THE STAY ISSUE IN THE PERRY PROP 8 CASE

As pretty much every sentient being knows by now, Judge Vaughn Walker issued a groundbreaking decision finding California's Proposition 8 ban on marriage equality to be fundamentally unconstitutional under both equal protection and due process considerations. The defendant-intervenors in the case, who are the dogmatic people supporting Proposition 8 and fighting against marriage equality, did not even wait for Walker's verdict to be publicly issued before lodging their Motion For Stay Pending Appeal.

The same Wednesday afternoon as he publicly released his opinion, Judge Walker set an accelerated schedule for consideration of DI's Motion For Stay.

.

> Plaintiffs, plaintiff-intervenor and defendants are DIRECTED to submit their responses to the motion to stay on or before August 6, 2010, at which time the motion will stand submitted without a hearing unless otherwise ordered.

Well, that is today and the briefs are hitting the docket.

California Attorney General Jerry Brown's Opposition To Stay

Governor Schwarzenegger's Administration's Opposition To Stay

Plaintiff Perry and City of San Francisco's Joint Opposition To Stay

I will update with any further filings on the stay issue, as they come in. Suffice it to say though, the three linked above paint quite a picture. Of course the Plaintiffs oppose the stay; that is to be expected. But the Attorney

General of California, representing the law department of the state, and the Governor and Administration of the state are something different altogether. You see, the State of California is the *real defendant in interest* in the case; the DIs are effectively interlopers that got involved because they thought Brown and Schwarzenegger might not, shall we say, put much effort in defending the egregious and discriminatory Proposition 8 (which is undoubtedly quite correct). Nevertheless, the state is actual putative primary defendant in this case, and the state has now officially accepted, conformed and ratified Walker's verdict. A marginally significant thing you might say.

From AG Brown's Opposition To Stay:

> As the Attorney General has consistently stated and as was convincingly demonstrated at trial, Proposition 8 violates the Fourteenth Amendment of the United States Constitution. Defendant-Intervenors thus cannot demonstrate a likelihood of success on the merits in their appeal of this Court's Order. Moreover, as this Court has concluded that Proposition 8 in unconstitutional, the public interest weighs against its continued enforcement.

From Governor Schwarenegger and his Administration's Opposition To Stay:

> From the outset, the Administration has urged the Court to resolve the important constitutional questions at issue in this case as expeditiously as possible. Now, after extensive discovery, a lengthy trial, thorough briefing, and development of a complete evidentiary record, the Court has done so. After cataloging the evidence and making detailed factual findings and legal conclusions, the Court has enjoined enforcement of Proposition 8 and, in

> effect, ordered California to resume issuing marriage licenses in a gender-neutral manner, as had been done before Proposition 8 went into effect. In doing so, the Court has fulfilled its constitutional duty to determine fundamental questions of due process, equal protection, and freedom from discrimination.
>
> The Administration believes the public interest is best served by permitting the Court's judgment to go into effect, thereby restoring the right of same-sex couples to marry in California. Doing so is consistent with California's long history of treating all people and their relationships with equal dignity and respect. Conversely, the Administration submits that staying the Court's judgment pending appeal is not necessary to protect any governmental or public interest. As the Court has pointed out, California has already issued 18,000 marriage licenses to same-sex couples without suffering any resulting harm. Government officials can resume issuing such licenses without administrative delay or difficulty. For these reasons, the Administration respectfully requests that the Court deny defendant-intervenors' motion for stay.

Ouch. Since the burden for obtaining a stay of judgment on appeal is "likelihood of success on the merits of the appeal" and a showing of "irreparable harm if the judgment is not stayed", it is pretty brutal when the real defendant in the case steps in and says they agree with the judgment, it is correct, there is no cognizable harm they will suffer and that the public interest is served in denying a stay. This is all in addition to the position of the plaintiffs of course who set out their own basis for opposition to a stay:

> After a full and fair trial on the merits of Plaintiff's constitutional claims, on August 4, 2010, this Court held that "Plaintiffs have demonstrated by overwhelming evidence that Proposition 8 violates their due process and equal protection rights and that they will continue to suffer these constitutional violations until state officials cease enforcement of Proposition 8. The Court therefore ruled that Plaintiffs are entitled to entry of judgment permanently enjoining enforcement of that unconstitutional enactment. As the Court also explained, "California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples.
>
> …..
>
> Plaintiffs and other gay and lesbian Californians, on the other hand, will continue to suffer irreparable harm if Proposition 8's irrational deprivation of their constitutional rights is prolonged. And no public interest is served by perpetuating Proposition 8's discriminatory effects and continuing to ban thousands of California citizens from exercising their fundamental due process right to marry. To the contrary, as the oppositions filed by the Attorney General and Governor demonstrate, the public interest strongly favors immediate "entry of judgment permanently enjoining [Proposition 8's] enforcement. Accordingly, this Court should deny Proponent's motion for a stay pending appeal.

This is one hell of a lot of cover for Judge Walker to deny the stay, and I think he will do just that. The way Walker stayed the judgment pending a determination of the motion for stay, but radically accelerating the process of consideration, lends the thought he was being

meticulous about protecting DI's due process but had no stomach for a stay in the least. Indeed, the tenor, tone, assertiveness, vibrancy and passion of Judge Walker's opinion/verdict is, as the real defendants in interest argue, simply not consistent with a legitimate basis for stay. And now Walker has incredibly good cover for denial of the stay. As if his decision particularly supports one in the first place (it does not).

Walker set his formal findings of fact and conclusions of law, not to mention dicta, up to say there is really no cognizable question about the fundamental rights of plaintiffs, and other same sex couples, under *both* the equal protection and due process clauses, and that their rights are fundamental and inherent. That is simply NOT consistent with there being a likelihood of success for the proponents of Proposition 8 – the DIs – on appeal.

Even the putative appellants, the DIs, screwed themselves to an extent by partially framing their Motion For Stay in terms of putative harm in "uncertainty" to those that might seek same sex marriage during the stay period. But, if the conclusion of the court is that citizens have an unmitigated right to marry irrespective of their sex, under both the equal protection and due process provisions of the Constitution, and that is exactly what the court found as fact and law, then it would be pretty inconsistent to hold a stay preventing the same is in the best interest of protecting them.

My knee jerk reflex as an attorney is to say Walker will, out of caution, maintain status quo pending appeal, which would militate in favor of granting the DI's stay pending appeal; but intellectually and legally, it just does not follow from the nature and quality of his decision. Seriously, it just does not comport with the words and intent of his verdict.

Furthermore, Walker not granting a stay for DIs, by definition, accelerates the appellate process by making the 9th Circuit assign a panel and

consider the the certain stay request by DIs there once Walker denies it at the District level. Walker knows this will accelerate the consideration by the 9th and keeps it moving along.

For the foregoing reasons, I think Judge Walker will deny the stay and force the 9th Circuit to start consideration of the appeal immediately. It is a safe bet that Alex Kozinsky and the judges in the 9th understand full well the stakes and intention of Walker; they are likely to move the case right along.