because we think it is unlikely that the Ninth Circuit will act before the Supreme Court's decision is final, this memorandum assumes that the Ninth Circuit does not lift the stay until it resumes full jurisdiction over the case and issues the mandate.

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A. Scenario 1: Supreme Court Reverses The Ninth Circuit And Upholds Proposition 8

If the Supreme Court reverses the Ninth Circuit, Proposition 8 will remain in effect. We hope this is not the result, but if it is, you should maintain your current practices in administering the State's marriage laws. Unless and until there are subsequent legislative or judicial developments, California county clerks and recorders will not be authorized to issue marriage licenses to same-sex couples. *See Lockyer*, 33 Cal.4th 1055, 1069 (2004).

Procedurally, once the Ninth Circuit resumes jurisdiction of the case it will likely vacate the District Court opinion and remand to the District Court for further proceedings consistent with the Supreme Court opinion. *See, e.g., Knox v. California State Employees Ass'n, Local 1000, Serv. Employees Int'l Union, AFL-CIO-CLC*, 692 F.3d 924 (9th Cir. 2012). These further proceedings might involve claims for attorney fees and similar issues, but they will not affect your marriage-related responsibilities.

B. Scenario 2: Supreme Court Affirms The Ninth Circuit Decision And Invalidates Proposition 8

If the Supreme Court affirms the Ninth Circuit and invalidates Proposition 8, you should be prepared to begin issuing marriage licenses to same-sex couples in mid-to-late July. After the Supreme Court issues its judgment, the Ninth Circuit will resume jurisdiction over the case. The Ninth Circuit will then issue a mandate making the District Court judgment effective, and you should begin issuing marriage licenses to same-sex couples as soon as the mandate issues.

There is no formal rule about when the Ninth Circuit must issue the mandate, but we expect it will do so promptly after resuming jurisdiction over the case. San Francisco and Los Angeles have lodged letters with the Ninth Circuit requesting 24 hours' advance notice of the issuance of mandate so that counties have adequate time to prepare.

Once the Ninth Circuit issues the mandate, Proposition 8 will be invalid and you must immediately begin processing applications, issuing licenses, and solemnizing marriages for same-sex couples who seek to marry. All county clerks and recorders will be bound by the Supreme Court decision both because they administer state marriage laws under the supervision of the state officials who are named as defendants in this case (see Part D) and because the Supreme Court decision will have precedential effect that will extend, at minimum, to all of California. If the decision focuses narrowly on Proposition 8 and events that occurred in California, its precedential effect beyond this state may be limited. However, if the Supreme Court issues a decision that broadly declares denial of marriage to same-sex couples unconstitutional, such a decision will be binding precedent for all courts throughout the nation.

C. Scenario 3: Supreme Court Dismisses The Case

During oral argument, some Justices suggested that perhaps the Supreme Court should not have granted review of the case. This comment has led some observers to speculate that the Court may decide to dismiss the case, leaving the Ninth Circuit decision in place as the final appellate decision in the case. If five justices support this approach, the Court will issue an order dismissing the petition for certiorari as improvidently granted. Parties will then have 25 days to petition for rehearing of that order. *See* Sup. Ct. Rule 44(2). If no party files a petition for rehearing, or if the Supreme Court denies any petition for rehearing, the Court will transmit its order to the Ninth Circuit after the end of the rehearing period. The subsequent timing and procedures would be the same as those following a merits decision affirming the Ninth Circuit.

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Specifically, once the Ninth Circuit resumes jurisdiction over the case, it will issue a mandate making the District Court judgment effective. This will likely occur in mid-to-late July, and you must begin processing marriage applications, issuing marriage licenses and solemnizing marriages for same-sex couples at that time. All county clerks and recorders will be bound by the Ninth Circuit decision both because they administer marriage laws under the supervision of the state officials who are named as defendants in this case (see Part D) and because the Ninth Circuit's February 2012 decision declaring Proposition 8 unconstitutional will be binding precedent for all lower federal courts throughout the Ninth Circuit, establishing as a matter of law that Proposition 8 is invalid and that same-sex couples have a right to marry in California. Because the Ninth Circuit decision rests on California-specific facts, it will not have an direct impact on other states' marriage laws, but it may have some precedential effect on future federal cases in the Ninth Circuit challenging other states' marriage laws.

D. Scenario 4: The Supreme Court Affirms The Decision Based On A Combination Of Rationales

The Supreme Court may issue a fractured opinion that contains separate opinions by less than a majority of the Court on the merits, lack of standing and/or dismissal of certiorari. If there is a majority supporting affirmance but there is not a majority for any one rationale, the Ninth Circuit decision will likely be the final decision in the case and become effective as soon as the Ninth Circuit issues the mandate. Your obligations would be the same as in Scenario 3.

