

Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; MARK A. JANSSON; and PROTECTMARRIAGE.COM
– YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,
Petitioners,

v.

PATRICK O’CONNELL, in his official capacity as Auditor-
Controller/County Clerk-Recorder of Alameda County, et al.,
Respondents,

and

EDMUND G. BROWN JR., in his official capacity as Governor of the
State of California, et al.,
Real Parties in Interest.

**PETITION FOR WRIT OF MANDATE AND REQUEST FOR
IMMEDIATE STAY OR INJUNCTIVE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES
STAY REQUESTED TO FORBID ISSUANCE OF MARRIAGE
LICENSES IN VIOLATION OF STATE LAW**

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+ *Pro Hac Vice* Motions filed
concurrently with this petition

(Full Case Caption on Following Pages)

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Respondents,

and

EDMUND G. BROWN JR., in his official capacity as Governor of the State of California; KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California; RON CHAPMAN, in his official capacity as Director of the California Department of Public Health; TONY AGURTO, in his official capacity as State Registrar of Vital Statistics and Assistant Deputy Director of Health Information and Strategic Planning of the California Department of Public Health,

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners hereby certify that they are not aware of any entity or person that rules 8.208 and 8.488 of the California Rules of Court require to be listed in this Certificate.

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**PETITION FOR WRIT OF MANDATE AND REQUEST FOR
IMMEDIATE STAY OR INJUNCTIVE RELIEF**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF
CALIFORNIA:**

PRELIMINARY AND JURISDICTIONAL STATEMENT

1. By this Verified Petition for Writ of Mandate, Petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Mark A. Jansson, and ProtectMarriage.com – Yes on 8, A Project of California Renewal, hereby respectfully request a writ of mandate ordering Respondents—the 58 county clerks in the State of California, each of whom is named below—to enforce article I, section 7.5 of the California Constitution (commonly known as Proposition 8), which states that “[o]nly marriage between a man and a woman is valid or recognized in California,” and other state law defining marriage as a union between a man and a woman, because Respondents, upon information and belief, are not enforcing those laws.

2. Petitioners also request an immediate stay or injunction, to remain in place during the pendency of these writ proceedings, requiring Respondents to enforce state law defining marriage as a union between a man and a woman. The urgency demanding this immediate stay or injunction, which is explained further in the accompanying Memorandum of Points and Authorities, derives from the need to affirm the rule of law and the legitimate limitations on Respondents’ authority, and to provide legal clarity regarding the issue of marriage in this State.

3. Petitioners respectfully invoke the original jurisdiction of this Court under article VI, section 10 of the California Constitution, California Code of Civil Procedure sections 1085 and 1086, and California Rules of Court, rules 8.485 through 8.493. As explained in the accompanying Memorandum of Points and Authorities, the legal issues raised herein are of great importance and require prompt resolution, and deciding those

important legal issues does not require this Court to resolve factual questions. Exercise of this Court's original jurisdiction is thus appropriate.

4. This Court should grant the relief requested in this Petition because state law defining marriage as a union between a man and a woman continues to govern throughout the State of California, Respondents' clear and present ministerial duties require them to enforce that state law, Respondents have ceased enforcing that state law, and Respondents lack authority to stop enforcing that state law.

5. Petitioners do not have a plain, speedy, and adequate remedy available at law. No other remedy or proceeding would enable Petitioners to obtain a speedy and final resolution of this challenge to Respondents' non-enforcement of state marriage law.

PARTIES

6. Petitioners Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, and Mark A. Jansson are Official Proponents of Proposition 8. They, unlike members of the general public, exercised their constitutional and statutory rights to propose Proposition 8 as an initiative amendment to the California Constitution. As part of exercising those rights, they supervised the preparation of the appropriate language for Proposition 8, paid the filing fee to begin the initiative process, submitted the draft initiative petition to the California Attorney General, oversaw the collection of signatures to qualify Proposition 8 for the ballot, authorized the filing of the signature petitions for verification, and submitted the arguments in favor of Proposition 8 that appeared in the voter pamphlet. They are beneficially interested in obtaining relief that requires government officials to enforce Proposition 8.

7. Petitioner Hollingsworth is a citizen, resident, taxpayer, and registered elector of the County of Riverside, State of California.

8. Petitioner Knight is a citizen, resident, taxpayer, and registered elector of the County of Los Angeles, State of California.

9. Petitioner Gutierrez is a citizen, resident, taxpayer, and registered elector of the County of Yolo, State of California.

10. Petitioner Jansson is a citizen, resident, taxpayer, and registered elector of the County of Sacramento, State of California.

11. Petitioners Hollingsworth, Knight, Gutierrez, and Jansson each has a right and an interest as a citizen in ensuring that state marriage laws are enforced and that government officials execute their public duties.

12. Petitioner ProtectMarriage.com – Yes on 8, A Project of California Renewal, is the primarily formed ballot measure committee recognized under California law to support Proposition 8's enactment. Official Proponents endorsed ProtectMarriage.com as the official committee to qualify Proposition 8 for the ballot and to advocate for its enactment. ProtectMarriage.com is beneficially interested in obtaining relief that requires government officials to enforce Proposition 8. It also has a right and an interest in ensuring that state marriage laws are enforced and that government officials execute their public duties.

13. Respondent Patrick O'Connell is Auditor-Controller/County Clerk-Recorder of Alameda County.

14. Respondent Barbara Howard is County Clerk of Alpine County.

15. Respondent Kimberly L. Grady is Clerk/Recorder/Registrar of Voters/Commissioner of Civil Marriages of Amador County.

16. Respondent Candace J. Grubbs is County Clerk-Recorder/Registrar of Voters of Butte County.

17. Respondent Madaline Krska is County Clerk Recorder of Calaveras County.

18. Respondent Kathleen Moran is County Clerk and Recorder of Colusa County.
19. Respondent Joseph E. Canciamilla is County Clerk-Recorder-Registrar of Contra Costa County.
20. Respondent Alissia Northrup is County Clerk/Recorder and Registrar of Voters of County of Del Norte.
21. Respondent William E. Schultz is Recorder-Clerk and Elections Official and Commissioner of Marriages of El Dorado County.
22. Respondent Brandi L. Orth is County Clerk/Registrar of Voters of Fresno County.
23. Respondent Sheryl Thur is Clerk-Recorder of County of Glenn.
24. Respondent Carolyn Crnich is County Clerk/Recorder/Registrar of Voters of Humboldt County.
25. Respondent Chuck Storey is Imperial County Clerk/Recorder.
26. Respondent Kammi Foote is Clerk/Recorder and Registrar of Voters of Inyo County.
27. Respondent Mary B. Bedard, CPA, is Auditor-Controller-County Clerk of Kern County.
28. Respondent Rosie Hernandez is Kings County Clerk/Recorder.
29. Respondent Cathy Saderlund is Auditor-Controller and County Clerk of County of Lake.
30. Respondent Julie Bustamante is Lassen County Clerk-Recorder.
31. Respondent Dean C. Logan is Registrar-Recorder/County Clerk of Los Angeles County.
32. Respondent Rebecca Martinez is County Clerk-Recorder/Registrar of County of Madera.

33. Respondent Richard N. Benson is Assessor-Recorder/County Clerk of County of Marin.
34. Respondent Keith M. Williams is County Clerk of Mariposa County.
35. Respondent Susan M. Ranochak is Mendocino County Assessor-County Clerk-Recorder.
36. Respondent Barbara J. Levey is County Clerk of Merced County.
37. Respondent Darcy Locken is Auditor/Recorder/Clerk/Registrar of Voters of Modoc County.
38. Respondent Lynda Roberts is Mono County Clerk-Recorder-Registrar.
39. Respondent Stephen L. Vagnini is Assessor-County Clerk-Recorder of County of Monterey.
40. Respondent John Tuteur is Assessor-Recorder-County Clerk of Napa County.
41. Respondent Gregory J. Diaz is Clerk-Recorder of Nevada County.
42. Respondent Hugh Nguyen is Orange County Clerk-Recorder.
43. Respondent Jim McCauley is County Clerk-Recorder and Registrar of Voters of Placer County.
44. Respondent Kathy Williams is Plumas County Clerk-Recorder.
45. Respondent Larry W. Ward is Assessor-County Clerk-Recorder of County of Riverside.
46. Respondent Craig A. Kramer is County Clerk/Recorder of Sacramento County.
47. Respondent Joe Paul Gonzalez is Clerk-Auditor and Recorder-Registrar of Voters of County of San Benito.

48. Respondent Dennis Draeger is Assessor-Recorder-County Clerk of San Bernardino County.
49. Respondent Ernest J. Dronenburg, Jr. is Assessor/Recorder/County Clerk of San Diego County.
50. Respondent Karen Hong Yee is Director of the San Francisco County Clerk's Office.
51. Respondent Kenneth W. Blakemore is Recorder/County Clerk of San Joaquin County.
52. Respondent Julie Rodewald is Clerk-Recorder of San Luis Obispo County.
53. Respondent Mark Church is Assessor-County Clerk-Recorder and Chief Elections Officer of San Mateo County.
54. Respondent Joseph E. Holland is County Clerk-Recorder and Assessor-Registrar of Voters of County of Santa Barbara.
55. Respondent Regina Alcomendras is Clerk Recorder of County of Santa Clara.
56. Respondent Gail Pellerin is County Clerk of County of Santa Cruz.
57. Respondent Cathy Darling Allen is County Clerk/Registrar of Voters of Shasta County.
58. Respondent Heather Foster is County Clerk-Recorder of Sierra County.
59. Respondent Colleen Setzer is Siskiyou County Clerk/Registrar of Voters.
60. Respondent Charles A. Lomeli is Treasurer/Tax Collector/County Clerk of Solano County.
61. Respondent William F. Rousseau is Sonoma County Clerk-Recorder-Assessor.

