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

KRISTIN M PERRY, SANDRA B STIER,
PAUL T KATAMI and JEFFREY J
ZARRILLO

No C 09-2292 VRW
ORDER

Plaintiffs,

v

ARNORLD SCHWARZENEGGER, in his
official capacity as governor of
California; EDMUND G BROWN JR, in
his official capacity as attorney
general of California; MARK B
HORTON, in his official capacity
as director of the California
Department of Public Health and
state registrar of vital
statistics; LINETTE SCOTT, in her
official capacity as deputy
director of health information &
strategic planning for the
California Department of Public
Health; PATRICK O'CONNELL, in his
official capacity as clerk-
recorder of the County of
Alameda; and DEAN C LOGAN, in his
official capacity as registrar-
recorder/county clerk for the
County of Los Angeles,

Defendants

DENNIS HOLLINGSWORTH, GAIL J
KNIGHT, MARTIN F GUTIERREZ,
HAKSHING WILLIAM TAM and MARK A
JANSSON, as official proponents
of Proposition 8,

Defendant-Intervenors

1 to the transaction that is the subject of the action; (3) they are
2 so situated that the disposition of the action may practically
3 impair or impede their ability to protect their interest; and (4)
4 their interest is not adequately represented by the parties to the
5 action. Donnelly v Glickman, 159 F3d 405, 409 (9th Cir 1998).

6 Generally, the court should be "guided primarily by practical and
7 equitable considerations" and should "interpret the requirements
8 broadly in favor of intervention." Id at 409 (citation omitted).

9 The proponents of Prop 8 meet all four of FRCP 24(a)'s
10 criteria: (1) their motion to intervene is timely, filed just days
11 after plaintiffs filed the complaint; (2) as official proponents,
12 they have a significant protectible interest in defending Prop 8's
13 constitutionality; (3) their interest in upholding Prop 8 is
14 directly affected by this lawsuit; and (4) their interest is not
15 represented by another party, as no defendant has argued that Prop
16 8 is constitutional. See Docs ##27, 30, 39, 46. Significantly,
17 with respect to the last factor, although the responsibilities of
18 the Attorney General of California contemplate that he shall
19 enforce the state's laws in accordance with constitutional
20 limitations, Cal Const art V § 13, see also Cal Govt Code §§ 12511,
21 12512, Attorney General Brown has informed the court that he
22 believes Prop 8 is unconstitutional. Doc #39 at 2.

23 Because the proponents have established their entitlement
24 to intervene as of right, the court GRANTS the proponents' motion
25 to intervene as defendants.

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II

The court turns now to plaintiffs' motion for a preliminary injunction. Because entering a preliminary injunction may raise novel concerns that could be avoided through a prompt decision on the merits, the court's tentative plan is instead to proceed expeditiously to trial, a decision on the merits and final judgment.

A

Defendants' positions regarding the preliminary injunction vary. Los Angeles County registrar-recorder Dean C Logan and Alameda County clerk-recorder Patrick O'Connell take no position on the motion. Docs ##27, 30. California Governor Arnold Schwarzenegger, along with Public Health Director Mark B Horton and Deputy Director Linette Scott, argue against a preliminary injunction because of prudential considerations - specifically, that same-sex marriages performed after the injunction but before a decision on the merits may not be recognized under state law. Doc #33 at 8-10. Attorney General Brown opposes the preliminary injunction because of uncertainty surrounding the validity of post-injunction same-sex marriages. Doc #34. As noted, Brown agrees with plaintiffs that Prop 8 violates the federal Constitution. Doc #39 at 2.

To obtain a preliminary injunction, plaintiffs must show they have raised a serious question on the merits and that the balance of hardships tips sharply in their favor. Department of Parks and Recreation v Bazaar Del Mundo, Inc, 448 F3d 1118, 1123 (9th Cir 2006). Brown's stance that Prop 8 violates the

1 Constitution may well suffice to establish a serious question on
2 the merits. See Doc #39 at 2. Furthermore, plaintiffs have
3 alleged a violation of their constitutional rights, which alone can
4 demonstrate irreparable harm. Goldie's Bookstore, Inc v Superior
5 Court, 739 F2d 466, 472 (9th Cir 1984).

