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#### 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

# ATTORNEY GENERAL'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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The Attorney General opposes Appellant-Intervenors' Request for a
Stay Pending Appeal of the district court's Order permanently enjoining the
application or enforcement of Proposition 8. As the Attorney General has
consistently stated and as was convincingly demonstrated after a full trial on
the merits, Proposition 8, which prohibits same-sex couples from marrying,
violates the Fourteenth Amendment of the United States Constitution.

Appellant-Intervenors thus cannot demonstrate a likelihood of success on the
merits in their appeal. Moreover, as the district court has concluded that
Proposition 8 is unconstitutional, the public interest weighs against its
continued enforcement.

Appellant-Intervenors' argument that the Attorney General's opposition to Plaintiffs' initial request for a preliminary injunction supports their request for a stay pending appeal ignores the fact that there has now been a trial on the merits that conclusively demonstrated that Proposition 8 is unconstitutional. In opposing the request for a preliminary injunction, the Attorney General argued that "the parties, the [district court], and, indeed, the general public would benefit" from having the constitutionality of Proposition 8 "decided on the merits following full briefing and argument by the parties." That has now occurred. And while there is still the potential

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for limited administrative burdens should future marriages of same-sex couples be later declared invalid, these potential burdens are outweighed by the district court's conclusion, based on the overwhelming evidence, that Proposition 8 is unconstitutional. Accordingly, the harm to Appellees outweighs any harm to the state defendants.

There is now a final determination that Proposition 8 is unconstitutional. Each of the four factors this Court must consider in determining whether a stay is warranted weigh against a stay. *See Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 115 (9th Cir. 2008). Thus, Appellant-Intervenors have not shown that they are entitled to a stay even if this Court were to conclude they have standing. To the extent the decision of the Attorney General not to file an appeal has bearing on this Court's decision of whether to grant a stay, however, the Attorney General will not be appealing the district court's Order permanently enjoining the enforcement of Proposition 8.

For the foregoing reasons, the Attorney General respectfully requests that Appellant-Intervenors' request for a stay pending appeal be denied.

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Dated: August 13, 2010 Respectfully Submitted,

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s/Daniel J. Powell

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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 <b>opening/answering/reply/cross-appeal</b> 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 <b>not</b> 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.
This brief complies with a page or size-volume limitation established by separate court order datedAugust 13, 2010 and is 3 Pages
Proportionately spaced, has a typeface of 14 points or more and contains words,
Monospaced, has 10.5 or fewer characters per inch and contains pages or words or lines of text.
3. Briefs in <b>Capital Cases</b> . This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and 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 21,000 words; reply briefs must not exceed 9,800 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 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

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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,		
or is		
Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,		
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).		
August 13, 2010	s/ Daniel J. Powell	
Dated	Daniel J. Powell	
	Deputy Attorney General	