62. Respondent Lee Lundrigan is Clerk Recorder of Stanislaus County.
63. Respondent Donna M. Johnston is Clerk Recorder of Sutter County.
64. Respondent Bev Ross is Clerk-Recorder of Tehama County.
65. Respondent Deanna Bradford is Clerk/Recorder/Assessor of Trinity County.
66. Respondent Roland P. Hill is Assessor/Clerk-Recorder of Tulare County.
67. Respondent Deborah Bautista is Clerk and Auditor-Controller of Tuolumne County.
68. Respondent Mark A. Lunn is County Clerk and Recorder/Registrar of Voters of Ventura County.
69. Respondent Freddie Oakley is County Clerk-Recorder of Yolo County.
70. Respondent Terry A. Hansen is County Clerk of Yuba County.
71. Respondents are the county clerks of their respective counties. Their ministerial duties as county clerks require them to ensure that couples who apply for marriage licenses satisfy the legal requirements for obtaining such a license. Their ministerial duties as county clerks also require them to issue marriage licenses to eligible couples. Respondents are named solely in their official capacities as county clerks.
72. Real Party in Interest Edmund G. Brown Jr., is Governor of the State of California. He is the chief executive officer in the State. He is named solely in his official capacity.
73. Real Party in Interest Kamala D. Harris is Attorney General of the State of California. Her official duties include enforcing the laws of the State. She is named solely in her official capacity.

74. Real Party in Interest Dr. Ron Chapman is Director of the California Department of Public Health. He is charged with administering the executive-branch agency that is responsible for recording marriage and other vital records. He is named solely in his official capacity.

75. Real Party in Interest Tony Agurto is State Registrar of Vital Statistics and Assistant Deputy Director of Health Information and Strategic Planning of the California Department of Public Health. He is the state record keeper charged with recording marriage and other vital records. He is named solely in his official capacity.

76. This proceeding directly affects the purported interests of Real Parties in Interest because they are state officials who allege that the State Registrar exercises supervisory control over county clerks when they issue marriage licenses. Upon information and belief, they ordered, permitted, or caused the State Registrar to issue a directive to county clerks ordering them to stop enforcing Proposition 8 and other state law defining marriage as a union between a man and a woman. The relief sought in this Petition will directly affect those actions by Real Parties in Interest.

FACTS¹

77. “From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman.” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 792 [76 Cal.Rptr.3d 683, 709-710, 183 P.3d 384, 407] (hereafter *Marriage Cases*)).) When politically powerful groups increased efforts to redefine marriage in this State, the People reinforced this understanding of marriage by approving Proposition 22, a statutory initiative, codified as

¹ All the exhibits in the Appendix filed in support of this Petition are true and correct copies of the provided documents that have been obtained by Petitioners and their counsel. The exhibits are incorporated herein by reference as if fully set forth in this Petition.

Family Code section 308.5, stating that “[o]nly marriage between a man and a woman is valid or recognized in California.”

78. In February 2004, San Francisco government officials began violating state law by issuing marriage licenses to same-sex couples. Then-Attorney General Bill Lockyer and a group of citizens filed two petitions with this Court seeking a writ of mandate ordering San Francisco officials to stop issuing unlawful marriage licenses and to enforce state law that defines marriage as a union between a man and a woman. Soon after those petitions were filed, this Court entered an immediate order directing San Francisco “officials to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions” pending the outcome of those proceedings. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1073 [17 Cal.Rptr.3d 225, 235, 95 P.3d 459, 467] (hereafter *Lockyer*)). In August 2004, this Court ruled in the petitioners’ favor and issued a writ of mandate directing San Francisco officials “to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes.” (*Id.* at p. 1120.)

79. Around that time, a number of cases were filed in California state courts alleging that state marriage laws, by defining marriage as a union between a man and a woman, violated the California Constitution. In May 2008, this Court agreed that those statutes were inconsistent with the California Constitution. (*Marriage Cases, supra*, 43 Cal.4th at pp. 855-856.)

80. On November 4, 2008, more than seven million Californians approved Proposition 8 as article I, section 7.5 of the California Constitution, which states that “[o]nly marriage between a man and a woman is valid or recognized in California.”

81. The following day, on November 5, 2008, various parties (including the City and County of San Francisco) filed petitions for a writ of mandate with this Court, seeking to strike down Proposition 8 as an invalid revision of the California Constitution and prevent government officials from enforcing it. The Attorney General (who at the time was Edmund G. Brown Jr.) declined to defend Proposition 8 in those proceedings. Petitioners in this case intervened there and defended Proposition 8. In May 2009, this Court rejected those legal challenges and affirmed Proposition 8 as a valid amendment to the California Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 474 [93 Cal.Rptr.3d 591, 680-681, 207 P.3d 48, 122].)

82. On May 22, 2009, four California citizens filed a lawsuit captioned *Perry v. Schwarzenegger* in United States District Court for the Northern District of California, alleging that Proposition 8 violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. A copy of the Complaint in that case is attached as Exhibit A. The named defendants, all sued in their official capacities, were the Governor, Attorney General, State Registrar, Deputy Director of Health Information and Strategic Planning, Auditor Controller/Clerk Recorder of Alameda County, and Registrar-Recorder/County Clerk of Los Angeles County. None of the defendants defended Proposition 8, and the Attorney General (similar to what he did before this Court in the *Strauss* case) agreed with the four plaintiffs that Proposition 8 should be struck down. Petitioners in this case intervened in the district court and defended Proposition 8.

83. In August 2010, the *Perry* district court ruled against Proposition 8 (see *Perry v. Schwarzenegger* (N.D.Cal. 2010) 704 F.Supp.2d 921), and entered a permanent injunction ordering that “Defendants in their official capacities, and all persons under the control or supervision of

defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.” (*Perry v. Schwarzenegger* (N.D.Cal. Aug. 12, 2010, No. C 09-2292 VRW) Permanent Injunction, Doc. No. 728 (attached as Exhibit B).) None of the named government defendants appealed that decision. But Petitioners sought review from the United States Court of Appeals for the Ninth Circuit.

84. The Ninth Circuit questioned Petitioners’ standing under state law to defend Proposition 8, and because it thought that the answer to that question may be dispositive of its jurisdiction to decide the merits of the plaintiffs’ claims, the Ninth Circuit certified the following question to this Court:

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative’s validity or the authority to assert the State’s interest in the initiative’s validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

(*Perry v. Schwarzenegger* (9th Cir. 2011) 628 F.3d 1191, 1193.)

85. On November 17, 2011, this Court answered that question in the affirmative, holding that “[i]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.” (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1127 [134 Cal.Rptr.3d 499, 505, 265 P.3d 1002, 1007].)

86. On February 7, 2012, the Ninth Circuit held that the Petitioners had standing to appeal, and affirmed the district court’s

judgment. (*Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, 1063-1064.)
Petitioners filed a petition for writ of certiorari with the Supreme Court of the United States, and the Court granted that petition. (*Hollingsworth v. Perry* (2012) ___ U.S. ___ [133 S.Ct. 786].)

87. On June 26, 2013, the Supreme Court disagreed with the Ninth Circuit, concluded that Petitioners lacked standing to appeal the *Perry* district court's decision, and declined to resolve the four plaintiffs' challenge to Proposition 8's constitutionality. (*Hollingsworth v. Perry* (June 26, 2013, No. 12-144) ___ U.S. ___ [2013 WL 3196927].)

88. Because Petitioners lacked standing to appeal the *Perry* district court's decision, the Supreme Court vacated the Ninth Circuit's decision in *Perry v. Brown*. (See *Hollingsworth, supra*, 2013 WL 3196927, at p. *14.)

89. On June 26, 2013, the same day as the Supreme Court's decision, the State Registrar issued a letter to all county clerks reporting that the Attorney General has "conclude[d] that the [*Perry* court's] injunction applies statewide, and that county clerks . . . in all 58 counties must comply with it." (State Registrar Tony Agurto, letter to County Clerks and County Recorders, June 26, 2013, p. 1, at <http://gov.ca.gov/docs/Letter_to_County_Officials.pdf> [as of July 11, 2013] (attached as Exhibit C).) The letter then stated that "[t]he effect of the district court's injunction is that same-sex couples will once again be allowed to marry in California" once "the Ninth Circuit issues a further order dissolving a stay of the injunction that has been in place throughout the appeal process." (*Ibid.*)

90. Two days later, on June 28, 2013, the Ninth Circuit in the *Perry* case issued an order declaring that "[t]he stay in the above matter is dissolved effective immediately." (*Perry v. Brown* (9th Cir. June 28, 2013, No. 10-16696) Order, Doc. No. 432 (attached as Exhibit D).)

91. That same day, the State Registrar issued another letter to county clerks, which stated:

On June 28, 2013, the U.S. Court of Appeals for the Ninth Circuit dissolved the stay of the order enjoining enforcement of Proposition 8. As explained in the notice dated June 26, 2013, this order applies to all 58 county clerks This means that same-sex marriage is again legal in California.

Effective immediately, county clerks shall issue marriage licenses to same-sex couples in California.

(State Registrar Tony Agurto, letter to County Clerks and County Recorders, June 28, 2013, p. 1, at <http://gov.ca.gov/docs/DPH_Letter.pdf> [as of July 11, 2013] (attached as Exhibit E).)

92. Upon information and belief, ever since the Ninth Circuit issued its order and the State Registrar issued his directive, many county clerks have been issuing marriage licenses in violation of state law. (See, e.g., Leff, *Appeals court lifts hold on Calif. gay marriages* (Jun. 28, 2013) <<http://news.yahoo.com/appeals-court-lifts-hold-calif-gay-marriages-224831884.html>> [as of July 11, 2013] (attached as Exhibit F).)