E. Scenario 5: Supreme Court Issues A Standing Decision

If the Supreme Court determines that Proposition 8's proponents lack standing to appeal, it will likely vacate the Ninth Circuit judgment and remand the case to the Ninth Circuit with instructions to dismiss the appeal for lack of jurisdiction. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 550 (1986). This will have the practical effect of erasing the Ninth Circuit decision and will leave the District Court opinion in place as the final decision in the case. *See, e.g., Karcher v. May*, 484 U.S. 72, 84 (1987). The District Court judgment will take effect as soon as the Ninth Circuit issues a mandate dismissing the appeal and dissolving the stay presently in place. We expect that this will happen promptly, and you should be prepared to issue marriage licenses to same-sex couples soon after the Supreme Court issues its final judgment, likely in late July.

Some commentators and the proponents of Proposition 8 have raised questions about the scope of the District Court judgment, suggesting that it might be limited to the named plaintiffs or the counties that are defendants in the case – namely, Alameda and Los Angeles. It is true that District Court decisions only declare the rights and obligations of parties before the court, unlike appellate court decisions that announce precedential rulings of law. In this case, however, the parties to the case include the state officials who supervise and control administration of the state's marriage laws. As explained in more detail below, the District Court judgment enjoins the Governor, State Registrar, Attorney General and "all persons under their control or supervision" from enforcing Proposition 8. When administering and enforcing state marriage laws, all county clerks and county recorders act under the direction of these State officials, and they are therefore covered by the injunction regardless of whether they were individually named in the case. Moreover, San Francisco intervened in the case and sought a judgment declaring Proposition 8 unconstitutional. The District Court entered judgment in San Francisco's favor. Therefore, regardless of the status of other counties, San Francisco will not be obliged to enforce Proposition 8.

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1. By Its Terms And Intent, The District Court Injunction Applies Statewide To All Persons Under The Supervision Of The Named State Defendants.

The District Court judgment enjoins the State Registrar, Governor, Attorney General and "all persons under their control or supervision" from enforcing Proposition 8. *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. Aug. 12, 2010) (permanent injunction). All parties and the court understood that this injunction would extend beyond the named Plaintiffs and Defendants and prohibit enforcement of Proposition 8 statewide. For example, when Proponents moved the District Court for a stay of the injunction, they argued that "absent an immediate stay of any ruling invalidating Prop 8, same-sex couples would be permitted to marry in the counties of Alameda and Los Angeles (and possibly throughout California)." Def. Mot. Stay, ECF No. 705 at 5. The Administration's opposition to this motion described the effect of the injunction even more clearly, stating "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. . . . 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." Admin. Opp. to Stay, ECF No. 717 at 1. *See also* Att'y General Opp. to Stay, ECF 716 at 2; Pl. and Pl.-Intervenor Opp. to Stay, ECF 718 at 1-2.

The District Court's order denying a stay of the injunction reiterated that it intended to reinstate marriage equality statewide: "Because a stay would force California to continue to violate plaintiffs' constitutional rights and would demonstrably harm plaintiffs *and other gays and lesbians* in California, the third factor [whether any other interested party would be injured if the court were to enter a stay] weighs heavily against proponents' motion." *Perry v. Schwarzenegger*, No. 09-2292, ECF 727 at 9 (N.D. Cal. Aug. 12, 2010) (emphasis added). Despite this statement, none of the parties challenged the scope of the injunction by motion for reconsideration or otherwise in the District Court.

The District Court addressed the relationship between the state defendants and counties in its order denying Imperial County's motion to intervene, explaining that the State Registrar has "supervisory responsibility" over county clerks and recorders with respect to the marriage laws. *Id.*, ECF 709 at 6. The Ninth Circuit affirmed this denial for two reasons. First, with respect to Imperial's Board of Supervisors, as well as the county itself, the Court explained that they have no role whatsoever with respect to marriage: "Local elected leaders 'may have authority under a local charter to supervise and control the actions of a county clerk or county recorder with regard to other subjects,' but they have 'no authority to expand or vary the authority of a county clerk or county recorder to grant marriage licenses or register marriage certificates . . . .'" *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Lockyer*, 33 Cal.4th at 1080). Second, with respect to Imperial's deputy county clerk, the Court concluded she was not a proper party. The Court explained that if the injunction bound an Imperial official directly, it would be the county clerk himself, not the deputy. *Id.* at 903. The Ninth Circuit did suggest in *dicta* that "the effect of the existing order and injunction on County Clerks in California's other counties is unclear . . . ." *Id.* at 904 n.3. As explained below, however, the scope of the injunction becomes clear when considered against the backdrop of state law, which establishes that the named state defendants supervise the local officials who administer marriage laws.