6 Governor Schwarzenegger has pointed out that "California
7 and its citizens have already confronted the uncertainty that
8 results when marriage licenses are issued in a gender-neutral
9 manner prior to the issuance of a final, judicial determination of
10 legal and constitutional issues." Doc #33 at 2. The governor
11 avers that in early 2004, shortly before the California Supreme
12 Court's decision in Lockyer v City and County of San Francisco, 33
13 Cal 4th 1055 (2004), some 4,000 same-sex marriages were performed
14 in California. In the period between the California Supreme
15 Court's decision in In re Marriage Cases, 43 Cal 4th 757 (2008) and
16 the passage of Prop 8, numerous other same-sex marriages were
17 performed. The validity of those marriages remained unclear until
18 the California Supreme Court issued its decision in Strauss v
19 Horton, 46 Cal 4th 364 (2009).

20 Given that serious questions are raised in these
21 proceedings, issuance of preliminary injunctive relief on an
22 incomplete record may inject still further uncertainty in an
23 important area of concern and interest to the state and its
24 citizens. To avoid the procedural and practical problems
25 surrounding a preliminary injunction, the court is inclined to
26 proceed directly and expeditiously to the merits of plaintiffs'
27 claims and to determine, on a complete record, whether injunctive
28 relief may be appropriate.

1 B

2 To reach a decision on the merits, it appears that the
3 court will need to resolve certain underlying factual disputes
4 raised by the parties. The court has identified several questions
5 from the parties' submissions to be resolved at trial. While the
6 issues identified by the parties and discussed below are by no
7 means exhaustive of the issues in this case, the breadth of factual
8 disputes raised by the parties supports the court's plan to proceed
9 directly to trial.

10 The parties disagree regarding the standard of review the
11 court should apply to plaintiffs' equal protection and due process
12 claims. Compare Doc #7 at 11 (suggesting that under the Due
13 Process Clause, Prop 8 is subject to strict scrutiny) and 18
14 (arguing that gays and lesbians are a suspect class for equal
15 protection purposes) with Doc #36 at 17 (arguing that Prop 8 does
16 not affect a fundamental right under the Due Process Clause and
17 must therefore only survive rational basis review) and 30 (arguing
18 that gays and lesbians are not a suspect class).

19 The facts necessary to establish the appropriate level of
20 scrutiny under the Equal Protection Clause have been adverted to in
21 the parties' submissions but have not been adequately briefed, nor
22 have these facts been established on an adequate evidentiary
23 record. The factors, of course, derive from the Supreme Court's
24 formulation in United States v Carolene Products Co, 304 US 144,
25 153 n4 (1938). See also Varnum v Brien, 763 NW2d 862, 887 (Iowa
26 2009) (synthesizing federal precedent and listing the factors used
27 to determine whether a classification should receive heightened
28 scrutiny). In the context of the present case, the relevant

1 factors appear to include: (1) the history of discrimination gays
2 and lesbians have faced; (2) whether the characteristics defining
3 gays and lesbians as a class might in any way affect their ability
4 to contribute to society; (3) whether sexual orientation can be
5 changed, and if so, whether gays and lesbians should be encouraged
6 to change it; and (4) the relative political power of gays and
7 lesbians, including successes of both pro-gay and anti-gay
8 legislation. The parties have also averted to facts, such as the
9 history of marriage and whether and why its confines may have
10 evolved over time, that may be necessary to determine whether the
11 right asserted by plaintiffs is "deeply rooted in this Nation's
12 history and tradition" and thus subject to strict scrutiny under
13 the Due Process Clause. Washington v Glucksberg, 521 US 702, 721
14 (1997) (citations omitted).