93. Upon information and belief, all four plaintiffs in the *Perry* case have been married. (See Leff, *Plaintiffs in Gay Marriage Case Wed in SF, LA* (Jun. 28, 2013) <<http://bigstory.ap.org/article/appeals-court-lifts-hold-calif-gay-marriages>> [as of July 11, 2013] (attached as Exhibit G).)

94. The Attorney General has publicly threatened that if county clerks decide not to enforce the *Perry* injunction, her office will take legal action against them. (See California Attorney General Kamala D. Harris's Post, Twitter (Jun. 26, 2013, 11:04 AM) <<https://twitter.com/KamalaHarris/status/349951321555734528>> [as of July 11, 2013] (attached as Exhibit H).)

95. Respondents each have clear and present ministerial duties requiring them to enforce state law defining marriage as a union between a man and a woman.

96. Upon information and belief, Respondents have stopped enforcing state law defining marriage as a union between a man and a woman.

97. Petitioners are beneficially interested in obtaining relief that requires Respondents to enforce state marriage law and abide by the California Constitution. They also have rights and interests in ensuring that state marriage law is enforced and that government officials execute their public duties consistently with the California Constitution.

CLAIMS ASSERTED

98. This Court's case law requires executive officials charged with ministerial duties to execute those duties regardless of their or others' views about the constitutionality of the laws imposing those duties. Yet Respondents are violating their ministerial duties by issuing marriage licenses in violation of state law. Petitioners are thus entitled to a writ of mandate requiring Respondents to comply with state law defining marriage as a union between a man and a woman.

99. Article III, section 3.5 of the California Constitution prohibits government agencies and officials from declaring state law unenforceable, or declining to enforce state law, on the basis that the law is unconstitutional, unless an appellate court has first made that determination. The Ninth Circuit's decision in *Perry* has been vacated; hence there is no appellate decision holding that Proposition 8 is unconstitutional. Petitioners are thus entitled to a writ of mandate requiring Respondents to comply with state law defining marriage as a union between a man and a woman.

100. As explained in the accompanying Memorandum of Points and Authorities, Petitioners and the citizens of the State of California will suffer irreparable injury and damage unless this Court orders Respondents

to enforce state law defining marriage as a union between a man and a woman.

101. As explained in the accompanying Memorandum of Points and Authorities, Petitioners and the citizens of the State of California will suffer irreparable injury and damage unless this Court issues an immediate stay or injunction—to remain in place during the pendency of these writ proceedings—requiring Respondents to enforce state law defining marriage as a union between a man and a woman.

102. Petitioners believe that they need not plead “demand and refusal” under these circumstances. Without prejudice to that position, Petitioners allege that it would have been futile for them to have demanded that Respondents comply with state law defining marriage as a union between a man and a woman because only a court order will cause Respondents to enforce state marriage law.

RELIEF SOUGHT

Wherefore, Petitioners respectfully request the following relief:

103. That this Court issue an immediate stay or injunction, to remain in place during the pendency of these writ proceedings, requiring Respondents to enforce state law defining marriage as a union between a man and a woman;

104. That this Court issue an alternative writ of mandate ordering Respondents to enforce California state law defining marriage as a union between a man and a woman, or in the alternative, to show cause before this Court at a specified time and place why Respondents will not do so;

105. That, upon Respondents’ return to the alternative writ of mandate, this Court hold a hearing at the earliest practicable time so that the important legal issues raised by this Petition may be resolved promptly;

106. That, following the hearing, this Court issue a peremptory writ of mandate or other appropriate equitable relief ordering Respondents

to enforce state law defining marriage as a union between a man and a woman;


107. That this Court award Petitioners their attorneys' fees and costs of suit; and

108. That this Court award other and further relief as it may deem just and equitable.

VERIFICATION

I, Dennis Hollingsworth, a citizen of the United States and a resident of the State of California, am a Petitioner in the above-captioned action. I have read the foregoing Petition and know the contents thereof. I am informed, believe, and allege based on that information and belief that the contents of the foregoing Petition are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of July, 2013, in Murrieta, CA,
California.



Dennis Hollingsworth

VERIFICATION

I, Ron Prentice, a citizen of the United States and a resident of the State of California, am Chairman of the ad hoc executive committee that oversees and manages the official Proposition 8 campaign committee known as ProtectMarriage.com – Yes on 8, a Project of California Renewal, a Petitioner in the above-captioned case. I have read the foregoing Petition and know the contents thereof. I am informed, believe, and allege based on that information and belief that the contents of the foregoing Petition are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11th day of July, 2013, in Oakhurst, CA,
California.



Ron Prentice, Chairman of
ProtectMarriage.com

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Californians hold their initiative power in the highest regard, it being one of the most precious rights of the People. In exercising that right, millions of California's citizens cast their votes on one of the most pressing social issues of our time—the fundamental definition of marriage. When the election was over, more than seven million Californians voted to approve Proposition 8 and thereby to restore traditional marriage in this State.

Since that election, the People's unambiguous expression of public and social policy on this profound question has been unceasingly attacked and continually abandoned by their elected officials, effectively thrown aside and forsaken. Now, state officials (the Real Parties in Interest here), through a directive to Respondents, seek to render Proposition 8 a dead letter, by ordering that Respondents not enforce it at all. Simply put, these state officials are trying to export throughout the State an unreviewable federal district court injunction, which resulted from a collusive lawsuit (against which they did not defend) and a judgment (from which they did not appeal). (*See Perry v. Schwarzenegger, supra*, 704 F.Supp.2d 921.) These officials, at bottom, seek to nullify Proposition 8 and thus accomplish indirectly that which they could not do directly. (Cf. *Perry v. Brown, supra*, 52 Cal.4th at pp. 1126-1127.) They attempt to justify their actions through a misguided understanding of their authority over Respondents.

So once more, the fate of Proposition 8 finds itself before this Court. And once again, the People ask this Court to affirm that exercise of their initiative power. In *Strauss v. Horton, supra*, 46 Cal.4th 364, this Court upheld the People's right to use their initiative power to enact Proposition 8. In *Perry v. Brown, supra*, 52 Cal.4th 1116, this Court sustained the

People’s right to defend that initiative when their public officials decline to do so. And now, this Court is asked to affirm the People’s right to require their elected officials to enforce this duly enacted initiative.

The urgent need to prevent state officials’ attempt to overrun a constitutional initiative—when combined with several important legal issues involving the limitations on public officials’ authority, the rule of law, and the division of power between public officials in this State—calls for this Court to intervene and breathe enforcement life into Proposition 8. Failing to do this, particularly in light of state officials’ history of antagonism to this initiative, will jeopardize the People’s confidence in their system of government, causing them to believe that elected officials may thwart the electorate’s will by declining to enforce initiative measures. Should this Court abstain from granting the relief requested, the end result will be to allow one federal district judge—empowered by state officials who openly advocated for and ceded to Proposition 8’s demise—to nullify a constitutional initiative approved by more than seven million voters.

Petitioners urge this Court to issue a writ of mandate requiring Respondents to enforce Proposition 8 and other state law defining marriage as a union between a man and a woman. The *Perry* injunction is no bar to this outcome, for at least two reasons. First, that injunction does not require *any* county clerk to cease future enforcement of Proposition 8. The *Perry* court’s authority was limited to providing injunctive relief for the four plaintiffs in that case. Because those plaintiffs have recently been married, all relief due under that injunction has already been provided, and therefore *none* of the county clerks are required by that injunction to stop enforcing Proposition 8 in the future. Second, and alternatively, the *Perry* injunction does not require the 56 county clerks who were not defendants to that action to stop enforcing Proposition 8. The injunction purports to cover all persons under the supervision or control of the named state defendants. But

none of those state officials have authority to supervise or control county clerks when issuing marriage licenses. Therefore, the *Perry* injunction does not bind the 56 county clerks not named as defendants in that case.

County clerks not bound by the *Perry* injunction must continue to enforce Proposition 8. Absent an appellate decision establishing the unconstitutionality of a state law, the principles recognized by this Court in *Lockyer, supra*, 33 Cal.4th 1055, and the provisions enshrined in article III, section 3.5 of the California Constitution require executive officials to enforce that law. Respondents therefore must enforce Proposition 8, and this Court should issue a writ of mandate ordering them to do so.

DISCUSSION

I. This Court Should Exercise its Original Jurisdiction.

The California Constitution affords this Court original jurisdiction over petitions for a writ of mandate. (Cal. Const., art. VI, § 10; *Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 252 [135 Cal.Rptr.3d 683, 701, 267 P.3d 580, 595].) This Court “will invoke [this] original jurisdiction where the matters to be decided are of sufficiently great importance and require immediate resolution.” (*Cal. Redevelopment Assn. v. Matosantos, supra*, 53 Cal.4th at p. 253; see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [276 Cal.Rptr. 326, 328, 801 P.2d 1077, 1079]; *Amador Valley J. Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [149 Cal.Rptr. 239, 241, 583 P.2d 1281, 1283] (hereafter *Amador Valley*).)

This Petition presents questions of great importance concerning the rule of law and limitations on public officials’ authority. In *Lockyer, supra*, 33 Cal.4th at pp. 1066-1067, this Court exercised its original jurisdiction and issued a writ of mandate ordering San Francisco officials not to issue marriage licenses in violation of state law. *Lockyer* identified as “important” the question whether an “executive official who is charged

with the ministerial duty of enforcing a state statute exceeds his or her authority” when that official declines to enforce state law. (*Ibid.*) That question “implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders.” (*Id.* at p. 1068.) It presents “a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being ‘a government of laws, and not of men’ (or women).” (*Ibid.*) Here, too, Respondents’ non-enforcement of state law that defines marriage as a union between a man and a woman raises similar important questions and fundamental concerns at the heart of our tripartite system of government.