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2. County Clerks And Recorders Are Bound by the Injunction Because They Administer Marriage Laws Under The Supervision Of The State Registrar.

State law vests the Registrar with responsibility for overseeing the State's marriage laws, with assistance from the Attorney General. The Health and Safety Code specifies that the Registrar has supervisory power over county recorders "so that there shall be uniform compliance with all the requirements" of the Health and Safety Code with respect to marriage. Cal. Health & Saf. Code § 102180. The Registrar is directed to "prescribe and furnish all record forms [relating to marriage] . . . and no records or formats other than those prescribed shall be used." *Id.* § 102200. More specifically, "[t]he forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar." *Id.* § 103125. Local recorders operate "under the supervision and direction of the State Registrar and shall make an immediate report to the State Registrar of any violation of this law coming to his or her knowledge." *Id.* § 102295. The Attorney General is given specific statutory authority to "assist in the enforcement of this part upon request of the State Registrar." *Id.*

It is well understood that the Registrar's authority over county clerks is the same as his authority over county recorders. Besides prescribing the marriage license and certificate forms used by county clerks, the Registrar provides direction to both county clerks and county recorders by publishing a detailed *Marriage License and Certificate Handbook*, which explains that "county clerks and recorders act under the direction of the State Registrar." *Id.* at 3. The Registrar also provides guidance by means of "All County Letters" that are regularly issued to both county clerks and county recorders. And when necessary, the Registrar supervises county clerks and county recorders to ensure that they comply with judicial rulings about the State's marriage laws.

The California Supreme Court recognized this chain of command in *Lockyer*, in which it explained that marriage is a matter of "statewide concern" given "the importance of having uniform rules and procedures apply throughout the state to the subject of marriage." *Id.* at 1079-80. Although a county clerk or recorder is a "local" official with respect to the discharge of other duties, she serves "as a state officer" with respect to marriage. *Id.* at 1080. County clerks' and county recorders' duties in administering state marriage statutes are purely ministerial, and they have no discretion to grant or withhold marriage licenses based on their own judgments or opinions. *Id.* at 1081-82. Nor do they take direction from higher local officials, such as a mayor or board of supervisors, with respect to these functions. *Id.* Rather, when county clerks and recorders administer marriage laws, they act as state officers and their principals are higher state officers, specifically, the Registrar.[3] *Id.* at 1118. Accordingly, the writ in *Lockyer* directed San

[3] The fact that a local official can be deemed a state executive officer when performing certain functions is no stranger to the law. After all, counties in California are subdivisions of state government, and therefore exercise "only the powers of the state, granted by the state." *Marin County v. Superior Court*, 53 Cal. 2d 633, 638 (1960). Thus, for example, when a local official is sued under 42 U.S.C. § 1983 for a violation of the federal constitution, that official is considered a state officer (and therefore protected from municipal liability under the doctrine of sovereign immunity) if the official committed the alleged constitutional violation in the performance of state-law duties. This is so even if the official is locally elected, receives her salary from the local treasury, and cannot be fired by any higher state official. *See, e.g.,*

Francisco's clerk and recorder to take corrective action "under the supervision of the California Director of Health Services." *Id.* at 1120. Similarly, the Court's order in the *Marriage Cases* directed "the appropriate state officials to take all actions necessary to effectuate [the Court's] ruling in this case so as to ensure that *county clerks and other local officials* throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." *Id.* at 857 (emphasis added).

3. County Clerks And Recorders Are Bound By The Injunction Because They Are Officers And Agents Of, And Act In Concert With, The Named State Defendants.

Rule 65(d)(2) of the Federal Rules of Civil Procedure states that injunctions apply not only to parties to a lawsuit but also to "officers" and "agents" of a party, and anyone who acts in "concert or participation" with a party or its officers or agents. Under this rule, county clerks and recorders would be bound by the injunction even if it did not specify that it applied to all persons under the supervision and control of the state defendants. It does not matter that the lawsuit did not name each individual county clerk and recorder as a defendant, because "a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945).