15 In support of their argument that Prop 8 is
16 constitutional, the intervenors have raised state interests that
17 appear to require evidentiary support. Doc #8 at 17-18 (citing
18 state interests asserted in In re Marriage Cases, 43 Cal 4th at 784
19 and Hernandez v Robles, 7 NY3d 338 (2006)). To determine whether
20 the asserted state interests can survive plaintiffs' constitutional
21 challenge, the record may need to establish: (1) the longstanding
22 definition of marriage in California; (2) whether the exclusion of
23 same-sex couples from marriage leads to increased stability in
24 opposite-sex marriage or alternatively whether permitting same-sex
25 couples to marry destabilizes opposite-sex marriage; (3) whether a
26 married mother and father provide the optimal child-rearing
27 environment and whether excluding same-sex couples from marriage
28 promotes this environment; and (4) whether and how California has

1 acted to promote these interests in other family law contexts.

2 The parties' submissions raise the question whether or
3 not Prop 8 discriminates based on sexual orientation or gender or
4 both. Compare Doc #7 at 20, 21 (citing In re Marriage Cases, 43
5 Cal 4th at 840, to argue it is "sophist to suggest" that Prop 8
6 does not discriminate against gays and lesbians) with Doc #36 at
7 29, 32 (citing Cuyahoga Falls, Ohio v Buckeye Comm Found, 538 US
8 194 (2003), for the proposition that Prop 8 has a disparate impact
9 on gays and lesbians but does not discriminate against them as a
10 class); see also Doc #52 at 17 (asserting that plaintiffs have
11 suffered psychological harm because Prop 8 directs state-sanctioned
12 discrimination at them based their sexual orientation). In
13 addition to the particular facts pertaining to the parties at bar,
14 resolution of this dispute may depend on: (1) the history and
15 development of California's ban on same-sex marriage; (2) whether
16 the availability of opposite-sex marriage is a meaningful option
17 for gays and lesbians; (3) whether the ban on same-sex marriage
18 meaningfully restricts options available to heterosexuals; and (4)
19 whether requiring one man and one woman in marriage promotes
20 stereotypical gender roles.

21 Finally, the parties have raised a question whether Prop
22 8 was passed with a discriminatory intent. Doc #7 at 18 (arguing
23 that the sole motivation for Prop 8 was moral disapproval of gays
24 and lesbians) with Doc #8 at 17-18 (arguing various state interests
25 in preventing same-sex couples from marrying). The question of
26 discriminatory intent may inform the court's equal protection
27 analysis. Romer v Evans, 517 US 620, 631-32 (1996); Vil of
28 Arlington Heights v Metro Housing Dev, 429 US 252, 266-67 (1977).

1 To resolve the question, the court may have to consider the
2 "immediate objective" and "ultimate effect" of Prop 8, along with
3 its "historical context and the conditions existing prior to its
4 enactment," Reitman v Mulkey, 387 US 369, 373 (1967), which in this
5 case may require the record to establish: (1) the voters'
6 motivation or motivations for supporting Prop 8, including
7 advertisements and ballot literature considered by California
8 voters; and (2) the differences in actual practice of registered
9 domestic partnerships, civil unions and marriage, including whether
10 married couples are treated differently from domestic partners in
11 governmental and non-governmental contexts.

12 The just, speedy and inexpensive determination of these
13 issues would appear to call for proceeding promptly to trial.
14 Although the court will entertain any party's objection to
15 proceeding promptly to trial without deciding plaintiff's request
16 for preliminary injunctive relief, the court believes that a case
17 management conference would likely be a more productive endeavor at
18 the hearing scheduled for July 2, 2009 at 10 AM. At that time, the
19 court will solicit the parties' views on the matters described in
20 FRCP 16(c)(2), as well as scheduling necessary to complete pretrial
21 preparation and the speedy disposition of these proceedings on the
22 merits.

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24 IT IS SO ORDERED.

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27 VAUGHN R WALKER
28 United States District Chief Judge