The importance of these questions is heightened by the history of some government officials’ unrelenting efforts to thwart the People’s attempts to preserve traditional marriage laws. For many years, the People have witnessed their government officials’ persistent attempts to attack, redefine, or undermine traditional marriage, despite the People’s repeated attempts to maintain it. In 2008, for example, the People approved Proposition 8 to restore traditional marriage, yet public officials in both *Strauss v. Horton* and *Perry v. Schwarzenegger* declined to defend it, and then-Attorney General Brown actively challenged it. (*Strauss v. Horton*, *supra*, 46 Cal.4th at pp. 465-466; *Perry v. Schwarzenegger* (N.D.Cal. 2010) 704 F.Supp.2d 921, 928.)² Now, Respondents’ collective non-enforcement of Proposition 8 marks the culmination of executive officials’ unyielding antagonism toward citizen-enacted marriage laws. It is imperative that this

² This Court exercised its original jurisdiction in *Strauss*, a case in which the petitioners challenged the validity of Proposition 8. (See *Strauss v. Horton*, *supra*, 46 Cal.4th at pp. 398-399.) This Court should likewise exercise its original jurisdiction here, a case in which Petitioners challenge Respondents’ authority not to enforce Proposition 8.

Court affirm the legitimate limits on executive officials' power, lest the People lose confidence in their system of government, believing that elected officials may thwart the People's express will by ignoring duly enacted laws.

Moreover, the important issues raised in this Petition require prompt resolution. The same need for legal clarity and predictability that demanded an immediate ruling in *Lockyer* calls for this Court's urgent attention here. (*See People v. Garcia* (2006) 39 Cal.4th 1070, 1080 [48 Cal.Rptr.3d 75, 81, 141 P.3d 197, 203] ["[C]ertainty, predictability and stability in the law are the major objectives of the legal system."].) If this Court does not require Respondents to enforce Proposition 8, Respondents will continue issuing marriage licenses to ineligible couples, and there will be uncertainty about the validity of the marriages that result from those licenses. "[I]t would not be prudent or wise," as this Court noted in *Lockyer*, "to leave the validity of th[o]se marriages in limbo for what might be a substantial period of time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail." (*Lockyer, supra*, 33 Cal.4th at p. 1117.) "[D]elaying a ruling," which would allow Respondents to continue ignoring Proposition 8, "might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm." (*Ibid.*, emphasis added.)

An immediate ruling is also necessary to preserve the public's trust in the rule of law. As explained above, executive officials have attacked, failed to enforce, and undermined state laws affirming traditional marriage. Under these circumstances, only a prompt order requiring Respondents to enforce Proposition 8 will restore the People's confidence in their government.

II. This Court Should Issue an Immediate Stay or Injunction Requiring Respondents to Enforce Proposition 8 during the Pendency of these Writ Proceedings.

This Court has authority to enter a temporary stay or injunction during the pendency of original action writ proceedings. Indeed, this Court has done just that on several occasions, including in *Lockyer* when it issued a temporary stay, “[p]ending [the Court’s] determination of the[] matter[,],” that directed a county clerk “to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions.” (*Lockyer, supra*, 33 Cal.4th at p. 1073; see, e.g., *Cal. Redevelopment Assn. v. Matosantos, supra*, 53 Cal.4th at p. 241 [noting that this Court in an original writ proceeding “issued an order” that “partially stayed” the two challenged legislative “measures intended to stabilize school funding”]; *Com. To Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 260 [172 Cal.Rptr. 866, 870, 625 P.2d 779, 783] [“stay[ing] enforcement of the [challenged statutory] restrictions pending resolution of the merits”]; *Hardie v. Eu* (1976) 18 Cal.3d 371, 375 [134 Cal.Rptr. 201, 203, 556 P.2d 301, 303] [“stay[ing] the enforcement of [the challenged statutes] pending . . . resolution of the matter”]; see also Cal. Rules of Court, rule 8.486(a)(7) [permitting petitioners to request “a temporary stay”]; Cal. Rules of Court, rule 8.487(a)(4) [authorizing this Court to “grant or deny a request for temporary stay”].) This Court should follow its course in *Lockyer* and enter a temporary stay or injunction requiring Respondents to enforce state marriage law and refrain from issuing marriage licenses not authorized by those laws pending the outcome of these writ proceedings.

These circumstances present an urgent need for a temporary stay or injunction. Unless this Court enters an immediate stay or injunction, Respondents will continue to unlawfully issue marriage licenses that will

result in marriages of uncertain validity. The proliferation of marriages clouded by uncertainty during the pendency of these proceedings will harm, as discussed in Section (I) above, (1) the public’s confidence in the rule of law and their system of government, and (2) the persons who might rely on those uncertain marriages when “mak[ing] fundamental changes in their lives.” (*Lockyer, supra*, 33 Cal.4th at p. 1117.)³

Failing to require Respondents to enforce Proposition 8 during the pendency of this litigation also harms the People by ignoring their will as expressed in a constitutional initiative. “[T]he provisions of the California Constitution itself constitute the ultimate expression of the people’s will.” (*Marriage Cases, supra*, 43 Cal.4th at p. 852.) The constitutional initiative power is particularly important to the People, “it being one of the most precious rights of our democratic process.” (*Amador Valley, supra*, 22 Cal.3d at p. 248, quotation marks omitted.) Californians expressed their will about marriage when they approved Proposition 8. Allowing Respondents to ignore Proposition 8 thus harms the more than seven million voters who approved that measure by silencing their unambiguous expression of public and social policy.

To avoid this imminent harm, this Court should issue an immediate stay or injunction—to remain in place during the pendency of these writ proceedings—requiring Respondents to enforce state law defining marriage as a union between a man and a woman. This Court should enter the stay or injunction immediately; it need not, nor should it, wait for Respondents to

³ Each marriage that results without an immediate stay or injunction might impose administrative costs and hardships on Respondents and waste taxpayer dollars. For if this Court eventually grants the requested writ, Respondents might be required, as the local officials were in *Lockyer*, to provide individualized notification to couples regarding the ongoing validity of marriages solemnized since June 28, 2013. (See *Lockyer, supra*, 33 Cal.4th at pp. 1118-1119.)

file their preliminary opposition. (See Code Civ. Proc., § 1107 [“The court in which the [writ] application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application”]; Cal. Rules of Court, rule 8.487(a)(4) [“Without requesting preliminary opposition . . . , the court may grant or deny a request for temporary stay”].) Time is of the essence, and vital public interests—including the rule of law, the confidence of the People in their government, and the future of a constitutional initiative addressing an issue of profound social importance—hang in the balance.

III. This Court Should Issue the Requested Writ of Mandate.

“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station” (Code Civ. Proc., § 1085, subd. (a).) “The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.” (Code Civ. Proc., § 1086.)

A petitioner is thus entitled to a writ of mandate as a matter of law where the petitioner shows that (1) there is not a plain, speedy, and adequate remedy in the ordinary course of law, (2) the respondent has “[a] clear, present and usually ministerial duty” to perform, and (3) the petitioner is beneficially interested in, or otherwise has standing to seek, the requested relief. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540 [28 Cal.Rptr.2d 617, 624, 869 P.2d 1142, 1149, quotation marks and alterations omitted], superseded by statute on other grounds as recognized in *Coachella Valley Mosquito and Vector Control Dist. v. Cal. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077 [29 Cal.Rptr.3d 234, 237, 112 P.3d 623, 625]; *Flora Crane*

Service, Inc. v. Ross (1964) 61 Cal.2d 199, 203-204 [37 Cal.Rptr. 425, 427-428, 390 P.2d 193, 195-196].) All of these requirements are satisfied here.

A. Petitioners Do Not Have a Plain, Speedy, and Adequate Remedy in the Ordinary Course of Law.

Section (I) above demonstrates that affirming Respondents' duty to enforce state law defining marriage as a union between a man and a woman requires the immediate attention of this Court through these proceedings. No remedy other than a writ of mandate can afford the speedy relief necessary under these circumstances.

Section (II) above similarly shows that significant damage to the rule of law, the People's confidence in their system of government, and a constitutional initiative on a matter of profound social importance will result unless this Court enters an immediate stay requiring Respondents to enforce state law defining marriage as a union between a man and a woman. No means of relief other than these writ proceedings can avert those harms.

Petitioners therefore do not have a plain, speedy, and adequate remedy in the ordinary course of law.

B. Respondents Are Violating Clear Ministerial Duties.

Respondents' official duties require them to enforce state law defining marriage as a union between a man and a woman. Respondents first must "ensure that the [legal] requirements for obtaining a marriage license are satisfied." (*Lockyer, supra*, 33 Cal.4th at p. 1076 [citing Fam. Code, § 354].) Then Respondents must distribute marriage licenses to eligible couples. (Fam. Code, § 350, subd. (a) ["Before entering a marriage . . . , the parties shall first obtain a marriage license from a county clerk."]; Fam. Code, § 359, subd. (a) ["[A]pplicants to be married shall first appear together in person before the county clerk to obtain a marriage license".])

These duties are ministerial, as this Court held in *Lockyer*. “A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists.” (*Lockyer, supra*, 33 Cal.4th at p. 1082 [quoting *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [129 Cal.Rptr.2d 811, 814, 62 P.3d 54, 58]].)