For example, in *American Booksellers Ass'n v. Webb*, 590 F.Supp. 677, 693 (N.D. Ga. 1984), local district attorneys were bound by an injunction preventing enforcement of a statute even though they were not party defendants, because the Attorney General had appeared in the case, and under Georgia law local district attorneys were subordinate to the Attorney General. Similarly, in *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 163 (S.D.N.Y. 1997), an injunction against the Governor and Attorney General preventing enforcement of a state statute bound the state's district attorneys even though they were not named in the lawsuit. There may be cases where, given the peculiarities of state law, local officials normally thought to be subordinate to a statewide official are not, in fact, "officers" or "agents" of the statewide official within the meaning of Rule 65(d)(2). But where, as here, the local official is an "officer" of the state, *Lockyer*, 33 Cal.4th at 1081, performing a ministerial duty under the supervision of higher state officers, in a domain of law where statewide uniformity is paramount, the local official is bound by an injunction against the higher state officers regardless of whether the local official participated in the litigation.

Furthermore, even if county clerks and recorders somehow could not be deemed "officers" and "agents" of the state defendants, they would still be bound by the injunction because they are in "active concert or participation" with the state defendants in the administration of California's marriage laws. The local and state officials here have a far closer relationship than entities held to be "in concert" in other cases. For example, in *Blackard v. Memphis Area Medical Center for Women*, 262 F.3d 568 (6th Cir. 2001), the Sixth Circuit held that an injunction against the state's Administrative Director of the Courts (ADC) also bound the state's juvenile courts, even though they were not named as parties and the ADC had no

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McMillan v. Monroe County, 520 U.S. 781, 792-93 (1997) (finding immunity for sheriff because, under Alabama law, "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties."). As with Alabama law regarding local sheriffs, *Lockyer* makes clear that under California law, county clerks and recorders "represent the State of [California]" when executing their ministerial duties with respect to marriage.

Memorandum

TO: Carmen Chu, Assessor-Recorder
Karen Hong Yee, Director of the San Francisco County Clerk's Office
DATE: June 11, 2013
PAGE: 11
RE: *Hollingsworth v. Perry*: Possible Outcomes and Next Steps

supervisory power over the juvenile courts. The fact that the ADC was "responsible for the orientation and continued education of the judges of the state courts and for the orderly operation of the court system" and "assist[ed] the chief justice of the Supreme Court, who does have such authority" sufficed to establish that the courts acted in concert with the ADC for Rule 65 purposes. *Id.* at 575-76.

4. The Injunction Is Not Limited To The Two Couples Who Brought The Suit.

Proponents have also argued that only the named plaintiffs may *benefit* from the injunction, and those plaintiffs live in the defendant counties of Alameda and Los Angeles. As a preliminary matter, this argument does not apply to San Francisco, which sought and obtained declaratory relief as a plaintiff-intervenor in this case, and is a beneficiary of the judgment just as much as Plaintiffs.

More fundamentally, this argument reflects a basic misunderstanding about the difference between facial and as-applied challenges. While a successful "as-applied" challenge to a statute results merely in a ruling that the government may not apply the statute to the individual plaintiff, a successful "facial" challenge to a statute results (except in rare circumstances not present here) in a ruling that the government may not enforce the statute *at all*. When a "statutory scheme [is] unconstitutional on its face," the statutory provisions are "not unconstitutional as to [plaintiffs] alone, but as to any to whom they might be applied." *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981). The reason is that facial invalidation, by definition, means there is no set of circumstances in which the government could constitutionally apply the statute. *See United States v. Salerno*, 481 U.S. 739, 746 (1987). A facial challenge and "the relief that would follow" will necessarily "reach beyond the particular circumstances of the[] plaintiffs." *Doe v. Reed*, __ U.S. __, 130 S. Ct. 2811, 2817 (2010). As the Seventh Circuit recently put it: "In a facial challenge like this one, the claimed constitutional violation inheres in the terms of the statute, not its application . . . . The remedy is necessarily directed at the statute itself and must be injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied to anyone." *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). The same holds true here.

Conclusion

Of the five outcomes we see as most probable, only one – a loss at the Supreme Court – will maintain the status quo. The other four possible outcomes will restore marriage equality in California, and you will have a duty to issue marriage licenses to same-sex couples immediately after the Ninth Circuit issues the mandate. This will likely occur in mid-to-late July.

There is a possibility of further litigation in the event of a standing decision, but it is highly unlikely that this litigation will alter San Francisco's obligation to comply with the District Court judgment in *Hollingsworth*. Unless there is a court order to the contrary, you should plan to begin issuing marriage licenses as soon as the Ninth Circuit issues the mandate.

cc: Mayor Lee
Members, Board of Supervisors
Naomi Kelly, City Administrator