When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk . . . has the respective mandatory duty to issue a marriage license . . . ; in that circumstance, the official[] ha[s] no discretion to withhold a marriage license By the same token, when the [legal] requirements have not been met, the county clerk . . . [is] not granted any discretion under the statutes to issue a marriage license

(*Lockyer, supra*, 33 Cal.4th at p. 1081-1082.) By issuing marriage licenses in violation of state law, Respondents are currently violating their clear and present ministerial duties as county clerks.

C. Petitioners Have Standing to Obtain the Requested Writ of Mandate.

To establish standing to seek a writ of mandate, a petitioner typically must be “beneficially interested” in the relief sought. (Code Civ. Proc., § 1086.) “The requirement that a petitioner be ‘beneficially interested’ has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.” (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165 [127 Cal.Rptr.3d 710, 717, 254 P.3d 1005, 1011, citation and quotation marks omitted] (hereafter *Save the Plastic Bag*)).

Petitioners satisfy the beneficial-interest requirement here. That conclusion necessarily follows from this Court’s recent decision in *Perry v. Brown*, *supra*, 52 Cal.4th p. 1127, which held that these very Petitioners, as Official Proponents of Proposition 8, have standing to “assert the state’s interest in [Proposition 8’s] validity . . . when the public officials who ordinarily defend the measure . . . decline to do so.” (*Ibid.*)

This Court has a “solemn duty jealously to guard the sovereign people’s initiative power, it being one of the most precious rights of our democratic process.” (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [186 Cal.Rptr. 30, 33, 651 P.2d 274, 277, quotation marks omitted].) “[I]n order ‘to guard the people’s right to exercise initiative power,’” “California courts have routinely permitted the official proponents of an initiative” to litigate in defense of their “voter-approved initiative measure.” (*Perry v. Brown*, *supra*, 52 Cal.4th at p. 1125 [quoting *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822 [226 Cal.Rptr. 81, 88, 718 P.2d 68, 75]].) “The initiative power would be significantly impaired if there were no one to assert the state’s interest in the validity of the measure[.]” (*Perry v. Brown*, *supra*, 52 Cal.4th at p. 1151.) Indeed, “it is essential to the integrity of the initiative process . . . that there be someone to assert the state’s interest in an initiative’s validity on behalf of the people[.]” (*Id.* at p. 1126.) That is why this Court in *Perry v. Brown* held that initiative proponents—“the most logical and appropriate choice to assert the state’s interest in the validity of the initiative measure on behalf of the electors who voted in favor of the measure”—have the right to “assert the state’s interest in the initiative’s validity” “when the public officials who ordinarily defend [that] measure decline to do so.” (*Id.* at p. 1152.)

Since, as *Perry v. Brown* establishes, Petitioners have the right under state law to litigate in defense of Proposition 8 when government officials decline to defend it in court, Petitioners also have the right under state law

to assert the People’s interest in the enforcement of Proposition 8 when government officials decline to enforce it. Otherwise, the “significant[] impair[ment]” of the People’s “initiative power” (*id.* at p. 1151) and the considerable harm to “the integrity of the initiative process” (*id.* at p. 1126) that this Court avoided in *Perry v. Brown* will result here. In other words, where government officials’ “public[] oppos[ition]” to an initiative measure reaches the point that they do not enforce it (*id.* at p. 1125), allowing official proponents to pursue a writ action is vital to preserving the People’s initiative power. Petitioners are thus beneficially interested in the relief sought here.

In addition to satisfying the beneficial-interest requirement, Petitioners also have public-interest standing to pursue the relief requested. (See *Perry v. Brown, supra*, 52 Cal.4th at p. 1160.) Under the public-interest doctrine, “private citizens have long been authorized to bring a mandate action to enforce a public duty involving the protection of a public right in order to ensure that no government body impairs or defeats the . . . right.” (*Ibid.*) Put differently, “‘where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.’” (*Save the Plastic Bag, supra*, 52 Cal.4th at p. 166 [quoting *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627, 628-629]].) “The term ‘citizen’ in this context is descriptive, not prescriptive. It reflects an understanding that the action is undertaken to further the public interest and is not limited to the plaintiff’s private concerns. Entities that are not technically ‘citizens’ regularly bring citizen suits.” (*Save the Plastic Bag, supra*, 52 Cal.4th at p. 168.)

Public-interest standing applies to Petitioners, both to Official Proponents and ProtectMarriage.com. The question raised here concerns public rights, which include (1) the right of the People to uphold the rule of law by requiring their elected officials to comply with duly enacted state law (see *Lockyer, supra*, 33 Cal.4th at pp. 1068, 1119-1120), and (2) the right of the People to use their initiative power to add constitutional provisions that are enforced (rather than ignored) by public officials (see *Perry v. Brown, supra*, 52 Cal.4th at pp. 1125-1127). Furthermore, Petitioners seek the enforcement of public duties (recounted in Section (III)(B))—and request Respondents’ compliance with, and enforcement of, state law defining marriage as a union between a man and a woman. Petitioners thus have the right under the public-interest doctrine to pursue the relief sought in this Petition.

IV. Respondents Cannot Justify Their Non-Enforcement of State Marriage Law.

Respondents will likely rely on the injunction entered by the district court in the *Perry* case, and the associated directive from the State Registrar, to justify their non-enforcement of Proposition 8. Because two Respondents (referred to as “Alameda and Los Angeles Respondents”) are named defendants in the *Perry* case and the remaining Respondents (referred to as “Non-*Perry* Respondents”) are not, we address separately the arguments against these two groups of Respondents.

A. Non-*Perry* Respondents Cannot Justify Their Non-Enforcement of State Marriage Law.

Non-*Perry* Respondents, as explained below, are not bound by, and thus cannot rely on, the *Perry* injunction to excuse their actions in not enforcing Proposition 8. Nor are they supervised by the State Registrar, and thus they cannot rely on his directive. In the absence of those justifications, this Court’s case law and the California Constitution, as we will show,

forbid Non-*Perry* Respondents from declining to enforce state marriage law.

1. Non-*Perry* Respondents Are Not Bound by the *Perry* Injunction.

This Court gives federal court judgments and injunctions the same effect that they would have in federal court. (*Younger v. Jensen* (1980) 26 Cal.3d 397, 411 [161 Cal.Rptr. 905, 914, 605 P.2d 813, 822, quotation marks omitted] [“A federal judgment has the same effect in the courts of this state as it would have in a federal court.”]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173 [137 Cal.Rptr. 162, 167, 561 P.2d 252, 257, citations omitted] [“Full faith and credit must be given to a final order or judgment of a federal court. Such an order or judgment has the same effect in the courts of this state as it would have in a federal court.”].)

The *Perry* district court entered a permanent injunction ordering that the “[d]efendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution.” (*Perry v. Schwarzenegger* (N.D.Cal. Aug. 12, 2010, No. C 09-2292 VRW) Permanent Injunction, Doc. No. 728 (Exhibit B).) Non-*Perry* Respondents, however, were not defendants to that litigation and thus are not bound by that injunction.

One of the lead attorneys for the *Perry* plaintiffs has openly acknowledged that Non-*Perry* Respondents are not bound by the injunction. As Ninth Circuit Judge Reinhardt stated, “according to what [the plaintiffs’] counsel represented to [the court] at oral argument, the complaint they filed and the injunction they obtained determines only that Proposition 8 may not be enforced in two of California’s fifty-eight counties.” (*Perry v. Schwarzenegger* (9th Cir. 2011) 630 F.3d 898, 907 [Reinhardt, J., concurring]; see also *Perry v. Schwarzenegger* (9th Cir.

2011) 628 F.3d 1191, 1195, fn. 2 [recounting the plaintiffs’ counsel’s statement at oral argument that if the Ninth Circuit were to conclude that “Proponents have no standing and . . . dismiss th[e] appeal,” “the district court decision would be binding on the named state officers and on the county clerks in two counties only, Los Angeles and Alameda.”).

Indeed, counsel for the *Perry* plaintiffs agreed that “the scope of the injunction is quite limited” and repeatedly recognized that Non-*Perry* Respondents “are not directly bound by the injunction.” (*Perry v. Brown*, Ninth Circuit Oral Argument Audio (Dec. 6, 2010, No. 10-16696) at 31:57-32:06, 37:40-37:45, 53:18-53:25 <<http://cdn.ca9.uscourts.gov/datastore/media/2010/12/06/10-16696.wma>> [as of July 11, 2013] (hereafter Ninth Circuit *Perry* Audio); accord *Perry v. Brown*, Ninth Circuit Unofficial Oral Argument Transcript (Dec. 6, 2010, No. 10-16696) at 13-14, 16, 22 <<http://www.docstoc.com/docs/83536462/120610-Oral-Argument-Unofficial-Transcript-Standing>> [as of July 11, 2013] (hereafter Unofficial Ninth Circuit *Perry* Transcript). Lest there be any doubt on that point, the plaintiffs’ counsel candidly conceded that Non-*Perry* Respondents could “refuse a marriage license to a same-sex couple” “without violating th[e] injunction.” (Ninth Circuit *Perry* Audio, *supra*, at 32:26-32:42, 55:09-55:22; accord Unofficial Ninth Circuit *Perry* Transcript, *supra*, at pp. 14, 23.)

This Court should thus affirm what the *Perry* plaintiffs have admitted—that the *Perry* injunction does not bind Non-*Perry* Respondents—and it should do so for the following reasons.

a. The *Perry* Court Lacks Authority to Apply its Injunction beyond the Four Plaintiffs.

The *Perry* district court lacks authority to order injunctive relief for anyone except the four plaintiffs in that case. Federal court remedies are limited to addressing “the inadequacy that produced the injury in fact that

the plaintiff has established.” (*Lewis v. Casey* (1996) 518 U.S. 343, 357 [116 S.Ct. 2174, 2183, 135 L.Ed.2d 606].) The *Perry* court therefore lacks the authority to award relief beyond an injunction limited to the four named plaintiffs. The plaintiffs there did not purport to represent a class; and an injunction permitting them, and only them, to marry provides them complete relief for the injuries they alleged. (See *Monsanto Co. v. Geertson Seed Farms* (2010) 130 S.Ct. 2743, 2760 and fn. 6 [177 L.Ed.2d 461]; *Califano v. Yamasaki* (1979) 442 U.S. 682, 702 [99 S.Ct. 2545, 2558, 61 L.Ed.2d 176].) The *Perry* plaintiffs did not have standing to seek relief for the injuries of third parties. (See *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 263 [97 S.Ct. 555, 562, 50 L.Ed.2d 450] [“In the ordinary case, a party is denied standing to assert the rights of third persons”]; *Warth v. Seldin* (1975) 422 U.S. 490, 499 [95 S.Ct. 2197, 2205, 45 L.Ed.2d 343] [similar].) The effect of the *Perry* injunction thus cannot “directly interfere with enforcement of contested [laws] . . . except with respect to the particular federal plaintiffs.” (See *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 931 [95 S.Ct. 2561, 2567, 45 L.Ed.2d 648].)

Because the scope of the injunction in *Perry* is limited to providing relief only to the four plaintiffs, that injunction cannot justify Non-*Perry* Respondents in declining to enforce Proposition 8. The *Perry* plaintiffs have already been married. Therefore, any relief due under that injunction has already been provided, and any obligation under the injunction requiring public officials not to enforce Proposition 8 has been satisfied. Consequently, all county clerks, including Non-*Perry* Respondents, must continue to enforce Proposition 8. The injunction poses no bar to their doing so.

b. The *Perry* Injunction Cannot Bind the State Officials.

The state official defendants named in *Perry*—the Governor, Attorney General, and State Registrar—have expressed their belief that Non-*Perry* Respondents are bound by the injunction because those county clerks are under state officials’ “control or supervision.” But the *Perry* injunction, as we explain below, cannot bind those state officials, and therefore the injunction cannot reach through them to bind Non-*Perry* Respondents.

Federal courts cannot bind state officers that do not possess direct “authority to enforce the complained-of provision.” (*Bronson v. Swensen* (10th Cir. 2007) 500 F.3d 1099, 1110; see also *Okpalobi v. Foster* (5th Cir. 2001) 244 F.3d 405, 426 (en banc) [a federal court is without authority over state officials who lack the “power to enforce the complained-of statute”]; *Socialist Workers Party v. Leahy* (11th Cir. 1998) 145 F.3d 1240, 1248 [state officials “cannot be proper defendants” in federal court where they lack “power to enforce” the challenged law].) The alleged injury in *Perry* was the denial of marriage licenses to the four plaintiffs. Yet county clerks, not the named state officials, are the exclusive government officers charged with issuing marriage licenses. (See Fam. Code, § 350, subd. (a); Fam. Code, § 359, subd. (a).) Thus, the *Perry* injunction cannot apply to the state officials.

As an initial matter, the *Perry* injunction lacks authority over the Governor and Attorney General. “General authority to enforce the laws of the state”—the power possessed by the Governor and Attorney General here (see Cal. Const., art. V, § 1; Cal. Const., art. V, § 13)—“is not sufficient to make government officials the proper parties to litigation challenging the law,” unless no other official has specific authority to enforce that law against the plaintiffs. (*Ist Westco Corp. v. School Dist. of*

Philadelphia (3d Cir. 1993) 6 F.3d 108, 113.) Federal courts thus have held that a governor’s and attorney general’s “generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a constitutional amendment [preserving traditional marriage that] they have no specific duty to enforce.” (*Bishop v. Oklahoma* (10th Cir. 2009) 333 F. App’x 361, 365 [challenging Oklahoma marriage law]; see also *Walker v. United States* (S.D.Cal. Nov. 25, 2008, No. 08-1314 JAH) 2008 U.S. Dist. LEXIS 107664 *9-10 [challenging California marriage law].)

In addition, the injunction issued in *Perry* also lacks authority over the State Registrar. A federal court cannot bind a state official whose only connection to the challenged law is supervisory authority over the government officer directly charged with enforcing that law. (See *Southern Pacific Transportation Co. v. Brown* (9th Cir. 1980) 651 F.2d 613, 615 [finding that the court did not have authority over the Attorney General because he did not directly enforce the challenged law, but merely had the “power to direct” the officials who enforced that law]; see also *Planned Parenthood of Idaho, Inc. v. Wasden* (9th Cir. 2004) 376 F.3d 908, 919-920 [“[A] generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.”].) Thus, even if the State Registrar (or any of the other state officials) has supervisory control over county clerks issuing marriage licenses—a false premise, as we explain below—the injunction cannot reach through a state official to bind the county clerks.

c. The *Perry* Injunction Does Not Bind Non-*Perry* Respondents Because They Are Not under the Control or Supervision of State Officials.

Assuming the *Perry* court had authority over the state officials named as defendants in that case, the injunction still would not bind Non-

Perry Respondents because they are not “under the control or supervision” of those state officers.

When determining whether any of these state officers has authority to control or supervise county clerks in their issuance of marriage licenses, the analysis focuses on the power granted by state statutes, for “the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated[.]” (*Lockyer, supra*, 33 Cal.4th at p. 1074 (quoting *McClure v. Donovan* (1949) 33 Cal.2d 717, 728 [205 P.3d 17, 24]).) The Legislature has designated county clerks as the only government officials with authority to issue marriage licenses. (Fam. Code, § 350, subd. (a); Fam. Code, § 359, subd. (a).) The Legislature has not directed any state official to oversee or control county clerks when they are carrying out that simply ministerial duty. Indeed, one Respondent, the County Clerk for the City and County of San Francisco, has acknowledged that “no state official or agency *controls* or *supervises* the county clerk with respect to the issuance of marriage licenses.” (*Lockyer v. City and County of San Francisco* (Cal. Mar. 18, 2004, No. S122923) San Francisco’s Supplemental Opposition to Application for an Immediate Stay and a Peremptory Writ of Mandate in the First Instance, p. 33, emphasis added (attached as Exhibit I).)

i. The State Registrar Does Not Have Authority to Supervise or Control County Clerks Issuing Marriage Licenses.

The Legislature has not imbued the State Registrar with supervisory authority or control over county clerks issuing marriage licenses. The State Registrar is a record keeper who ensures that each “marriage that *occurs* in the state shall be registered.” (Health & Saf. Code, § 102100, emphasis added; see also Health & Saf. Code, § 102180 (charging State Registrar “with the execution of this part [the recording of marriage and other vital

records”]; Health & Saf. Code, § 102205 [requiring State Registrar “to procure . . . the maintenance of a satisfactory system of registration”].) As it relates to marriage, the State Registrar’s job includes two sets of duties. First, he prepares marriage forms and instructions regarding those forms. (See Health & Saf. Code, § 102200 [“State Registrar shall prescribe . . . all record forms for use in carrying out the purposes of this part . . . , and no record forms or formats other than those prescribed shall be used.”]; Health & Saf. Code, § 103125; Health & Saf. Code, § 102205; see also Fam. Code, § 355, subd. (a); *Lockyer, supra*, 33 Cal.4th at p. 1076.) Second, he receives, reviews, stores, and maintains *completed* marriage records. (See Health & Saf. Code, § 102225 [“The State Registrar shall carefully examine the marriage certificates received . . . , and if they are incomplete or unsatisfactory shall require any further information that may be necessary”]; Health & Saf. Code, § 102330 [indicating that the State Registrar will direct local registrars regarding the manner in which they shall preserve the “local registrar’s copy” of marriage certificates]; Health & Saf. Code, § 102355 [“The local registrar of marriages shall transmit to the State Registrar . . . all original marriage certificates accepted for registration”].) None of the State Registrar’s duties involve issuing marriage licenses or overseeing the issuance of marriage licenses. He only receives, reviews, stores, and maintains the records once completed.

The authority that the State Registrar claims over county clerks appears to confuse local registrars—who hold that office because they are county recorders (see Health & Saf. Code, § 102285)—with county clerks.⁴

⁴ The offices of county clerk and county recorder are separate. (See Gov. Code, § 24000.) In some counties, the Board of Supervisors may consolidate the offices of the county clerk and county recorder. (See Gov. Code, § 24300.) Nevertheless, “[t]he offices of county clerk and of county

The State Registrar, to be sure, has “supervisory power over local registrars.” (Health & Saf. Code, § 102180; see also Health & Saf. Code, § 102295 [“[L]ocal registrar is hereby charged with the enforcement of this part . . . under the supervision and the direction of the State Registrar”].) But the duties of the local registrars, like those of the State Registrar, relate to maintaining and storing completed marriage records—not the issuance of marriage licenses. (See Health & Saf. Code, § 102310 [“The local registrar of marriages shall carefully examine each license . . . and, if it is incomplete or unsatisfactory, he or she shall require any further information to be furnished as may be necessary”]; Health & Saf. Code, § 102325 [“The local registrar shall number each marriage certificate consecutively”]; Health & Saf. Code, § 102330 [“The local registrar shall make a complete and accurate copy of each certificate accepted for registration and shall preserve it in his or her office”]; Health & Saf. Code, § 102355 [“The local registrar of marriages shall transmit to the State Registrar . . . all original marriage certificates accepted for registration”].) Tellingly, state law tasks local registrars with many of the same record-keeping duties that it imposes on the State Registrar.⁵

In short, while the State Registrar and local registrars are in charge of record keeping, the county clerks are tasked with issuing marriage

recorder are distinct offices, though they may be held by the same person[.]” (*People ex rel. Anderson v. Durick* (1862) 20 Cal. 94, 95.)

⁵ (Compare Health & Saf. Code, § 102225 [requiring the State Registrar to “carefully examine” marriage certificates and, “if they are incomplete or unsatisfactory,” to “require any further information that may be necessary”], with Health & Saf. Code, § 102310 [requiring the same of local registrars]; see also Health & Saf. Code, § 103225 [instructing persons wanting to correct errors in any marriage certificate to file an affidavit “with the state or local registrar”]; Health & Saf. Code, § 103525, subd. (a) [“[T]he State Registrar, local registrar, or county recorder shall, upon request and payment of the required fee, supply to an applicant a certified copy of the record of a . . . marriage”].)

licenses. (See Fam. Code, §§ 350, subd. (a), 354, 359, subd. (a), 401.) And no statute permits the State Registrar to supervise or control county clerks when carrying out those duties. County clerks thus are not persons supervised or controlled by the State Registrar when they issue marriage licenses.

ii. The State Registrar Does Not Have Authority to Supervise or Control County Clerks Issuing Marriage Licenses.

Neither the Governor nor the Attorney General has authority to supervise or control county clerks when issuing marriage licenses because no state statute or constitutional provision expressly provides the Governor or Attorney General with that power.

County clerks operate independently of the Governor and Attorney General. No statute requires county clerks to report to the Governor or Attorney General. (Cf. Gov. Code, § 12522 [“[T]he Attorney General shall report to the Governor”].) Neither are they appointed or removable by the Governor or Attorney General. (See Gov. Code, § 24009, subd. (a) [“[T]he county officers to be elected by the people [include] the . . . county clerk”]; cf. *Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 31 [30 Cal.Rptr.3d 30, 49, 113 P.3d 1062, 1078] [“[T]here is nothing in the California Constitution that grants the Governor (or any other executive official) the exclusive or paramount authority to appoint all executive officials”].) Nor does the Governor or Attorney General control the marriage-license-related litigation decisions of county clerks. (See *Perry v. Brown, supra*, 52 Cal.4th at p. 1159 [“[H]ad any of the other public officials [such as the county clerks] who were named as defendants [in *Perry*] chosen to present a substantive defense of the challenged measure or to appeal the adverse judgment entered by the trial court, the Attorney General could not have prevented that public official from presenting a

defense or filing an appeal”]; see also *Pacific Gas and Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1157 [69 Cal.Rptr.2d 329, 338, 947 P.2d 291, 300] [acknowledging that the Attorney General does not “direct[] and control[] litigation in which a county is a party”].)

Although the Governor and Attorney General have general duties to see that the law is faithfully executed and enforced (see Cal. Const., art. V, § 1; Cal. Const., art. V, § 13), this nonspecific authority does not give them supervisory control over county clerks’ issuance of marriage licenses.⁶ Just as former San Francisco Mayor Gavin Newsom lacked authority to direct the county clerk regarding the issuance of marriage licenses because “[t]he statutes d[id] not authorize the mayor . . . to take any action with regard to the process of issuing marriage licenses” or overseeing that process (*Lockyer, supra*, 33 Cal.4th at p. 1080), the Governor and Attorney General do not supervise or control county clerks when issuing marriage licenses because no statute or constitutional provision gives them that specific authority.

That county clerks operate independent of oversight by state officials is not at all troublesome as a matter of practice or policy. The task of issuing marriage licenses, as discussed above, is ministerial in nature, and does not require the exercise of discretion. (*Lockyer, supra*, 33 Cal.4th at p. 1081-1082.) County clerks therefore do not need guidance when performing that straightforward, nondiscretionary duty. In addition, writ-of-

⁶ One state statute instructs “[t]he Attorney General [to] assist in the enforcement of this part [which involves recording marriage (and other vital) records] upon request of the State Registrar.” (Health & Saf. Code, § 102195.) But that enforcement power, assuming it could be read to imbue the Attorney General with supervisory control, is limited to the record-keeping duties of the State Registrar and local registrars discussed in that part of the Health & Safety Code. It does not extend to the county clerks’ duties in issuing marriage licenses.

mandate proceedings ensure uniform compliance with state marriage law by all county clerks. (*See, e.g., id.* at p. 1120 [issuing a writ of mandate compelling the county clerk to comply with her ministerial duties].)

Because of this, no state official needs supervisory authority over county clerks to ensure uniform operation of the marriage laws statewide. This Court should thus affirm what the state statutes reflect: that county clerks, when they issue marriage licenses, are not persons under the control or supervision of the Governor or Attorney General.

This Court’s decisions in *Lockyer* and the *Marriage Cases* do not contradict the foregoing analysis. Neither of those decisions holds that state officials possess supervisory authority over county clerks issuing marriage licenses.⁷ Nor does either of those opinions cite any statute establishing that any state official supervises county clerks when issuing marriage licenses. This is critical because only the Legislature, with its plenary authority over marriage (see *McClure v. Donovan, supra*, 33 Cal.2d at p. 728), may vest marriage-license-related supervisory authority in state officials.

Nor do the concluding directives in those cases establish that state officials have authority to supervise county clerks when issuing marriage licenses. In *Lockyer*, this Court “direct[ed] the county clerk and the county recorder . . . to take . . . corrective actions under the supervision of the California Director of Health Services.” (*Lockyer, supra*, 33 Cal.4th at p. 1120.) But those “corrective actions,” undertaken by both the clerk and the recorder, consisted of notifying couples that their marriages were invalid, correcting records, and offering refunds. (*Id.* at 1118-1119.) It did not involve the issuance of marriage licenses. In *Marriage Cases*, this Court “direct[ed] the appropriate state officials to take all actions necessary . . . to

⁷ The *Marriage Cases*, in fact, did not address any issue that remotely pertains to the supervisory authority of state officials over county clerks.

ensure that county clerks and other local officials . . . apply [the marriage laws] in a manner consistent with th[at] decision.” (*Marriage Cases, supra*, 43 Cal.4th at p. 857.) Yet this vague instruction to “take all actions necessary” must be read in the light of the unidentified state officials’ lawful authority, which, as we have shown, does not include supervisory authority over county clerks issuing marriage licenses. Nor was it necessary for this Court to create such supervisory control, for the *Marriage Cases* decision itself, as authoritative appellate court precedent of this Court, directly bound all county clerks.

Furthermore, Federal Rule of Civil Procedure 65(d)(2), which provides that a federal injunction binds a party’s “agents,” does not establish that Non-*Perry* Respondents are bound by the *Perry* injunction. (Fed. Rules Civ. Proc., rule 65, subd. (d)(2)(B).) “An essential element of agency is the principal’s right to control the agent’s actions.” (Rest.3d Agency, § 1.01, com. F.) But as demonstrated above, state officials do not have authority to control county clerks when issuing marriage licenses. Nor are Non-*Perry* Respondents “in active concert” with state officials for purposes of that rule (Fed. Rules Civ. Proc., rule 65, subd. (d)(2)(C)) because county clerks are not “identified with [state officials] in interest [or] in ‘privity’ with them[.]” (*Regal Knitwear Co. v. NLRB* (1945) 324 U.S. 9, 14 [65 S. Ct. 478, 481, 89 L. Ed. 661].) County clerks’ primary marriage-related interest is in issuing marriage licenses as required by law, but the state officials do not share that interest. Additionally, privity does not exist because the state officials have not defended Proposition 8—the relevant law impacting the clerks’ duties.

For the foregoing reasons, the *Perry* injunction does not authorize Non-*Perry* Respondents to stop enforcing Proposition 8.

2. This Court’s Case Law and the California Constitution Require Non-*Perry* Respondents to Enforce State Marriage Laws.

Because Non-*Perry* Respondents are not bound by the *Perry* injunction, they are required to enforce Proposition 8. In California, executive officials must enforce state law absent an appellate court decision declaring the law unconstitutional. Two sources support this limitation on executive officials’ conduct. First, this Court’s case law, particularly *Lockyer*, recognizes that “an executive official” generally may not “refus[e] to perform a ministerial duty imposed by [law].” (*Lockyer, supra*, 33 Cal.4th at p. 1105; see also *id.* at p. 1109 [discussing “the established rule that an executive official generally does not have the authority to refuse to comply with a ministerial duty imposed by [law]”].) Second, article III, section 3.5 of the California Constitution (hereafter referred to as section 3.5) forbids executive officials from “refus[ing] to enforce a statute[] on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional[.]” (Cal. Const., art. III, § 3.5, subd. (a).) Both the legal principles recognized in *Lockyer* and section 3.5 require Non-*Perry* Respondents to enforce state law defining marriage as a union between a man and a woman.

a. This Court’s Case Law Requires Non-*Perry* Respondents to Enforce State Marriage Law.

This Court in *Lockyer* recognized and applied “the established rule that an executive official generally does not have the authority to refuse to comply with a ministerial duty imposed by [law].” (*Lockyer, supra*, 33 Cal.4th at p. 1109.) Although the public officers whose actions were challenged in *Lockyer* acted “in the absence of [any] judicial determination of unconstitutionality” (*id.* at p. 1082; see also *id.* at p. 1094), and the officials here purport to rely on a federal district court decision now

insulated from appellate review by government officials' decision not to appeal, the same rule applies here for the following reasons.

First, a federal district court's decision does not establish governing precedent that requires (or even permits) executive officials to ignore their ministerial duties. Such a judicial decision does not bind a subsequent state or federal court. In federal court, for example, "[t]he doctrine of stare decisis does not compel one district court judge to follow the decision of another." (*Starbuck v. City and County of San Francisco* (9th Cir. 1977) 556 F.2d 450, 457, fn. 13.) Similarly, in state court, decisions of lower federal courts addressing federal questions do not bind California courts. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [81 Cal.Rptr. 457, 460, 460 P.2d 129, 132] ["[A]lthough we are bound by decisions of the United States Supreme Court interpreting the federal Constitution, we are not bound by the decisions of the lower federal courts even on federal questions."].) Because the district court's decision in *Perry* does not bind the judicial rulings of other state or federal courts, it does not establish controlling case law that governs the actions of executive officials or excuses them from complying with their ministerial duties.

Second, because a nonbinding federal district court decision does not dictate the actions of public officials, an official's decision to ignore or enforce the law will depend only on her subjective assessment of its constitutionality, based in part on her assessment of the nonbinding legal analysis. But as this Court has recognized, most local officials "have no legal training and thus lack the relevant expertise to make constitutional determinations" about the persuasiveness of another's legal evaluation. (*Lockyer, supra*, 33 Cal.4th at p. 1107.)

Third, because a nonbinding federal district court decision does not direct the actions of executive officials, some local officials might decide to follow the law as prescribed, while others, persuaded by the district court's

(or another's) analysis, decline to enforce it. But as this Court explained in *Lockyer*:

[T]here are thousands of elected and appointed public officials in California's 58 counties charged with the ministerial duty of enforcing thousands of state statutes. If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos

(*Lockyer, supra*, 33 Cal.4th at p. 1108.) This unpredictability is not due solely to the conflict created by varying county officials adopting various approaches to the law at issue. Inconsistency is bound to occur even within a particular public office. For instance, if a county clerk were allowed to ignore Proposition 8 because she agrees with a district court decision concluding that it is unconstitutional, her decision could be reversed by her successor, resulting in unpredictability, inconsistency, and confusion within that county.

Fourth, allowing public officials not to enforce state law because of a nonbinding federal district court decision encourages manipulation of the legal system. In response to a lawsuit challenging a state law, for example, a local official that disapproves of the law might, as the Attorney General did in *Perry*, agree that the law is unconstitutional and decline to appeal an adverse trial court ruling, thereby achieving her desired outcome and shielding that result from review. This would allow a local official with no veto power over a law to achieve indirectly what she cannot do directly. (Cf. *Perry v. Brown, supra*, 52 Cal.4th at pp. 1126-1127 [declining to permit public officials who lack "authority to veto or invalidate" a law "to indirectly achieve" that result].)

Furthermore, "[w]ere [this Court] to hold that [executive] officials possess this authority [not to enforce a duly enacted law], it is not difficult

to anticipate that private individuals who oppose enforcement of a [law] and question its constitutionality would attempt to influence [executive] officials . . . to exercise—on behalf of such opponents—the officials’ newly recognized authority” to selectively enforce state law. (*Lockyer, supra*, 33 Cal.4th at p. 1109.) Indeed, the attorneys opposing Proposition 8 in the *Perry* case admitted that they communicated their views to government officials, urging them to rely on the district court’s decision and stop enforcing Proposition 8. (Dolan and Savage, *Supreme Court might dismiss Prop. 8 case on a technicality*, L.A. Times (May 26, 2013) <<http://www.latimes.com/news/local/la-me-prop-8-20130527,0,3214416.story>> [as of July 11, 2013] (attached as Exhibit J).) For all these reasons, the rule recognized in *Lockyer* requires Respondents to enforce state law defining marriage as a union between a man and a woman.

b. The California Constitution Requires Non-*Perry* Respondents to Enforce State Marriage Law.

Article III, section 3.5 of the California Constitution provides that “[a]n administrative agency . . . has no power . . . [t]o . . . refuse to enforce a statute[] on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional[.]” (Cal. Const., art. III, § 3.5, subd. (a).) The United States Supreme Court’s decision in *Hollingsworth v. Perry* vacated the Ninth Circuit’s decision because the court of appeals lacked jurisdiction to hear that appeal. (See *Hollingsworth, supra*, 2013 WL 3196927, at p. *14.) Since no appellate ruling holds that Proposition 8 is unconstitutional, section 3.5 establishes that Non-*Perry* Respondents have no power to ignore state law defining marriage as a union between a man and a woman.

Section 3.5, which specifically references “administrative agenc[ies],” applies broadly to all state executive agencies and officials.

(See, e.g., *Kloepfer v. Com. Jud. Performance* (1989) 49 Cal.3d 826, 833, fn.3 [264 Cal.Rptr. 100, 103, fn.3, 782 P.2d 239, 242, fn.3] [indicating that section 3.5 applies to the Commission on Judicial Performance]; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 48-49 [112 Cal.Rptr.2d 5, 32] [“[Under Section 3.5] the [State Lottery C]ommission and director lack the authority to cure a facially unconstitutional statute by refusing to enforce it as written”]; *Regents of Univ. of Cal. v. Superior Court of Los Angeles County* (1990) 225 Cal.App.3d 972, 976 [276 Cal.Rptr. 197, 198] [“A trial court declaration that a state statute is unconstitutional does not bind state agencies or officials [such as the University of California and the California State University and their officials]. To the contrary, a state agency is forbidden to refuse to enforce a statute thought to be unconstitutional unless an appellate court has so determined. (Cal. Const., art. III, § 3.5.)”]; *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969 [273 Cal.Rptr. 91, 96] [“Administrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.)”]; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 780 [189 Cal.Rptr. 212, 218] [“[Under Section 3.5] the named respondents [which include the State Controller and the Public Employees’ Retirement System Board of Administration] are under a constitutional duty to comply with the contested provisions . . . unless and until an appellate court declares them unconstitutional”].)

Section 3.5 also applies to local executive agencies and officials when they administer state law. This Court left that question open in *Lockyer*. (See *Lockyer, supra*, 33 Cal.4th at p. 1085 [“[W]e have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5”].) But “one Court of Appeal decision

[*Billig v. Voges, supra*, 223 Cal.App.3d at p. 969] contains language directly supporting . . . that article III, section 3.5’s reference to administrative agencies properly is interpreted to include local executive officials such as county clerks.” (*Lockyer, supra*, 33 Cal.4th at p. 1084.)

The *Billig* court stated:

Administrative agencies, including public officials in charge of such agencies, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.) [The relevant election statute] has not been declared unconstitutional by an appellate court in this state. Consequently, the offices of city clerks throughout the state are mandated by the constitution to implement and enforce the statute’s procedural requirements. In the instant case, respondent had the clear and present ministerial duty to refuse to process [the] petition because it did not comply with the procedural requirements of [the statute].

(*Billig v. Voges, supra*, 223 Cal.App.3d at p. 969.) This discussion of section 3.5, which is admittedly dictum (see *Lockyer, supra*, 33 Cal.4th at p. 1085, fn. 17), expressly endorses section 3.5’s application to local executive officials like county clerks. And an Attorney General Opinion confirms that section 3.5 applies to local government. (See 64 Ops.Cal.Atty.Gen. 690 (1981) [concluding that “[c]ounty boards of equalization are required to enforce [the law] until a court determination on the issue as provided in article 3, section 3.5, of the California Constitution”].) This Court should thus hold that section 3.5 applies to local executive agencies and officials, like county clerks, when they administer state law.

Because section 3.5 applies to county clerks issuing marriage licenses, that provision compels Non-*Perry* Respondents to enforce state marriage law. In the absence of an appellate court decision, Non-*Perry* Respondents have stopped enforcing state law defining marriage as a union

between a man and a woman. Section 3.5 does not permit them to defy state law in this manner.

B. Alameda and Los Angeles Respondents Cannot Justify Their Non-Enforcement of State Marriage Law.

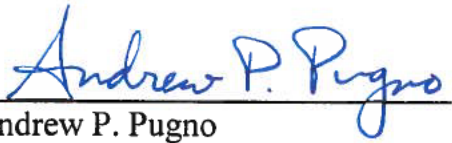
Similar to Non-*Perry* Respondents, Alameda and Los Angeles Respondents cannot completely decline to enforce Proposition 8. Although Alameda and Los Angeles Respondents are named defendants in the *Perry* case and thus are bound by the court's injunction, that injunction, as explained in Section (IV)(A)(1)(a) above, authorizes them to issue marriage licenses only to the four *Perry* plaintiffs; it does not justify their complete failure to enforce Proposition 8 prospectively. Therefore, if Alameda and Los Angeles Respondents issue marriage licenses to same-sex couples other than the four plaintiffs in *Perry*, their conduct exceeds the scope of the injunction. And absent any refuge in the injunction, those actions, as explained in Section (IV)(A)(2) above, exceed the limitations on local executive officials recognized in *Lockyer* and section 3.5.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the relief sought in the Petition for Writ of Mandate and Request for Immediate Stay or Injunctive Relief.

Dated: July 11, 2013,

Respectfully submitted,



Andrew P. Pugno

CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this document, certify that the foregoing Petition and Memorandum of Points and Authorities contain 13807 words, excluding the words in the sections that California Rules of Court, rules 8.204(c)(3) and 8.486(a)(6) instruct counsel to exclude.


Andrew P. Pugno

PROOF OF SERVICE

I declare as follows:

1. I am over the age of 18 and not a party to this action. I am employed by Alliance Defending Freedom in the County of Maricopa, State of Arizona. My business address is 15100 N. 90th Street, Scottsdale, AZ 85260.

2. On July 11, 2013, I served true and correct copies of the attached document entitled:

PETITION FOR WRIT OF MANDATE AND REQUEST
FOR IMMEDIATE STAY OR INJUNCTIVE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES

and the accompanying Appendix by placing them in addressed and sealed envelopes, with delivery fees fully paid, and depositing those envelopes in a regularly maintained FedEx facility in Scottsdale, Arizona for overnight delivery on the persons listed below at the provided address:

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